

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



In the Matter of)
)
)

BENCO DENTAL SUPPLY CO.,)
a corporation,)
)

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

PATTERSON COMPANIES, INC.)
a corporation.)
)
)
)

DOCKET NO. 9379

COMPLAINT COUNSEL'S POST-TRIAL REPLY TO RESPONDENT HENRY
SCHEIN'S PROPOSED FINDINGS OF FACT

D. Bruce Hoffman
Director

Ian R. Conner
Deputy Director

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., N.W.
Washington, DC 20580
Telephone: (202) 326-2470
Facsimile: (202) 326-3496

Thomas N. Dahdouh
Regional Director, Western Region
San Francisco and Los Angeles
Federal Trade Commission
Telephone: (415) 848-5122
Electronic Mail: tdahdouh@ftc.gov

Lin W. Kahn
Jeanine K. Balbach
N. Diana Chang
Karen V. Goff
Josh Goodman
Daniel Matheson
Jessica Moy
Danica Noble
Jasmine Y. Rosner
Ronnie Solomon
Erika Wodinsky
Federal Trade Commission
Bureau of Competition – Western Region
901 Market Street, Suite 570
San Francisco, CA 94103
Telephone: (415) 848-5100
Facsimile: (415) 848-5184
Electronic Mail: lkahn@ftc.gov

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SCHEIN’S RECORD REFERENCES

References to the record are made using the following citation forms and abbreviations:

CX # - Complaint Counsel Exhibit

RX # - Respondent Exhibit

CXD # - Complaint Counsel Demonstrative Exhibit

RXD# - Respondent Demonstrative Exhibit

Name of Witness, Tr. xx -Trial Testimony

CX/RX # (Name of Witness, Dep. at xx) - Deposition Testimony

CX/RX # (Name of Witness, IHT at xx) - Investigational Hearing Testimony

JSLF ¶ x - Joint Stipulations of Law and Fact

Complaint ¶ x - Complaint Counsel's Complaint filed February 14, 2018

Answer ¶ x - Respondent Henry Schein, Inc.’s Answer to Complaint

RRFA No. x – Respondent’s Response to Complaint Counsel’s Requests for Admission

CRFA No. x – Complaint Counsel’s Response to Respondent’s Requests for Admission

CMTD at x – Complaint Counsel’s Opposition to Patterson’s Motion to Dismiss

CC Pretrial Br. at x – Complaint Counsel’s Pretrial Brief

SF – Schein’s Proposed Findings of Fact

JF – Respondents’ Joint Proposed Findings of Fact

{ **bold** } - *In Camera* Material

I. HENRY SCHEIN, INC.

1. Through its dental business, Henry Schein, Inc. (“Schein”) sells essentially anything and everything a dentist would need to operate his or her practice. (Sullivan, Tr. 4046-50).²

Response to Proposed Finding No. 1

Complaint Counsel has no specific response.

2. Besides distributing dental supplies and equipment supplied by manufacturers, Schein also offers its own private label brand products. (CX 5023).

Response to Proposed Finding No. 2

Complaint Counsel has no specific response.

3. Schein provides various services to its customers, including product education and training, equipment installation, equipment repair and maintenance, and an array of business solutions services. (CX 5023; CX 0311 (Sullivan, IHT at 26 (“I consider us a full-service distributor. We do basically anything and everything within the dental office and dental practice.”))).

Response to Proposed Finding No. 3

Complaint Counsel has no specific response.

4. Schein’s dental business consists of two separate divisions: Henry Schein Dental (“HSD”) and Special Markets. The two divisions collaborate with each other on certain matters, but otherwise operate independently. That is, neither division reports to the other. (Sullivan, Tr. 4091; Meadows, Tr. 2460, 2475 (“Special Markets and Henry Schein Dental are two divisions, so I could not approve that those customers and those sales would move over to a different division.”); CX 0309 (Muller, IHT at 12-13); CX 8033 (Cavaretta, Dep. at 198)).

Response to Proposed Finding No. 4

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that there was no coordination regarding buying group strategy between HSD and Special Markets during the conspiracy period. In fact, the record evidence shows both HSD and Special

² Unless otherwise noted, the term “Schein” in these Proposed Findings of Fact only refers to the dental business and dental divisions within Henry Schein, Inc.

Markets had responsibility for buying groups. (Foley, Tr. 4523; *see also* Responses to Proposed Finding Nos. 104-106). HSD had primary responsibility for buying groups beginning in 2010 or 2011. (Steck, Tr. 3735-3737). HSD and Special Markets also coordinated regarding buying group strategy, both adhered to policy not to work with buying groups during the conspiracy period, and indeed, both rejected buying groups during the conspiracy period. (Complaint Counsel’s Post-Trial Proposed Findings of Fact and Conclusions of Law filed on April 11, 2019 (hereinafter “CCFF”) ¶¶ 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief filed on April 11, 2019 (hereinafter “Complaint Counsel’s Post Trial Brief”), at Attachment C).

A. Henry Schein Dental (“HSD”)

5. HSD is the larger of the two divisions, focusing on providing full-service distribution services to independent dentists. (Compare Sullivan, Tr. 3872-74 (there are “roughly 300 team Schein members” in HSD, not including FSCs [Field Sales Consultants]) *with* CX 0309 (Muller, IHT at 25-26 (Special Markets has “99 employees”))).

Response to Proposed Finding No. 5

Complaint Counsel has no specific response.

6. In 1997, Schein acquired Sullivan Dental Products and placed Tim Sullivan in charge of HSD. (CX 0311 (Sullivan, IHT at 12); RX 2673-005). Mr. Sullivan is not now, nor ever was, the sole decision-maker for HSD or Schein. (CX 8025 (Sullivan, Dep. at 57-58)).

Response to Proposed Finding No. 6

Complaint Counsel has no specific response.

7. HSD’s primary customer is the individual dentist, and the single-office dental practice still reflects the way in which most dentists in the United States practice. (Steck, Tr. 3677-79 (estimating that “70 to 80 percent of HSD’s customer base are private practices ... [b]ut ten years ago, private practices were 80 to 90 percent of HSD’s customer base”); *see also* RX 0544-00023, 00039).

Response to Proposed Finding No. 7

Complaint Counsel has no specific response.

8. Full-service distribution entails not just the sale of supplies and equipment, but also a variety of value-added services, including sales representatives, equipment servicing, sales professional support, and practice management software. (CX 5023; Sullivan, Tr. 3869-70, 4050 (“So you can click here and get some supplies from us or anyone online as well, but you can’t click here for the rest of this [practice care] wheel.”); CX 0311 (Sullivan, IHT at 26, 45-46)).

Response to Proposed Finding No. 8

Complaint Counsel has no specific response.

9. Schein’s dental field sales force, including its Field Sales Consultants (“FSCs”), falls within HSD. During the relevant period, HSD was led by its President, Tim Sullivan. (Sullivan, Tr. 3871-72).

Response to Proposed Finding No. 9

Complaint Counsel has no specific response.

10. HSD sells supplies, equipment, and technology via its 800-plus FSCs, 100-plus telesales representatives, hundreds of equipment sales specialists, five distribution centers, and online portals. (RX 2930; CX 5021; RX 2673; Sullivan, Tr. 3875, 4040-41).

Response to Proposed Finding No. 10

Complaint Counsel has no specific response.

11. HSD maintains over 70 equipment centers and showrooms, regional distribution centers, and substantial teams of sales people, technicians, and customer service representatives. (Sullivan, Tr. 3875, 4040-41; CX 5023).

Response to Proposed Finding No. 11

Complaint Counsel has no specific response.

12. HSD has a team of about 170 equipment sales specialists and 800 equipment service technicians located throughout the United States, whose sole responsibility is to sell and service dental equipment, respectively. Each of the dental equipment service technicians has a company-provided van so that they can quickly repair any broken equipment with minimal disruption to the dentist’s business. (Sullivan, Tr. 4036-39; Steck, Tr. 3802).

Response to Proposed Finding No. 12

Complaint Counsel has no specific response.

13. HSD offers its customers the high-touch and personalized service of its FSCs. They visit a customer's office repeatedly each month to advise the practice owner on how he or she can be more efficient and profitable. (CX 0311 (Sullivan, IHT at 26); Sullivan, Tr. 3869-70, 4039-40, 4058-60; Cavaretta, Tr. 5541-2, 5548; Steck, Tr. 3784-86; Meadows, Tr. 2525).

Response to Proposed Finding No. 13

Complaint Counsel has no specific response.

14. FSCs also visit their customers about every two weeks to discuss new products and take orders for anything the office may need. (CX 8001 (Foster, Dep. at 36); RX 2673).

Response to Proposed Finding No. 14

Complaint Counsel has no specific response.

15. HSD has offered – and continues to offer – a number of pricing programs and adjustments that FSCs can make on a customer- and order-specific basis to lower the price on any given product below the catalog price, even down to cost. (Sullivan, Tr. 4064-65; Steck, Tr. 3760-61, 3791; Cavaretta, Tr. 5552-53 (“if I am an FSC ... I can create a custom quote where I put the 10, 20, 50, 80 items on there that are special pricing to that customer”); Meadows, Tr. 2471).

Response to Proposed Finding No. 15

Complaint Counsel has no specific response.

16. FSCs can also give discounts on any particular product within seconds by simply using an iPad, and do not need any approvals to do so. (Cavaretta, Tr. 5549-51).

Response to Proposed Finding No. 16

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that an FSC's ability to give discounts disproves Tim Sullivan's directives to the sales force *during* the conspiracy not to work with buying groups. The record evidence clearly shows that Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups regardless of type during the conspiracy period. By February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-

870). The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period. (CCFF ¶¶ 432-453, 661-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

17. HSD's pricing programs are called Volume Purchase Agreements, which provide discounts to dentists who can commit to purchase a particular volume. (Meadows, Tr. 2554; Steck, Tr. 3797-98; Sullivan, Tr. 4064).

Response to Proposed Finding No. 17

Complaint Counsel has no specific response.

18. FSCs mostly focus on serving individual dental practitioners and small- to mid-size purchasers, customers who represent the traditional private practice model of dentistry. (Meadows, Tr. 2629; CX 0305 (Cavaretta, IHT at 49-50); CX 0311 (Sullivan, IHT at 21-22)).

Response to Proposed Finding No. 18

Complaint Counsel has no specific response.

19. Schein also provides many business consulting services at no cost to the dentist, which requires Schein to hire and train sales consultants. (RX 2429-010-11 (Schein's FSCs are trained to assist dental offices with products, clinical techniques, and practice management solutions to improve an office's "efficiency, productivity [and] profitability"); Steck, Tr. 3801; Cavaretta, Tr. 5548; Sullivan, Tr. 4036-37, 4058-60).

Response to Proposed Finding No. 19

Complaint Counsel has no specific response.

B. Special Markets.

20. Schein's Special Markets division, launched in 1996, primarily serves customers other than independent dentists, such as federal and state government purchasers, dental schools, community health centers ("CHCs"), other institutions, and Dental Support Organizations ("DSOs"). (CX 0309 (Muller, IHT at 9); Foley, Tr. 4509; Sullivan, Tr. 4109-10; Steck, Tr. 3733; Titus, Tr. 5196; Foley, Tr. 4637; RX 2392). During the relevant period, Schein's Special Markets division was led by its President, Hal Muller. (Foley, Tr. 4516; Steck, Tr. 3807).

Response to Proposed Finding No. 20

The Proposed Finding is vague as to the phrase “other institutions,” which is neither defined nor explained. Complaint Counsel has no specific response to the remainder of the Proposed Finding.

21. Through its Special Markets division, Schein was one of the first distributors to pursue DSOs and other large group purchasers like federal government agencies and institutional customers. (CX 0309 (Muller, IHT at 9, 15-16); Foley Tr. 4509; McFadden Tr. 2783-84).

Response to Proposed Finding No. 21

Complaint Counsel has no specific response.

22. Mr. Foley testified that DSO customers were Special Markets’ “bread and butter.” (Foley, Tr. 4637).

Response to Proposed Finding No. 22

Complaint Counsel has no specific response.

23. Because Special Markets specializes in servicing large clients, it does not need to provide the same types of individualized services that FSCs provide directly to dentists, including regular FSC support such as visiting the dentist’s office every two weeks. (Sullivan Tr. 4093-94; CX 8016 (Meadows, Dep. at 271-72); CX 0309 (Muller, IHT at 20, 59-60)).

Response to Proposed Finding No. 23

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it asserts or implies that Special Markets was the only division that had responsibility for or interacted with buying groups during the conspiracy period. The record evidence shows that both Special Markets and HSD had responsibility for buying groups, that the two communicated and coordinated regarding buying group strategy, and that buying group opportunities were directed to HSD. (Foley, Tr. 4523; CX0309 (Muller, IHT at 94-95) (“Q. . . . Prior to 2014, when a buying group was interested in working with Henry Schein, which division would that buying group be directed toward? A. If it was for the private practitioner, it would go to Henry Schein dental. If it was for a special markets world type of

customer, it would go to me.”)); CX2060 at 001 (Special Markets executive Randy Foley stated in 2011: “If it turns out to be a DSO, all ours. If it turns out to be more of a local buying group, HSD (if they even want it”)); CX0165 at 002 (In 2011, Special Markets Manager Kathleen Titus declined a buying group and sent it to HSD, and stated: “The participants are Private Practice customers which rules SM out.”)). Buying groups were better served by HSD. (CX2509 at 001) (“Henry Schein Dental manages customers who are buying groups, not Special Markets.”); Cavaretta, Tr. 5639-5640; CX2504 at 003 (In 2011, Special Markets Manager Kathleen Titus stated that GPOs are “a better fit for HSD than SM.”)). The head of HSD, Tim Sullivan, and Special Markets, Hal Muller, discussed and coordinated regarding buying group strategy between the two divisions and transferred a pre-existing, pre-conspiracy buying group from Special Markets to HSD. (CCFF ¶¶ 901-902). Ultimately, the record evidence shows that HSD and Special Markets coordinated regarding buying group and both rejected buying groups during the conspiracy period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

24. Accordingly, although FSCs sometimes visited certain Special Markets accounts (and the equipment sales specialists served their equipment needs), Special Markets’ costs are lower than HSD’s costs, which include the commissions HSD paid to FSCs. (CX 2024 (2015 FSC Compensation Plan, Henry Schein Dental, Slides 7-9); Foley, Tr. 4661; Meadows, Tr. 2522-23.

Response to Proposed Finding No. 24

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it asserts or implies that Special Markets was the only division that had responsibility for or interacted with buying groups during the conspiracy period. (*See* Response to Proposed Finding No. 23).

25. Special Markets also has expertise in negotiating with central procurement agents, developing specialized formularies, negotiating customer-specific discounts from manufacturers, and working with central entities to drive compliance. (CX 8003 (Foley, Dep. at 27-28, 39, 109,

119, 342-43); CX 0306 (Foley, IHT at 63, 69); CX 8005 (Muller, Dep. at 63, 94); Steck, Tr. 3731).

Response to Proposed Finding No. 25

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it asserts or implies that Special Markets was the only division that had responsibility for or interacted with buying groups during the conspiracy period. (*See* Response to Proposed Finding No. 23).

26. In addition to DSOs and other centralized purchasers, Special Markets also worked with buying groups. (CX 8005 (Muller, Dep. at 31); CX 8003 (Foley, Dep. at 39)).

Response to Proposed Finding No. 26

Complaint Counsel has no specific response to the statement that Special Markets worked with DSOs and other centralized purchasers. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Special Markets was the only division that had responsibility for or interacted with buying groups during the conspiracy period. (*See* Response to Proposed Finding No. 23).

27. Due to Special Markets' strengths, it typically worked with buying groups that were centrally managed, had broad geographic reach or required customer formularies. CX 8003 (Foley, Dep. at 27-28, 39, 109, 119, 342-43 ("Special Markets had a more – had more flexibility in the price and how it attached pricing plans to multiple sites associated with a similar group. It also had ... a better way to create a central site and do reporting for all the sub-sites.")); CX 0306 (Foley, IHT at 63, 69); CX 8005 (Muller, Dep. at 63, 94); Steck, Tr. 3731).

Response to Proposed Finding No. 27

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts that Schein only worked with buying groups that had certain characteristics, like central management, or "required customer formularies." The record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminately turning down all buying groups during the conspiracy

pursuant to Sullivan’s directives, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Furthermore, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685). Thus, to the extent that the Proposed Finding implies or asserts that Special Markets partnered only with entities with certain qualities or rejected buying groups because they lacked certain qualities, it is misleading and contrary to the weight of the evidence. The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Special Markets was the only division that had responsibility for or interacted with buying groups during the conspiracy period. (*See* Response to Proposed Finding No. 23).

28. Although Schein’s HSD and Special Markets’ divisions coordinated to execute Schein’s mission, each division developed its own approach to targeting and serving its customers, providing price discounts, managing different cost structures, and using its own sales teams. (CX 0309 (Muller, IHT at 13 (“We each have our own marketing, merchandising and sales teams.”))).

Response to Proposed Finding No. 28

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts Special Markets and HSD had different approaches to buying groups during the conspiracy period. The record evidence shows that HSD and Special Markets were both responsible for buying groups, coordinated regarding buying group, and both rejected buying groups during the conspiracy period pursuant to a policy. (CCFF ¶¶ 661-1100, 1159-1166, 1316-1322; *see also*

Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Response to Proposed Finding No. 23).

29. Throughout the relevant period, both divisions have had at least some involvement or responsibility for Schein's buying group relationships, though primary responsibility shifted during the relevant period. (Sullivan, Tr. 4091-92, 4113; Meadows, Tr. 2616; Foley, Tr. 4523).

Response to Proposed Finding No. 29

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Special Markets was the only division that had responsibility for or interacted with buying groups during the conspiracy period, or that HSD at some point did not have responsibility for buying groups. The record evidence shows that HSD and Special Markets were both responsible for buying groups, coordinated regarding buying group, and both rejected buying groups during the conspiracy period pursuant to a policy. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Response to Proposed Finding No. 23).

30. From the beginning of the relevant period to mid-2014, primary responsibility for buying groups rested with Special Markets. (Sullivan, Tr. 3918, 4091, 4112-13; Steck, Tr. 3735-36; Cavaretta, Tr. 5588; Meadows, Tr. 2464, 2481; Titus, Tr. 5196-98; Foley, Tr. 4607-09; *see also* RX 2405 (April 2, 2002 email from Mr. Muller stating that he has "been the contact person for GPOs for [HSD] and SM [Special Markets]")).

Response to Proposed Finding No. 30

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Special Markets was the only division that had responsibility for or interacted with buying groups during the conspiracy period. (*See* Response to Proposed Finding No. 23). In fact, the record evidence shows that HSD and Special Markets coordinated regarding buying group and both rejected buying groups during the conspiracy

period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

31. As Schein’s Jake Meadows testified, “prior to the creation of Mid Markets” in mid-2014, the HSD field sales force “had responsibilities for doing due diligence, but generally the centralized contracting and the creation of formularies ... fell to Special Markets.” (Meadows, Tr. 2481).

Response to Proposed Finding No. 31

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Special Markets was the only division that had responsibility for or interacted with buying groups during the conspiracy period. (*See* Response to Proposed Finding No. 23). In fact, the record evidence shows that HSD and Special Markets coordinated regarding buying group and both rejected buying groups during the conspiracy period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

32. A formulary is a more focused group of products from Schein’s total offerings (“say five or six thousand products” out of a hundred thousand) that Schein would “heavily discount ... on a pricing list.” (Meadows, Tr. 2474, 2477-80).

Response to Proposed Finding No. 32

Complaint Counsel has no specific response.

33. In mid-2014, primary responsibility for buying groups shifted to the newly-created Mid-Market group within HSD. (Meadows, Tr. 2482 (explaining that “after the creation of Mid Markets,” the HSD team “had the same responsibilities” for conducting due diligence, but also now had “contracting responsibilities”); Foley, Tr. 4610, 4607; Steck, Tr. 3745-46; Titus, Tr. 5198).

Response to Proposed Finding No. 33

The Proposed Finding is misleading and contrary to the weight of the record evidence in asserting that the Mid-Market group had “primary responsibility for buying groups” in “mid-2014.” The record evidence shows that the Mid-Market group was formed to serve small

DSOs, group practices, and community health centers. (Steck, Tr. 3690). The record evidence also shows that even as of January 2016, Schein still had to “figure out if the [Mid-Market] is going to be responsible for [buying groups].” (CX2280 at 001; Cavaretta, Tr. 5637-5638).

34. Regardless of which division had primary responsibility for buying groups, however, Schein employed a consistent approach to dealing with buying groups. Both Special Markets and HSD were generally skeptical of buying groups, engaged buying groups cautiously, and made careful case-by-case partnership decisions. (SF 159-88, 189-341).

Response to Proposed Finding No. 34

The Proposed Finding is contrary to the weight of the evidence to the extent it asserts that Schein “employed a consistent approach to dealing with buying groups” at all times, or to the extent it asserts that it engaged in a “careful case-by-case” evaluation of buying groups during the conspiracy period. It did neither. (*See* Responses to Proposed Finding Nos. 159-188, 189-341). The record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to turning down all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

II. AT ALL TIMES, SCHEIN ACTED DELIBERATELY, RATIONALLY, AND UNILATERALLY WHEN EVALUATING BUYING GROUP OPPORTUNITIES.

A. Buying Groups.

1. *The Evolution of Buying Groups.*

35. “[B]uying groups have always existed in some shape or form, but ... they started really becoming a little bit more prevalent over the last four years....” (CX 0305 (Cavaretta, IHT

at 137); CX 8025 (Sullivan, Dep. at 66-67); Ryan, Tr. 1039; Foley, Tr. 4542 (buying groups “were popping up through my entire time at Schein.”)).

Response to Proposed Finding No. 35

Complaint Counsel has no specific response.

36. Buying groups arose largely in response to “corporate dentistry.” (Goldsmith, Tr. 1935; Reece, Tr. 4415-16).

Response to Proposed Finding No. 36

Complaint Counsel has no specific response.

37. In September 2015, Schein’s Brian Brady wrote that buying groups were starting to form at “2-3x the level that they were just a year ago,” and in a variety of forms – not just “private groups..., but entire state dental associations are now looking to form their own groups.” (CX 0192-003 (“The landscape of our industry is changing and it’s crucial we get ahead of the curve using all resources possible.”); Steck, Tr. 3761-62).

Response to Proposed Finding No. 37

Complaint Counsel has no specific response.

38. As described in more detail below (SF 375-1135), Schein has done business with buying groups since they existed, and as it observed the growth and evolution of buying groups, Schein evolved its internal structures and strategies to take advantage of the opportunities in the buying group space. (*See e.g.*, Cavaretta, Tr. 5530-31, 5590-91; SF 35-42, 159-341).

Response to Proposed Finding No. 38

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts that “Schein has done business with buying groups since they existed” and continued to do so into the conspiracy period. In fact, the record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to turning down buying groups during the conspiracy pursuant to an instruction to the sales force to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF

¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 35-42, 159-341, 375-1135).

39. As of February 2016, buying groups still represented only a small fraction of the dental market. (Rogan, Tr. 3465-67; CX 3181). Only a small fraction of dentists are members of buying groups. (RX 0572-49 [REDACTED]).

Response to Proposed Finding No. 39

Complaint Counsel has no specific response as to the first sentence of the Proposed Finding. The second sentence of the Proposed Finding is vague as to “small fraction,” which is not quantified or described, and it is misleading to the extent it implies or asserts that membership in buying groups has not increased. The record evidence shows that the membership count of existing buying groups increased over the last decade. (CCFF ¶ 135).

40. Buying groups come in all shapes, forms, and sizes. (Cavaretta, Tr. 5569).

Response to Proposed Finding No. 40

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies Schein categorized buying group models during the conspiracy period. The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period that Schein did not identify or categorize as one of the various buying groups models now described in SF 43-76.

(Complaint Counsel’s Post-Trial Brief, at Attachment C). The record evidence and contemporaneous documents show that Schein never distinguished among types of buying groups during the conspiracy, never distinguished among types of buying groups in documents evidencing Schein’s policy against buying groups, and never distinguished among types of buying groups in communicating Schein’s policy to Schein’s sales force, to manufacturer partners, to potential customers, and to each other. (CCFF ¶¶ 728-954).

Furthermore, the record evidence shows that if Schein has prohibited its DSO customers

from creating a buying group or extending its DSO pricing to a buying group component.

(CCFF ¶¶ 149, 863-865, 1792)

41. Schein's Dave Steck described some of the "different structures" in a 2015 presentation: "Annual Fee Based; Percent of Gross Based; 'Loose' and 'Binding' Commitments; Dental Associations; Study Clubs, etc." (CX 2835-008; Steck, Tr. 3746-48 (some groups were "more desirable," such as "ones that could commit volume").

Response to Proposed Finding No. 41

Complaint Counsel has no specific response to the attribution of the statements to Dave Steck. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein evaluated buying groups' structures or characteristics, or to the extent it asserts or implies that Schein did not reject buying groups pursuant to a policy during the conspiracy period. The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period that Schein did not identify or categorize as one of the various buying groups models now described in SF 43-76. (Complaint Counsel's Post-Trial Brief, at Attachment C). The record evidence and contemporaneous documents show that Schein never distinguished among types of buying groups during the conspiracy, never distinguished among types of buying groups in documents evidencing Schein's policy against buying groups, and never distinguished among types of buying groups in communicating Schein's policy to Schein's sales force, to manufacturer partners, to potential customers, and to each other. (CCFF ¶¶ 728-954). The record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to turning down buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF

¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; Complaint Counsel's Post-Trial Brief, at Attachment C). Furthermore, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685). Thus, to the extent that the Proposed Finding implies or asserts that Schein partnered only with entities with certain qualities or rejected buying groups because they lacked certain qualities during the conspiracy period, it is misleading and contrary to the weight of the evidence.

42. However, a majority of groups that approached Schein were either not yet formed or otherwise lacked structure of any kind. (SF 69-72).

Response to Proposed Finding No. 42

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein evaluated buying groups' structures or characteristics, or to the extent it asserts or implies that Schein did not reject buying groups pursuant to a policy during the conspiracy period. The record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to turning down buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; Complaint Counsel's Post-Trial Brief, at Attachment C). Furthermore, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685). Thus, to the extent that the Proposed Finding implies or asserts that Schein partnered only with entities with certain qualities or rejected buying groups because they lacked certain qualities during the conspiracy period, it is misleading and contrary to the weight of the evidence. (*See* Responses to Proposed Finding Nos. 69-72).

2. *The Franchise Model.*

43. Some buying groups are set up as a franchise system, much like McDonald's. (*See* Goldsmith, Tr. 2046).

Response to Proposed Finding No. 43

The second clause of the Proposed Finding, "much like McDonald's," mischaracterizes the cited evidence. Dr. Andrew Goldsmith did not testify that some buying group franchises were set up "much like McDonald's." (Goldsmith, Tr. 2046 ("Q. Okay. And as a franchise, it's sort of like McDonald's; right? A. I suppose. There's a relationship.")). The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not consider Smile Source to be a buying group or that Schein did not consider Comfort Dental to be a DSO. The record evidence shows that Schein and Sullivan considered Smile Source to be a buying group, and that Schein considered Comfort Dental to be a DSO. (Sullivan, Tr. 3914; CCF ¶¶ 175, 1098-1099; *see* Responses to Proposed Finding Nos. 47-56, 493-511).

The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it implies Schein categorized buying group models during the conspiracy period. The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period that Schein did not identify or categorize as one of the various buying groups models now described in SF 43-76. (Complaint Counsel's Post-Trial Brief, at Attachment C). The record evidence and contemporaneous documents show that Schein never distinguished among types of buying groups during the conspiracy, never distinguished among types of buying groups in documents evidencing Schein's policy against buying groups, and never distinguished among types of buying groups in communicating Schein's policy to Schein's sales force, to manufacturer partners, to potential customers, and to each

other. (CCFF ¶¶ 728-954). Furthermore, the record evidence shows that if Schein has prohibited its DSO customers from creating a buying group or extending its DSO pricing to a buying group component. (CCFF ¶¶ 149, 863-865, 1792).

44. Under a franchise system, members sign a franchise agreement that allows the member to use the buying group's name and participate in purchasing, education, marketing, and any other programs the buying group offers in accordance with the terms of the agreement. (*See, e.g.,* RX 0290-00099-100; Goldsmith, Tr. 2046 (“We utilized a franchise agreement in order to allow our members to work together.”); Maurer, Tr. 4936 (“As a franchise, they get separate territories and they get a number of business service offerings from us.”)).

Response to Proposed Finding No. 44

Complaint Counsel has no specific response to the statements attributed to RX0290.

However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not consider Smile Source to be a buying group. Schein considered Smile Source to be a buying group and referred to it as such. (CCFF ¶ 175).

45. Examples of franchised buying groups include Smile Source and Comfort Dental. (Goldsmith Tr. 2064-65; Maurer, Tr. 4962; Meadows, Tr. 2500-01; Sullivan, Tr. 3914; Foley, Tr. 4632-4633).

Response to Proposed Finding No. 45

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not consider Smile Source to be a buying group. Schein and Sullivan considered Smile Source to be a buying group and referred to it as such. (CCFF ¶ 175; Sullivan, Tr. 3914). It is also misleading and contrary to the record evidence to the extent it asserts that Comfort Dental is a buying group. The record evidence shows that Schein considered Comfort Dental to be a DSO. (CCFF ¶¶ 1198-1199; *see* Responses to Proposed Findings Nos. 493-511).

46. Schein did business with both Smile Source and Comfort Dental. (SF 223-36, 493-511, 1105-86).

Response to Proposed Finding No. 46

The Proposed Finding is vague with respect to the time-period at issue. It is also misleading and contrary to the weight of the record evidence to the extent it implies or asserts that evidence regarding Comfort Dental disproves its participation in a conspiracy, as Comfort Dental was considered a DSO and Schein's conduct regarding a DSO is irrelevant to its conduct regarding buying groups. It is also misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein contracted with Smile Source during the conspiracy. The record evidence shows that Schein had a pre-existing relationship with Smile Source beginning in 2008, which ended at the beginning of 2012. (CCFF ¶¶ 687-688, 914). The record evidence also shows that Schein did not contract with Smile Source during the conspiracy, that Sullivan was happy that Schein's relationship with Smile Source ended, and that Schein's 2014 proposal to Smile Source was an attempt at cheating on the agreement. (CCFF ¶¶ 923-924, 1824-1852; *see also* Responses to Proposed Finding Nos. 1105-1186).

a. Smile Source.

47. Smile Source is a franchised DSO that was formed around 2006. (Meadows, Tr. 2500; Sullivan, Tr. 3914; Goldsmith, Tr. 2046, 2070).

Response to Proposed Finding No. 47

Complaint Counsel has no specific response to the statement that Smile Source was formed around 2006. However, the assertion that Smile Source is a franchised DSO is inaccurate and contrary to the weight of the record evidence. The record evidence shows that Smile Source is a buying group, Schein referred to Smile Source as a buying group, and that Schein's Sullivan also considered Smile Source to be a buying group, not a DSO. (Sullivan, Tr. 3914, CCFF ¶ 175; *see also* CCFF ¶¶ 443, 899). Furthermore, the Proposed Finding is not

supported by the cited evidence. The cited testimony of Meadows, Sullivan, and Dr. Goldsmith shows that Smile Source has *called* itself a franchise, which should not be mischaracterized or conflated to support a finding that Smile Source is a franchised DSO or that Schein or Sullivan considered Smile Source to be a DSO. (Goldsmith, Tr. 2046, Meadows, Tr. 2500, Sullivan, Tr. 3914). An assertion that Smile Source was not a buying group is also internally contradictory, as Schein itself asserts that it “viewed Smile Source as a buying group and treated it as such.” (SF 53).

48. Smile Source registers as a franchise, and its members pay Smile Source a franchise fee. (Goldsmith, Tr. 2042).

Response to Proposed Finding No. 48

To the extent the Proposed Finding implies that Smile Source is a franchised DSO, it is inaccurate and contrary to the weight of the evidence. The record evidence shows that Smile Source is a buying group and that Schein and Sullivan viewed and treated it as such. (Sullivan, Tr. 3914; CCFF ¶ 175; *see also* Response to Proposed Finding No. 47). Schein itself asserts that it “viewed Smile Source as a buying group and treated it as such.” (SF 53).

49. Smile Source members are considered franchisees and are given exclusive territories. (Goldsmith, Tr. 2046).

Response to Proposed Finding No. 49

To the extent the Proposed Finding implies that Smile Source is a franchised DSO, it is inaccurate and contrary to the weight of the evidence. The record evidence shows that Smile Source is a buying group and that Schein and Sullivan viewed and treated it as such. (Sullivan, Tr. 3914; CCFF ¶ 175; *see also* Response to Proposed Finding No. 47). Schein itself asserts that it “viewed Smile Source as a buying group and treated it as such.” (SF 53). In addition, the portion of the Proposed Finding, which states that “Smile Source members are considered franchisees,” is not supported by the cited evidence. The cited testimony of

Dr. Goldsmith does not establish that Smile Source members were considered to be franchisees. (*See* Goldsmith, Tr. 2046).

50. Smile Source members are entitled to operate under the Smile Source trademarks, though there is conflicting evidence concerning whether Smile Source members actually do so. (RX 0290 (franchise agreement requiring Smile Source members to operate under the Smile Source trademarks); Goldsmith, Tr. 2047 (testifying that most members do not operate under the Smile Source logo)). Smile Source also offers members education and marketing support. (Goldsmith, Tr. 1935; Maurer, Tr. 5017).

Response to Proposed Finding No. 50

To the extent the Proposed Finding implies that Smile Source is a franchised DSO, it is inaccurate and contrary to the weight of the evidence. The record evidence shows that Smile Source is a buying group and that Schein and Sullivan viewed and treated it as such.

(Sullivan, Tr. 3914; CCFF ¶ 175; *see also* Response to Proposed Finding No. 47). Schein itself asserts that it “viewed Smile Source as a buying group and treated it as such.” (SF 53).

Complaint Counsel has no specific response to the remainder of the Proposed Finding.

51. In exchange for the services Smile Source provides, each member pays a substantial fee. [REDACTED]

[REDACTED] (Goldsmith, Tr. 1970-71, 2125). The franchise fee has changed from time to time. [REDACTED]

[REDACTED] (Goldsmith, Tr. 1971-72). [REDACTED] (RX 2952 (Maurer, Dep. at 42-43)).

Response to Proposed Finding No. 51

To the extent the Proposed Finding implies that Smile Source is a franchised DSO, it is inaccurate and contrary to the weight of the evidence. The record evidence shows that Smile Source is a buying group and that Schein and Sullivan viewed and treated it as such.

(Sullivan, Tr. 3914; CCFF ¶ 175; *see also* Response to Proposed Finding No. 47). Schein itself asserts that it “viewed Smile Source as a buying group and treated it as such.” (SF 53).

Complaint Counsel has no specific response to the remainder of the Proposed Finding.

52. [REDACTED]

(Goldsmith, Tr. 2053-54).

Response to Proposed Finding No. 52

To the extent the Proposed Finding implies that Smile Source is a franchised DSO, it is inaccurate and contrary to the weight of the evidence. The record evidence shows that Smile Source is a buying group and that Schein and Sullivan viewed and treated it as such.

(Sullivan, Tr. 3914; CCFF ¶ 175; *see also* Response to Proposed Finding No. 47). Schein itself asserts that it “viewed Smile Source as a buying group and treated it as such.” (SF 53).

Complaint Counsel has no specific response to the remainder of the Proposed Finding.

53. Though Smile Source is not a traditional buying group given its franchise structure, it has a buying group component. Schein viewed Smile Source as a buying group and treated it as such. (RX 2956-004; RX 3087-004).

Response to Proposed Finding No. 53

Complaint Counsel has no specific response to the second sentence of the Proposed Finding.

The first sentence is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Smile Source is not a buying group. The record evidence shows that Smile Source is a buying group and that Schein and Sullivan viewed and treated it as such. (Sullivan, Tr. 3914; CCFF ¶ 175; *see also* Response to Proposed Finding No. 47).

b. Comfort Dental

54. Comfort Dental is another “franchisee/franchisor-type buying group, similar to Smile Source.” (Foley, Tr. 4632-4633).

Response to Proposed Finding No. 54

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts that Comfort Dental is a buying group, or to the extent it asserts that Smile Source is not a buying group. Schein, and Sullivan specifically, considered Comfort Dental

to be an elite DSO, not a buying group. (CCFF ¶¶ 1098-1099; *see also* CCFF ¶¶ 72-76 (distinguishing buying groups and DSOs)). The record evidence also shows that Smile Source is a buying group and that Schein and Sullivan viewed and treated it as such. (Sullivan, Tr. 3914; CCFF ¶ 175; *see also* Response to Proposed Finding No. 47). Schein itself asserts that it “viewed Smile Source as a buying group and treated it as such.” (SF 53). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

55. Comfort Dental has agreements with each of its members allowing them to operate as a franchisee. (Foley, Tr. 4633-34).

Response to Proposed Finding No. 55

The Proposed Finding is misleading and contrary to the weight of the evidence. Schein, and Sullivan specifically, considered Comfort Dental to be an elite DSO, not a buying group. (CCFF ¶¶ 1098-1099; *see also* CCFF ¶¶ 72-76 (distinguishing buying groups and DSOs)).

56. Comfort Dental describes itself as a dental franchise, with its locations independently owned and operated. (RX 2877).

Response to Proposed Finding No. 56

The Proposed Finding is misleading and contrary to the weight of the evidence. Schein, and Sullivan specifically, considered Comfort Dental to be an elite DSO, not a buying group. (CCFF ¶¶ 1098-1099; *see also* CCFF ¶¶ 72-76 (distinguishing buying groups and DSOs)).

3. *The DSO-Affiliate Model.*

57. Some DSOs have created buying group affiliates or arms, the members of which are independent dentist offices. (Puckett, Tr. 2214-15; *see also* CX 2372-002 (noting “[m]any of the DSOs are starting to open ‘affiliates’”)).

Response to Proposed Finding No. 57

Complaint Counsel does not have a specific response to the statement that some DSOs have created buying group arms. However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies Schein categorized buying group models

during the conspiracy period. The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period that Schein did not identify or categorize as one of the various buying groups models now described in SF 43-76. (Complaint Counsel's Post-Trial Brief, at Attachment C). The record evidence and contemporaneous documents show that Schein never distinguished among types of buying groups during the conspiracy, never distinguished among types of buying groups in documents evidencing Schein's policy against buying groups, and never distinguished among types of buying groups in communicating Schein's policy to Schein's sales force, to manufacturer partners, to potential customers, and to each other. (CCFF ¶¶ 728-954). Furthermore, the record evidence shows that if Schein has prohibited its DSO customers from creating a buying group or extending its DSO pricing to a buying group component. (CCFF ¶¶ 149, 863-865, 1792).

58. Examples of DSOs that created separate buying groups comprised of independent dentists include Intermountain Dental Associates, Tralongo, Advantage Dental, Dental Gator, and Floss Dental. (Foley, Tr. 4642-43 ("IDA was an existing, small DSO that fell under Special Markets, and they are now wanting to create a buying group where they have no ownership of their affiliate offices..."), 4590, 4712; RX 2947 (Cavaretta, Dep. at 85-86); Foley, Tr. 4699-700; Sullivan, Tr. 4096; RX 2105; CX 2084).

Response to Proposed Finding No. 58

The portion of the Proposed Finding that states Dental Gator is an example of a DSO that created a separate buying group is inaccurate. Dental Gator is a buying group, not a DSO, that was created by MB2 Dental Solutions, which is a DSO. (SF 635; CCFF ¶¶ 1769, 1783).

59. Schein did business with IDA, Tralongo, Advantage Dental, Dental Gator, and Floss Dental. (SF 377-94, 634-75, 732-48, 757-64, 1263-85).

Response to Proposed Finding No. 59

The Proposed Finding is vague and misleading. In SF 58 above, Schein asserted that IDA, Tralongo, Advantage Dental, Dental Gator, and Floss Dental were DSOs. To the extent the Proposed Finding asserts that Schein did business with DSOs, that is irrelevant, as it has no

bearing on Schein's conduct regarding buying groups. However, if the Proposed Finding asserts that Schein began doing business with the *buying groups components* of DSOs Intermountain Dental Associates, Tralongo, Advantage Dental, Dental Gator, or Floss Dental during the conspiracy period, that is also misleading, not supported by the cited evidence, and contrary to the weight of the evidence. First, Schein considered Intermountain Dental Associates to be a DSO, and it did not do business with the buying group component of Intermountain Dental Associates at any point in time. (Cavaretta, Tr. 5642). Second, Schein refused to bid on Tralongo's buying group component in 2014 and did not do business with the buying group component of Tralongo. (CCFF ¶ 941). Third, Schein worked with MB2, the DSO that created Dental Gator, but its agreement with MB2 restricted it from creating a buying group. (CCFF ¶¶ 1783, 1788-1792). Moreover, the record evidence shows Schein "shut down" Dental Gator. (CCFF ¶¶ 867-870, 1788-1792). Fourth, Schein did business with the DSO component of Advantage Dental in 2009, but it did not do business with the buying group arm of Advantage Dental and in fact, did not allow Advantage Dental's DSO-specific pricing be shared with the buying group arm. (CCFF ¶¶ 149, 863-865). Finally, as to Floss Dental, there is no record evidence that shows Schein contracted with any part of Floss Dental at any time, buying group component or otherwise. (See Responses to Proposed Finding Nos. 757-764).

4. *The Value-Added Services Model.*

60. Some buying groups offer more to their members than just discounts. Such value-added services can include education, training, financial, and marketing services. (See CX 4109-004; R. Johnson, Tr. 5482, 5484-88).

Response to Proposed Finding No. 60

Complaint Counsel does not have a specific response to the statement that some buying groups offer more to their member than discounts. However, the Proposed Finding is

misleading and contrary to the weight of the evidence to the extent it implies Schein categorized buying group models or distinguished types of buying groups during the conspiracy period. The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period that Schein did not identify or categorize as one of the various buying groups models now described in SF 43-76. (Complaint Counsel's Post-Trial Brief, at Attachment C). The record evidence and contemporaneous documents show that Schein never distinguished among types of buying groups during the conspiracy, never distinguished among types of buying groups in documents evidencing Schein's policy against buying groups, and never distinguished among types of buying groups in communicating Schein's policy to Schein's sales force, to manufacturer partners, to potential customers, and to each other. (CCFF ¶¶ 728-954). Brian Brady, Schein's Former Director of Group Practices, testified that he used the term "buying group" in reference to buying groups broadly, and not to any specific type. (CX8020 (Brady, Dep. at 126-127)).

61. Klear Impakt is a good example of this kind of buying group. It offers its members a wide range of services beyond just discounted supplies, such as "streamlining and efficiency class[es] that would teach people the process of a patient walking through an office from beginning to end"; phone training classes; patient experience classes; financing assistance for patient procedures or office expansion or acquisition; hiring assistance through personality assessments; business coaches; marketing; business management; leadership training and coaching; and waiting room television programming. (R. Johnson, Tr. 5482, 5484-89; CX 4109-004).

Response to Proposed Finding No. 61

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies Schein categorized buying group models or distinguished types of buying groups during the conspiracy period. The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period that Schein did not identify or categorize as one of the various buying

groups models now described in SF 43-76. (Complaint Counsel’s Post-Trial Brief, at Attachment C). The record evidence and contemporaneous documents show that Schein never distinguished among types of buying groups during the conspiracy, never distinguished among types of buying groups in documents evidencing Schein’s policy against buying groups, and never distinguished among types of buying groups in communicating Schein’s policy to Schein’s sales force, to manufacturer partners, to potential customers, and to each other. (CCFF ¶¶ 728-954). Brian Brady, Schein’s Former Director of Group Practices, testified that he used the term “buying group” in reference to buying groups broadly, and not to any specific type. (CX8020 (Brady, Dep. at 126-127)).

62. These kinds of value-added services and offerings help a buying group obtain “stickiness,” or the ability to retain members by providing value beyond just discounts. (Meadows, Tr. 2544-45).

Response to Proposed Finding No. 62

Complaint Counsel has no specific response to the attribution of the statement to Meadows. However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies Schein categorized buying group models or distinguished types of buying groups during the conspiracy period. The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period that Schein did not identify or categorize as one of the various buying groups models now described in SF 43-76. (Complaint Counsel’s Post-Trial Brief, at Attachment C). The record evidence and contemporaneous documents show that Schein never distinguished among types of buying groups during the conspiracy, never distinguished among types of buying groups in documents evidencing Schein’s policy against buying groups, and never distinguished among types of buying groups in communicating Schein’s policy to Schein’s sales force, to manufacturer partners, to potential customers, and to each other. (CCFF ¶¶ 728-954). Brian

Brady, Schein's Former Director of Group Practices, testified that he used the term "buying group" in reference to buying groups broadly, and not to any specific type. (CX8020 (Brady, Dep. at 126-127)).

63. Groups without such "stickiness" often fail. (Reece, Tr. 4460).

Response to Proposed Finding No. 63

The Proposed Finding is vague as to the terms "stickiness" as the cited testimony of Jeff Reece does not explain or define the term, nor does the Proposed Finding make clear what the term means specifically in the context of Proposed Finding No. 63. However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies Schein categorized buying group models or distinguished types of buying groups during the conspiracy period. The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period that Schein did not identify or categorize as one of the various buying groups models now described in SF 43-76. (Complaint Counsel's Post-Trial Brief, at Attachment C). The record evidence and contemporaneous documents show that Schein never distinguished among types of buying groups during the conspiracy, never distinguished among types of buying groups in documents evidencing Schein's policy against buying groups, and never distinguished among types of buying groups in communicating Schein's policy to Schein's sales force, to manufacturer partners, to potential customers, and to each other. (CCFF ¶¶ 728-954). Brian Brady, Schein's Former Director of Group Practices, testified that he used the term "buying group" in reference to buying groups broadly, and not to any specific type. (CX8020 (Brady, Dep. at 126-127)).

64. Dr. Richard Johnson – co-owner and founder of Klear Impakt – testified that the additional services and training were important to Klear Impakt's success as a buying group. (R. Johnson, Tr. 5478-79, 5484).

Response to Proposed Finding No. 64

Complaint Counsel has no specific response.

5. The Dental Association Model.

65. Some dental associations have sought to create discounted purchasing programs for their existing membership. Local dental associations, such as the Stark County Dental Society and the Corydon Palmer Dental Society, have done this, as have state dental associations, including the California Dental Association, the Florida Dental Association, and the Georgia Dental Association. (SF 468-86, 512-47, 749-56, 765-85, 1187-98).

Response to Proposed Finding No. 65

The Proposed Finding is vague as to “discounted purchasing programs.” To the extent the Proposed Finding conflates “discounted purchasing programs” with buying groups, it is misleading. For example, Corydon Palmer Dental Society and Stark County Dental Society created rebate programs, which are not the same as buying groups and neither is a buying group. (CCFF ¶¶ 1764-1765; Responses to Proposed Finding Nos. 1187-1198). In addition, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies Schein categorized buying group models or distinguished types of buying groups during the conspiracy period. The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period that Schein did not identify or categorize as one of the various buying groups models now described in SF 43-76. (Complaint Counsel’s Post-Trial Brief, at Attachment C). The record evidence and contemporaneous documents show that Schein never distinguished among types of buying groups during the conspiracy, never distinguished among types of buying groups in documents evidencing Schein’s policy against buying groups, and never distinguished among types of buying groups in communicating Schein’s policy to Schein’s sales force, to manufacturer partners, to potential customers, and to each other. (CCFF ¶¶ 728-954). Brian Brady, Schein’s Former Director of

Group Practices, testified that he used the term “buying group” in reference to buying groups broadly, and not to any specific type. (CX8020 (Brady, Dep. at 126-127)).

6. *The Consulting Group Model.*

66. Some dental consulting firms – firms that provide independent dentists with business and marketing consulting services – have sought to add a discounted purchasing component. Business Intelligence Group (“B.I.G.”), a “marketing and consulting group” is an example. (CX 0165).

Response to Proposed Finding No. 66

Complaint Counsel has no specific response. In addition, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies Schein categorized buying group models or distinguished types of buying groups during the conspiracy period. The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period that Schein did not identify or categorize as one of the various buying groups models now described in SF 43-76. (Complaint Counsel’s Post-Trial Brief, at Attachment C). The record evidence and contemporaneous documents show that Schein never distinguished among types of buying groups during the conspiracy, never distinguished among types of buying groups in documents evidencing Schein’s policy against buying groups, and never distinguished among types of buying groups in communicating Schein’s policy to Schein’s sales force, to manufacturer partners, to potential customers, and to each other. (CCFF ¶¶ 728-954). Brian Brady, Schein’s Former Director of Group Practices, testified that he used the term “buying group” in reference to buying groups broadly, and not to any specific type. (CX8020 (Brady, Dep. at 126-127)).

67. B.I.G. ran marketing campaigns for its dental clients, such as Groupon-like campaigns for whitening services. (CX 0165). In early 2011, B.I.G. sought to also supply the whitening products and other products for its clients in addition to running the marketing campaigns. (CX 0165).

Response to Proposed Finding No. 67

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies Schein categorized buying group models or distinguished types of buying groups during the conspiracy period. The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period that Schein did not identify or categorize as one of the various buying groups models now described in SF 43-76. (Complaint Counsel’s Post-Trial Brief, at Attachment C). The record evidence and contemporaneous documents show that Schein never distinguished among types of buying groups during the conspiracy, never distinguished among types of buying groups in documents evidencing Schein’s policy against buying groups, and never distinguished among types of buying groups in communicating Schein’s policy to Schein’s sales force, to manufacturer partners, to potential customers, and to each other. (CCFF ¶¶ 728-954). Brian Brady, Schein’s Former Director of Group Practices, testified that he used the term “buying group” in reference to buying groups broadly, and not to any specific type. (CX8020 (Brady, Dep. at 126-127)).

7. The Procurement Service Model.

68. Some buying groups operated as nothing more than a procurement service or agent for members. Under that model, member orders would first go to the buying group, which would reallocate the orders to the lowest bidder. So, for example, if a member ordered ten items from Schein, but another distributor had a lower bid for five of those items, only the remaining five items would go to Schein. Steadfast operated its buying group in this way. (Titus, Tr. 5298-99; Cavaretta, Tr. 5595 (Steadfast would “tak[e] ... Henry Schein business, and then ... farm[] it out to different dealers....”).

Response to Proposed Finding No. 68

The Proposed Finding is inaccurate and misleading in asserting that Steadfast is “nothing more than a procurement service or agent” because it relies on incomplete, mischaracterized evidence. The citation for the Proposed Finding excludes Titus’ testimony admitting that

Steadfast was a buying group. (CCFF ¶ 876 (citing Titus, Tr. 5297)). The record evidence also shows that Titus stated “there is no question this [Steadfast] is a buying group.” (CCFF ¶ 875). The Proposed Finding is not supported and should be disregarded. The record evidence also shows that Schein terminated a pre-existing, legacy relationship with Steadfast, dating back to 2010, during the conspiracy pursuant to its participation in a conspiracy. (CCFF ¶¶ 871-885; *see also* Responses to Proposed Finding Nos. 1199-1242). In addition, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies Schein categorized buying group models or distinguished types of buying groups during the conspiracy period. The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period that Schein did not identify or categorize as one of the various buying groups models now described in SF 43-76. (Complaint Counsel’s Post-Trial Brief, at Attachment C). The record evidence and contemporaneous documents show that Schein never distinguished among types of buying groups during the conspiracy, never distinguished among types of buying groups in documents evidencing Schein’s policy against buying groups, and never distinguished among types of buying groups in communicating Schein’s policy to Schein’s sales force, to manufacturer partners, to potential customers, and to each other. (CCFF ¶¶ 728-954). Brian Brady, Schein’s Former Director of Group Practices, testified that he used the term “buying group” in reference to buying groups broadly, and not to any specific type. (CX8020 (Brady, Dep. at 126-127)).

8. *The List-of-Dentists Model.*

69. Many of the groups that approached Schein were unsophisticated and typically comprised of dentists that had banded together loosely to try to get a better discount. (CX 8020 (Brady, Dep. at 77-78); CX 8033 (Cavaretta, Dep. at 142-43); CX 8031 (Steck, Dep. at 52-53 (describing groups with just “a very loose membership ... that doesn’t really follow the directive of the group that they’re part of.”))); *see also* CX 0319 (Reece, IHT at 76 (“[T]hen there are other ones that ... seem[] like ... a couple of guys that over cocktails decided they wanted to save money on supplies, so they formed a group of buddies.”)); CX 8005 (Muller, Dep. at 42 (“I

got a call a couple years ago from a graduate student from a school in Pennsylvania who called and said that he was going to put a bunch of dentists together to form a buying group....”).

Response to Proposed Finding No. 69

The Proposed Finding is not supported by the cited evidence, as none of cited evidence establishes the quantity of the buying groups that approached Schein that were “unsophisticated and typically comprised of dentists that had banded together loosely.” None of the cited evidence identifies a single such group by name. In addition, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies Schein categorized buying group models or distinguished types of buying groups during the conspiracy period. The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period that Schein did not identify or categorize as one of the various buying groups models now described in SF 43-76. (Complaint Counsel’s Post-Trial Brief, at Attachment C). The record evidence and contemporaneous documents show that Schein never distinguished among types of buying groups during the conspiracy, never distinguished among types of buying groups in documents evidencing Schein’s policy against buying groups, and never distinguished among types of buying groups in communicating Schein’s policy to Schein’s sales force, to manufacturer partners, to potential customers, and to each other. (CCFF ¶¶ 728-954). Brian Brady, Schein’s Former Director of Group Practices, testified that he used the term “buying group” in reference to buying groups broadly, and not to any specific type. (CX8020 (Brady, Dep. at 126-127)).

70. Because such groups did not present any kind of value proposition or promise of compliance or exclusivity to Schein, “from a business standpoint [it made] very little sense for [Schein] to do business with them.” (CX 8033 (Cavaretta, Dep. at 133-34); Steck, Tr. 3728-29 (“some simply collect a fee from a customer and promise them a large discount on dental supplies and really don’t offer much value to us because they’re asking for a larger discount than we would give a normal dentist without a commitment”); Cavaretta, Tr. 5564-65.

Response to Proposed Finding No. 70

Complaint Counsel has no specific response to the attribution of the statements to Joe Cavaretta. However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies Schein categorized buying group models or distinguished types of buying groups during the conspiracy period. The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period that Schein did not identify or categorize as one of the various buying groups models now described in SF 43-76. (Complaint Counsel's Post-Trial Brief, at Attachment C). The record evidence and contemporaneous documents show that Schein never distinguished among types of buying groups during the conspiracy, never distinguished among types of buying groups in documents evidencing Schein's policy against buying groups, and never distinguished among types of buying groups in communicating Schein's policy to Schein's sales force, to manufacturer partners, to potential customers, and to each other. (CCFF ¶¶ 728-954). Brian Brady, Schein's Former Director of Group Practices, testified that he used the term "buying group" in reference to buying groups broadly, and not to any specific type. (CX8020 (Brady, Dep. at 126-127)).

71. Schein has always been skeptical and wary of the discount-only buying group that simply seeks an additional discount without delivering any incremental volume or cost efficiencies. (SF 183-88).

Response to Proposed Finding No. 71

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies Schein categorized buying group models or distinguished types of buying groups during the conspiracy period. The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period that Schein did not identify or categorize as one of the various buying groups models now described in SF 43-76. (Complaint Counsel's

Post-Trial Brief, at Attachment C). The record evidence and contemporaneous documents show that Schein never distinguished among types of buying groups during the conspiracy, never distinguished among types of buying groups in documents evidencing Schein's policy against buying groups, and never distinguished among types of buying groups in communicating Schein's policy to Schein's sales force, to manufacturer partners, to potential customers, and to each other. (CCFF ¶¶ 728-954). Brian Brady, Schein's Former Director of Group Practices, testified that he used the term "buying group" in reference to buying groups broadly, and not to any specific type. (CX8020 (Brady, Dep. at 126-127)).

72. Such groups also weaken the relationships that FSCs have with their dentists, and thereby weaken the Schein brand among its customers. (Meadows, Tr. 2560 ("Henry Schein, our brand and what we've worked on for a lot of years is presenting our brand as a high-touch, high-valued brand in the marketplace. And if a buying group were to present our brand as a price-only brand or a fulfillment house only and push aside the value that we create with our FSCs and our service, that would be detrimental to our brand in the marketplace."); Sullivan, Tr. 4085, 4090 ("Many of the groups ... that we've met with, that don't have that stickiness, don't have the compliance, don't have other things that drive value for their members who are our customers, and it is only around price, I believe that devalues our brand or what Henry Schein stands for."); Cavaretta, Tr. 5544-45; Titus, Tr. 5199).

Response to Proposed Finding No. 72

The Proposed Finding is vague as to the term "such," and Complaint Counsel cannot determine which groups are specified. Moreover, a portion of the Proposed Finding is also not supported by the cited evidence, which does not support assertion that any buying groups "weaken the relationship that FSCs have with their dentists."

9. *The Co-Op Model.*

73. "A dental cooperative is a group of individuals that collaborate for the entire business," including "credit cards, insurance negotiation, dental supplies, the equipment, business insurance, banking[,] ... everything that would be needed to run the business." (Mason, Tr. 2327).

Response to Proposed Finding No. 73

Complaint Counsel has no specific response.

74. The Utah Dental Co-Op is an example of the co-op buying group model. Dr. Brenton Mason, who was a founding member of the New Mexico chapter of the Utah Dental Co-Op, distinguished the co-op model from just a buying group: “The buying group deals with ... mostly the dental supplies and the dental equipment. The cooperative deals with the entire business.” (Mason, Tr. 2327-28, 2331).

Response to Proposed Finding No. 74

The Proposed Finding is incomplete, inaccurate, and contrary to the weight of the evidence.

Dr. Brenton Mason testified that dental cooperatives included the same benefits as joining a buying group and that the terms were interchangeable. (Mason, Tr. 2327). Furthermore, Schein understood that buying groups were referred to as buying cooperatives (or co-ops) and that the two terms were interchangeable. (CCFF ¶ 68). The Proposed Finding is also misleading to the extent it asserts that there is a distinction between the two terms, as the record evidence clearly shows there is no distinction and most importantly, that Schein did not see a distinction between the two terms during the relevant time period. Indeed, any distinction made now is irrelevant to Schein’s conduct during the relevant time period.

75. The New Mexico chapter of the Utah Dental Co-Op did not require its members to purchase through the co-op or from the co-op’s vendors. (Mason, Tr. 2405).

Response to Proposed Finding No. 75

Complaint Counsel has no specific response.

76. Even though Schein had a partnership with the Utah Dental Co-Op, including the New Mexico chapter of the Utah Dental Co-Op, Dr. Mason moved to a different buying group called Synergy and purchased from a different distributor, Darby Dental. (Mason, Tr. 2405-06; *see also* CX0185 (noting Synergy’s “[w]ebsite reads ‘is a purchasing organization based on the concept of leveraging the purchasing power of independent dental practices to negotiate discounts with suppliers[.] Example of contract with Darby that results in an average discount of 17%....’”)).

Response to Proposed Finding No. 76

Complaint Counsel does not object to the statement that Schein had a partnership with the

Utah Dental Co-op other than to note that the statement is vague because it does not specify

the date of that partnership. Schein began working with the Utah Dental Co-Op in 2007 and terminated the profitable relationship pursuant to Schein's participation in a conspiracy.

(CCFF ¶¶ 442, 886-898; *see also* Responses to Proposed Finding Nos. 581-633). In addition, the Proposed Finding is misleading to the extent it implies anything regarding Schein from assertions regarding Darby Dental. Darby Dental is a separate company from Schein, and Schein does not run the day-to-day business of Darby Dental. (Sullivan, Tr. 4348). Darby Dental has its own President and its own executives who are in charge of its sales force. (Sullivan, Tr. 4348).

10. *The Economics of Buying Groups.*

77. Because, as collections of independent dentists, buying groups were unlike the independent solo and small group practices served by HSD, and also unlike the DSOs served by Special Markets, buying groups presented unique economic considerations and issues. (Meadows, Tr. 2491-95, 2550, 2630 (explaining the differences); Foley, Tr. 4688; Reece, Tr. 4462 (DSOs have "more structured support"); CX 8012 (Breslawski, Dep. at 20-22 ("DSOs distinguish themselves from Private Practice Dentists.... They feel sales consultants in many of those customers is not necessary. We have more of a corporate-to-corporate management program."))).

Response to Proposed Finding No. 77

Complaint Counsel has no specific response to the statement that "buying groups presented unique economic considerations and issues." The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies Schein categorized buying group models or distinguished types of buying groups during the conspiracy period. The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period that Schein did not identify or categorize as one of the various buying groups models now described in SF 43-76. (Complaint Counsel's Post-Trial Brief, at Attachment C). The record evidence and contemporaneous documents show that Schein never distinguished among types of buying groups during the conspiracy, never distinguished

among types of buying groups in documents evidencing Schein's policy against buying groups, and never distinguished among types of buying groups in communicating Schein's policy to Schein's sales force, to manufacturer partners, to potential customers, and to each other. (CCFF ¶¶ 728-954). Brian Brady, Schein's Former Director of Group Practices, testified that he used the term "buying group" in reference to buying groups broadly, and not to any specific type. (CX8020 (Brady, Dep. at 126-127)). In fact, the record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to turning down buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). Furthermore, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685).

a. Potential Benefits of Buying Groups.

78. Some buying groups might be able to present an economic benefit to a distributor if they had the ability to bring new customers to the distributor that the distributor could not otherwise obtain by offering a discount to the individual members. (Meadows, Tr. 2487, 2489-90).

Response to Proposed Finding No. 78

Complaint Counsel has no specific response to the statement attributed to Jake Meadows.

However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies Schein categorized buying group models or distinguished types of buying groups during the conspiracy period. The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period that Schein did not identify

or categorize as one of the various buying groups models now described in SF 43-76. (Complaint Counsel's Post-Trial Brief, at Attachment C). The record evidence shows that Schein never distinguished among types of buying groups during the conspiracy, never distinguished among types of buying groups in documents evidencing Schein's policy against buying groups, and never distinguished among types of buying groups in communicating Schein's policy to Schein's sales force, to manufacturer partners, to potential customers, and to each other. (CCFF ¶¶ 728-954). Brian Brady, Schein's Former Director of Group Practices, testified that he used the term "buying group" in reference to buying groups broadly, and not to any specific type. (CX8020 (Brady, Dep. at 126-127)). In fact, the record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to turning down buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). Furthermore, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685).

79. Some buying groups might be able to complement Schein's mission to help its customers grow their practices and enhance practice care by offering extra value like education and marketing services. (Meadows, Tr. 2487-88, 2495). Schein calls this "stickiness." (Meadows, Tr. 2487-88, 2495, 2544-45; RXD 0015).

Response to Proposed Finding No. 79

Complaint Counsel has no specific response to the attribution of the statement to Meadows. The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies Schein categorized buying group models or distinguished types of buying groups

during the conspiracy period. The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period that Schein did not identify or categorize as one of the various buying groups models now described in SF 43-76. (Complaint Counsel's Post-Trial Brief, at Attachment C). The record evidence and contemporaneous documents show that Schein never distinguished among types of buying groups during the conspiracy, never distinguished among types of buying groups in documents evidencing Schein's policy against buying groups, and never distinguished among types of buying groups in communicating Schein's policy to Schein's sales force, to manufacturer partners, to potential customers, and to each other. (CCFF ¶¶ 728-954). Brian Brady, Schein's Former Director of Group Practices, testified that he used the term "buying group" in reference to buying groups broadly, and not to any specific type. (CX8020 (Brady, Dep. at 126-127)). In fact, the record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to turning down buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). Furthermore, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685). Finally, the citation to RXD0015 is improper and should be disregarded, as the Order on Post-Trial Briefs specifically precludes citing demonstratives a substantive evidence. (*See* February 21, 2019 Order on Post-Trial Briefs).

80. This kind of "stickiness" is particularly important for buying groups. Offering nothing more than price discounts cannot guarantee that dentists will shift their purchases,

because many dentists make their purchasing decisions on more than just price. (Meadows, Tr. 2506-07 (“dentists are very hard to win or they’re hard to change their behaviors”), 2508-09 (describing time investment related to learning new ordering logistics when switching distributors); Kois Sr., Tr. 227 (discussing dentists’ brand loyalty)).

Response to Proposed Finding No. 80

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies Schein categorized buying group models or distinguished types of buying groups during the conspiracy period. The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period that Schein did not identify or categorize as one of the various buying groups models now described in SF 43-76. (Complaint Counsel’s Post-Trial Brief, at Attachment C). The record evidence and contemporaneous documents show that Schein never distinguished among types of buying groups during the conspiracy, never distinguished among types of buying groups in documents evidencing Schein’s policy against buying groups, and never distinguished among types of buying groups in communicating Schein’s policy to Schein’s sales force, to manufacturer partners, to potential customers, and to each other. (CCFF ¶¶ 728-954). Brian Brady, Schein’s Former Director of Group Practices, testified that he used the term “buying group” in reference to buying groups broadly, and not to any specific type. (CX8020 (Brady, Dep. at 126-127)). In fact, the record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to turning down buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at

Attachment C). Furthermore, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685).

81. As Dr. Kois Sr. testified, his purchases of dental products typically “are all trust-based purchases, so we have to have the confidence that the company has quality products.” (Kois Sr., Tr. 173). “[I]t really depends for me not just on the price but working with the company and the relationship with the company. My patients are dentists. I have to really trust every product that I use for them, and I’m really completely dedicated to providing the best quality that I can for my patients, so I take no chances.” (Kois Sr., Tr. 173-74, 227; *see also* Kois Sr., Tr. 176 (“JUDGE CHAPPELL: I’ve heard you mention quality more than once regarding who you go to to purchase. I have not heard you mention price as a factor; is that correct? THE WITNESS: That’s correct. JUDGE CHAPPELL: Not a factor. THE WITNESS: On the specific products that I purchase from direct companies, the price isn’t the factor.”); Meadows, Tr. 2508 (“[B]ecause a customer’s behavior is so hard to change, ... I don’t believe that we would get the new customer growth that we would expect from that buying group if they were only price-focused.”)).

Response to Proposed Finding No. 81

The second sentence of the Proposed Finding is misleading to the extent it implies or asserts that price is not a factor for buying groups. The record evidence establishes that buying groups market themselves as a means of helping independent dentists survive and achieve more reasonable prices on equipment and dental supplies. (CCFF ¶¶ 138-145). Furthermore, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685). Thus, to the extent the Proposed Finding asserts or implies that buying groups do not drive incremental sales or volume to distributors, it is misleading and contrary to the weight of the record evidence.

82. Buying groups that offer exclusivity with a particular distributor might also be able to offer an economic benefit to a distributor. Outside of that promise of exclusivity, customers would have other choices within the buying group. (Meadows, Tr. 2488, 2495; RXD 0015).

Response to Proposed Finding No. 82

Complaint Counsel has no specific response to the attribution of the statement to Meadows. However, the citation to RXD0015 is improper and should be disregarded, as the Order on Post-Trial Briefs specifically precludes citing demonstratives a substantive evidence. (*See*

February 21, 2019 Order on Post-Trial Briefs). In addition, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies Schein declined to work with buying groups during the conspiracy period due to exclusivity concerns. The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period regardless of any exclusivity concerns. (Complaint Counsel’s Post-Trial Brief, at Attachment C). In fact, the record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to turning down buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

83. Buying groups that could offer a commitment to purchase from a particular distributor might also be able to present an economic benefit for a distributor like Schein. (Meadows, Tr. 2488, 2490-91; RXD 0015). Without such a commitment, buying group members would be able to cherry-pick and “basically only pick the items that were cheapest on the formulary” rather than “give [Schein] all their business....” (Meadows, Tr. 2491).

Response to Proposed Finding No. 83

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that buying groups do not drive incremental sales or volume to distributors. The record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685). The citation to RXD0015 is improper and should be disregarded, as the Order on Post-Trial Briefs specifically precludes citing demonstratives a substantive evidence. (*See* February 21, 2019 Order on Post-Trial Briefs). In addition, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies Schein declined to work with buying

groups during the conspiracy period because of “commitment to purchase.” The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy without evaluation of such characteristics or concerns. (Complaint Counsel’s Post-Trial Brief, at Attachment C). In fact, the record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to turning down buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

84. As Schein’s Kathleen Titus explained at trial, “exclusivity and compliance go hand in hand. [Y]ou can promise exclusivity. However, if you don’t have compliance, it’s an empty promise....” (Titus, Tr. 5201-02).

Response to Proposed Finding No. 84

Complaint Counsel has no specific response to the attribution of the statement to Titus.

However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that buying groups do not drive incremental sales or volume to distributors. The record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685). In addition, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies Schein declined to work with buying groups during the conspiracy period because of “commitment to purchase.” The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy without evaluation of such characteristics or concerns. (Complaint Counsel’s Post-Trial Brief, at Attachment C). In fact, the record evidence establishes that Schein’s conduct changed from working with buying groups before

the conspiracy, to turning down buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

85. Buying groups that do not drive any purchasing compliance do not have buying power. The Kois Buyers Group, for example, advertises that "[t]here is no obligation to purchase from any of the listed vendors and no exclusivity agreements. You are free to purchase as little or as much as you like from any of them." (RX 2928; Kois Sr., Tr. 246-249; Kois Jr., Tr. 319 ("There's no purchasing requirements, and there's no requirement to purchase from anybody in quantity or vendor.")). As such, Dr. Kois agreed that Kois Buyers Group does not actually have any buying power. (Kois Sr., Tr. 249-50; Kois Jr., Tr. 366-67; *see also* Kois Jr., Tr. 337 ("I think for an offer that has no minimum quantity to purchase and no requirement to purchase from the people and no legal document that says they're required to offer that discount, I think offering any kind of discount that they get is a very favorable outcome.")).

Response to Proposed Finding No. 85

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that buying groups do not drive incremental sales or volume to distributors. The record evidence shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685). In addition, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies Schein declined to work with buying groups during the conspiracy period because of any evaluation of "purchasing compliance." The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy without evaluation of such characteristics or concerns. (Complaint Counsel's Post-Trial Brief, at Attachment C). In fact, the record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to turning down buying groups during the conspiracy pursuant

to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

86. Compliance is one of the fundamental problems with buying groups. (Sullivan, Tr. 4098; Cavaretta, Tr. 5660-61 [REDACTED] Marshall, Tr. 3088-89 [REDACTED])

Response to Proposed Finding No. 86

Complaint Counsel has no specific response to the attribution of the statements to Sullivan and Cavaretta. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that buying groups do not drive incremental sales or volume to distributors. The record evidence shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685). In addition, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies Schein declined to work with buying groups during the conspiracy period because of "commitment to purchase." However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts that Schein only worked with buying groups that had certain characteristics or that it did not reject buying groups during the conspiracy period pursuant to a policy to do so. The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy pursuant to a policy to do so. (Complaint Counsel's Post-Trial Brief, at Attachment C). In fact, the record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to turning down buying groups during the conspiracy pursuant to a

policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

This Proposed Finding inaccurate and misleading to the extent that it suggests that Dr. Robert Marshall's data studies do not illustrate that that buying groups can, in fact, drive compliance. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED])

87. Many buying groups simply were incapable of, or unwilling to, drive compliance. (RX 2340-005 ("PGMS cannot guarantee that its members will purchase from Schein..."); RX 2806-001 ("[Synergy] has no authority to tell its members what to do."); RX 2825-002 ("UnifiedSmiles is committed to making sure your independent practice stays independent – which is why we're never going to tell you who to buy from."); RX 2928 (Kois website: "There is no obligation to purchase from any of the listed vendors and no exclusivity agreements.")).

Response to Proposed Finding No. 87

Complaint Counsel has no specific response to the statement that many buying groups do not or cannot drive compliance. By definition, buying groups do not control purchasing or make contractual volume commitments on behalf of members, and Schein recognized as much. (CCFF ¶¶ 72-76). The record evidence and contemporaneous documents show that Schein distinguished buying groups from DSOs and MSOs based on the latter's centralized control over purchasing. On April 2, 2015, Andrea Hight sent a document entitled "Business Segment Definitions," to Cavaretta, Meadows, and Brady. (CX2764 at 001). It provided a

definition of various customer segments, including DSOs, MSOs, and GPOs (buying groups). (CX2764 at 004). It distinguished DSOs and MSOs from GPOs based on the lack of centralized purchasing and management in GPOs. (CX2764 at 004). It defined MSO as “an entity created to provide management and administrative services to other dental practices that may be privately owned,” and “Key differentiation from GPO is the authority to make decisions for the practices under management, and require compliance to a designated prime vendor relationship.” (CX2764 at 004). By contrast, it defined GPO as “an entity created to leverage the purchasing power of individual and autonomous private practices to obtain discounts from vendors based on the collective buying power of the GPO members. The GPO has no authority or oversight in its members’ purchasing decisions.” (CX2764 at 004). In addition, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts that Schein only worked with buying groups that had certain characteristics, or to the extent it implies that it did not reject buying groups during the conspiracy period pursuant to a policy not to do business with buying groups. The record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to turning down all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Furthermore, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that lack of compliance does not drive incremental sales or profits to distributors. In fact, the record evidence also shows that buying

groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685).

88. Complaint Counsel concedes that “buying groups typically do not force members to purchase from their supplier partners,” and therefore cannot typically drive incremental volume. (See CC Opp. to Respondent Patterson Companies, Inc.’s Motion for Summary Decision, at 3 (Oct. 2, 2018)).

Response to Proposed Finding No. 88

The Proposed Finding is inaccurate because it mischaracterizes Complaint Counsel’s statement, which does not concede that buying groups cannot drive incremental volume. In full, Complaint Counsel stated: “While buying groups typically do not force members to purchase from their supplier partners, independent dentists are incentivized to buy from a buying group’s supplier partners to take advantage of lower prices.” (CC Opp. to Respondent Patterson Companies, Inc.’s Motion for Summary Decision, at 3 (Oct. 2, 2018)). That is consistent with what the record evidence shows—that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685).

89. The ultimate goal of doing business with a buying group would be to reach new customers, but not all buying groups could offer that benefit. (Meadows, Tr. 2489). It generally took some combination of exclusivity, commitment, or stickiness. (Meadows, Tr. 2506).

Response to Proposed Finding No. 89

Complaint Counsel has no specific response to the attribution of the statement to Meadows. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts that Schein only worked with buying groups that had certain characteristics, or the extent it implies that Schein did not reject buying groups during the conspiracy pursuant to a policy not to do business with buying groups. The record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to turning down all buying groups during the conspiracy pursuant to a policy to

do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). Furthermore, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that lack of compliance does not drive incremental sales or profits to distributors. In fact, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685).

b. Risks and Conflicts Posed by Buying Groups.

90. While some buying groups might offer some economic benefits, buying groups also pose risks. One of the "most glaring" is cannibalization. (Meadows, Tr. 2506-07; RXD 0015).

Response to Proposed Finding No. 90

Complaint Counsel has no specific response to the statement that buying groups offer economic benefits and pose risks. However, the citation to RXD0015 is improper and should be disregarded, as the Order on Post-Trial Briefs specifically precludes citing demonstratives a substantive evidence. (*See* February 21, 2019 Order on Post-Trial Briefs). The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it implies or asserts that concerns of cannibalization affected Schein's conduct during the conspiracy, when it indiscriminately rejected buying groups. The record evidence shows that Schein worked with buying groups before the conspiracy and after the conspiracy became difficult to maintain, regardless of such risk. (CCFF ¶¶ 432-453, 661-1100, 1159-1166). Indeed, Schein's relationship with Smile Source before the conspiracy period was profitable even though half of the sales came from existing Schein customers. (CCFF ¶ 447). The

record evidence establishes that during the conspiracy period Schein rejected buying groups because it had a policy to do so and accordingly instructed its sales force to do so rather than because of a concern about cannibalization. (CCFF ¶¶ 661-1100; Complaint Counsel’s Post-Trial Brief, at Attachment C).

91. Cannibalization occurs when a distributor offers a buying group discounts, and the buying group just offers “those discounts to existing customers that [the distributor] already had.” (Meadows, Tr. 2506).

Response to Proposed Finding No. 91

Complaint Counsel has no specific response to the statement. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts to the extent it implies or asserts that concerns of cannibalization affected Schein’s conduct during the conspiracy, when it indiscriminately rejected buying groups. The record evidence shows that Schein worked with buying groups before the conspiracy and after the conspiracy became difficult to maintain, regardless of such risk. ((CCFF ¶¶ 432-453, 1159-1166). Indeed, Schein’s relationship with Smile Source before the conspiracy period was profitable even though half of the sales came from existing Schein customers. (CCFF ¶ 447). The record evidence establishes that during the conspiracy period Schein rejected buying groups because it had a policy to do so and accordingly instructed its sales force to do so rather than because of a concern about cannibalization. (CCFF ¶¶ 661-1100; Complaint Counsel’s Post-Trial Brief, at Attachment C).

92. Complaint Counsel’s expert, Dr. Marshall, described the “cannibalization effect”:

(Marshall, Tr. 2926-27).

Response to Proposed Finding No. 92

This Proposed Finding is incomplete and misleading to the extent that it suggests that Dr. Marshall did not specifically study the effects of cannibalization in relation to Respondents, including Schein, in this matter and conclude that it was still profitable for Respondents to do business with buying groups – he did. Specifically, Dr. Marshall examined the effects of potential cannibalization in his five profitability studies and found that the distributor-buying groups relationships were profitable for the distributor despite the potential for cannibalization. (CCFF ¶¶ 1637-1684). [REDACTED]

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This Proposed Finding is inaccurate and misleading to the extent that it suggests that Dr. Marshall's profitability studies results do not apply to a larger national full-service distributor, such as Schein. Dr. Marshall performed two different data-driven studies of incentives and losses of the largest national full-service distributor: The Schein-Smile Source

2012 profitability study, and the Schein-Smile-Source 2017 profitability study. (CCFF ¶¶ 1675-1884). In these two different instances, Dr. Marshall found that it was in Schein’s interest to do business with buying groups. (CCFF ¶¶ 1675-1884).

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Dr. Marshall testified that buying group opportunities were profitable even for a larger full-service distributor and describes that in the state of Washington, Burkhart, Patterson, and Schein have roughly equivalent market share, so by analogy, “what is profitable in that case for Burkhart would be profitable in that case for Burkhart would be profitable for Schein or Patterson to engage in.” (Marshall, Tr. 2874-2875).

93. [REDACTED] (Marshall, Tr. 3002-03). As a result, not every buying group is a profitable opportunity, particularly “if the cannibalization effect is overwhelming everything” else. (Marshall, Tr. 2972, 3002-03).

Response to Proposed Finding No. 93

This Proposed Finding is incomplete and misleading to the extent that it suggests that Dr. Marshall did not specifically study the effects of cannibalization in relation to Respondents, including Schein, in this matter and conclude that it was still profitable for Respondents to do business with buying groups—he did.

Specifically, Dr. Marshall examined the effects of potential cannibalization in his five profitability studies and found that the distributor-buying groups relationships were profitable for the distributor despite the potential for cannibalization. (CCFF ¶¶ 1637-1684). [REDACTED]

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This Proposed Finding is inaccurate and misleading to the extent that it suggests that Dr. Marshall's profitability studies results do not apply to a larger national full-service

distributor, such as Schein. Dr. Marshall performed two different data-driven studies of incentives and losses of the largest national full-service distributor: The Schein-Smile Source 2012 profitability study, and the Schein-Smile Source 2017 profitability study. (CCFF ¶¶ 1675-1884). In these two different instances, Dr. Marshall found that it was in Schein's interest to do business with buying groups. (CCFF ¶¶ 1675-1884).

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Dr. Marshall testified that buying group

opportunities were profitable even for a larger full-service distributor and describes that in the state of Washington, Burkhart, Patterson, and Schein have roughly equivalent market share, so by analogy, "what is profitable in that case for Burkhart would be profitable in that case for Burkhart would be profitable for Schein or Patterson to engage in." (Marshall, Tr. 2874-2875).

94. The cannibalization effect means that, all else equal, supplying a buying group is likely to be less profitable for a larger distributor than a smaller distributor. (Marshall, Tr. 2972 (noting it [REDACTED] that poses a substantial risk of cannibalization); Cohen, Tr. 685-86 ("if it's a group of a hundred dental – individual dental practices, of whom 30 are already Benco clients, and then we offer a discount to all 100, the only customers who take advantage of it are the 30 customers we already had, now we've got the worst of both worlds, where we've offered a discount to existing clients without adding any new clients.")).

Response to Proposed Finding No. 94

The Proposed Finding is not supported by a citation to Chuck Cohen’s testimony, which does not address profitability for larger compared to smaller distributors. In addition, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies anything about Schein’s conduct regarding buying groups based on Cohen’s testimony. In fact, the record evidence shows that Schein worked with buying groups before the conspiracy and after the conspiracy became difficult to maintain regardless of cannibalization concerns. (CCFF ¶¶ 432-453, 1159-1166). Indeed, Schein’s relationship with Smile Source before the conspiracy period was profitable even though half of the sales came from existing Schein customers. (CCFF ¶ 447). The record evidence establishes that during the conspiracy period Schein rejected buying groups because it had a policy to do so and accordingly instructed its sales force to do so rather than because of a concern about cannibalization. (CCFF ¶¶ 661-1100; Complaint Counsel’s Post-Trial Brief, at Attachment C).

In addition, this Proposed Finding is incomplete and misleading to the extent that it suggests that Dr. Marshall did not specifically study the effects of cannibalization in relation to Respondents, including Schein, in this matter and conclude that it was still profitable for Respondents to do business with buying groups—he did.

Specifically, Dr. Marshall examined the effects of potential cannibalization in his five profitability studies and found that the distributor-buying groups relationships were profitable for the distributor despite the potential for cannibalization. (CCFF ¶¶ 1637-1684). [REDACTED]

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This Proposed Finding is inaccurate and misleading to the extent that it suggests that Dr. Marshall's profitability studies results do not apply to a larger national full-service distributor, such as Schein. Dr. Marshall performed two different data-driven studies of incentives and losses of the largest national full-service distributor: The Schein-Smile Source 2012 profitability study, and the Schein-Smile Source 2017 profitability study. (CCFF ¶¶ 1675-1884). In these two different instances, Dr. Marshall found that it was in Schein's interest to do business with buying groups. (CCFF ¶¶ 1675-1884).

[REDACTED]

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[REDACTED]. Dr. Marshall testified that buying group opportunities were profitable even for a larger full-service distributor and describes that in the state of Washington, Burkhart, Patterson, and Schein have roughly equivalent market share, so by analogy, “what is profitable in that case for Burkhart would be profitable in that case for Burkhart would be profitable for Schein or Patterson to engage in.” (Marshall, Tr. 2874-2875).

95. Dr. Kois Sr.’s dental practice exemplifies the cannibalization that buying groups can cause. Burkhart made more money from its sales to Dr. Kois before the Kois Buyers Group was formed than after. (Kois Sr., Tr. 289).

Response to Proposed Finding No. 95

The Proposed Finding lacks foundation, as Dr. Kois is not a reliable source for information regarding Burkhart’s profits. The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Burkhart’s relationship with the Kois Buyers Group was not profitable. [REDACTED]

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The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein that concerns of cannibalization affected Schein's conduct during the conspiracy, when it indiscriminately rejected buying groups. The record evidence shows that Schein worked with buying groups before the conspiracy and after the conspiracy became difficult to maintain, regardless of such risk. (CCFF ¶¶ 432-453, 1159-1166). Indeed, Schein's relationship with Smile Source before the conspiracy period was profitable even though half of the sales came from existing Schein customers. (CCFF ¶ 447). The record evidence establishes that during the conspiracy period Schein rejected buying groups because it had a policy to do so and accordingly instructed its sales force to do so rather than because of a concern about cannibalization. (CCFF ¶¶ 661-1100; Complaint Counsel's Post-Trial Brief, at Attachment C).

96. Burkhart confirmed that its contract with the Kois Buyers Group cannibalized its existing customers. (Reece, Tr. 4412-13 (Burkhart kept existing customers who joined the Kois

Buyers Group, but “at an expense” because “[i]t would have reduced the price that they paid for some of the same supplies that they would have previously bought from us....”)).

Response to Proposed Finding No. 96

The Proposed Finding is incomplete, misleading, and contrary to the weight of the record evidence to the extent it asserts or implies that Burkhart’s relationship with the Kois Buyers Group was not profitable. Reece testified that existing customers who joined the Kois Buyers Group ended up purchasing more from Burkhart after joining the Kois Buyers Group.

(Reece, Tr. 4413-4414).

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97. The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it implies or asserts that concerns of cannibalization affected Schein's conduct during the conspiracy, when it indiscriminately rejected buying groups. The record evidence shows that Schein worked with buying groups before the conspiracy and after the conspiracy became difficult to maintain, regardless of such risk. (CCFF ¶¶ 432-453, 1159-1166). Indeed, Schein's relationship with Smile Source before the conspiracy period was profitable even though half of the sales came from existing Schein customers. (CCFF ¶ 447). The record evidence establishes that during the conspiracy period Schein rejected buying groups because it had a policy to do so and accordingly instructed its sales force to do so rather than because of a concern about cannibalization. (CCFF ¶¶ 661-1100; Complaint Counsel's Post-Trial Brief, at Attachment C). In addition to the risk of cannibalization, buying groups could negatively impact a distributor's FSCs, who are paid a commission based on gross profit from a particular customer. (Meadows, Tr. 2519 ("[I]f we discount a customer, the FSC makes less."); RXD 0015).

Response to Proposed Finding No. 97

The Proposed Finding is inherently contradictory. Schein also asks the Court to adopt findings that assert Schein worked with buying regardless of FSC commission decreases. If that is the case (it is not), the Proposed Finding is irrelevant because it admittedly has no bearing on Schein's rejection of buying groups. Furthermore, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein rejected any buying groups during the conspiracy period because of FSC-related risks. The record evidence shows that Schein's FSCs asked about opportunities to discount to buying groups, which were met with repeated instructions to reject all buying groups during the conspiracy. (*See, e.g.*, CCFF ¶¶ 772-781; *see also* CCFF ¶¶ 717-954; Complaint Counsel's Post-Trial Brief, at Attachment C). Moreover, such an assertion is contrary to the record evidence that clearly shows Schein worked buying groups before the conspiracy and after the conspiracy became difficult to maintain, despite the claimed FSC-related risks. (CCFF ¶¶ 432-452, 1159-1166, 1316-1322). Only during the conspiracy does the evidence

show a blanket rejection of buying groups by a sales force that was instructed not to deal with them. (CCFF ¶¶ 717-954; Complaint Counsel’s Post-Trial Brief, at Attachment C)). Finally, the citation to RXD0015 is improper and should be disregarded, as the Order on Post-Trial Briefs specifically precludes citing demonstratives a substantive evidence. (*See* February 21, 2019 Order on Post-Trial Briefs).

98. Mr. Meadows explained the impact on FSCs at trial. If a buying group negotiates an extra 10-percent discount and signs up the independent dentist, the FSC’s commission declines by one-third. (Meadows, Tr. 2520-22; RXD 0015-002). The drop in FSC commission posed by buying groups “deincentivize[s]” FSCs to “continue to call on that customer.” (Meadows, Tr. 2525-26). As one FSC wrote to the President of Schein, Inc., if “the commission ... drops,” it “would not really give me any incentive to try and drive the business.” (CX 2298-002).

Response to Proposed Finding No. 98

The Proposed Finding is inherently contradictory. Schein also asks the Court to adopt findings that assert Schein worked with buying groups regardless of any FSC-related risks. If that is the case (it is not), the Proposed Finding is irrelevant because it admittedly has no bearing on Schein’s rejection of buying groups. The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein rejected buying groups during the conspiracy period because of FSC-related risks. The record evidence shows that Schein’s FSCs asked about opportunities to discount to buying groups, which were met with repeated instructions to reject all buying groups during the conspiracy. (*See, e.g.*, CCFF ¶¶ 772-781; *see also* CCFF ¶¶ 717-954; Complaint Counsel’s Post-Trial Brief, at Attachment C). Moreover, such an assertion is contrary to the record evidence that clearly shows Schein worked buying groups before the conspiracy and after the conspiracy became difficult to maintain, despite the claimed FSC-related risks. (CCFF ¶¶ 432-452, 1159-1166, 1316-1322). Only during the conspiracy does the evidence show a blanket

rejection of buying groups by a sales force that was instructed not to deal with them. (CCFF ¶¶ 717-954; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C)).

99. This caused many FSCs to see buying groups as “the enemy” and their competition because, like FSCs, buying groups were signing dentists that would otherwise be FSC customers. FSCs were concerned buying groups would “eliminate the FSC job or [impact] their commissions.” (CX 2033; Meadows, Tr. 2532-34).

Response to Proposed Finding No. 99

The Proposed Finding is inherently contradictory. Schein also asks the Court to adopt a finding that “Schein was open to working with a buying group like Dental Gator.” (*Compare* SF 644 *with* SF 656, CX2033 at 001). Even setting Dental Gator aside, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein rejected any buying groups during the conspiracy period because of FSC-related risks. The record evidence shows that Schein’s FSCs asked about opportunities to discount to buying groups, which were met with repeated instructions to reject all buying groups during the conspiracy. (*See, e.g.*, CCFF ¶¶ 772-781; *see also* CCFF ¶¶ 717-954; Complaint Counsel’s Post-Trial Brief, at Attachment C). Moreover, such an assertion is contrary to the record evidence that clearly shows Schein worked buying groups before the conspiracy and after the conspiracy became difficult to maintain, despite the claimed FSC-related risks. (CCFF ¶¶ 432-452, 1159-1166, 1316-1322). Only during the conspiracy does the evidence show a blanket rejection of buying groups by a sales force that was instructed not to deal with them. (CCFF ¶¶ 717-954; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

100. The prospect of new customers from a buying group (assuming the buying group is capable of delivering new customers) does not solve the conflict with and impact on FSCs because FSCs are already working “40-plus hours” a week. So, “in order to handle” the new customers, Schein “would have to hire new FSCs.” The added business would not necessarily go to existing FSCs. (Meadows, Tr. 2526-28).

Response to Proposed Finding No. 100

The Proposed Finding is inherently contradictory. Schein also asks the Court to adopt findings that assert Schein worked with buying groups. If that is the case (it is not), the Proposed Finding is irrelevant because it admittedly has no bearing on Schein's rejection of buying groups. Nonetheless, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein rejected any buying groups during the conspiracy period because of FSC-related risks. The record evidence shows that Schein's FSCs asked about opportunities to discount to buying groups, which were met with repeated instructions to reject all buying groups during the conspiracy. (*See, e.g.*, CCFF ¶¶ 772-781; *see also* CCFF ¶¶ 717-954; Complaint Counsel's Post-Trial Brief, at Attachment C). Moreover, such an assertion is contrary to the record evidence that clearly shows Schein worked buying groups before the conspiracy and after the conspiracy became difficult to maintain, despite the claimed FSC-related risks. (CCFF ¶¶ 432-452, 1159-1166, 1316-1322). Only during the conspiracy does the evidence show a blanket rejection of buying groups by a sales force that was instructed not to deal with them. (CCFF ¶¶ 717-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

101. Lower compensation to FSCs for the same amount of work impacts Schein's ability to retain good FSCs, who might look "to go to Patterson or Benco" if Schein was "paying ... at a lower rate...." (Meadows, Tr. 2528).

Response to Proposed Finding No. 101

The Proposed Finding is inherently contradictory. Schein also asks the Court to adopt findings that assert Schein worked with buying groups. If that is the case (it is not), the Proposed Finding is irrelevant because it admittedly has no bearing on Schein's rejection of buying groups. Nonetheless, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein rejected any buying groups

during the conspiracy period because of FSC-related risks. The record evidence shows that Schein's FSCs asked about opportunities to discount to buying groups, which were met with repeated instructions to reject all buying groups during the conspiracy. (*See, e.g.*, CCFF ¶¶ 772-781; *see also* CCFF ¶¶ 717-954; Complaint Counsel's Post-Trial Brief, at Attachment C). Moreover, such an assertion is contrary to the record evidence that clearly shows Schein worked buying groups before the conspiracy and after the conspiracy became difficult to maintain, despite the claimed FSC-related risks. (CCFF ¶¶ 432-452, 1159-1166, 1316-1322). Only during the conspiracy does the evidence show a blanket rejection of buying groups by a sales force that was instructed not to deal with them. (CCFF ¶¶ 717-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

102. Schein's Dave Steck estimated that between 2011 and 2015 a good sales representative "could certainly bring \$2 million a year" in business, meaning the loss of a good FSC could result in considerable lost business. (Steck, Tr. 3803).

Response to Proposed Finding No. 102

The Proposed Finding is inherently contradictory. Schein also asks the Court to adopt findings that assert Schein worked with buying groups. If that is the case (it is not), the Proposed Finding is irrelevant because it admittedly has no bearing on Schein's rejection of buying groups. Nonetheless, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein rejected any buying groups during the conspiracy period because of FSC-related risks. The record evidence shows that Schein's FSCs asked about opportunities to discount to buying groups, which were met with repeated instructions to reject all buying groups during the conspiracy. (*See, e.g.*, CCFF ¶¶ 772-781; *see also* CCFF ¶¶ 717-954; Complaint Counsel's Post-Trial Brief, at Attachment C). Moreover, such an assertion is contrary to the record evidence that clearly shows Schein worked buying groups before the conspiracy and after the conspiracy became difficult to

maintain, despite the claimed FSC-related risks. (CCFF ¶¶ 432-452, 1159-1166, 1316-1322). Only during the conspiracy does the evidence show a blanket rejection of buying groups by a sales force that was instructed not to deal with them. (CCFF ¶¶ 717-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

103. If Special Markets signed up the buying group and placed the buying group on a Special Markets formulary, HSD's FSCs who served dentists who joined that buying group would suffer an even greater reduction in commission because the commission rate under Special Markets formularies goes down to 10 percent. That would reduce the FSC's take-home commission to 2 percent of sales. (Meadows, Tr. 2549-51).

Response to Proposed Finding No. 103

The Proposed Finding is inherently contradictory. Schein also asks the Court to adopt findings that assert Schein worked with buying groups. If that is the case (it is not), the Proposed Finding is irrelevant because it admittedly has no bearing on Schein's rejection of buying groups. Nonetheless, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein rejected any buying groups during the conspiracy period because of FSC-related risks. The record evidence shows that Schein's FSCs asked about opportunities to discount to buying groups, which were met with repeated instructions to reject all buying groups during the conspiracy. (*See, e.g.*, CCFF ¶¶ 772-781; *see also* CCFF ¶¶ 717-954; Complaint Counsel's Post-Trial Brief, at Attachment C). Moreover, such an assertion is contrary to the record evidence that clearly shows Schein worked buying groups before the conspiracy and after the conspiracy became difficult to maintain, despite the claimed FSC-related risks. (CCFF ¶¶ 432-452, 1159-1166, 1316-1322). Only during the conspiracy does the evidence show a blanket rejection of buying groups by a sales force that was instructed not to deal with them. (CCFF ¶¶ 717-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

104. In addition to creating conflicts with its FSCs, buying groups could create conflicts between Schein's two divisions: HSD and Special Markets. (Meadows, Tr. 2532; RXD 0015).

Response to Proposed Finding No. 104

Complaint Counsel has no specific response to the attribution of the statement to Meadows. However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein rejected buying groups during the conspiracy period because of conflicts between divisions. That is contrary to the record evidence, which shows that the head of HSD, Sullivan, and the head of Special Markets, Muller, coordinated to best serve its pre-existing buying groups relationships prior to the conspiracy period. In early 2011, Smile Source was transferred from Special Markets to HSD in order to best accommodate its structure. (CCFF ¶¶ 901-902). In fact, both of Schein's dental divisions—HSD and Special Markets—had responsibility for buying groups. (Foley, Tr. 4523). The record evidence shows that HSD and Special Markets were both responsible for buying groups, coordinated regarding buying group, and both rejected buying groups during the conspiracy period pursuant to a policy. (CCFF ¶¶ 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). As such, it is contrary to the weight of the record evidence to suggest that conflicts between divisions explains the blanket rejection of buying groups during the conspiracy period. (CCFF ¶¶ 717-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). Finally, the citation to RXD0015 is improper and should be disregarded, as the Order on Post-Trial Briefs specifically precludes citing demonstratives a substantive evidence. (*See* February 21, 2019 Order on Post-Trial Briefs).

105. HSD and Special Markets compete for sales credit to hit quotas and budgets. If Special Markets signs up a buying group whose members were existing HSD customers, not only are those customers cannibalized and FSC compensation reduced, but HSD loses the sales credit. (Meadows, Tr. 2552-53).

Response to Proposed Finding No. 105

Complaint Counsel has no specific response to the attribution of the statement to Meadows. However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein rejected buying groups during the conspiracy period because of conflicts between divisions. That is contrary to the record evidence, which shows that the head of HSD, Sullivan, and the head of Special Markets, Muller, coordinated to best serve its pre-existing buying groups relationships prior to the conspiracy period. In early 2011, Smile Source was transferred from Special Markets to HSD in order to best accommodate its structure. (CCFF ¶¶ 901-902). In fact, both of Schein's dental divisions—HSD and Special Markets—had responsibility for buying groups. (Foley, Tr. 4523). The record evidence shows that HSD and Special Markets were both responsible for buying groups, coordinated regarding buying group, and both rejected buying groups during the conspiracy period pursuant to a policy. (CCFF ¶¶ 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). As such, it is contrary to the weight of the record evidence to suggest that conflicts between divisions explains the blanket rejection of buying groups during the conspiracy period. (CCFF ¶¶ 717-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). Finally, the citation to RXD0015 is improper and should be disregarded, as the Order on Post-Trial Briefs specifically precludes citing demonstratives a substantive evidence. (*See* February 21, 2019 Order on Post-Trial Briefs).

106. Mr. Sullivan explained the conflicts that arose between HSD and Special Markets (and within HSD) as buying groups emerged:

We both [HSD and Special Markets] had buying groups in our P&Ls ... But the communication ... between the two divisions was not great. And there were times that Hal would be -- and his team were out making proposals that impacted single-office space practitioners that we, as HSD, are servicing. And once they

became some sort of a special markets account, those sales would then transfer, at least the consumables, over onto the special markets P&L. That would impact our field sales consultants, who continue to call on those customers and provide incredible value. Commissions were reduced. Our sales force would obviously not be happy with that outcome. And so it was creating conflicts of who should be focusing on these groups versus not. Some groups we'd [HSD] want to work with; some we didn't. Some Hal would want to; some we [HSD] wouldn't. So there was not complete agreement internally on the exact strategy around them, who was going to be approaching them. And then we had our own inherent internal conflicts from a P&L standpoint and [FSC] conflict[s]. (RX 2941 (Sullivan, Dep. at 500-02)).

Response to Proposed Finding No. 106

Complaint Counsel has no specific response to the attribution of the statement to Sullivan.

Complaint Counsel has no specific response to the attribution of the statement to Meadows.

However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein rejected buying groups during the conspiracy period because of conflicts between divisions. That is contrary to the record evidence, which shows that the head of HSD, Sullivan, and the head of Special Markets, Muller, coordinated to best serve its pre-existing buying groups relationships prior to the conspiracy period. In early 2011, Smile Source was transferred from Special Markets to HSD in order to best accommodate its structure. (CCFF ¶¶ 901-902). In fact, both of Schein's dental divisions—HSD and Special Markets—had responsibility for buying groups. (Foley, Tr. 4523). The record evidence shows that HSD and Special Markets were both responsible for buying groups, coordinated regarding buying group, and both rejected buying groups during the conspiracy period pursuant to a policy. (CCFF ¶¶ 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). As such, it is contrary to the weight of the record evidence to suggest that conflicts between divisions explains the blanket rejection of buying groups during the conspiracy period. (CCFF ¶¶ 717-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

107. Signing up a buying group could also create conflicts across regions at Schein. (Meadows, Tr. 2545-47; RXD 0015). For example, if a regional manager in the West signed up a buying group with members nationwide, it might help win some customers from Burkhart in the West, but could pose cannibalization issues for existing Schein customers in the East and affect compensation for Schein's FSCs in the East. (Meadows, Tr. 2545-49).

Response to Proposed Finding No. 107

Complaint Counsel has no specific response to the attribution of the statements to Meadows.

However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein rejected buying groups during the conspiracy period because of risks related to "conflicts across regions," "cannibalization," or "compensation." The record evidence shows that Schein's sales force, including regional managers, asked about opportunities to discount to buying groups, which were met with instructions to reject all buying groups during the conspiracy. (*See, e.g.*, CCFF ¶¶ 812-813, 828-829, 835, 946-947; *see also* CCFF ¶¶ 717-954; Complaint Counsel's Post-Trial Brief, at Attachment C). It also shows that Schein worked with Smile Source before the conspiracy period even though half of those sales came from existing Schein customers. (CCFF ¶ 447). In fact, the record evidence shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). As such, it is contrary to the weight of the record evidence to suggest that any of the asserted conflicts explain the blanket rejection of buying groups during the conspiracy period. (CCFF ¶¶ 717-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

108. Buying groups could also create conflicts directly with HSD's existing customers. Schein's discount programs – to independent dentists and DSOs – are based on volume commitments, but if those discounts were made available to buying group members who did not meet the volume commitments, Schein's other customers may view that as unfair treatment. (Meadows, Tr. 2555-57; RXD 0015; *see also* CX 2456-001 (buying groups “cause[] all sorts of issues for ... local area non-members who then expect the same [and] will change ... [a]way from us ... out of frustration that their business is viewed as ‘not worthy’.”)).

Response to Proposed Finding No. 108

Complaint Counsel has no specific response to the statements attributed to Meadows and CX2456. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that the asserted conflicts, like volume commitment and customer conflicts, affected Schein's conduct during the conspiracy, when it indiscriminately rejected buying groups. That is contrary to the record evidence, which shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and indiscriminately turned down all buying groups, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). As such, it is contrary to the weight of the record evidence to suggest that any of the asserted conflicts explain the blanket rejection of buying groups during the conspiracy period. (CCFF ¶¶ 717-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). Moreover, the record evidence also shows that Schein bid for Smile Source in 2017 despite the fact that Smile Source's business model remained the same and despite the lack of any volume guarantees. (CCFF ¶ 1718). The record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685). Finally, the citation to RXD0015 is improper and should be disregarded, as

the Order on Post-Trial Briefs specifically precludes citing demonstratives a substantive evidence. (*See* February 21, 2019 Order on Post-Trial Briefs).

109. Some of Schein’s manufacturer partners also extend discounts (called chargebacks) for high-volume customers. If Schein started offering those discounts to buying group members that did not meet the volume thresholds, the buying group could cause conflicts with Schein’s manufacturer partners as well and “undermine[] [Schein’s] relationship with [its] manufacturers.” (Meadows, Tr. 2557-59; Foley, Tr. 4696-98; Puckett, Tr. 2266-67 (describing how Schein “[was] getting pressure from their distributors and manufacturers, mostly manufacturers, regarding Dental Gator”); RXD 0015).

Response to Proposed Finding No. 109

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that the asserted conflicts, like volume commitments and manufacturer conflicts, affected Schein’s conduct during the conspiracy, when it indiscriminately rejected buying groups. That is contrary to the record evidence, which shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and indiscriminately turned down all buying groups, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). As such, it is contrary to the weight of the record evidence to suggest that any of the asserted conflicts explain the blanket rejection of buying groups during the conspiracy period. (CCFF ¶¶ 717-954; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Moreover, the record evidence also shows that Schein bid for Smile Source in 2017 despite the fact that Smile Source’s business model remained the same and despite the lack of any volume guarantees. (CCFF ¶ 1718). The record evidence also shows that buying groups were profitable for distributors even without

contractual volume guarantees. (CCFF ¶ 1685). Finally, the citation to RXD0015 is improper and should be disregarded, as the Order on Post-Trial Briefs specifically precludes citing demonstratives a substantive evidence. (*See* February 21, 2019 Order on Post-Trial Briefs).

110. Schein's business with buying groups also caused administrative burdens. To track buying group members, for example, it had to create separate systems that could track members across regions. (Meadows, Tr. 2559-60; RXD 0015; *see also* CX 2362 (describing administrative difficulties in setting up Dental Gator accounts in HSD)).

Response to Proposed Finding No. 110

Complaint Counsel has no specific response to the statements attributed to Meadows and CX2362. However, the Proposed Finding is inherently contradictory. Schein also asks the Court to adopt a finding that "Schein was open to working with a buying group like Dental Gator" despite the claimed "administrative burdens." (*Compare* SF 644 *with* CX2362 at 002-003). If that is the case (it is not), the Proposed Finding admittedly has no bearing on Schein's rejection of buying groups during the conspiracy. Furthermore, even setting Dental Gator aside, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein rejected other buying groups during the conspiracy period because of administrative burdens. That is contrary to the record evidence, which shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and indiscriminately turned down all buying groups, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). As such, it is contrary to the weight of the record evidence to suggest that any of the asserted conflicts explain the blanket rejection of buying groups during the

conspiracy period. (CCFF ¶¶ 717-954; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Finally, the citation to RXD0015 is improper and should be disregarded, as the Order on Post-Trial Briefs specifically precludes citing demonstratives a substantive evidence. (*See* February 21, 2019 Order on Post-Trial Briefs).

111. Buying groups also limit the pricing flexibility of Schein’s FSCs. For example, in 2015, Hal Muller emailed HSD executives to request that Schein FSCs not discount to dentists that were members of certain buying groups because FSC discounts could put the buying group agreements at risk. (CX 0248-001). As Mr. Meadows explained, “from an FSC’s perspective, if those customers’ pricing is already set, and let’s say that a box of gloves costs \$10 on their formulary and Patterson or Benco can walk through the door and say, I’ll give it to you for nine, if we can’t adjust our price down to nine to match or beat our competitor’s ... offer, that limits our ability to grow within this group.” (Meadows, Tr. 2529-30).

Response to Proposed Finding No. 111

Complaint Counsel has no specific response to the statements attributed to Meadows and CX0248. However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein rejected buying groups during the conspiracy due to “pricing flexibility” issues That is contrary to the record evidence, which shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and indiscriminately turned down all buying groups, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). As such, it is contrary to the weight of the record evidence to suggest that any of the asserted conflicts explain the blanket rejection of buying groups during the conspiracy period. (CCFF ¶¶ 717-954; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

112. Buying groups could also have a negative impact on the Henry Schein brand. While some groups could complement Schein's full-service, high-touch, high-value model and philosophy, groups that were "price-only" could tarnish Schein's brand. (Meadows, Tr. 2560; RXD 0015).

Response to Proposed Finding No. 112

Complaint Counsel has no specific response to the statement attributed to Meadows.

However, the Proposed Finding is misleading and contrary to the record evidence to the extent it asserts or implies that Schein rejected buying groups because they were "price-only" buying groups. The record evidence shows that Schein never distinguished between types of buying groups during the conspiracy and never used the term "price-only" buying groups in documents evidencing Schein's policy against buying groups. (CCFF ¶¶ 728-954).

Meadows, a former Vice President of Sales in HSD, testified that he did not recall ever hearing of the term "price-only buying group." (CX8016 (Meadows, Dep. at 52)). Muller, Schein's President of Special Markets, testified that all buying groups are "primarily just price," and that this is the main distinction between buying groups and MSOs. (CX0309 (Muller, IHT at 141) ("Q. And what's the difference between an MSO and a buying group? A. An MSO has a lot of the management elements; HR, payroll, training, all those elements, as opposed to a buying group that is primarily just price.")). Consistent with this, Brian Brady, Schein's Former Director of Group Practices, testified that he used the term "buying group" in reference to buying groups broadly, and not to any specific type. (CX8020 (Brady, Dep. at 126-127)). Finally, the citation to RXD0015 is improper and should be disregarded, as the Order on Post-Trial Briefs specifically precludes citing demonstratives a substantive evidence. (*See* February 21, 2019 Order on Post-Trial Briefs).

113. Thus, whenever Schein was confronted with a buying group opportunity, it had to weigh the group's potential benefits against its potential risks and conflicts. (*E.g.*, SF 159-82; *see also, e.g.*, RX 2172 ("We will not partner with [b]uying groups that charge a fee to customers to negotiate a lower price on their behalf. We will partner with groups that offer some other

value that they charge for and we're in a marketing partnership together. [W]e can't allow people to profit by dividing us from our customers.'')).

Response to Proposed Finding No. 113

The Proposed Finding is misleading and contrary to the weight of the record evidence in its assertion that Schein evaluated a buying group opportunity “whenever” confronted with one. In fact, the record evidence shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C, Responses to Proposed Finding Nos. 159-182).

114. As discussed below, Schein has faced these trade-offs and conflicts with buying groups for numerous years, including prior to the alleged conspiracy, and each time worked through them with each group rather than ceasing business with buying groups altogether. (*E.g.*, SF 189-341).

Response to Proposed Finding No. 114

The Proposed Finding is misleading and contrary to the weight of the record evidence in its assertion that Schein “worked through” the buying group opportunities “rather than ceasing business with buying groups altogether.” In fact, the record evidence shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C, Responses to Proposed Finding Nos. 189-341).

c. Not All Buying Groups Can Save Dentists Money Through Discounts on Supplies.

115. Many buying groups charge dentists a membership fee. (Goldsmith, Tr. 1971; Puckett, Tr. 2224; Kois Sr., Tr. 238; Baytosh, Tr. 1887-88; CX 0320 (Capaldo, IHT at 39)).

Response to Proposed Finding No. 115

Complaint Counsel has no specific response.

116. These “middleman fees” can eat into discounts – money that would otherwise go to dentists. (Meadows, Tr. 2505 (“if ... a buying group ... was just purely after middleman fees and then ultimately didn’t provide that stickiness to us, considering the fact that we could negotiate a lower price with these customers and were willing to and ready, I didn’t -- I didn’t see value....”); *see also* Rogan, Tr. 3532 (“we provide a lot to the dental offices, and it costs a lot of money to do that, and so to give that middle party 2 percent for just being a middle party when we could deal directly didn’t make any business sense.”)).

Response to Proposed Finding No. 116

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that buying group membership fees reduce a distributor’s competitiveness because it takes money away from lowering prices, or that it was a reason Schein rejected buying groups during the conspiracy period. The record evidence shows that Schein profitably worked with buying groups that charged membership fees. (CCFF ¶ 443; [REDACTED] CCFF ¶ 1318; R. Johnson, Tr. 5519; CCFF ¶¶ 447-453).

117. Because many buying groups charged their members fees, it could be difficult if not impossible for many buying groups to actually save their dentist members money. [REDACTED]

(Goldsmith, Tr. 2055). [REDACTED]

(Goldsmith, Tr. 2061; RXD 0010). [REDACTED]

(Goldsmith, Tr. 2061; RXD 0010; Meadows Tr [REDACTED]

Goldsmith, Tr. 2061, 2065; RXD 0010). [REDACTED]

(Goldsmith, Tr. 2066; RXD 0010).

Nor has Complaint Counsel presented evidence that any buying group captured 100% of a member's purchases.

Response to Proposed Finding No. 117

First, the citation to RXD0010 is improper and should be disregarded, as the Order on Post-Trial Briefs specifically precludes citing demonstratives a substantive evidence. (*See* February 21, 2019 Order on Post-Trial Briefs). Second, the Proposed Finding (and footnote 3 to the extent it is included as part of the Proposed Finding) is a hypothetical calculation, and it is misleading and contrary to the weight of the record evidence. The record evidence establishes that buying groups save dentists money. (CCFF ¶ 138). Moreover, the record evidence shows that Schein profitably worked with Smile Source, [REDACTED]

(CCFF ¶¶ 443, 447-453; [REDACTED])

Thus, the Proposed Finding is also misleading and contrary to the record evidence to the extent it implies or asserts that a membership fee reduces a distributor's competitiveness or that Schein otherwise rejected buying groups that charged membership fees for that reason.

118. [REDACTED] (Goldsmith, Tr. 2073).

[REDACTED] (Goldsmith, Tr. 2074-75).

(Goldsmith, Tr. 2073-74; RXD 0011).

Response to Proposed Finding No. 118

First, the citation to RXD0010 is improper and should be disregarded, as the Order on Post-Trial Briefs specifically precludes citing demonstratives a substantive evidence. (*See*

³ As Dr. Goldsmith noted, Smile Source also negotiated discounts on lab fees and other items (Goldsmith, Tr. 2187-88), but that just underscores how much a buying group would need to offer in order to actually save a dentist money.

February 21, 2019 Order on Post-Trial Briefs). Second, the Proposed Finding is a hypothetical calculation, and it is misleading and contrary to the weight of the record evidence. The record evidence establishes that buying groups save dentists money. (CCFF ¶ 138). Moreover, the record evidence shows that Schein profitably worked with Smile Source, [REDACTED] (CCFF ¶¶ 443, 447-453; [REDACTED] [REDACTED]). Thus, the Proposed Finding is also misleading and contrary to the record evidence to the extent it implies or asserts that a membership fee reduces a distributor's competitiveness or that Schein otherwise rejected buying groups that charged membership fees for that reason.

119. [REDACTED]
[REDACTED] (Goldsmith, Tr. 2074; RXD 0012).

Response to Proposed Finding No. 119

First, the citation to RXD0010 is improper and should be disregarded, as the Order on Post-Trial Briefs specifically precludes citing demonstratives a substantive evidence. (*See* February 21, 2019 Order on Post-Trial Briefs). Second, the Proposed Finding is a hypothetical calculation, and it is misleading and contrary to the weight of the record evidence. The record evidence establishes that buying groups save dentists money. (CCFF ¶ 138). Moreover, the record evidence shows that Schein profitably worked with Smile Source, [REDACTED] (CCFF ¶¶ 443, 447-453; [REDACTED] [REDACTED]). Thus, the Proposed Finding is also misleading and contrary to the record evidence to the extent it implies or asserts that a membership fee reduces a distributor's competitiveness or that Schein otherwise rejected buying groups that charged membership fees for that reason.

B. Every Witness Asked at Trial Testified that Schein Did Business with Buying Groups.

1. *Buying Group Witnesses.*

120. Dr. Andrew Goldsmith, former President and Chief Dental Officer of Smile Source, testified that: (1) Smile Source already had a contract with Schein when he joined the company in August 2011; (2) Schein continued to work with Smile Source, even when it might not have made sense; (3) even after Smile Source [REDACTED] in early 2012, Schein remained willing to work with Smile Source; and (4) at no time was he told that [REDACTED] or that Schein would [REDACTED]

(Goldsmith, Tr. 1934, 1974-75, 2036-37, 2098, 2103-04, 2137-39).

Response to Proposed Finding No. 120

Complaint Counsel has no specific responses to the numbered assertions in (1) or (4). The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts that Schein “continued to work with Smile Source” and “remained willing to work with Smile Source.” The record shows that after Smile Source was transferred from Special Markets to HSD in 2011, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], the relationship ended at the beginning of 2012. (CCFF ¶¶ 899-913).

Regardless of who terminated whom, the record evidence shows that Schein did not work with Smile Source during the conspiracy and that Sullivan was pleased when the relationship ended at the beginning of 2012. (CCFF ¶¶ 914-924). Finally, evidence regarding Schein’s conduct in relation to the pre-existing Smile Source relationship does not disprove Schein’s participation in a conspiracy. The record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the

conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

121. Mr. Trevor Maurer, President and CEO of Smile Source, started with Smile Source in 2012 and similarly testified that: (1) Schein did business with Smile Source prior to when Mr. Maurer began working at Smile Source; (2) he was never told that Schein did not do business with buying groups; (3) in 2014, Schein tried to win Smile Source's business with a competitive proposal that "was similar to the deal [Smile Source] had in place with Burkhardt," but that Smile Source "rejected" the proposal out of "loyalty [to] Burkhardt;" (4) Tim Sullivan remained open to working with Smile Source after 2014; and (5) Henry Schein entered into a contract with Smile Source in February 2017, which continues today. (Maurer, Tr. 4937-39, 4942-43, 4945-47).

Response to Proposed Finding No. 121

Complaint Counsel has no specific response the assertions in (1). As to the assertion in (2), the Proposed Finding is misleading, as what Trevor Maurer was told does not disprove Schein's participation in a conspiracy, as described further here.

As to the assertions in (3), the Proposed Finding is inaccurate and misleading. Complaint Counsel contends that Schein's 2014 proposal to Smile Source was an attempt at cheating on the agreement. (Kahn, Tr. 61). The record evidence shows that Schein's interactions with Smile Source in 2014 was an attempt at cheating—Schein knew Benco and Patterson would not be bidding, offered Smile Source a low, non-competitive bid, instructed its team not to do business with buying groups at the time it was allegedly working on that bid, and Sullivan continued instructing against buying groups after the bid. First, the record evidence shows that by 2014, the Big Three already knew that they would not discount to buying groups. (CCFF ¶¶ 674-676, 700, 1178-1198). Second, the record evidence also shows that the proposed discount in 2014 was non-competitive at 7%, [REDACTED]

[REDACTED] (CCFF ¶¶ 1829-1837). [REDACTED]

[REDACTED] (CCFF ¶¶ 1835, 1843-1847). Schein's 2014 partnership proposal to do business with Smile Source members offered [REDACTED]

[REDACTED] Both Dr. Goldsmith and Maurer expected a

[REDACTED] (CCFF ¶¶ 1835-1836). Maurer's testimony that the 2014 proposal was "similar" to the Burkhart discount is not supported by the record evidence. [REDACTED]

[REDACTED], which is not similar to the 7% discount Schein offered in 2014. (*Compare* CCFF ¶ 181 *with* Maurer, Tr. 4945).

As to the assertions in (4), the Proposed Finding is inaccurate and misleading. Just several months after the 2014 proposal, Sullivan told other Schein executives internally that he was "Not interested" in the arrangement that Smile Source had been seeking and continued instructing against buying groups. (CCFF ¶¶ 1849, 809). Sullivan stated: "I still believe this is a slippery slope . . . don't plan to take the lead role." (CCFF ¶ 809). Indeed, even at the same time Schein was allegedly working on a bid for Smile Source, it was instructing its team not to do business with buying groups: "Just for clarity, we are NOT participating in any GPOs regardless of what they promise to bring us." (CCFF ¶ 816 (quoting CX2354 at 001) (emphasis in original)).

As to the assertions in (5), the Proposed Finding is misleading and contrary to the weight of the record evidence. Evidence regarding Schein's conduct in relation to the Smile Source

relationship in 2014 and later in 2017 does not disprove Schein's participation in a conspiracy. There was no agreement reached in 2014 despite Schein's attempt at cheating, and the 2017 agreement occurred well after the conspiracy became difficult to maintain. Indeed, the record evidence still clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

122. Mr. Justin Puckett, one of the founders of the buying group Dental Gator, testified that Schein was Dental Gator's distributor from 2014 until Dental Gator closed in 2017. (Puckett, Tr. 2211, 2219; 2231; 2269; 2294). Mr. Puckett also testified that no one at Schein ever told him that Schein did not work with buying groups. (Puckett, Tr. 2275-76).

Response to Proposed Finding No. 122

The Proposed Finding is misleading to the extent it asserts or implies that evidence regarding Dental Gator disproves Schein's participation in a conspiracy. The record evidence shows otherwise.

The record evidence shows that Dental Gator became a customer of Schein Special Markets when MB2 Solutions ("MB2"), an elite DSO customer of Schein that created Dental Gator, extended the pricing it received from Schein under a 2014 agreement ("2014 MB2 Agreement") to Dental Gator, initially without Schein's knowledge. (CCFF ¶¶ 1778, 1783, 1789-1796). The 2014 MB2 Agreement prohibited MB2 from forming a buying group, and Schein inserted these provisions into the agreement to prevent Dental Gator from becoming a "typical GPO." (CCFF ¶¶ 1791-1793). When Schein learned that MB2 formed buying group Dental Gator, Schein deemed it a breach of the 2014 MB2 agreement. (CCFF ¶¶ 1796).

Schein informed Dental Gator that if “it looks at any time like a GPO [Schein] will disenroll” and imposed advertising guidelines to ensure that Dental Gator did not “represent in their marketing anything that looks like a GPO.” (CCFF ¶¶ 1797-1800; *see also* CCFF ¶¶ 1812-1817). The record also shows that Sullivan approached Muller to discuss shutting down Dental Gator. (CCFF ¶ 1806 (quoting CX0246 at 001)). Muller testified that while he does not recall this discussion with Sullivan, he had no reason to doubt that Sullivan approached him about shutting down Dental Gator. (CX0309 (Muller, IHT at 176)). Sullivan and other executives had sought to end the relationship with Dental Gator, but Schein was worried about losing MB2’s business in doing so, which was a long-term and top 50 customer for Special Markets. (CCFF 1801-1806, 1776-1782). Schein was “accommodating [Dental Gator] for unique reasons” but feared “open[ing] the floodgates on buying groups.” (CCFF ¶¶ 1811 (citing CX0188 at 001), 1802-1810; *see also* CX0309 (Muller, IHT at 102) (“we supported it because we hoped our customer [MB2] would buy those offices. So in that case, yes, but Dental Gator really didn’t go anywhere”)). Indeed, Schein would not have tolerated Dental Gator but for its relationship with MB2, and the record evidence shows that Schein never bid on Dental Gator, did not have a separate contract with Dental Gator, and that Dental Gator became a Schein customer without its knowledge. (CCFF ¶¶ 1790, 1795, 1810). The Proposed Finding is also misleading, lacks foundation, and is irrelevant to the extent that it suggests that a conspiracy did not exist because Mr. Justin Puckett, who was not a party to the conspiracy, testified that “no one at Schein ever told him that Schein did not work with buying groups.” A third party, who had no involvement in perpetrating the agreement, is not a reliable source regarding Schein’s conduct.

123. Dr. Brenton Mason, one of the founding members of the New Mexico chapter of the Utah Dental Co-Op, testified that Schein did business with the Utah Dental Co-Op, including the

New Mexico chapter of the Utah Dental Co-Op in at least 2013 and 2014. (Mason, Tr. 2391, 2402, 2405).

Response to Proposed Finding No. 123

The Proposed Finding is misleading to the extent it asserts or implies that evidence regarding the Utah Dental Co-op, or its New Mexico chapter, disproves Schein's participation in a conspiracy. The record evidence shows otherwise. The record evidence shows that Schein rejected the New Mexico Dental Co-op's request for a supply partnership. (CCFF ¶ 507-509). Having no full-service distributor, the New Mexico Dental Co-op's attempt to build a buying group was stymied, and it merged with the existing Dental Co-op of Utah and became a branch of the Dental Co-op of Utah. (CCFF ¶ 511). Schein already had a relationship with the Utah Dental Co-op since 2007. (CCFF ¶¶ 688, 889). Indeed, Schein's pre-existing, legacy buying group relationship with the Dental Co-op of Utah has no bearing on Schein's conduct during the conspiracy, where it instructed its sales force to reject buying groups that approached it. (*See Responses to Proposed Finding Nos. 584-633 (Dental Co-op of Utah)*). Moreover, the record evidence shows that Schein shut-down its relationship with the Dental Co-op of Utah, and its branches, during the conspiracy period pursuant to its policy not to do business with buying groups. (*See Responses to Proposed Finding Nos. 581-633*).

124. Dr. Joseph Baytosh, former President of the Corydon Palmer Dental Society, testified that in 2014, Schein offered the opportunity to set up "a formulary of products with Henry Schein" and create an "up-front discount program" for Corydon Palmer Dental Supply members, as well as a rebate program. (Baytosh, Tr. 1906-07, 1910-11). Dr. Baytosh testified that Corydon Palmer and Schein entered into an agreement for a rebate program on January 1, 2015. (Baytosh, Tr. 1910-12). Dr. Baytosh also testified he was never told that Schein does not work with buying groups. (Baytosh, Tr. 1911).

Response to Proposed Finding No. 124

The Proposed Finding is misleading and irrelevant to the extent it asserts or implies that evidence regarding Corydon Palmer Dental Society disproves Schein's participation in a

conspiracy. Corydon Palmer is not a buying group, and as such, has no bearing on Schein's instruction to reject buying groups during the conspiracy period and compliance with that instruction. (*See Responses to Proposed Finding Nos. 512-547*). The Proposed Finding is also misleading, lacks foundation, and is irrelevant to the extent that it suggests that a conspiracy did not exist because Dr. Joseph Baytosh, who was not a party to the conspiracy, testified that "he was never told that Schein does not work with buying groups." A third party, who had no involvement in perpetrating the agreement, is not a reliable source regarding Schein's conduct.

125. Dr. Richard Johnson, co-founder and co-owner of the buying group Klear Impakt, testified that Klear Impakt's discussions with Schein started in 2014 and culminated with a vendor agreement in August 2015. (R. Johnson, Tr. 5479, 5481, 5501). Mr. Johnson testified that he was never told that Schein does not work with buying groups. (R. Johnson, Tr. 5490-91; 5493-94).

Response to Proposed Finding No. 125

The Proposed Finding is misleading and irrelevant to the extent it asserts or implies that evidence regarding Klear Impakt disproves Schein's participation in a conspiracy. Schein entered into an agreement with Klear Impakt after the conspiracy became difficult to maintain. (CCFF ¶1318). In addition, even as of November 2015, Sullivan was unaware of Klear Impakt and any discussions with Klear Impakt. (CCFF ¶ 849). As such, it has no bearing on Sullivan's directives to Schein executives and sales force to reject buying groups during the conspiracy period and Schein's compliance with that instruction. (*See Responses to Proposed Finding Nos. 802-838*). The Proposed Finding is also misleading, lacks foundation, and is irrelevant to the extent that it suggests that a conspiracy did not exist because Dr. Richard Johnson, who was not a party to the conspiracy, testified that "he was never told that Schein does not work with buying groups." A third party, who had no

involvement in perpetrating the agreement, is not a reliable source regarding Schein's conduct.

2. *Patterson Witnesses.*

126. Mr. Guggenheim, Patterson's President during the alleged conspiracy, testified that he "all along believed" that Schein was working with buying groups because Schein is a "very aggressive company" and "tended to be an innovator working with alternative groups before anyone else." (Guggenheim, Tr. 1817-18, 1856-57).

Response to Proposed Finding No. 126

The Proposed Finding is vague as to the time-period at issue. Complaint Counsel does not dispute that Schein was the first to work with buying groups before the conspiracy period. (Kass, Tr. 89).

However, the Proposed Finding is inaccurate, misleading, and contrary to the weight of the record evidence to the extent that it asserts that Paul Guggenheim believed Schein was working with buying groups during the conspiracy. The record evidence shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Benco, Patterson, and Schein's internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195). The record also shows that Patterson understood that Schein and Benco would reject buying groups during the conspiracy. For example, on February 27, 2013, Dave Misiak (Patterson) directed a Regional Manager to refuse a buying group, explaining that Patterson's largest competitors, Schein and Benco, refuse buying groups as well: "**Confidential and not for discussion . . . our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me.**" (CCFF ¶ 1187 (quoting CX0093 at 001 (emphasis in original))). Misiak was also concerned that Schein and Benco would submit bids for buying groups and deny doing so. On February 27, 2013, Misiak wrote to Guggenheim, "I've coached [Regional Manager Anthony Fruehauf] on how to stay out of

this [buying group] with grace. I'm concerned that Schein and Benco sneak into these co-op bids and deny it. . . ." (CCFF ¶ 1188 (quoting CX0092 at 001), 1189). Then on August 4, 2013, Tim Rogan (Patterson) wrote to Neal McFadden (Patterson): "Neal, we don't need GPO's in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry." (CCFF ¶ 1190 (quoting CX0106 at 001)). Schein's documents similarly refer to an understanding that the Big Three would refuse buying groups. On March 5, 2014, Randy Foley (Schein) wrote to Chad Thompson of Heartland: "The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott." (CCFF ¶ 1185 (quoting CX2106 at 001); *see also* CCFF ¶ 1194). Then on October 28, 2015, Foley wrote to Schein employees, "Keep in mind that I and others have been in contact with Tralongo over the years. Schein, PDCO and Benco all refused to bid on their business when they entered the GPO/Buying Group world." (CCFF ¶ 1195 (quoting CX2094 at 001)). Benco's documents similarly refer to an overarching conspiracy. (CCFF ¶¶ 1191-1193).

127. On multiple occasions, Mr. Guggenheim sent and received competitive intelligence that Schein was working with what he understood to be buying groups, including Dental Gator and Klear Impakt. (Guggenheim, Tr. 1861-62; RX 0387, CX 3091, CX 3236).

Response to Proposed Finding No. 127

The Proposed Finding is vague as to the time-period at issue, and it is misleading and contrary to the weight of the record evidence to the extent it asserts that Schein contracted with buying groups during the conspiracy period, or that Guggenheim believed it did. The record shows that it did not. (CCFF ¶¶ 661-1100).

The Proposed Finding is not supported by the cited evidence. First, as to RX0387, Guggenheim testified that he had no personal knowledge that RX0387 referred to a buying group. (Guggenheim, Tr. 1873). Second, even after the March 2015 discussion of MB2 and

Dental Gator in CX3091, Benco's documents from May 2015 continue to refer to an overarching conspiracy and the understanding that all of the Big Three would decline buying groups: "The best part about calling these [buying groups] is I already KNOW that Patterson and Schein have said NO." (CCFF ¶ 1191 (quoting CX0012 at 001)). Third, CX3236, a document from November 2015 or after the conspiracy became difficult to maintain, does not show that Schein was working with buying groups during the conspiracy period. (CX3236 at 001). Rather, CX3236 is consistent with the record evidence showing that the Big Three began competing for buying groups in late 2015. (CCFF ¶¶ 1159-1166).

Moreover, regardless of the competitive intelligence he may have received, Guggenheim understood that Schein would say no to buying groups pursuant to an overarching conspiracy. In fact, the record evidence shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein's internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195). For example, on February 27, 2013, Misiak (Patterson) directed a Regional Manager to refuse a buying group, explaining that Patterson's largest competitors, Schein and Benco, refuse buying groups as well: **"Confidential and not for discussion . . . our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me."** (CCFF ¶ 1187 (quoting CX0093 at 001 (emphasis in original))). Misiak was also concerned that Schein and Benco would submit bids for buying groups and deny doing so. On February 27, 2013, Misiak wrote to Guggenheim, "I've coached [Regional Manager Fruehauf] on how to stay out of this [buying group] with grace. I'm concerned that Schein and Benco sneak into these co-op bids and deny it. . . ." (CCFF ¶ 1188 (quoting CX0092 at 001), 1189). Then on August 4, 2013, Rogan (Patterson) wrote to McFadden (Patterson): "Neal, we don't need

GPO's in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry.” (CCFF ¶ 1190 (quoting CX0106 at 001)). Schein's documents similarly refer to an understanding that the Big Three would refuse buying groups. On March 5, 2014, Foley (Schein) wrote to Chad Thompson of Heartland: “The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott.” (CCFF ¶ 1185 (quoting CX2106 at 001); *see also* CCFF ¶ 1194). Then on October 28, 2015, Foley wrote to Schein employees, “Keep in mind that I and others have been in contact with Tralongo over the years. Schein, PDCO and Benco all refused to bid on their business when they entered the GPO/Buying Group world.” (CCFF ¶ 1195 (quoting CX2094 at 001)).

Benco's documents similarly refer to an overarching conspiracy. (CCFF ¶¶ 1191-1193).

128. Mr. Guggenheim, aware that Schein was working with buying groups, never asked Schein to stop selling to buying groups and never contacted anyone at Schein about buying groups. (Guggenheim, Tr. 1855-56, 1862).

Response to Proposed Finding No. 128

The Proposed Finding is vague as time-period at issue. Complaint Counsel does not object to an assertion that Schein was working with buying groups before the conspiracy and after the conspiracy became difficult to maintain. (*See* CCFF ¶¶ 432-453, 1159-1166).

However, the Proposed Finding is misleading and is contrary to the weight of the record evidence to the extent that it asserts or implies that Guggenheim knew Schein was working with buying groups during the conspiracy. As set forth in Response to Proposed Finding No. 127, Guggenheim understood that the Big Three would reject buying groups pursuant to an overarching conspiracy. As such, it is irrelevant that Guggenheim never contacted anyone at Schein about buying groups. The record evidence shows that he did not have to, as Patterson,

Schein, and Benco each understood that its competitors would reject buying groups pursuant to their agreement. (CCFF ¶¶ 1178-1198; *see also* Response to Proposed Finding No. 127).

129. Mr. Neal McFadden, Patterson's President of Special Markets, similarly had "the impression that Schein is in [the buying group] space." (McFadden, Tr. 2841; CX 0161). Mr. McFadden testified that he sent and received competitive intelligence on numerous occasions that Schein was working with buying groups. (McFadden, Tr. 2707-09; 2713-15 (Patterson's "number one sales rep" reported that "a very good Patterson client" was forming a buying group and Schein was supplying it), 2839-41; CX 0106; CX 3091; RX 0387; CX 0163).

Response to Proposed Finding No. 129

The Proposed Finding is contrary to the weight of the record evidence to the extent it asserts or implies that McFadden believed Schein was working with buying groups during the conspiracy period. The record evidence shows otherwise. On June 12, 2014, McFadden expressly told a potential customer that Patterson has "signed an agreement that we won't work with GPO's." (CCFF ¶ 657 (quoting CX0164 at 002 (row 248))). The record evidence also shows that in September 2013, McFadden had told a regional manager that Patterson was "choosing to forgo this route [joining with a GPO] as its [sic] both anti rep, manufacturer and distributor." (CCFF ¶ 606 (quoting CX3116 at 001)).

The Proposed Finding is also misleading and is contrary to the weight of the record evidence to the extent that it implies McFadden's testimony disproves Schein's participation in a conspiracy. As set forth in Response to Proposed Finding No. 127, Guggenheim, as a participant to the conspiracy, understood that the Big Three would reject buying groups pursuant to an overarching conspiracy. (*See* Responses to Proposed Finding Nos. 127-128). It is irrelevant what competitive intelligence McFadden sent or shared, as the record clearly shows that Guggenheim, the participant, knew Schein and Benco would stay the course. In fact, the record evidence shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein's internal documents refer

to the overarching conspiracy. (CCFF ¶¶ 1183-1195). For example, on February 27, 2013, Misiak (Patterson) directed a Regional Manager to refuse a buying group, explaining that Patterson's largest competitors, Schein and Benco, refuse buying groups as well:

“Confidential and not for discussion . . . our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me.” (CX0093 at 001 (emphasis in original); *see also* CCFF ¶ 1187). Misiak was also concerned that Schein and Benco would submit bids for buying groups and deny doing so. On February 27, 2013, Misiak wrote to Guggenheim, “I’ve coached [Regional Manager Fruehauf] on how to stay out of this [buying group] with grace. I’m concerned that Schein and Benco sneak into these co-op bids and deny it. . . .” (CX0092 at 001; *see also* CCFF ¶¶ 1188-1189). Then on August 4, 2013, Rogan (Patterson) wrote to McFadden (Patterson): “Neal, we don’t need GPO’s in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry.” (CX0106 at 001; *see also* CCFF ¶ 1190). Schein’s documents similarly refer to an understanding that the Big Three would refuse buying groups. On March 5, 2014, Foley (Schein) wrote to Chad Thompson of Heartland: “The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott.” (CX2106 at 001; *see also* CCFF ¶ 1194). Then on October 28, 2015, Foley wrote to Schein employees, “Keep in mind that I and others have been in contact with Tralongo over the years. Schein, PDCO and Benco all refused to bid on their business when they entered the GPO/Buying Group world.” (CX2094 at 001; *see also* CCFF ¶ 1195). Benco’s documents similarly refer to an overarching conspiracy. (CCFF ¶¶ 1191-1193).

Finally, the Proposed Finding is also vague as time-period at issue, as Complaint Counsel does not object to an assertion that Schein was working with buying groups before the conspiracy and after the conspiracy became difficult to maintain. (*See* CCFF ¶¶ 432-453).

130. Despite being aware that Schein was working with buying groups, Mr. McFadden never contacted anyone at Schein about Schein offering discounts to buying groups. (McFadden, Tr. 2836).

Response to Proposed Finding No. 130

As set forth in Responses to Proposed Finding No. 129, the Proposed Finding is misleading and contrary to the weight of the record evidence. McFadden did not believe that Schein was working with buying groups during the conspiracy, and indeed, the record evidence shows that Schein was not contracting with buying groups during the conspiracy. (Response to Proposed Finding No. 129; CCFF ¶¶ 661-1100). As such, it is irrelevant that McFadden never contacted anyone at Schein about buying groups, as Guggenheim, who was a participant to the conspiracy, already knew Schein would decline to work with buying groups during the conspiracy.

131. Mr. Dave Misiak, former Vice President of Sales for Patterson during the alleged conspiracy, testified that Smile Source is a buying group and that Schein won Smile Source's business. (Misiak, Tr. 1297-98, 1327; CX 3117). Mr. Misiak also received competitive intelligence on numerous occasions that Schein was working with buying groups. (CX 3176; CX 0163; CX 3091; CX 3134).

Response to Proposed Finding No. 131

The Proposed Finding is vague as to the time-period at issue. Complaint Counsel does not object to an assertion that Schein began working with Smile Source in 2008, that the relationship ended at the beginning of 2012, that Schein did not contract with Smile Source during the conspiracy period, and that it entered into an agreement with Smile Source in 2017. (CCFF ¶¶ 899-924, 1319). Complaint Counsel also does not object to an assertion that

Schein was working with buying groups before the conspiracy and after the conspiracy became difficult to maintain. (See CCFF ¶¶ 432-454, 1159-1166).

However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Misiak believed Schein was working with buying groups during the conspiracy. The record shows otherwise. The record shows that Cohen communicated Benco's no buying group policy to Guggenheim on February 8, 2013 and that Guggenheim immediately forwarded Cohen's email regarding its no buying group policy to Misiak. (CCFF ¶¶ 484, 491-495). The evidence shows that, a few hours after Guggenheim received Cohen's email about Patterson's involvement with NMDC and Benco's no buying group policy, Guggenheim responded to Cohen: "Thanks for the heads up. I'll investigate the situation. We feel the same way about these." (CCFF ¶ 495 (quoting CX0090 at 001)). Shortly after this exchange, Misiak instructed his team not to bid for a group he believed was a buying group: **"Confidential and not for discussion . . . our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me."** (CCFF ¶ 549 (quoting CX0093 at 001 (emphasis in original))); *see also* CCFF ¶ 1187).

Moreover, Misiak himself was involved in communications with Schein's Steck regarding distributors pulling out of the Texas Dental Association's ("TDA") 2014 Annual Meeting because the TDA sponsored a buying group called TDAPerks. The contemporaneous documentary evidence shows that Misiak believed that he had an agreement with his Schein counterpart. (CCFF ¶¶ 1131 (quoting CX0112 at 001), 1123-1132).

In fact, the Proposed Finding is misleading and is contrary to the weight of the record evidence to the extent that it implies McFadden's testimony disproves Schein's participation

in a conspiracy. The record evidence shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein's internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195).

132. Mr. Misiak never took any actions to stop or prevent Schein from working with buying groups, nor did he have any discussions with anyone at Schein about Schein's different philosophy on buying groups. (Misiak, Tr. 1505).

Response to Proposed Finding No. 132

As set forth in Responses to Proposed Finding No. 131 above, the Proposed Finding is misleading and contrary to the weight of the record evidence. Misiak did not believe that Schein was working with buying groups during the conspiracy, and indeed, the record evidence shows that Schein was not contracting with buying groups during the conspiracy. (Response to Proposed Finding No. 131; CCFF ¶¶ 661-110). It is also inaccurate, as the record evidence shows that Misiak called Schein's Steck to discuss TDA and Schein and Patterson's response to TDA's launch of a buying group, TDAPerks. (CCFF ¶¶ 1123-1132). In fact, the Proposed Finding is misleading and is contrary to the weight of the record evidence to the extent that it implies McFadden's testimony disproves Schein's participation in a conspiracy. The record evidence shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein's internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195).

133. Mr. Tim Rogan, Patterson's Vice President and General Manager for North America, testified that he received competitive intelligence that Schein had a "different approach" than Patterson's approach of saying no to buying groups, and was working with a number of them. (Rogan, Tr. 3420-21, 3654-57, 3659-60 ("clearly we've pointed out a few cases where [Schein was] working with GPOs"), 3661; CX 0106; CX 3091; CX 3176; CX 3134).

Response to Proposed Finding No. 133

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Rogan believed Schein was working with buying groups

during the conspiracy. The record evidence shows that Rogan understood that the Big Three would not discount to buying groups. For example, the record shows that Cohen communicated Benco's no buying group policy to Guggenheim on February 8, 2013 and that Guggenheim immediately forwarded Cohen's email regarding its no buying group policy to Misiak. (CCFF ¶¶ 484, 491-495). The record also shows that, several months later in June 2013, when Guggenheim learned that Benco was working with ADC (a group Patterson thought was a buying group), Rogan received a copy of Guggenheim's communication with Cohen and asking if Benco was changing its position with respect to buying groups. (CCFF ¶ 570 (quoting CX0095 at 001 ("I'm wondering if your position on buying groups is still as you articulated back in February? Let me know your thoughts. . . . Sometimes these things grow legs without our awareness!")))). On August 2013, in response to market intelligence that Schein might be working with a buying group called Western North Carolina Health Network, Rogan communicated to others at Patterson that the Big Three were saying "no" to buying groups. (CCFF ¶ 1190 (quoting CX0106 at 001 ("... we don't need GPO's in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry.")); *see also* CCFF ¶ 603). Moreover, there is no record evidence that Schein ever did business with the Western North Carolina Health Network.

The Proposed Finding is vague as to the time-period at issue. Complaint Counsel does not object to an assertion that Schein was working with buying groups before the conspiracy and after the conspiracy became difficult to maintain. (CCFF ¶¶ 432-453, 1159-1166).

Finally, the Proposed Finding is misleading and is contrary to the weight of the record evidence to the extent that it implies Rogan's testimony disproves Schein's participation in a

conspiracy. The record evidence shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein's internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195).

134. Mr. Rogan did not contact anyone at Schein or take any action to prevent Schein from continuing its approach of offering discounts to buying groups. (Rogan, Tr. 3653, 3655-58).

Response to Proposed Finding No. 134

As set forth in Response to Proposed Finding No. 133, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein contracted with buying groups during the conspiracy period or that Rogan believed Schein was working with buying groups during the conspiracy. Moreover, the assertion that Rogan did not contact anyone at Schein about buying groups is irrelevant, as Guggenheim, who was a participant to the conspiracy, already knew Schein would decline to work with buying groups during the conspiracy. (*See Responses to Proposed Finding Nos. 126-128*). In fact, the Proposed Finding is misleading and is contrary to the weight of the record evidence to the extent that it implies Rogan's testimony disproves Schein's participation in a conspiracy. The record evidence shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein's internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195).

135. Patterson's non-action with regard to Schein's business with buying groups is inconsistent with Complaint Counsel's alleged conspiracy. (Complaint ¶ 1).

Response to Proposed Finding No. 135

The Proposed Finding is not supported by a citation to the Complaint and should be disregarded. Nonetheless, it is inaccurate and contrary to the weight of the record evidence as to the assertion of "Patterson's non-action." The record evidence shows that Patterson's Misiak called Schein's Steck on January 6, 2014 regarding TDA's buying group, TDAPerks,

and Schein's response to the launch of TDAPerks. The two spoke on the phone for 14 minutes. (CCFF ¶¶ 1123-1124). On that January 6, 2014 telephone call, Patterson's Misiak informed his counterpart at Schein, Steck, that Patterson was planning to pull out of the TDA meeting, which was related to TDA's endorsement of a buying group, TDA Perks. (CCFF ¶¶ 1123-1132).

Furthermore, the Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it implies that "Patterson's non-action" disproves Schein's participation in a conspiracy. As set forth above in Responses to Proposed Finding Nos. 126-134, Guggenheim, the participant in the conspiracy, understood that the Big Three would not discount to buying groups. In fact, the record evidence shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein's internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195).

3. *Benco Witnesses.*

136. Mr. Chuck Cohen, Benco's Managing Director and Co-Owner, received competitive intelligence that Schein was working or negotiating with buying groups, including Smile Source, Dentists for a Better Huntington, the Dental Co-Op, and the Kojs Buyers Group. (Cohen, Tr. 401, 852, 867-68, 912-13; CX 1039; CX 1047; CX 1048; CX 1074; CX 1116).

Response to Proposed Finding No. 136

The Proposed Finding is inaccurate and contrary to the weight of the record evidence to the extent it implies or asserts that Cohen believed Schein was working with buying groups during the conspiracy period, or that Schein actually did so. The record evidence shows otherwise.

The evidence shows that Cohen initiated communications with and participated in a conspiracy with Schein and Patterson not to do business with buying groups. (CCFF ¶¶ 661-686, 955-1100). In fact, Cohen does not deny the underlying conduct and communications

that formed the basis of the agreement. Cohen admitted that he communicated Benco's no buying group policy to Sullivan. (CCFF ¶¶ 662-664). Benco knew that Schein worked with buying groups in 2011. (CCFF ¶¶ 665-673). By 2012, however, Cohen no longer believed that Schein would be working with the buying group Smile Source. (CCFF ¶¶ 674-678). In 2013 and 2014, Cohen believed that Benco was not competing with Schein and Patterson for buying groups, and he understood that the Big Three would not align with a buying group. (CCFF ¶¶ 675-678). Cohen's belief that Schein was not working with buying groups was *contrary* to the market intelligence that he received indicating that Schein worked with buying groups. (CCFF ¶¶ 665-673, 684-684). In fact, while Schein had discounted to buying groups historically and profited from such arrangements, by late 2011, Sullivan informed his employees that he did "NOT want to lead in getting" the buying group initiative started in dental. (CCFF ¶¶ 709; *see also* CCFF ¶¶ 712-716).

Furthermore, the record shows that between 2011 and 2015, Cohen and Sullivan exchanged at least 56 calls and 225 text messages. (CCFF ¶ 351). Cohen and Sullivan communicated about buying groups multiple other times during the conspiracy. For example, in January 2012, Cohen confronted Sullivan when he learned that Schein might be discounting to a buying group, Unified Smiles. (CCFF ¶¶ 965-972). Patrick Ryan passed information to Cohen that Schein was working with a buying group called Unified Smiles with a note "For Timmy [Sullivan] conversation." (CCFF ¶ 964). Cohen texted Sullivan to schedule a time to speak on the phone, and the two spoke for 11 minutes and 34 seconds on January 13, 2012. (CCFF ¶ 964-968). While neither Cohen nor Sullivan remembered the content of the call, Cohen admitted he had buying groups on his mind within the hour he called Sullivan. (CCFF ¶¶ 971-972).

Cohen also planned to confront Sullivan a second time in July 2012 after he once again learned from Ryan that Schein might be working with a buying group, this time Smile Source. (CCFF ¶¶ 978-983). This time, Ryan forwarded the information to Cohen with a note that says, “Better tell your buddy Tim to knock this shit off.” (CCFF ¶¶ 982 (quoting CX0018 at 001), 983-986). Ryan wanted Cohen to tell Sullivan to stop working with buying group Smile Source. (CCFF ¶¶ 984-986). Cohen agreed and responded to Ryan by asking him to resend his email without the commentary so that Cohen could “print & send to Tim with a note.” (CCFF ¶¶ 988-992). Cohen testified it would not be a surprise if he sent Sullivan a note about Smile Source. (CCFF ¶ 992).

On March 26, 2013, Cohen contacted Sullivan again regarding buying groups. Cohen had emailed a Benco sales representative to ask for the name of the buying group in his area that worked with Schein. (CCFF ¶ 995). Almost immediately after receiving the response from the sales representative, Cohen copied and pasted the Benco sales representative’s email into a text to Sullivan:

As per my guy in Raleigh: ‘Dental alliance. They apparently get 7% off of catalog pricing just for joining. Dr. Ben Koren is the dentist involved. A guy named Sam contacted me about a year ago and asked if Benco was interested. Told him he was out of his tree.’ Could be a rumor, sometimes stories go around.
Thanks.

(CCFF ¶ 997 (quoting CX6027 at 028 (Rows 245-246))). Cohen confirmed at trial that he was informing “Tim Sullivan about market intelligence on Schein doing business with a buying group.” (CCFF ¶ 994; Cohen, Tr. 557 (“Q. So here you’re texting Tim Sullivan about market intelligence on Schein doing business with a buying group. A. Yes.”)).

Then again, in March 2013, ADC approached Benco asking for a bid for its \$3.5 million dental supply business. (CCFF ¶ 1022). Benco was unsure whether ADC qualified as a

buying group so Cohen contacted his competitor, Sullivan, to help determine “how [Benco] would handle that account.” (CCFF ¶¶ 1023-1032, 1037). On March 25, 2013, Cohen created a calendar entry reminding him to call Sullivan regarding buying groups. (CCFF ¶ 1028). Cohen texted Sullivan asking for a call, and the two set up a time to talk at 5 p.m. on March 25, 2013. (CCFF ¶¶ 1029-1032). Cohen and Sullivan spoke on the call regarding a customer, ADC. (CCFF ¶¶ 1034-1035). Cohen testified that he and Sullivan were “exchanging information” about whether ADC was a buying group or a DSO. (CCFF ¶¶ 1036-1037). Two days later, Cohen learned, through outside counsel hired by Benco, that ADC was not a buying group. (CCFF ¶¶ 1061-1065). Benco decided to bid. (CCFF ¶ 1066). Cohen even contacted Sullivan the same day to tell him that Benco *would be bidding* on a potential \$3.5 million customer, ADC. (CCFF ¶¶ 1068-1070). Cohen admitted at trial that he told Sullivan of Benco’s bidding plans because wanted to maintain “a high level of credibility” with Sullivan (CCFF ¶ 1075-1076).

In addition, on April 16, 2014, Cohen emailed Sullivan and Guggenheim about TDA buying group, attaching an article about TDA leveraging the volume purchasing power of TDA members to level the playing field between independent dentists and corporate practices. (CCFF ¶ 1134). Following this email, Sullivan called Cohen and the two spoke the same day for 9 minutes and 16 seconds. (CCFF ¶ 1135).

As such, the record evidence shows that Cohen and Sullivan discussed buying groups during the conspiracy, that Benco understood Schein would not discount to buying groups, that Cohen confronted Sullivan when he suspected Schein of discounting to buying groups, and that Benco shared competitively sensitive information with Schein to show it was not deviating from prior assurances.

The Proposed Finding is vague as to the time-period at issue and misleading to the extent it implies Schein entered into relationships with these groups during the conspiracy period.

Complaint Counsel does not object to an assertion that Schein began working with buying groups before the conspiracy and had pre-existing buying group relationships, like Smile Source in 2008, Dentists for a Better Huntington in 2009, and the Dental Co-op of Utah in 2007. (CCFF ¶¶ 899, 444, 442). The record evidence also shows that Schein (and Patterson and Benco) did not bid on Kois Buyers Group during the conspiracy period. (CCFF ¶ 928; *see also* Responses to Proposed Finding Nos. 839-936).

137. Mr. Cohen testified that he did not take any action to prevent Schein from offering discounts to buying groups. (Cohen, Tr. 715, 843, 852-53, 867-68 (“[B]y November 7, 2011, you had received emails indicating that Schein was working with at least three buying groups... Did you call Mr. Sullivan about any of them? A. I did not.”), 885, 913-14 (“Did you pick up the phone or text or email Mr. Sullivan to see if the information about Schein negotiating with Kois was true? A. No.”)).

Response to Proposed Finding No. 137

The Proposed Finding is inaccurate, misleading, and contrary to the weight of the record evidence. As set forth above in Response to Proposed Finding No. 136, the record evidence shows that Benco orchestrated an agreement with Schein that neither would discount to buying groups, informed Schein of Benco’s no buying group policy, exchanged assurances that neither would discount to buying group, confronted Schein when it suspected Schein of discounting to buying groups, and communicated competitively sensitive information to Schein to show it was not deviating from prior assurance. (CCFF ¶¶ 661-1100). Moreover, the Proposed Finding is inaccurate as to the phrase “did not take any action.” The record evidence shows Cohen reached out to Sullivan multiple times in order to discuss buying groups and exchange assurances that neither would discount to buying groups. (*See* Response to Proposed Finding No. 136; CCFF ¶¶ 679-681, 1022-1100).

138. Mr. Patrick Ryan, Benco's Director of Sales, received competitive intelligence that Schein was working with buying groups during the alleged conspiracy period, including Smile Source, Dental Gator, Dentists for a Better Huntington, the Dental Co-Op, and the Schulman Group. (Ryan, Tr. 1245-53; CX 1039; CX 1047; CX 1104; CX 1116; CX 1158).

Response to Proposed Finding No. 138

The Proposed Finding is inaccurate and contrary to the weight of the record evidence to the extent it implies or asserts that Ryan believed Schein was working with buying groups during the conspiracy period, or that Schein actually did so. The record evidence shows otherwise.

The record evidence shows that Benco reached out to Schein on no fewer than six occasions from 2011 to 2014 and gained an understanding that Schein did not work with buying groups during the conspiracy period. (CCFF ¶¶ 674-681).

The Proposed Finding is also contrary to contemporaneous documents that show Ryan understood Schein and Benco would not to do business with buying groups. For example, in July 2012, when Ryan learned that Schein might be doing business with Smile Source, Ryan wrote to Cohen, his boss, "Better tell your buddy Tim [Sullivan] to knock this shit off."

(CCFF ¶ 982 (quoting CX0018 at 001); Ryan, Tr. 1065). Ryan admitted under oath that he was referring to Schein working with Smile Source. (CCFF ¶ 985 (citing Ryan, Tr. 1065-66)). Then in June 2012, Ryan learned that Schein might be working with a buying group, this time Smile Source. (CCFF ¶¶ 978-983). This time, Ryan forwarded the information to Cohen with a note that says, "Better tell your buddy Tim to knock this shit off." (CCFF ¶¶ 982 (quoting CX0018 at 001), 983-986). Ryan wanted Cohen to tell Sullivan to stop working with buying group Smile Source. (CCFF ¶¶ 984-986). Cohen testified that Ryan's email to Cohen regarding Smile Source (CX0018) was the second time Ryan forwarded information regarding buying groups to Cohen for communication to Sullivan. (Cohen, Tr. 518; CCFF ¶ 987).

The Proposed Finding is also vague as to the time-period at issue and misleading to the extent it implies Schein entered into relationships with these groups during the conspiracy period. Complaint Counsel does not object to an assertion that Schein began working with buying groups before the conspiracy and had pre-existing buying group relationships, like Smile Source in 2008, Dentists for a Better Huntington in 2009, and the Dental Co-op of Utah in 2007. CCFF ¶¶ 899, 444, 442). As to Dental Gator and the Schulman Group, the evidence shows that neither group disprove Schein's participation in a conspiracy. (*See* Responses to Proposed Finding Nos. 634- 675 (Dental Gator), 1093-1104 (Schulman Group)).

139. Even though he was aware Schein was working with buying groups, Mr. Ryan testified that he did not contact anyone at Schein or take any action to prevent Schein from doing business with buying groups. (Ryan, Tr. 1245, 12467-48, 1251-53, 1257-58).

Response to Proposed Finding No. 139

The Proposed Finding is inaccurate, misleading, and contrary to the weight of the record evidence. First, as set forth above in Response to Proposed Finding No. 138, Benco understood in 2012, 2013, and 2014 that Schein would not align itself with a buying group. (CCFF ¶¶ 674-678). The Proposed Finding is also contrary to contemporaneous documents that show Ryan understood Schein and Benco would not to do business with buying groups. For example, in July 2012, when Ryan learned that Schein might be doing business with Smile Source, Ryan wrote to Cohen, his boss, "Better tell your buddy Tim [Sullivan] to knock this shit off." (CCFF ¶ 982 (quoting CX0018 at 001); Ryan, Tr. 1065). Ryan admitted under oath that he was referring to Schein working with Smile Source. (CCFF ¶ 985 (citing Ryan, Tr. 1065-66)). Then in June 2012, Ryan learned that Schein might be working with a buying group, this time Smile Source. (CCFF ¶¶ 978-983). This time, Ryan forwarded the information to Cohen with a note that says, "Better tell your buddy Tim to knock this shit

off.” (CCFF ¶¶ 982 (quoting CX0018 at 001), 983-986). Ryan wanted Cohen to tell Sullivan to stop working with buying group Smile Source. (CCFF ¶¶ 984-986). Cohen testified that Ryan’s email to Cohen regarding Smile Source (CX0018) was the second time Ryan forwarded information regarding buying groups to Cohen for communication to Sullivan. (Cohen, Tr. 518; CCFF ¶ 987).

The record evidence further shows that Benco reached out to Schein on no fewer than six occasions from 2011 to 2014 and gained an understanding that Schein did not work with buying groups during the conspiracy period. (CCFF ¶¶ 674-681). Second, the phrase “did not contact anyone” is inaccurate and misleading. On October 1, 2013, Ryan called Schein’s Foley. (CCFF ¶ 1009; *see also* CCFF ¶¶ 1005-1008, 1010-1021). On that 18 minute call, Ryan informed Foley that Benco would not bid on Smile Source. (CCFF ¶ 1013). Foley testified that he “got the impression that they’re anti buying group” and that Ryan wanted to know whether Schein would bid on Smile Source. (CCFF ¶¶ 1012-1013). Following these communications, Benco declined to work with Smile Source in 2013 and 2014. (CCFF ¶ 1020).

140. Benco’s non-action with regard to Schein’s business with buying groups is inconsistent with Complaint Counsel’s alleged conspiracy. (*See, e.g.*, Complaint ¶¶ 1, 8, 31).

Response to Proposed Finding No. 140

The Proposed Finding is not supported by a citation to the Complaint and should be disregarded. Nonetheless, it is inaccurate and contrary to the weight of the record evidence as to the assertion of “Benco’s non-action.” The record evidence shows that Benco orchestrated an agreement with Schein that neither would discount to buying groups, informed Schein of Benco’s no buying group policy, exchanged assurances that neither would discount to buying group, confronted Schein when it suspected Schein of discounting to buying groups, and

communicated competitively sensitive information to Schein to show it was not deviating from prior assurance. (CCFF ¶¶ 661-1100). Moreover, the record evidence shows that Benco reached out to Schein on no fewer than six occasions from 2011 to 2014 and gained an understanding that Schein did not work with buying groups during the conspiracy period. (CCFF ¶¶ 679-681; *see also* Responses to Proposed Finding Nos. 138-139).

4. *Schein Witnesses.*

141. Mr. Joe Cavaretta, former Vice President of Sales for the West at Schein and now President of the buying group Dental Whale (previously Breakaway), identified five buying groups that in his mind addressed the compliance issues that buying groups face: Dental Whale, Smile Source, Synergy, Klear Impakt, and Mastermind Group. (Cavaretta, Tr. 5526, 5540, 5569-70, 5598-99). Schein worked with four of the five. (Cavaretta, Tr. 5570).

Response to Proposed Finding No. 141

Complaint Counsel has no specific response to the first sentence of the Proposed Finding.

The second sentence of the Proposed Finding is vague as to which four groups it asserts Schein worked with and vague as to the time-period at issue. Nonetheless, Complaint Counsel addresses all five groups in the following response.

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that the listed entities disprove Schein's participation in a conspiracy. The record evidence shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322). The record evidence is replete with examples of buying groups that Schein turned down during the conspiracy period pursuant to an instruction to do so. (Complaint Counsel's Post-Trial Brief, at Attachment C).

Evidence regarding the groups Schein asserts it worked with—Dental Whale, Smile Source, Klear Impakt, and Mastermind Group—is consistent with the weight of the record evidence showing a conspiracy. (*See Responses to Proposed Finding Nos. 1105-1186 (Smile Source), 802-838 (Klear Impakt), 950-962 (Mastermind Group), SF 437 (Synergy)*). First, Schein’s relationship with Smile Source is consistent with the record evidence establishing Schein’s participation in a conspiracy. It was a pre-existing relationship established in 2008 that ended at the beginning of 2012, which made “Sullivan [] happy that we are less one more BG.” (CCFF ¶¶ 758, 899). Schein did not work with Smile Source during the conspiracy period. (*See Responses to Proposed Finding Nos. 1105-1186*). Second, as to Klear Impakt, Schein contracted with it after the conspiracy became difficult to maintain and any discussions with it during the conspiracy period were unbeknownst to Sullivan. (*See Responses to Proposed Finding Nos. 802-838*). Third, Schein asserted that it contracted with Mastermind in August 2017, or well after the conspiracy became difficult to maintain, and as such, it is irrelevant to Schein’s conduct during the conspiracy period. (*See Responses to Proposed Findings Nos. 950-962*). Fourth, if Schein is asserting that it worked with Dental Whale during the conspiracy period, that is inaccurate. Schein worked with Breakaway, which it considered to be a DSO/MSO hybrid not a buying group. (*See Responses to Proposed Finding Nos. 402-445*). Dental Whale purchased Breakaway in 2018. (SF 437). That evidence is irrelevant to Schein’s conduct regarding buying groups during the conspiracy period. (*See Responses to Proposed Finding Nos. 402-445*). Fifth, Schein rejected Synergy during the conspiracy period. (CCFF ¶ 952-954). In sum, the listed entities do not disprove Schein’s participation in the conspiracy and in fact, evidence regarding those entities is consistent with a conspiracy or otherwise irrelevant to the inquiry at hand.

142. Mr. Cavaretta also testified that Schein worked with buying groups throughout his 17-year tenure at Schein. (Cavaretta, Tr. 5535, 5568, 5620 (“Henry Schein was doing business with buying groups my whole time employed by them.”)).

Response to Proposed Finding No. 142

The Proposed Finding is vague, as it does not specify specific groups or specific time-periods. It is also contrary to the weight of the record evidence. The record evidence shows that Schein worked with buying groups before the conspiracy, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728- 870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups. (Complaint Counsel’s Post-Trial Brief, at Attachment C). For example:

- December 21, 2011: Randy Foley, Director of Sales for Special Markets, rejected buying group Unified Smiles, stating, “[U]nless you have some ‘ownership’ of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups.” (CCFF ¶ 719 (quoting CX2062 at 001)).
- January 26, 2012: Western Zone Manager Joe Cavaretta wrote to sales representatives, “It is dangerously close but I told him we would not do business with a GPO.” (CCFF ¶ 750 (quoting CX0168 at 001)).
- February 20, 2012: Foley wrote to his direct report, Strategic Account Manager Debbie Torgersen-Foster, “Honestly, within Schein we have a few buying groups (BG) that we wish we didn’t have . . . So, this is a corporate decision, not to participate in these.” (CX0238 at 001, CCFF ¶¶ 754, 757).
- June 8, 2012: Regional Account Manager Andrea Hight wrote to her boss, Foley and Zone Manager Kathleen Titus: “I explained that we do not accommodate GPOs” (CCFF ¶ 771 (quoting CX2423 at 004)).
- May 29, 2013: Cavaretta wrote to two Schein employees, “We try to avoid buying groups at all costs and therefore don’t really recognize them.” (CCFF ¶¶ 785 (quoting CX2509 at 001)).

- December 20 2013: Foley told his counterpart at Colgate, one of Schein’s manufacturer partners: “It’s a buying group that we do not participate with, as with all buying groups.” (CCFF ¶¶ 788 (quoting CX2073 at 001), 789).
- On August 20, 2014, Schein employee George Khoury asked Andrea Hight whether Schein was meeting with any GPOs. (CX2441 at 001). Hight responded: “We have had lots of GPO requests (Kathleen and I) and we have been shutting them down. We had one situation which looked closer to a GPO/MSO and came up with a way to be exclusive in order to consider but even Tim wasn’t comfortable walking in the ‘grey’ are [sic] this created so no GPOs which is I think a good rule.” (CX2441 at 001).
- October 8, 2014: a regional manager wrote to Titus, Schein’s Director of Group Practices: “I recently had a conversation with Kathleen regarding this group and they are nothing more than a GPO. It is my understanding that this violates our policy as we do not engage with GPOs.” (CCFF ¶¶ 811, 812 (quoting CX0260 at 002)).
- November 5, 2014: Eastern Area Sales Director Jake Meadows wrote to a Regional Manager: “We do not currently participate with GPOs. . . .” (CCFF ¶ 828 (quoting CX2358 at 001)).
- July 1, 2015: Sullivan to Cavaretta, “The Dec ‘offsite’ last year I left with a goal to see if we could get Hal [Muller] to shut [Dental Gator] down” (CCFF ¶¶ 836 (quoting CX0246 at 001)).

Only after the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein, did . (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322).

143. Mr. Randy Foley, former Vice President of Special Markets at Henry Schein, testified that “both HSD and Special Markets work with buying groups” and that there was never a policy at Henry Schein not to do business with buying groups. (Foley, Tr. 4523, 4659).

Response to Proposed Finding No. 143

The Proposed Finding is misleading and contrary to the weight of the record evidence. As set forth above in Response to Proposed Finding No. 142, the record evidence contains dozens of documents that confirm that Schein, and specifically Foley, enforced a policy against buying groups during the conspiracy period. (Complaint Counsel’s Post-Trial Brief, at Attachment C).

144. Mr. Foley also testified that Schein worked with buying groups throughout his career at Schein, which spanned from 2003 to 2016. (Foley, Tr. 4507, 4603, 4606).

Response to Proposed Finding No. 144

The Proposed Finding is vague, as it does not specify specific groups or specific time-periods. It is also contrary to the weight of the record evidence. The record evidence shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322). The record evidence is replete with examples of buying groups that Schein, and specifically Foley, turned down during the conspiracy period pursuant to an instruction to do so. (Complaint Counsel's Post-Trial Brief, at Attachment C).

145. Mr. Foley identified at least four buying groups that Special Markets had a pre-existing relationship with prior to him joining Special Markets in 2009: Dental Partners of Georgia, OrthoSynetics, Smile Source, and Ciraden. (Foley, Tr. 4603-04).

Response to Proposed Finding No. 145

Complaint Counsel has no specific response to the statement that Schein had pre-existing, legacy buying group relationships that it entered into prior the conspiracy period, like Smile Source and Ciraden. However, the Proposed Finding is inaccurate because Schein did not consider Dental Partners of Georgia and OrthoSynetics to be buying groups. (*See Responses to Proposed Finding Nos. 676-689, 1026-1037*).

146. Mr. Foley also identified at least seven buying groups that he personally helped open after he joined Special Markets in 2009: Pugh Dental Alliance, Steadfast Medical, Dental Gator, Intermountain Dental Associates, Tralongo, and Comfort Dental. (Foley, Tr. 4605).

Response to Proposed Finding No. 146

Complaint Counsel has no specific response to the attribution of the statement to Foley.

However, the Proposed Finding is vague as to the time-period for each of the listed groups.

The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it implies or asserts that the listed entities disprove Schein's participation in a conspiracy. The record evidence shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322). The record evidence is replete with examples of buying groups that Schein turned down during the conspiracy period pursuant to an instruction to do so.

(Complaint Counsel's Post-Trial Brief, at Attachment C). Evidence regarding these groups is consistent with the weight of the record evidence. (*See Responses to Proposed Finding Nos. 493-511 (Comfort Dental), 634-675 (Dental Gator), 732-748 (Intermountain Dental Associates), 1082-1092 (Pugh Dental Alliance), 1199-1242 (Steadfast), 1263-1285 (Tralongo)*). First, Schein's pre-existing, legacy buying group relationships, like Pugh Dental Alliance and Steadfast, have no bearing on Schein's conduct during the conspiracy, where it instructed its sales force to reject buying groups that approached it. (*See Responses to Proposed Finding Nos. 1082-1092 (Pugh Dental Alliance), 1199-1242 (Steadfast)*). Second, while Complaint Counsel need not show that Schein terminated all of its pre-existing, legacy buying groups relationships during the conspiracy, there is also record evidence that Schein shut-down existing relationships during the conspiracy period, like it did with Steadfast. (*See*

Responses to Proposed Finding Nos. 1199-1242 (Steadfast); *see also* Responses to Proposed Findings Nos. 584-633 (Dental Co-op of Utah)). Third, as to Dental Gator, the record evidence shows that Schein never bid on Dental Gator, viewed MB2's creation of Dental Gator as a breach of its agreement with MB2, did not have a separate contract with Dental Gator, and that Dental Gator became a Schein customer without its knowledge but was tolerated to keep MB2's business. (*See* Responses to Proposed Finding Nos. 634-675). Fourth, Schein considered Comfort Dental and Intermountain Dental Associates to be DSOs, and they are irrelevant to Schein's conduct regarding buying groups. (*See* Responses to Proposed Finding Nos. 493-511 (Comfort Dental), 732-748 (Intermountain Dental Associates)). Fifth, buying group relationships entered into after the conspiracy became difficult to maintain, like Tralongo, have no bearing on Schein's conduct during the conspiracy period. (*See* Responses to Proposed Finding Nos. 1263-1285 (Tralongo)). In sum, the listed entities do not disprove Schein's participation in the conspiracy and in fact, evidence regarding those entities is consistent with a conspiracy or otherwise irrelevant.

147. Mr. Jake Meadows, Vice President of Sales for Special Markets at Henry Schein, has been employed by Schein since 2001 and testified that between 2011 and 2015 Schein worked with at least "Smile Source. Comfort Dental. OrthoSynetics. Dental Partners of Georgia. ... [and] Klear Impact." (Meadows, Tr. 2417, 2482 ("I know there's a longer list.")).

Response to Proposed Finding No. 147

Complaint Counsel has no specific response to the attribution of the statement to Meadows. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that the listed entities disprove Schein's participation in a conspiracy. The record evidence shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to

maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322). The record evidence is replete with examples of buying groups that Schein turned down during the conspiracy period pursuant to an instruction to do so. (Complaint Counsel's Post-Trial Brief, at Attachment C). Evidence regarding these groups is consistent with the weight of that record evidence. (*See* Responses to Proposed Finding Nos. 493-511 (Comfort Dental), 676-689 (Dental Partners of Georgia), 802-838 (Klear Impakt), 1026-1037 (OrthoSynetics), 1105-1186 (Smile Source)). First, Schein's relationship with Smile Source is consistent with the record evidence establishing Schein's participation in a conspiracy. It was a pre-existing relationship established in 2008 that ended at the beginning of 2012, which made "Sullivan [] happy that we are less one more BG." (CCFF ¶¶ 758, 899). Schein did not work with Smile Source during the conspiracy period. (*See* Responses to Proposed Finding Nos. 1105-1186). Second, the record evidence shows that Comfort Dental, Dental Partners of Georgia, and OrthoSynetics were considered to be DSOs or MSOs, and they are irrelevant to Schein's conduct regarding buying groups. (*See* Responses to Proposed Finding Nos. 493-511 (Comfort Dental), 676-689 (Dental Partners of Georgia), 1026-1037 (OrthoSynetics)). Third, as to Klear Impakt, Schein contracted with it after the conspiracy became difficult to maintain and any discussions with it during the conspiracy period were unbeknownst to Sullivan. (*See* Responses to Proposed Finding Nos. 802-838). In sum, the listed entities do not disprove Schein's participation in the conspiracy and in fact, evidence regarding those entities is consistent with a conspiracy or otherwise irrelevant to the inquiry at hand.

148. Mr. Meadows also testified that Schein did not have a policy not to do business with buying groups. (Meadows, Tr. 2470).

Response to Proposed Finding No. 148

The Proposed Finding is misleading and contrary to the weight of the record evidence. As set forth above in Response to Proposed Finding No. 142, the record evidence contains dozens of documents that confirm that Schein, and specifically Meadows, enforced a policy against buying groups during the conspiracy period. (Complaint Counsel’s Post-Trial Brief, at Attachment C). For example, on July 17, 2012, Meadows wrote to his direct report: “I have to tell you Ron and Dan made a decision that is against what Tim Sullivan has directed us to do in regards to supporting Buying groups. We do not want our customers organizing and creating what are known as GPOs it takes the value away from the distributor.” (CCFF ¶ 773 (quoting CX0170 at 001)). On October 25, 2014, Meadows wrote to Jeff Reichardt, a Zone Manager: “Do not forward. Quick note. I’ve received a few [field sales consultant] phone calls over the last few weeks regarding group purchasing organizations (GPO). Just for clarity, we are NOT participating in any GPOs regardless of what they promise to bring us. We can discuss on Monday [Eastern Area] call.” (CCFF ¶ 816 (quoting CX2354 at 001 (emphasis in original))). And again on November 3, 2015, Meadows to Cavaretta: “[Sullivan] was going off about how we do not have any buying group agreements and that we will not do them. Soap boxing about HSD and buying groups.” (CCFF ¶ 850 (quoting CX0176 at 001)).

149. Ms. Kathleen Titus, former Director of Mid-Market at Henry Schein, testified that Schein “definitely” was working with buying groups during the alleged conspiracy, identifying the Dental Co-Op, Steadfast, Dental Gator and Breakaway as examples. (Titus, Tr. 5194, 5198, 5233, 5248-49, 5258, 5235, 5268).

Response to Proposed Finding No. 149

Complaint Counsel has no specific response to the attribution of the statement to Titus.

However, the Proposed Finding is misleading and contrary to the weight of the record

evidence to the extent it implies or asserts that the listed entities disprove Schein's participation in a conspiracy. The record evidence shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322). The record evidence is replete with examples of buying groups that Schein turned down during the conspiracy period pursuant to an instruction to do so. (Complaint Counsel's Post-Trial Brief, at Attachment C). Evidence regarding these groups is consistent with the weight of the record evidence. (*See Responses to Proposed Findings Nos. 402-445 (Breakaway), 581-633 (Dental Co-op of Utah), 634-675 (Dental Gator), 1199-1242 (Steadfast)*). First, Schein's pre-existing, legacy buying group relationships, like Dental Co-op of Utah and Steadfast, have no bearing on Schein's conduct during the conspiracy, where it instructed its sales force to reject buying groups that approached it. (*See Responses to Proposed Finding Nos. 584-633 (Dental Co-op of Utah), 1199-1242 (Steadfast)*). Second, while Complaint Counsel need not show that Schein terminated its pre-existing, legacy buying groups relationships during the conspiracy, there is also record evidence that Schein shut-down its relationships with both Steadfast and the Dental Co-op of Utah. (*See Responses to Proposed Finding Nos. 584-633 (Dental Co-op of Utah), 1199-1242 (Steadfast)*). Third, as to Dental Gator, the record evidence shows that Schein never bid on Dental Gator, viewed MB2's creation of Dental Gator as a breach of its agreement with MB2, did not have a separate contract with Dental Gator, and that Dental Gator became a Schein customer without its knowledge but was tolerated to keep MB2's

business. (*See* Responses to Proposed Finding Nos. 634-675). Fourth, Schein considered Breakaway to be a DSO/MSO hybrid, and there is no record evidence that Schein entered into an agreement with any buying group arm of Breakaway. (*See* Responses to Proposed Finding Nos. 402-445). In sum, the listed entities do not disprove Schein's participation in the conspiracy and in fact, evidence regarding those entities is either irrelevant or if relevant, consistent with a conspiracy.

150. Ms. Titus also testified that she worked with buying groups for her entire twenty-plus year career at Schein and has never heard of a policy at Schein not to work with buying groups. (Titus, Tr. 5191, 5193).

Response to Proposed Finding No. 150

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts that Schein did not have a policy not to discount to buying groups because of Titus' denial. The Proposed Finding is contrary to the weight of the record evidence. The record evidence shows that Schein worked with buying groups before the conspiracy, instructed its sales force to reject buying groups during the conspiracy period and complied with that instruction, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322). As set forth above in Response to Proposed Finding No. 142, the record evidence contains dozens of documents that confirm that Schein, and enforced a policy against buying groups during the conspiracy period, which Titus was aware of and understood. (Complaint Counsel's Post-Trial Brief, at Attachment C). For example, on July 16, 2014, Titus wrote to Cavaretta and Regional Managers Glenn Showgren and Brian Brady: "I [spoke with] Joe about the [buying group] agreement. [Sullivan] was not in favor of it." (CCFF ¶ 795 (quoting CX2219 at 001)). On July 17, 2014, Titus wrote to

Showgren and Zone Manager Kevin Upchurch: “We had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. . . It went to [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)). Then on August 29, 2014, Titus wrote to Cavaretta: “It doesn’t help to have a GPO policy if [Special Markets] is opening up these consulting firms.” (CCFF ¶ 808 (CX2220 at 001)).

151. Mr. David Steck, Vice President and General Manager of Henry Schein, has been employed at Schein since 2005 and testified that Schein worked with numerous buying groups, including Smile Source, Alpha Omega, and Breakaway. (Steck, Tr. 3671, 3686, 3765-66, 3774).

Response to Proposed Finding No. 151

Complaint Counsel has no specific response to the attribution of the statement to Steck.

However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that the listed entities disprove Schein’s participation in a conspiracy. The record evidence shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322). The record evidence is replete with examples of buying groups that Schein turned down during the conspiracy period pursuant to an instruction to do so. (Complaint Counsel’s Post-Trial Brief, at Attachment C). Evidence regarding these groups is consistent with the weight of the record evidence. (*See* Responses to Proposed Findings Nos. 395-398 (Alpha Omega), 1105-1182 (Smile Source), Breakaway (402-445). First, Alpha Omega was considered to be a “dental fraternity,” not a buying group. And even if Alpha Omega were a buying group, the record evidence shows that

Schein's sales to Alpha Omega as an entity began in 2003 or 2004, well before the conspiracy period, and likely ceased in 2005, again well before the conspiracy period. (*See* Responses to Proposed Finding Nos. 395-398). Such evidence is irrelevant to Schein's conduct during the conspiracy. Second, Schein considered Breakaway to be a DSO/MSO hybrid, and there is no record evidence that Schein entered into an agreement with any buying group arm of Breakaway. (*See* Responses to Proposed Finding Nos. 402-445). Third, Schein's relationship with Smile Source is consistent with the record evidence establishing Schein's participation in a conspiracy. It was a pre-existing relationship established in 2008 that ended at the beginning of 2012, which made "Sullivan [] happy that we are less one more BG." (CCFF ¶¶ 758, 899). Schein did not work with Smile Source during the conspiracy period. (*See* Responses to Proposed Finding Nos. 1105-1186). In sum, the listed entities do not disprove Schein's participation in the conspiracy and in fact, evidence regarding those entities is either irrelevant or if relevant, consistent with a conspiracy.

152. Mr. Steck also testified that he had never heard of any policy at Schein not to work with buying groups. (Steck, Tr. 3709).

Response to Proposed Finding No. 152

The Proposed Finding is misleading and contrary to the weight of the record evidence. As set forth above in Response to Proposed Finding No. 142, the record evidence contains dozens of documents that confirm that Schein, and specifically Steck, enforced a policy against buying groups during the conspiracy period. (Complaint Counsel's Post-Trial Brief, at Attachment C). For example, Steck created an activity report for the dates of November 14 through December 30, 2011, which stated: "Have had two internal calls and one external call on partnering with the Florida Dental Association. This is the classic 'buying group'

approach that we aren't buying into.” (CCFF ¶ 747 (quoting CX0201 at 001), 748-749, 925-926).

153. Mr. Timothy Sullivan, President of Henry Schein Dental during the alleged conspiracy, testified that Schein “worked with several” buying groups over the course of the alleged conspiracy, including Klear Impakt, Smile Source, Dental Co-Op, Universal Dental Alliance, Dental Gator, and MeritDent. (Sullivan, Tr. 3997-98, 4098, 4128, 4140-41, 4182, 4233, 4240, 4243).

Response to Proposed Finding No. 153

Complaint Counsel has no specific response to the attribution of the statement to Sullivan.

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Sullivan was aware of or approved relationships with the listed entities, or to the extent it implies that these entities disprove Schein's participation in a conspiracy. The record evidence shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322). The record evidence is replete with examples of buying groups that Schein turned down during the conspiracy period pursuant to an instruction to do so.

(Complaint Counsel's Post-Trial Brief, at Attachment C).

Evidence regarding these groups is consistent with the weight of the record evidence establishing Schein's participation in a conspiracy. (*See Responses to Proposed Findings* Nos. 802-838 (Klear Impakt), 1105-1182 (Smile Source), 581-633 (Dental Co-Op), 1309-1335 (Universal Dental Alliance), 634-675 (Dental Gator), and 969-981 (MeritDent)). First, as to Klear Impakt—Schein contracted with it after the conspiracy became difficult to maintain and any discussions with it during the conspiracy period were unbeknownst to

Sullivan, making this evidence irrelevant to Schein’s conduct during the conspiracy. (*See* Responses to Proposed Finding Nos. 802-838). Second, as to Smile Source—Schein’s relationship with Smile Source is consistent with the record evidence establishing Schein’s participation in a conspiracy. It was a pre-existing relationship established in 2008 that ended at the beginning of 2012, which made “Sullivan [] happy that we are less one more BG.” (CCFF ¶¶ 758, 899). Schein did not work with Smile Source during the conspiracy period. (*See* Responses to Proposed Finding Nos. 1105-1186). Third, as to the Dental Co-op of Utah—Schein’s pre-existing, legacy buying group relationships, like Dental Co-op of Utah, have no bearing on Schein’s conduct during the conspiracy, where it instructed its sales force to reject buying groups that approached it. (*See* Responses to Proposed Finding Nos. 584-633). Moreover, the record evidence also shows that Schein shut-down its relationships with the Dental Co-op of Utah during the conspiracy. (*See* Responses to Proposed Finding Nos. 584-633 (Dental Co-op of Utah)). Fourth, as to Universal Dental Alliance—Schein’s relationship with Dental Alliance was unknown to Sullivan and when informed of it, Sullivan was assured Dental Alliance was not a buying group. (*See* Responses to Proposed Finding Nos. 1309-1335). Dental Alliance is also is the subject of inter-firm communications between Sullivan and Cohen, in which Cohen confronted Sullivan for cheating on the agreement not to sell to buying groups via a text message. (CCFF ¶¶ 994-1004). This evidence, too, is consistent with evidence showing a conspiracy. (*See* Responses to Proposed Finding Nos. 1309-1335). Fifth, as to Dental Gator—the record evidence shows that Schein never bid on Dental Gator, viewed MB2’s creation of Dental Gator as a breach of its agreement with MB2, did not have a separate contract with Dental Gator, and that Dental Gator became a Schein customer without its knowledge but was tolerated to keep MB2’s business. (*See*

Responses to Proposed Finding Nos. 634-675). Sixth, as to MeritDent—CX2458 shows Sullivan instructed Schein to reject MeritDent. (CX2458 at 001 (“I just met with Tim, Dave and John about the Merit Dent group. As you can imagine they feel the same as we do that we don’t want to be the first company to open the floodgates to the dangerous world of GPOs.”)). Furthermore, Sullivan did not testify that he had ever approved of an offer to or an agreement with MeritDent, or that he was involved in the negotiations with MeritDent. (*See* Response to Proposed Finding No. 972). In sum, the listed entities do not disprove Schein’s participation in the conspiracy and in fact, evidence regarding those entities is either irrelevant or if relevant, consistent with a conspiracy.

154. Mr. Sullivan also testified that there has never been a policy at Schein not to do business with buying groups. (Sullivan, Tr. 4086-87).

Response to Proposed Finding No. 154

The Proposed Finding is contrary to the weight of the record evidence. The record evidence shows that Schein worked with buying groups before the conspiracy, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that show Sullivan’s directives and Schein’s enforcement of a policy against buying groups. (Complaint Counsel’s Post-Trial Brief, at Attachment C). For example:

- July 17, 2011: Tim Sullivan, President of Schein, informed other Schein executives: “I don’t think you will ever see a full service dealer get involved with GPOs.” (CCFF ¶ 705 (quoting CX0185 at 001)).
- December 7, 2011, Sullivan told his employees that he did “NOT want to lead in getting [buying groups] started in dental.” He explained that buying groups were “a very slippery slope.” (CCFF ¶ 709 (CX2456 at 001)).

- December 22, 2011, Sullivan, told Western Zone Manager Joe Cavaretta that he did not want to “be the first company to open the floodgates to the dangerous world of GPOs.” (CCFF ¶ 713 (CX2458 at 001)).
- December 21, 2011: Randy Foley, Director of Sales for Special Markets, rejected buying group Unified Smiles, stating, “[U]nless you have some ‘ownership’ of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups.” (CCFF ¶ 719 (quoting CX2062 at 001)).
- January 26, 2012: Western Zone Manager Joe Cavaretta wrote to sales representatives, “It is dangerously close but I told him we would not do business with a GPO.” (CCFF ¶ 750 (quoting CX0168 at 001)).
- February 2, 2012, Sullivan wanted to know “what we can do to KILL the buying group model!!” (CCFF ¶ 729 (quoting CX0199 at 001 (emphasis in original))).
- February 20, 2012: Foley wrote to his direct report, Strategic Account Manager Debbie Torgersen-Foster, “Honestly, within Schein we have a few buying groups (BG) that we wish we didn’t have . . . So, this is a corporate decision, not to participate in these.” (CX0238 at 001, CCFF ¶¶ 754, 757).
- June 8, 2012: Regional Account Manager Andrea Hight wrote to her boss, Foley and Zone Manager Kathleen Titus: “I explained that we do not accommodate GPOs” (CCFF ¶ 771 (quoting CX2423 at 004)).
- July 17, 2012, Northwest Zone Manager Jake Meadows wrote to his direct report: “I have to tell you Ron and Dan made a decision that is against what Tim Sullivan has directed us to do in regards to supporting Buying groups. We do not want our customers organizing and creating what are known as GPOs it takes the value away from the distributor.” (CCFF ¶ 773 (quoting CX0170 at 001)).
- May 29, 2013: Cavaretta wrote to two Schein employees, “We try to avoid buying groups at all costs and therefore don’t really recognize them.” (CCFF ¶¶ 785 (quoting CX2509 at 001)).
- December 20 2013: Foley told his counterpart at Colgate, one of Schein’s manufacturer partners: “It’s a buying group that we do not participate with, as with all buying groups.” (CCFF ¶¶ 788 (quoting CX2073 at 001), 789).
- July 18, 2014, Upchurch told Titus and Cavaretta: “From [Sullivan], HSD does not want to enter the GPO world.” (CCFF ¶ 806 (quoting CX2221 at 002)).
- September 8, 2014, Sullivan wrote: “I still believe [buying groups are a] slippery slope . . . and don’t plan to take the lead role.” (CCFF ¶ 809 (quoting CX2469 at 002)).

- October 8, 2014: a regional manager wrote to Titus, Schein’s Director of Group Practices: “I recently had a conversation with Kathleen regarding this group and they are nothing more than a GPO. It is my understanding that this violates our policy as we do not engage with GPOs.” (CCFF ¶¶ 811, 812 (quoting CX0260 at 002)).
- November 5, 2014: Eastern Area Sales Director Jake Meadows wrote to a Regional Manager: “We do not currently participate with GPOs. . . .” (CCFF ¶ 828 (quoting CX2358 at 001)).
- January 7, 2015, Muller to his boss, Jim Breslawski, Chairman and CEO of Henry Schein, Inc. and Sullivan: “Buying Groups: Do we keep saying no?” (CCFF ¶ 839 (CX2141 at 001-002)).
- July 1, 2015: Sullivan to Cavaretta, “The Dec ‘offsite’ last year I left with a goal to see if we could get Hal [Muller] to shut [Dental Gator] down” (CCFF ¶¶ 836 (quoting CX0246 at 001)).

Only after the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein, did. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322)).

Moreover, there are no documents in the record that evidence Sullivan’s approval of a buying group. At trial, Schein introduced an email from November 20, 2015, in which Sullivan wrote, “[t]o be clear, we have nothing against Buying Groups per se....” (RX2360 at 001).

Sullivan sent the email to Schein executives, as well as Schein’s trial counsel in this matter John McDonald and Colin Kass. (RX2360 at 001). Sullivan testified at trial that he copied Schein’s trial counsel on the email because he knew it was a “sensitive topic,” because of the FTC’s investigation of Respondents, investigations of Respondents by the Texas Attorney General and the Arizona Attorney General concerning alleged antitrust violations, and lawsuits against Respondents alleging antitrust violations. (Sullivan, Tr. 4352-4356).

155. Schein’s relationship with numerous buying groups during the alleged conspiracy period is inconsistent with Complaint Counsel’s allegations. (*See, e.g.*, Complaint ¶ 1).

Response to Proposed Finding No. 155

The Proposed Finding is not supported by a citation to the Complaint and should be disregarded. Nonetheless, the Proposed Finding contradicts the weight of the record evidence. The record evidence shows that Schein worked with buying groups before the conspiracy, instructed its sales force to reject buying groups during the conspiracy period and complied with that instruction, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322). The record evidence is replete with examples of buying groups that Schein turned down during the conspiracy period pursuant to an instruction to do so. (Complaint Counsel's Post-Trial Brief, at Attachment C).

5. *Expert Witnesses*

156. Complaint Counsel's expert, Dr. Robert Marshall, testified that Schein worked with buying groups during the alleged conspiracy. (Marshall, Tr. 2962 [REDACTED])

Response to Proposed Finding No. 156

The Proposed Finding is vague as time-period at issue, as Complaint Counsel does not object to an assertion that Schein was working with buying groups before the conspiracy and after the conspiracy became difficult to maintain. (See CCFF ¶¶ 432-454, 1159-1166).

Additionally, for reasons explained in more detail in Responses to Proposed Finding Nos. 1611-1612, this Proposed Finding is irrelevant and misleading to the extent that it suggests that it is necessary for Schein's sales during the relevant period to be reduced to "zero" in order to find that Schein participated in the conspiracy not to bid on buying groups and changed its conduct with regards to buying groups during the relevant period. As explained in Responses to Proposed Finding Nos. 1611-1612, some buying group relationships and

sales that occurred during the relevant period are either pre-existing, legacy relationships formed prior the conspiracy or those that were entered into after the conspiracy became difficult to maintain and Schein began competing for buying groups. (CCFF ¶¶ 440-444, 1159-1166, 1398, 1400, 1403, 1717-1719, 1730, 1734-1735). Schein executives did not even know that some of these “legacy” buying groups were customers and referred to some as “inherited messes.” (CX2287 at 001; CX2286 at 001).

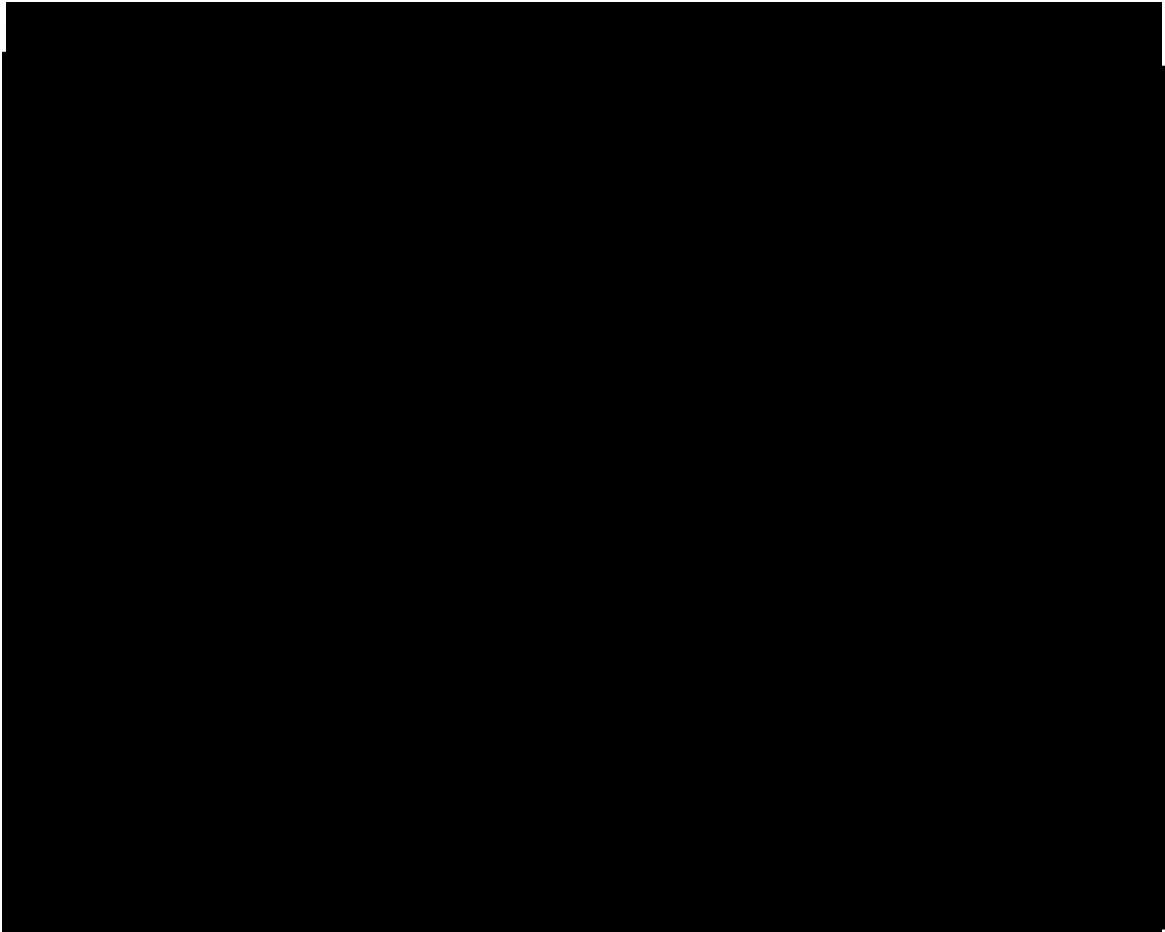
The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy because it bid on some buying groups between 2011 and 2015. Indeed, record evidence shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). This Proposed Finding is also unreliable, inaccurate, and misleading to the extent that it relies on Dr. Carlton’s testimony and his Expert Report Table 1 analysis of Schein sales purporting to show lack of parallel conduct or structural break for Schein. (RX2832 at 021-022 (¶ 29) (Carlton Expert Report)). In response to Dr. Carlton’s Table 1, Dr. Marshall explained that if sales for admitted non-buying groups and contested groups are removed from Table 1 in Dr. Carlton’s Expert Report, the total sales reported in that table would be reduced by more than 95 percent. (CCFF ¶ 2036). Dr. Marshall determined that, once sales for admitted non-buying groups and contested groups are removed from Dr. Carlton’s Table 1, the data show that Schein’s sales to dentists in buying

groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017. (CCFF ¶ 2037). When Dr. Marshall removed Schein's sales to the admitted non-buying groups and contested groups from Dr. Carlton's Table 1, the pattern of Schein's sales to buying groups is contrary to Schein's representation that there was no change in its conduct during the conspiracy period and entirely consistent with a collusive agreement to avoid doing business with buying groups, as illustrated by Figure 3 in Dr. Marshall's Rebuttal Report. [REDACTED]

[REDACTED]. To summarize the results, Schein's sales to dentists in buying groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017.

[REDACTED]:

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Each of Schein's buying group relationships represented in Figure 3 above is consistent with and explained by Schein's shift in behavior relating to buying groups around the start of the relevant period. (CX7101 at 035 (¶ 83) (Marshall Rebuttal Expert Report)). Indeed, the facts of this case show that, prior to the start of the conspiracy, Respondents did not engage in the same parallel conduct of instructing their employees to refuse to discount to buying groups. Instead, the facts show that Schein started discounting to buying groups before 2011. (CCFF ¶¶ 432-453). Moreover, the record evidence shows that all three Respondents turned down buying groups during the conspiracy period, all three of Respondents' executives, including

Cohen, Guggenheim, and Sullivan, instructed their sales teams to turn down buying groups during the conspiracy period, and all three of Respondents' sales teams understood that the directive not to deal with buying groups came from the top of the company. (CCFF ¶¶ 398-399, 406-425, 527, 534-563, 630-650, 661-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). Thus, the premise that Respondents could have engaged in the same parallel conduct of instructing their employees to reject buying groups, absent collusive behavior, is contrary to the facts of this case.

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions, particularly without any evidence of which entities are or are not buying groups, that should be established by fact witnesses or documents not through expert testimony. (*See* February 21, 2019 Order on Post-Trial Briefs).

157. Patterson's expert, Dr. Lawrence Wu, testified that "Schein and smaller company Burkhart ... [dealt] with buying groups" during the alleged conspiracy period. (Wu, Tr. 5075).

Response to Proposed Finding No. 157

The Proposed Finding is vague as to the time-period at issue, as Complaint Counsel does not object to an assertion that Schein was working with buying groups before the conspiracy and after the conspiracy became difficult to maintain.

The Proposed Finding is misleading, incomplete, and not based on expert analysis in the field of economics. The views of Patterson's expert Dr. Lawrence Wu on Schein's supposed dealings with buying groups are based on nothing more than his claimed "understanding of the facts." (RX2967 (Wu Dep. 107-108)). As Patterson's hired expert, Dr. Wu did not study Schein's supposed dealings with buying groups and testified that it would make no difference to any of his opinions if Schein openly admitted to participating in a conspiracy. (RX2967 (Wu, Dep. at 63)).

The Proposed Finding should be disregarded by the Court because Dr. Wu is being relied upon for factual propositions that should be established by fact witnesses or documents not through expert testimony. (*See* February 21, 2019 Order on Post-Trial Briefs).

This Proposed Finding is also irrelevant and misleading to the extent that it suggests that it is necessary for Schein's sales during the relevant period to be reduced to "zero" in order to find that Schein participated in the conspiracy not to bid on buying groups and changed its conduct with regards to buying groups during the relevant period for reasons explained in Responses to Proposed Finding Nos. 1612. As explained in Responses to Proposed Finding Nos. 1611-1612, some buying group relationships and sales that occurred during the relevant period are either pre-existing, legacy relationships formed prior the conspiracy or those that were entered into after the conspiracy became difficult to maintain and Schein began competing for buying groups. (CCFF ¶¶ 440-444, 1159-1166, 1398, 1400, 1403, 1717-1719, 1730, 1734-1735). Schein executives did not even know that some of these "legacy" buying groups were customers and referred to some as "inherited messes." (CX2287 at 001; CX2286 at 001).

158. Schein's expert witness, Professor Dennis Carlton, testified that Schein worked with buying groups before, during, and after the alleged conspiracy period. (Carlton, Tr. 5366, 5368, 5439).

Response to Proposed Finding No. 158

The Proposed Finding is vague as time-period at issue, as Complaint Counsel does not object to an assertion that Schein was working with buying groups before the conspiracy and after the conspiracy became difficult to maintain

As explained in Responses to Proposed Finding Nos. 1611-1612, some buying group relationships and sales that occurred during the relevant period are either pre-existing, legacy relationships formed prior the conspiracy or those that were entered into after the conspiracy

became difficult to maintain and Schein began competing for buying groups. (CCFF ¶¶ 440-444, 1159-1166, 1398, 1400, 1403, 1717-1719, 1730, 1734-1735). Schein executives did not even know that some of these “legacy” buying groups were customers and referred to some as “inherited messes.” (CX2287 at 001; CX2286 at 001).

The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy because it bid on some buying groups between 2011 and 2015. Indeed, record evidence shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

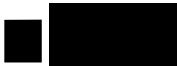
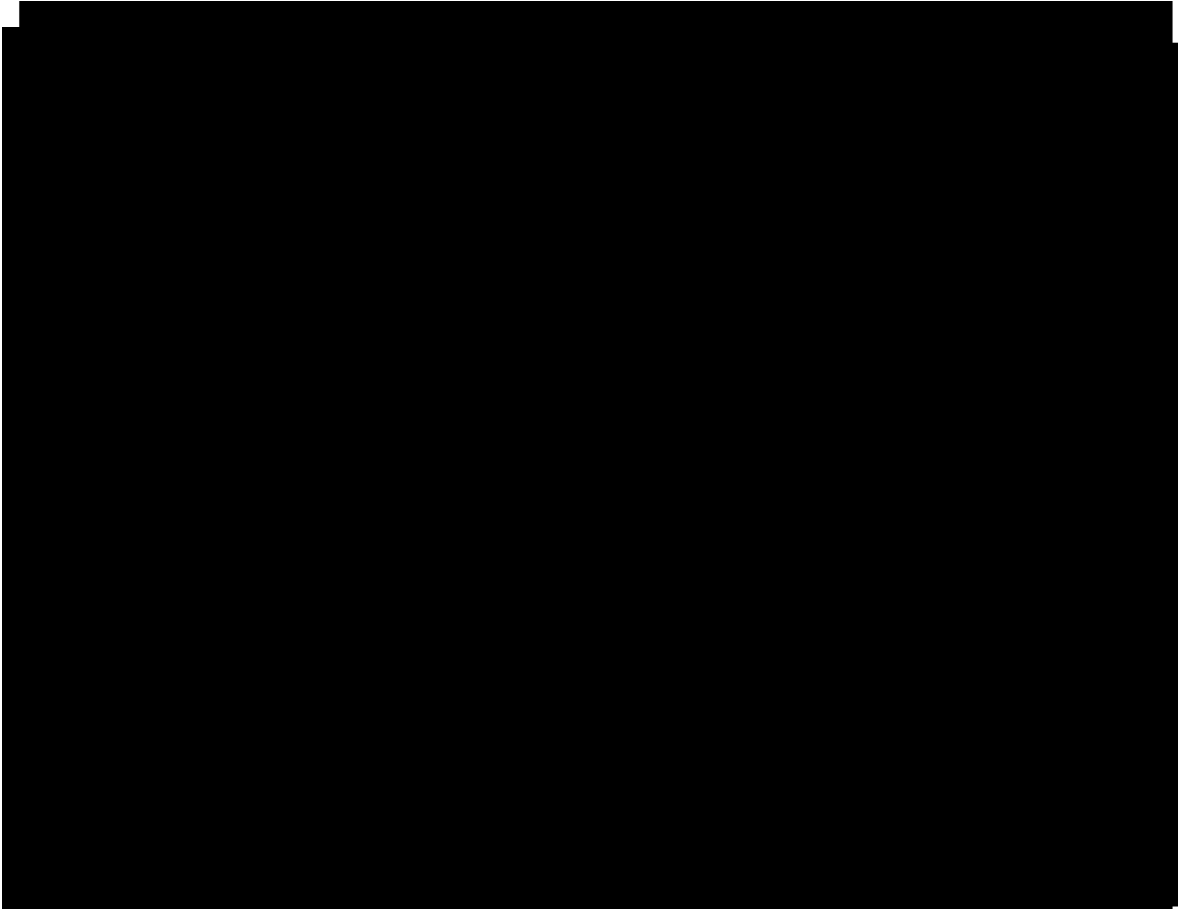
This Proposed Finding is also unreliable, inaccurate, and misleading to the extent that it relies on Dr. Dennis Carlton’s testimony and his Expert Report Table 1 analysis of Schein sales purporting to show lack of parallel conduct or structural break for Schein. (RX2832 at 021-022 (¶ 29) (Carlton Expert Report)). In response to Dr. Carlton’s Table 1, Dr. Marshall explained that if sales for admitted non-buying groups and contested groups are removed from Table 1 in Dr. Carlton’s Expert Report, the total sales reported in that table would be reduced by more than 95 percent. (CCFF ¶ 2036). Dr. Marshall determined that, once sales for admitted non-buying groups and contested groups are removed from Dr. Carlton’s Table 1, the data show that Schein’s sales to dentists in buying groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017. (CCFF ¶ 2037). When

Dr. Marshall removed Schein's sales to the admitted non-buying groups and contested groups from Dr. Carlton's Table 1, the pattern of Schein's sales to buying groups is contrary to Schein's representation that there was no change in its conduct during the conspiracy period and entirely consistent with a collusive agreement to avoid doing business with buying groups, as illustrated by Figure 3 in Dr. Marshall's Rebuttal Report. [REDACTED]

[REDACTED]. To summarize the results, Schein's sales to dentists in buying groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017. [REDACTED]

[REDACTED]:

{



Each of Schein's buying group relationships represented in Figure 3 above is consistent with and explained by Schein's shift in behavior relating to buying groups around the start of the relevant period. (CX7101 at 035 (¶ 83) (Marshall Rebuttal Expert Report)).

Indeed, the facts of this case show that, prior to the start of the conspiracy, Respondents did not engage in the same parallel conduct of instructing their employees to refuse to discount to buying groups. Instead, the facts show that Schein started discounting to buying groups before 2011. (CCFF ¶¶ 432-453). Moreover, the record evidence shows that all three

Respondents turned down buying groups during the conspiracy period, all three of Respondents' executives, including Cohen, Guggenheim, and Sullivan, instructed their sales teams to turn down buying groups during the conspiracy period, and all three of Respondents' sales teams understood that the directive not to deal with buying groups came from the top of the company. (CCFF ¶¶ 398-399, 406-425, 527, 534-563, 630-650, 661-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). Thus, the premise that Respondents could have engaged in the same parallel conduct of instructing their employees to reject buying groups, absent collusive behavior, is contrary to the facts of this case. The Proposed Finding should be disregarded by the Court because Dr. Carlton is being relied upon for factual propositions that should be established by fact witnesses or documents not through expert testimony. (*See* February 21, 2019 Order on Post-Trial Briefs).

C. Schein Evaluated Each Buying Group Opportunity, Weighing the Pros & Cons.

159. Schein has worked with buying groups from as early as the late 1990s through the present. (Sullivan, Tr. 4020 (Schein provided discounts to and competed for the business of new buying groups for Mr. Sullivan's "entire 21 years at Schein"); Titus, Tr. 5191-93 (Ms. Titus, who started at Schein in 1994 and retired in 2018, testified: "I worked with buying groups for essentially my entire career up until the time I retired."); Cavaretta, Tr. 5535-36 (confirming that Schein was working with buying groups when he started in 2001 and never stopped working with buying groups during his 18 years at Schein); Foley, Tr. 4600 ("I'd been working with buying groups from the day I started with Special Markets [in 2009] until the day I retired [in 2016].")).

Response to Proposed Finding No. 159

The Proposed Finding is misleading and contrary to the weight of the record evidence as to the phrase "through the present." The record shows that Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF

¶¶ 432-453, 1159-1166, 1316-1322). During the conspiracy period, however, the record evidence shows that Schein instructed its sales force to reject buying groups pursuant to Sullivan's directives and that it complied with that instruction. (CCFF ¶¶ 661-954). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

160. While Schein has always been skeptical of the value of buying groups, Schein has nevertheless worked with them when it made business sense. (Sullivan, Tr. 4085 ("I have always been and I am to[o] today very skeptical about the value that buying groups can bring both to Henry Schein or to its members who are our customers, very skeptical.... I've seen some work, and we've taken a chance and we've engaged with some, and many we don't see work."), 4205, 4256-4257, 4243-44; Cavaretta, Tr. 5568-70, 5574-76 (despite various challenges, "some buying groups did represent an opportunity where there was mutual growth"); Titus, Tr. 5199 ("Some are good and healthy business partners for Henry Schein and some are not so good, and it was my job to help to establish those that made sense and those that perhaps did not.")).

Response to Proposed Finding No. 160

The Proposed Finding is vague as to the time-period referenced in the phrase "worked with them." The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not have a policy or instruction to reject buying groups during the conspiracy period. The record shows that Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015, following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 1159-1166, 1316-1322). During the conspiracy period, however, the record evidence shows that Schein instructed its sales force to reject buying groups and that it complied with that instruction. (CCFF ¶¶ 661-954). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying

groups and shows that Schein rejected numerous buying groups during the conspiracy.

(Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

161. Schein generally looks to partner with buying groups that “shar[e] the same values and integrity that we have at Henry Schein, the same reverence and respect for the dentists who we’re focused on, those that offer more than just an opportunity to buy consumables at a discount, someone who shares our vision for developing the productivity and profitability of a dentist and also offers some added value like business solutions as well as education.” (Titus, Tr. 5200; *see also* Sullivan, Tr. 4090). However, Schein is not interested in partnering with buying groups that are simply “looking to just build an additional revenue stream on the back of [a] dentist [and] gain access to Henry Schein’s customer list.” (Titus, Tr. 5202).

Response to Proposed Finding No. 161

Complaint Counsel has no specific response to the first sentence of the Proposed Finding.

The second sentence of the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts that Schein rejected buying groups during the conspiracy period due to certain characteristics, rather than pursuant to a blanket instruction to reject all buying groups. The record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to turning down all buying groups that approached it during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

162. Schein has always evaluated each buying group on a case-by-case basis, primarily looking for exclusivity, compliance, and stickiness. (Meadows, Tr. 2495, 2506, 2544; Sullivan,

Tr. 4088, 4098-99; Cavaretta, Tr. 5574-76; Titus, Tr. 5199-202; Foley, Tr. 4638-39, 4614-15; *see also* RXD 0015-001).

Response to Proposed Finding No. 162

The Proposed Finding is misleading and contrary to the weight of the evidence as to the term “always” and as to the assertion that Schein evaluated buying groups during the conspiracy period for certain characteristics. The record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). The record evidence is replete with examples of buying groups that Schein turned down during the conspiracy period pursuant to an instruction to do so. (Complaint Counsel’s Post-Trial Brief, at Attachment C). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

163. Exclusivity refers to a buying group’s willingness to work exclusively with Schein. (Titus, Tr. 5201, 5236-37; Meadows, Tr. 2487-88; RX 2941 (Sullivan, Dep. at 511-12 (describing exclusivity as “whatever group that [Schein] signed up with, they have exclusively said Henry Schein is the sponsor ... [but] their member[s]... can still purchase from wherever they choose”))).

Response to Proposed Finding No. 163

Complaint Counsel has no response to the statement. However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that

Schein evaluated buying groups during the conspiracy period for certain characteristics, like exclusivity. The record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

164. From Schein's perspective, exclusivity is important because "we were going to pour a lot of resources into helping that buying group round out their offering, be supportive to them, understand each other's cultures and environment, so in order to justify the amount of resources that we were pouring into that relationship, we would look for an opportunity to be exclusive with that buying group, so we wouldn't want to have them invite our competitors to share that same partnership." (Titus, Tr. 5201).

Response to Proposed Finding No. 164

Complaint Counsel has no response to the attribution of the statement to Titus. However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein evaluated buying groups during the conspiracy period for certain characteristics, like exclusivity. The record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all

communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

165. Compliance refers to a commitment by the buying group membership to purchase from Schein. (Sullivan, Tr. 4088, 4100; Meadows, Tr. 2487-88; RX 2941 (Sullivan, Dep. at 511-12 (describing compliance as the group's members "understand[ing] who their dealer partner is, [and] they actually are complying with the terms ... of the agreement that [Schein has]")))).

Response to Proposed Finding No. 165

Complaint Counsel has no specific response to the statement. However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein evaluated buying groups during the conspiracy period for certain characteristics, like compliance. The record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). Moreover, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685).

166. Schein looked for “[buying group] partners that c[an] actually move the needle, meaning that they c[an] enforce a certain amount of compliance and ... affect and influence the behavior of those [buying group] customers to buy from Henry Schein.” (Titus, Tr. 5201-02; *see also* Sullivan, Tr. 4088).

Response to Proposed Finding No. 166

Complaint Counsel has no specific response to the attribution of the statement to Titus.

However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein evaluated buying groups during the conspiracy period for certain characteristics, like compliance. The record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). Moreover, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685).

167. Stickiness refers to value-added services and characteristics such as camaraderie, education, or other services that complement Schein’s value proposition and would help a buying group retain and influence its membership. In other words, it is a group’s “effectiveness with the members.” (Sullivan, Tr. 4004, 4088; Meadows, Tr. 2487-88, 2506, 2544-45; Cavaretta, Tr. 5568-69; Foley, Tr. 4621-22).

Response to Proposed Finding No. 167

Complaint Counsel has no specific response to the statement. However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein evaluated buying groups during the conspiracy period for certain characteristics, like “stickiness.” The record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). Moreover, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685).

168. Not all buying groups exhibit the characteristics of exclusivity, compliance, and stickiness. (Sullivan, Tr. 4088-90; Foley, Tr. 4615-16, 4618; Titus, Tr. 5202; Cavaretta, Tr. 5555, 5660-61; *see also* Reece, Tr. 4460).

Response to Proposed Finding No. 168

Complaint Counsel has no specific response.

169. Based on Schein’s experience in asking prospective buying group partners whether they would be able to influence their members to purchase from Schein, “typically, the answer is no.” (Cavaretta, Tr. 5568-69). Buying groups “can’t commit to a number because they don’t have control over where these dentists buy.” (Cavaretta, Tr. 5568-69).

Response to Proposed Finding No. 169

The first sentence of the Proposed Finding is vague as to “Schein’s experience,” which is not described with any specificity as to a time-period. The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein evaluated buying groups during the conspiracy period for certain characteristics, like “whether they would be able to influence their members to purchase from Schein.” The record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

The second sentence is contrary to the weight of the record evidence. The record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685). To the extent the second sentence implies or asserts otherwise, it is misleading.

170. In contrast to DSOs that guarantee volume, “if [buying groups] didn’t have a commitment ... we would be rolling the dice or taking the chance on whether or not those customers would buy Henry Schein through that discount.” (Meadows, Tr. 2491-92).

Response to Proposed Finding No. 170

Complaint Counsel has no response to the attribution of the statement to Meadows. However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein evaluated buying groups during the conspiracy period for certain characteristics, like whether it could “guarantee volume.” The record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). Moreover, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685).

171. Lack of compliance is also problematic for Schein, because “if there is no commitment between the buying group and the membership to do business with Henry Schein, then [Schein] would potentially advance a discount to a customer who ... would cherry-pick [Schein] and basically only pick the items that were cheapest on the formulary or on the list versus give [Schein] all their business” (Meadows, Tr. 2490-91; *see also* Sullivan, Tr. 4098).

Response to Proposed Finding No. 171

Complaint Counsel has no response to the attribution of the statement to Meadows. However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein evaluated buying groups or decided whether or not to do business with buying groups during the conspiracy period due to certain characteristics, like

“lack of compliance.” The record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). Moreover, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685).

172. Because compliance is always a challenge for buying groups, Schein looked for “mechanisms in place where [the group was] able to communicate and educate their members on why it was important that they were buying from the dealer that was supporting the buying group.” (Cavaretta, Tr. 5574-76; Titus, Tr. 5207-08 (“[W]e were looking for somebody that could effect [*sic*] influence with those dentists who buy from Henry Schein, and those dentists had to have a degree of credibility with their dentists. They had to be offering something more than just an opportunity to get a discount in order to have that credibility....”)).

Response to Proposed Finding No. 172

Complaint Counsel has no response to the attribution of the statement to Meadows. However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein evaluated buying groups or decided whether or not to do business with buying groups during the conspiracy period due to certain characteristics, like “compliance.” The record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups

when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). Moreover, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685).

173. However, Schein has discovered that if "there is not an actual business structure in place, it usually leads to there's no value proposition, there's no compliance, and it's just a loose group and from a business standpoint makes very little sense for us to do business with [those buying groups]." (CX 8033 (Cavaretta, Dep. at 133-34); *see also* Sullivan, Tr. 4090 (stating that many of the buying groups that Schein meets with "don't have that stickiness, don't have the compliance, don't have other things that drive value for their members who are our customers, and it is only around price ... [which] devalues our brand or what Henry Schein stands for.")).

Response to Proposed Finding No. 173

Complaint Counsel has no response to the attribution of the statement to Cavaretta. However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein evaluated buying groups or decided whether or not to do business with buying groups during the conspiracy period due to certain characteristics, or that Schein ever distinguished buying groups that were "only around price." The record evidence shows that Schein never distinguished between types of buying groups during the conspiracy and never used the term "price-only" buying groups in documents evidencing Schein's policy against buying groups. (CCFF ¶¶ 728-954). Meadows, a former Vice President of Sales in HSD, testified that he does not recall ever hearing of the term "price-only buying group." (CX8016 (Meadows, Dep. at 52)). Consistent with this, Brady, Schein's

Former Director of Group Practices, testified that he used the term “buying group” in reference to buying groups broadly, and not to any specific type. (CX8020 (Brady, Dep. at 126-127)). Moreover, Schein executives admitted at trial that they never used the term “price-only” buying group in contemporaneous documents and emails. Rather, they referred categorically to buying groups, without distinction, when communicating Schein’s policy to Schein’s sales force, to manufacturer partners, to potential customers, and to each other. (Foley, Tr. 4736-4737 (“Q. This is an e-mail to Unified Smiles where you tell Ms. Knysz ‘we no longer participate in Buying Groups’; right? A. That is correct. Q. Where do you use the term ‘price-only buying group’ in this e-mail? A. I do not use it.”); Foley, Tr. 4738-4739 (“Q. This [email] is also about Unified Smiles; correct? A. That is correct. Q. Do you use the term ‘price-only buying group’ in this e-mail? A. No.”); Foley, Tr. 4739 (“Q. This is an e-mail with your direct report, right? A. That's correct. Q. Do you use the term ‘price-only buying group’ anywhere here? A. No.”); Foley, Tr. 4739-4740 (“Q. And toward the bottom you say, ‘As with other buying groups we continue to say no. Do you see that? A. Yes. Q. Do you use the term ‘price-only buying group’ anywhere on this page? A. No.”)).

In fact, the record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the

conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). Moreover, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶1685).

174. Schein has also evaluated the makeup of a buying group’s membership to assess potential profitability and the risk of cannibalization. (Sullivan, Tr. 4088-4089, 4126; Titus, Tr. 5208; Cavaretta, Tr. 5607-08 (“[W]e have to establish a baseline of a business that’s already in there.”), 5571-72; Meadows, Tr. 2489-90).

Response to Proposed Finding No. 174

The Proposed Finding is vague as to when Schein “evaluated the makeup of a buying group’s membership.” To the extent the Proposed Finding implies or asserts that Schein did so at all times, or during the conspiracy, it is misleading and contrary to the weight of the evidence.

The record evidence shows that Schein did not evaluate certain characteristics of buying groups to decide whether or not to do business with them during the conspiracy period. The record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). In addition, the record evidence shows that Schein never distinguished between types of buying groups during the conspiracy, never used the term

“price only” in documents, and never used the term “price only” in communications to its sales force, manufacturer partners, potential customers, or each other. (CX8016 (Meadows, Dep. at 52); CX8020 (Brady, Dep. at 126-127); Foley, Tr. 4736-4740; *see also* Response to Proposed Finding No. 173). Moreover, the record evidence shows that Schein’s relationship with Smile Source before the conspiracy period was profitable even though it cannibalized sales from existing customers. (CCFF ¶ 447).

175. Cannibalization occurs when a distributor offers a buying group discounts, and the buying groups offers “those discounts to existing customers that [the distributor] already had,” which reduces gross profit for the distributor. (Meadows, Tr. 2506; Steck, Tr. 3730).

Response to Proposed Finding No. 175

Complaint Counsel has no specific response to the attribution of the statement to Meadows and Steck. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein rejected buying groups during the conspiracy period because of the risk of cannibalization, as the record evidence shows that Schein worked with buying before the conspiracy and after the conspiracy became difficult to maintain, regardless of such risk. (CCFF ¶¶ 661-1100, 1159-1166; *see also* Response to Proposed Finding No. 91). Indeed, Schein’s relationship with Smile Source before the conspiracy period was profitable even though half of the sales came from existing Schein customers. (CCFF ¶ 447). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

176. As Mr. Cavaretta testified, “if a buying group is a good opportunity for one dealer, it doesn’t necessarily mean it’s a good opportunity for Henry Schein,” especially considering that the risk of cannibalization is higher for Schein as the largest distributor in the dental market. (Cavaretta, Tr. 5574, 5607-08; Sullivan, Tr. 4089).

Response to Proposed Finding No. 176

Complaint Counsel has no specific response to the attribution of the statement to Cavaretta. However, the cited evidence does not support the assertion that “the risk of cannibalization is higher for Schein.” In addition, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein rejected buying groups during the conspiracy period because of the risk of cannibalization, as the record evidence shows that Schein worked with buying before the conspiracy and after the conspiracy became difficult to maintain, regardless of such risk. (CCFF ¶¶ 661-1100; *see also* Response to Proposed Finding No. 91). Indeed, Schein’s relationship with Smile Source before the conspiracy period was profitable even though half of the sales came from existing Schein customers. (CCFF ¶ 447). The record evidence also establishes that during the conspiracy period Schein rejected buying groups because it had a policy to do so and accordingly instructed its sales force to do so without evaluation of any specific characteristics of the buying group or any cannibalization risks. (CCFF ¶¶ 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

177. Schein would specifically evaluate whether adding discounts – beyond any discounts extended through Schein’s typical business model of working with dentists through their full-service FSCs – would lower Schein’s profits by cannibalizing Schein’s sales to existing customers and therefore make discounting through buying groups less profitable than not discounting to the buying group. (Meadows, Tr. 2489-90; Cavaretta, Tr. 5571-72).

Response to Proposed Finding No. 177

Complaint Counsel has no specific response to the attribution of the statement to Meadows and Cavaretta. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein evaluated buying groups during the conspiracy period at all, much less for any risk of cannibalization. The record

evidence shows that Schein did not evaluate certain characteristics of buying groups to decide whether or not to do business with them during the conspiracy period. The record evidence shows that Schein worked with buying before the conspiracy and after the conspiracy became difficult to maintain. (CCFF ¶¶ 432-453, 1159-1166, 1316-1322; *see also* Response to Proposed Finding No. 91). Indeed, Schein's relationship with Smile Source before the conspiracy period was profitable even though half of the sales came from existing Schein customers. (CCFF ¶ 447). The record evidence also establishes that during the conspiracy period Schein rejected buying groups because it had a policy to do so and accordingly instructed its sales force to do so without evaluation of any specific characteristics of the buying group or any cannibalization risks. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

178. Mr. Sullivan testified that not "every buying group relationship result[s] in Schein increasing its sales to existing customers," and not "every buying group relationship that [HSD] enter[s] into result[s] in Schein taking business away from its competitors." (RX 2941 (Sullivan, Dep. at 503-04) ("[B]ased on history in certain groups, we've seen that business does not transfer over."); *see also* Sullivan, Tr. 4088-89; Meadows, Tr. 2489, 2506-07).

Response to Proposed Finding No. 178

Complaint Counsel has no specific response to the attribution of the statement to Sullivan. However, the Proposed Finding is misleading and contrary to the weight of the record evidence, which shows that Schein worked with buying groups before the conspiracy period to gain sales and customers, and that those buying group relationships established prior to the conspiracy period were profitable. (CCFF ¶¶ 440-453). Moreover, prior to the conspiracy, Sullivan explained that any risks posed by buying groups were outweighed by the opportunity to increase overall gross profit for Schein and those pre-conspiracy buying

groups relationships presented revenue and profit opportunities to Schein that it valued.

(CCFF ¶¶ 432-438).

179. Thus, Schein had justifiable and economically rational concerns that led it to selectively, on a case-by-case basis, do business with certain groups but not others. (Cavaretta, Tr. 5607-08 (noting that PGMS was not “in alignment, they weren’t promising any type of compliance which would help grow the business, there was no value proposition, and it was just pretty much risk for Henry Schein’s business”); Foley, Tr. 4621-22 (describing partnering with the OrthoSynetics buying group due to its “stickiness with Schein,” including the fact that the group hosted software for all their members and “worked with their members to drive compliance to buy from Schein”); Titus, Tr. 5251, 5259 (describing Schein’s decision to stop working with the Steadfast Medical buying group due in part to the almost 50% decline in a portion of Schein’s business after partnering with Steadfast)).

Response to Proposed Finding No. 179

The Proposed Finding is not supported by the cited evidence, misleading, and contrary to the weight of the record evidence. The cited testimony of Cavaretta and Titus regarding PGMS and Steadfast do not support the Proposed Finding. PGMS and Steadfast are both examples of buying group relationships that Schein terminated during the conspiracy period, which is consistent with the record evidence establishing Schein’s compliance with a policy not to do business with buying groups during the conspiracy period. (*See Responses to Proposed Findings Nos. 1046-1077 (PGMS), 1199-1242 (Steadfast)*). The cited testimony of Foley regarding OrthoSynetics does not support the Proposed Finding and is irrelevant, as Schein considered OrthoSynetics to be an MSO not a buying group. (*See Responses to Proposed Findings Nos. 1026-1037*). Indeed, the record evidence does not establish that Schein evaluated buying groups on a “case-by-case basis” during the conspiracy period or that it worked with or rejected certain buying groups based on “justifiable and economically rational concerns” during the conspiracy period. In fact, the record evidence establishes that during the conspiracy period Schein indiscriminately rejected buying groups because it had a policy to do so and accordingly instructed its sales force to do so without evaluation of any

specific characteristics of the buying group. (CCFF ¶¶ 661-1100, 1159-1166, 1316-1322).

The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

180. As Kathleen Titus wrote to the leadership of the Klear Impakt buying group in January 2015, Schein does "not enter in to relationships like this lightly," but when it does, it is "fully committed to the cause." (CX 2208-002).

Response to Proposed Finding No. 180

Complaint Counsel has no specific response.

181. Though Schein formalized its buying group evaluation process over time, the criteria and "yardstick to measure whether a customer or a buying group entity was a good fit for Henry Schein" has essentially remained the same. (Titus, Tr. 5208).

Response to Proposed Finding No. 181

The Proposed Finding is misleading and contrary to the weight of the record evidence. The record evidence does not establish that Schein had a "buying group evaluation process" during the conspiracy period or that its criteria for evaluating buying groups "has essentially remained the same." In fact, the record evidence establishes that during the conspiracy period Schein indiscriminately rejected buying groups because it had a policy to do so and accordingly instructed its sales force to do so without evaluation of any specific characteristics of the buying group. (CCFF ¶¶ 661-1100). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). In contrast, Schein worked with buying groups before the

conspiracy and competed for buying groups after the conspiracy became difficult to maintain. (CCFF ¶¶ 432-453, 1159-1166, 1316-1322).

182. At all times, Schein acted deliberately, rationally, and unilaterally in evaluating buying group opportunities based on what was in the best interest of Schein – and Schein alone. (Meadows, Tr. 2467, 2599; 2621; Titus, Tr. 5192, 5194, 5275, 5228, 5248; Sullivan, Tr. 4068, 4254, 4257, 4292-93; Cavaretta, Tr. 5528-29, 5605, 5610, 5566-68, 5621).

Response to Proposed Finding No. 182

The Proposed Finding is misleading and contrary to the weight of the record evidence. The record evidence does not establish that Schein acted “unilaterally” or that it evaluated buying group opportunities during the conspiracy period. In fact, the record evidence establishes that during the conspiracy period Schein indiscriminately rejected buying groups because it had a policy to do so and accordingly instructed its sales force to do so without evaluation of any specific characteristics of the buying group. (CCFF ¶¶ 661-1100, 1159-1166, 1316-1322).

The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). Schein rejected buying groups although it had historically had profitable relationships with them. (CCFF ¶¶ 445-453). Brady, Schein’s former Director of Group practices, testified that Schein’s work with buying group has led to increased revenue and contributed to Schein’s profitability. (CX8020 (Brady, Dep. at 295-296)). The record evidence also shows, in contrast with conduct pursuant to a blanket policy to reject buying groups during the conspiracy, that Schein worked with buying before the conspiracy and after the conspiracy became difficult to maintain. (CCFF ¶¶ 432-453, 1159-1166, 1316-1322; *see also* Response to Proposed Finding No. 91).

D. From Time Immemorial, Schein Was Skeptical of Buying Groups, Though It Did Business with Them from Time to Time.

183. Complaint Counsel claims that before the alleged conspiracy, “Schein had historically worked with some Buying Groups,” but after the alleged conspiracy started, it “did an about face and initiated a no-buying group strategy....” (Complaint ¶ 33; CC Pretrial Br. at 18). The evidence does not support this contention.

Response to Proposed Finding No. 183

The second sentence of the Proposed Finding is not supported by any citation to the record evidence and should be disregarded. Complaint Counsel has no specific response to the first sentence of the Proposed Finding.

184. Before Schein created its Mid-Market group in 2014, the primary responsibility for buying groups at Schein was the Special Markets division, led by Hal Muller. (Sullivan, Tr. 4091, 4113; Foley, Tr. 4514, 4607; Steck, Tr. 3731-32; Cavaretta, Tr. 5588; Meadows, Tr. 2476; Titus, Tr. 5336).

Response to Proposed Finding No. 184

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it excludes HSD with the phrase “primary responsibility.” It is also internally contradictory if it asserts as much, as Schein itself states that “both divisions have had at least some involvement or responsibility for Schein’s buying group relationships.” (SF 29; *see also* Response to Proposed Finding No. 29). In fact, the record evidence shows that Special Markets and HSD communicated and coordinated regarding buying group strategy and that buying group opportunities were directed to HSD. (CX0309 (Muller, IHT at 94-95) (“Q. . . . Prior to 2014, when a buying group was interested in working with Henry Schein, which division would that buying group be directed toward? A. If it was for the private practitioner, it would go to Henry Schein dental. If it was for a special markets world type of customer, it would go to me”); CX2060 at 001 (Special Markets executive Foley stated in 2011: “If it turns out to be a DSO, all ours. If it turns out to be more of a local buying group, HSD (if

they even want it”); CX0165 at 002 (In 2011, Special Markets Manager Kathleen Titus declined a buying group and sent it to HSD, and stated: “The participants are Private Practices which rules SM out.”)). Buying groups were better served by HSD. (CX2509 at 001 (“Henry Schein Dental manages customers who are buying groups, not Special Markets.”); Cavaretta, Tr. 5639-5640; CX2504 at 003 (In 2011, Special Markets Manager Kathleen Titus stated that GPOs are “a better fit for HSD than SM.”)). The head of HSD, Sullivan, and Special Markets, Muller, discussed and coordinated regarding buying group strategy between the two divisions and transferred a pre-existing, pre-conspiracy buying group from Special Markets to HSD. (CCFF ¶¶ 901-902; *see also* Responses to Proposed Finding Nos. 23, 29-30). Ultimately, the record evidence shows that HSD and Special Markets coordinated regarding buying group and both enforced a policyu not to work with buying groups and rejected them during the conspiracy period. (CCFF ¶¶ 661-1100; Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

185. As with other Schein executives like Tim Sullivan and Joe Cavaretta, Mr. Muller has always been skeptical about the value of buying groups. (Sullivan, Tr. 4085; Cavaretta, Tr. 5568-5570). For example, in an April 2002 email regarding a group referred to as “IFS,” Mr. Muller notes that:

[T]his type of GPO would kill the margins for both manufacturers and distributors. The way I see it – everyone would have to play – thus there would be no increased volume and just lower costs.... In my opinion we need to stop this effort. We have always contended that Schein is a GPO and negotiates the best prices for our customers... we need to continue that line.

(RX 2405).

Response to Proposed Finding No. 185

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies that Sullivan,

Cavaretta, or Muller rejected buying groups during the conspiracy period because of a skepticism. The record evidence shows that Sullivan directed Schein not to discount to buying groups and that Schein enforced that policy during the conspiracy. The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C). These documents are set forth in Complaint Counsel’s Post-Trial Brief, at Attachment C and also in the Responses to Proposed Finding Nos. 142, 148, 150, 152, 154. As an example, on December 22, 2011, Sullivan told Western Zone Manager Joe Cavaretta that he did not want to “be the first company to open the floodgates to the dangerous world of GPOs.” (CCFF ¶ 713). On January 26, 2012, Cavaretta wrote to two sales representatives: “It is dangerously close but I told him we would not do business with a GPO.” (CCFF ¶ 750). September 14, 2014, Foley to Muller, President of Schein’s Special Markets: “As with other buying groups we continue to say no (at least try to).” (CCFF ¶ 810).

186. Schein’s skepticism and concerns regarding the value of buying groups existed before, during, and after the alleged conspiracy. In another example, on December 3, 2008 – three years before the conspiracy allegedly began – Joe Cavaretta sent the Steadfast proposal to Tim Sullivan noting: “This sounds like a GPO to me, and I’m not sure if we want to get involved with them ... I wanted to bounce this off the two of you before I just said no.” (RX 2411).

Response to Proposed Finding No. 186

The first sentence of the Proposed Finding is not supported by any citation to the record evidence and should be disregarded. Furthermore, the record evidence shows that Schein’s conduct regarding buying groups was different during the conspiracy period compared to before the conspiracy and after the conspiracy became difficult to maintain. It shows that Schein worked with buying groups before the conspiracy period to gain sales and customers,

and that those buying group relationships established prior to the conspiracy period were profitable. (CCFF ¶¶ 440-453). Moreover, prior to the conspiracy, Sullivan explained that any risks posed by buying groups were outweighed by the opportunity to increase overall gross profit for Schein and those pre-conspiracy buying groups relationships presented revenue and profit opportunities to Schein that it valued. (CCFF ¶¶ 432-438). Schein also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1166, 1316-1322). However, during the conspiracy, it rejected buying groups pursuant to a policy to do so and instructed its sales force to turn down buying groups. The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). Complaint Counsel has no specific response to the attribution of the statement in the second sentence of the Proposed Finding to Cavaretta.

Furthermore, Schein's conduct regarding Steadfast during the conspiracy period is consistent with the record evidence that shows Schein turned down and even terminated pre-existing legacy buying groups relationships it had entered into prior to the conspiracy. (*See* Responses to Proposed Finding Nos. 1199-1242).

187. Yet, as noted below, Schein ultimately had a relationship with Steadfast, including during the alleged conspiracy. (SF 1199-242; Foley, Tr. 4681; CX 0306 (Foley, IHT at 91)).

Response to Proposed Finding No. 187

Schein's conduct regarding Steadfast during the conspiracy period is consistent with the record evidence that shows Schein turned down and even terminated pre-existing legacy

buying groups relationships it had entered into prior to the conspiracy. (*See* Responses to Proposed Finding Nos. 1199-1242). In fact, the record evidence shows that Steadfast was a pre-existing, legacy buying group relationship, which was shut down during the conspiracy period. The evidence shows that Schein had a relationship and sold to Steadfast in 2010 or prior to the conspiracy. (CX2667 (lines 174-177, 5238-5244 showing sales to Steadfast in 2010); *see also* CX0306 (Foley, IHT at 91) (“[Steadfast] first came to special markets in 2009 or ‘10”)). The evidence shows that Schein had a relationship and sold to Steadfast in 2010, or prior to the conspiracy. (CX2667 (lines 174-177, 5238-5244 showing sales to Steadfast in 2010); *see also* CX0306 (Foley, IHT at 91) (“[Steadfast] first came to special markets in 2009 or ‘10”)). The evidence also shows that Schein shut down Steadfast in June 2014 during the conspiracy period. (CCFF ¶¶ 871-885).

On March 25, 2014, Titus sent an email to her boss Cavaretta with the subject “Buying Group STEADFAST DENTAL, do we shut this down?” and wrote: “We need to discuss this. . . I’m still in discovery on their DNA (we think it’s a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened.” (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of “hot topics,” which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus then sought permission from her superiors to “shut down” Steadfast, and on June 10, 2014, she did so by writing to the CEO of Steadfast, Jon Staples: “After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday;

06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model,” which had been in place for the entirety of Schein’s relationship with Steadfast, was “counter to [Schein’s] business practices.” (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus’ boss, Cavaretta praised her for “shut[ting] down” a GPO; on June 10, 2014, Cavaretta wrote: “GPO’s are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers.” (CCFF ¶ 885 (quoting CX2216 at 001)).

188. Despite Schein’s long-standing skepticism of whether buying groups were worthwhile opportunities, Schein did enter into partnerships with some buying groups where it made sense. Schein began and continued relationships with a number of buying groups in the years before Complaint Counsel alleges the conspiracy began. Examples include Alpha Omega, the Dental Co-Op, Dentists for a Better Huntington, Long Island Dental Forum, Smile Source, and Comfort Dental. (*See* SF 397, 498-503, 583-91, 719-24, 940-48; *see also* CX 8005 (Muller, Dep. at 31 (“When, to your knowledge, did Schein first start doing business with buying groups? A. Probably before I was there, and I’ve been there for 28 years.”))).

Response to Proposed Finding No. 188

Complaint Counsel has no specific response to the statement that Schein had a number of pre-existing buying group relationships that began prior to the conspiracy. However, the Proposed Finding is misleading to the extent it implies that Schein intentionally continued and worked with those pre-existing groups. First, the record evidence also shows that Schein terminated profitable, pre-existing buying group relationships during the conspiracy, like those with the Dental Co-op of Utah and Steadfast. (CCFF ¶¶ 871-898; *see also* Responses to Proposed Finding Nos. 581-633 (Dental Co-op of Utah), 1199-1242 (Steadfast)). Second, Schein executives did not know that Schein engaged with certain buying groups and learned

about them only after the conspiracy. On May 10, 2016, Brady wrote to Steck: “Want to make sure you aren’t in the dark on this. . . . We discovered four existing buying groups dating back to 2004.” (CCFF ¶ 1767 (quoting CX2287 at 001)). Steck was not aware of those four existing buying groups dating to 2004. (CCFF ¶ 1767 (quoting CX8031 (Steck, Dep. at 129) (“Q. Were you aware of the four existing buying groups dating to 2004? A. No.”))). On May 10, 2016, Steck referred to the four existing buying groups as “inherited messes.” (CCFF ¶ 1767 (quoting CX2287 at 001) (“[U]nfortunately, part of your job is cleaning up inherited ‘messes’.”)). Third, Alpha Omega and Comfort Dental are irrelevant because Alpha Omega was considered to be a “dental fraternity” and Comfort Dental was considered to be an elite DSO. (*See* Responses to Proposed Finding Nos. 395-398 (Alpha Omega), 493-511 (Comfort Dental)). Thus, to the extent that the Proposed Finding asserts or implies that continued relationships with legacy buying groups disproves Schein’s participation in conspiracy, that is misleading and contrary to the weight of the record evidence.

E. Schein Evolved Its Buying Group Infrastructure to Match the Evolving Marketplace.

1. *Pugh Dental Alliance, Conflicts Between Special Markets and HSD, and the 2010 Guidance.*

189. Pugh Dental Alliance was one of the buying groups that Special Markets opened before the alleged conspiracy. (Foley, Tr. 4522, 4605, 4662-63).

Response to Proposed Finding No. 189

Complaint Counsel has no specific response.

190. Randy Foley opened the Pugh Dental Alliance account shortly after he started in Schein’s Special Markets division in 2009. (Foley, Tr. 4522, 4605, 4662-63).

Response to Proposed Finding No. 190

Complaint Counsel has no specific response.

191. The Pugh Dental Alliance was a local association of female dentists in Southeast Florida created by Jody Pugh, whose wife was a dentist and had a number of friends who were also female dentists. (Foley, Tr. 4657, 4662).

Response to Proposed Finding No. 191

Complaint Counsel has no specific response.

192. The Pugh Dental Alliance provided merchandise discounts and other services “to private dental practices.” (CX 2529-002, -012 (“These are private practice offices....”)).

Response to Proposed Finding No. 192

Complaint Counsel has no specific response.

193. Schein provided discounts to the group under a formulary plan, and Special Markets Equipment created “a ‘start up’ equipment formulary with Midmark.” (CX 2529-002).

Response to Proposed Finding No. 193

Complaint Counsel has no specific response.

194. Shortly after the Pugh Dental Alliance buying group opened, however, it started causing “friction” with Schein’s local FSCs, who thought the buying group relationship would take accounts away from the FSCs. (Foley, Tr. 4639, 4661-66; Steck, Tr. 3766-70; CX 2529-004-05, -007 (“One of my larger accounts ... contacted me last week to ask me if I ever heard of Pugh Dental Alliance.... It seems they were solicited ... and were told if they joined the alliance ... they could continue to buy from [Henry Schein] on the website.... The Dr inquired what would happen to his Schein rep. He was informed he would no longer be needed.”)).

Response to Proposed Finding No. 194

Complaint Counsel has no specific response.

195. Mr. Scott Schenker was the local FSC, and he wrote to Mr. Breslawski on January 5, 2010 that Pugh Dental Alliance “was opened through special markets,” and that the Pugh Dental Alliance “sales person informed [his] account [that] they could join the alliance for \$2,000/yr, eliminate their FSC[,] and save as much as 20% on their supply bills and continue to order from” Henry Schein. (CX 2296-002-03).

Response to Proposed Finding No. 195

Complaint Counsel has no specific response.

196. Mr. Schenker also described the danger of cannibalization given that the members “are mostly [Henry Schein] customers with various FSCs [including] quite a few more of [his] own customers.... This is a potentially cancerous situation.” (CX 2529-011).

Response to Proposed Finding No. 196

Complaint Counsel has no specific response.

197. Mr. Schenker continued, “It’s absolutely absurd that I should be put in a situation that I’m competing with my own company.” (CX 2296-002).

Response to Proposed Finding No. 197

Complaint Counsel has no specific response.

198. Mr. Schenker’s boss, Regional Manager Mike Finnan, echoed this concern, noting that this “could be disastrous” and that, if it is not promptly “shut down,” the FSC team will “be at risk” of losing “some very important customers.” (CX 2529-010).

Response to Proposed Finding No. 198

Complaint Counsel has no specific response.

199. Two years before the start of the alleged conspiracy, Mr. Steck asked Randy Foley to “look into [Pugh]” because it sounded “like a buying group situation, which [Schein] normally stay[s] away from.” (CX 2529-007).

Response to Proposed Finding No. 199

Complaint Counsel has no specific response.

200. In response to Mr. Schenker’s plea for “help,” Mr. Breslawski instructed Mr. Sullivan and Mr. Muller, the leaders of HSD and Special Markets, to work out the conflicts created by the Pugh Dental Alliance partnership. (CX 2529-011; CX 2296-002).

Response to Proposed Finding No. 200

Complaint Counsel has no specific response.

201. Mr. Muller explained that Special Markets justified its aggressive discounts by cutting FSC support. At “that pricing level,” Mr. Muller wrote, “we usually ask our field sales consultants to visit less often as obviously profits have been cut.” (CX 2296-001).

Response to Proposed Finding No. 201

Complaint Counsel has no specific response.

202. Mr. Muller also wrote that “[w]e really don’t have a lot of time for this infighting ... however we need to be open to some of these people that are doing creative approaches to the market – and find the right way to deal with them....” (CX 2529-009).

Response to Proposed Finding No. 202

Complaint Counsel has no specific response.

203. As Mr. Muller did in 2002, Mr. Sullivan expressed skepticism towards buying groups, almost two years before the start of the alleged conspiracy. (CX 2296-001 (“I do not support us opening Buying Clubs.”)).

Response to Proposed Finding No. 203

Complaint Counsel has no specific response.

204. By January 7, 2010, Mr. Muller had discussed the issue with Mr. Pugh, who decided to discontinue the growth of the buying club, which had not been very successful. (CX 2529-012). However, as Mr. Foley testified, Pugh Dental Alliance still operated as a buying group. (Foley, Tr. 4666).

Response to Proposed Finding No. 204

Complaint Counsel has no specific response.

205. For its part, Schein agreed to keep the formulary discount plan in place for the existing members, and Mr. Muller “asked for a business plan to see how [Schein] can work with them going forward.” (CX 2529-012).

Response to Proposed Finding No. 205

Complaint Counsel has no specific response.

206. The next month, February 2010 (nearly two years before the start of the alleged conspiracy), Mr. Muller again expressed his skepticism towards buying groups when Mr. Cavaretta raised issues relating to CF Dental Group and a group called Dentist United in Las Vegas that asked for the “same group pricing we gave Smile Source.” (CX 2503-001). Mr. Muller noted that he had rebuffed CF Dental’s efforts multiple times, as he did “not believe in selling to buying groups.” (CX 2503-001).

Response to Proposed Finding No. 206

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein’s approach to buying groups *prior* to the conspiracy period was consistent *into and during* the conspiracy period. The record evidence shows that Schein did not evaluate certain characteristics of buying groups to decide whether or not to do business with them during the

conspiracy period. The record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

207. In doing so, Mr. Muller distinguished buying groups, like CF Dental, that seek nothing more than a discount (and a cut for themselves) from those like OrthoSynetics (a buying group Schein does business with), that have a deeper integration between the corporate office and the member and can drive compliance. (CX 2503-001; *see also* SF 206, 1026-36). "[T]he problem," Mr. Muller explained is that, unlike CF Dental, OrthoSynetics "takes a percentage of revenues and the offices get a lot of services for that payment." (CX 2503-001).

Response to Proposed Finding No. 207

The portion of the Proposed Finding that asserts "OrthoSynetics (a buying group Schein does business with)" is inaccurate. Schein considered OrthoSynetics to be an MSO not a buying group. (Responses to Proposed Findings Nos. 1026-1037). For the same reason, the second sentence of the Proposed Finding is inaccurate and misleading to the extent it implies or asserts that OrthoSynetics is a buying group. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein's approach to buying groups *prior* to the conspiracy period was the same *during* the conspiracy period. The record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during

the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). Even if Schein evaluated buying groups on a case-by-case basis prior to the conspiracy, the record evidence shows that Schein did not evaluate certain characteristics of buying groups to decide whether or not to do business with them during the conspiracy period. The record evidence is replete with examples of buying groups that Schein turned down during the conspiracy period pursuant to an instruction to do so without any evaluation of the buying groups characteristics. (Complaint Counsel's Post-Trial Brief, at Attachment C).

208. In early 2010, the leadership of HSD and Special Markets – Tim Sullivan, Dave Steck, Hal Muller, and Randy Foley – got together to discuss these conflicts and issues with buying groups. (Sullivan, Tr. 4098-99; Foley, Tr. 4638-41; CX 2111-001).

Response to Proposed Finding No. 208

Complaint Counsel has no specific response.

209. At the meeting, Messrs. Sullivan, Steck, Muller, and Foley developed and agreed on a set of general guidelines for doing business with buying groups. (Sullivan, Tr. 4098-99; Foley, Tr. 4638-41; CX 2111-001; CX 2153).

Response to Proposed Finding No. 209

The Proposed Finding is vague as to the phrase “set of general guidelines for doing business with buying groups,” as it does not specify if or when such guidelines were implemented or actually applied to the buying groups that approached Schein. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein's approach to buying groups *prior* to the conspiracy period was the same *during* the conspiracy period, and to the extent it implies or asserts that Schein contracted with buying groups during the conspiracy period. The record evidence establishes that Schein's conduct

changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). Even if Schein evaluated buying groups on a case-by-case basis prior to the conspiracy, the record evidence shows that Schein did not evaluate certain characteristics of buying groups to decide whether or not to do business with them during the conspiracy period. The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

210. Primarily, the four agreed that if a buying group "could drive compliance, then ... they could be a good opportunity for Schein." (The "2010 Guidance"). (Foley, Tr. 4638-41; Sullivan, Tr. 4098-99; CX 2111 (Hal Muller: "We also determined at the beginning of the year (Dave, Tim, Randy and myself) that we would entertain organizations that could force compliance.")).⁴

Response to Proposed Finding No. 210

Complaint Counsel has no specific response to the statement or footnote 4 (to the extent that Schein is including the language in footnote 4 as part of its Proposed Finding). However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein's approach to buying groups *during* the conspiracy period was one that engaged in any evaluation of a buying group's characteristics, including ability to

⁴ The term "force compliance" did not have a fixed definition, but typically meant that the entity had the ability to make purchase commitments, require members to purchase from the designated distributor, or, at a minimum, heavily influence the dentist's purchasing decision beyond merely transmitting Schein's offer to the dentist. (Sullivan, Tr. 4099-4100).

drive compliance. It is also misleading to the extent it asserts the 2010 Guidance was used during the conspiracy period. The record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). Even if Schein evaluated buying groups on a case-by-case basis prior to the conspiracy, the record evidence shows that Schein did not evaluate buying groups to decide whether or not to do business with them during the conspiracy period. The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). Finally, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685).

211. Mr. Foley similarly recounted this meeting to his team, noting that, “[w]hen Hal and I met with Tim and Dave, we decided” that “Buying Groups” needed to have “complete control of purchasing policy that would force the distributor purchases to Schein.” (CX 2153-002).

Response to Proposed Finding No. 211

Complaint Counsel has no specific response to the attribution of the statement to Foley.

However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein’s approach to buying groups *during* the conspiracy period was one that evaluated buying groups. The record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to indiscriminate

rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). Even if Schein evaluated buying groups on a case-by-case basis prior to the conspiracy, the record evidence shows that Schein did not evaluate certain characteristics of buying groups to decide whether or not to do business with them during the conspiracy period, including compliance. The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). Finally, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685).

212. After developing the 2010 Guidance with respect to buying groups, Schein continued to approach such groups with skepticism. In March 2010, for example, the buying group Synergy Dental asked Special Markets for a bid regarding Ace bone grafting products. (CX 2451).

Response to Proposed Finding No. 212

The first sentence of the Proposed Finding is vague as to how the 2010 Guidance was applied and when. In fact, the record evidence shows that by September 2010, Sullivan explained that any risks posed by buying groups were outweighed by the opportunity to increase overall gross profit for Schein. (CCFF ¶¶ 432-438). Schein worked with buying groups before the conspiracy period to gain sales and customers, and those buying group relationships established prior to the conspiracy period were profitable. (CCFF ¶¶ 440-453). The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it implies

or asserts that the 2010 Guidance was applied or followed *during* the conspiracy period. The record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). Even if Schein evaluated buying groups on a case-by-case basis prior to the conspiracy or applied the 2010 Guidance, the record evidence shows that Schein did not do so during the conspiracy period. The record evidence contains dozens of documents that confirm that Schein enforced a policy of not discounting to buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). Finally, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685).

213. Both Mr. Foley and Special Markets Director of Marketing Annette Martino explained that, because this was “strictly a GPO for private practices” and that there would “not be any ownership,” Special Markets was “not interested.” (CX 2451-001; Foley, Tr. 4641).

Response to Proposed Finding No. 213

Complaint Counsel has no specific response.

214. Mr. Muller forwarded the opportunity to Mr. Sullivan to give HSD a chance to evaluate the opportunity as well. Mr. Sullivan also declined, noting “the risk is much greater if we do sign th[a]n if we don’t.” (CX 2451).

Response to Proposed Finding No. 214

Complaint Counsel has no specific response to the attribution of the statement to CX2451.

However, the Proposed Finding is misleading and contrary to the weight of the evidence to

the extent it implies or asserts that the 2010 Guidance was applied or followed *during* the conspiracy period. The record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). Prior to the conspiracy period, by September 2010, Sullivan explained that any risks posed by buying groups were outweighed by the opportunity to increase overall gross profit for Schein. (CCFF ¶¶ 432-438). Schein worked with buying groups before the conspiracy period to gain sales and customers, and those buying group relationships established prior to the conspiracy period were profitable. (CCFF ¶¶ 440-453). Further, even if Schein evaluated buying groups on a case-by-case basis prior to the conspiracy or applied the 2010 Guidance, the record evidence shows that Schein did not do so during the conspiracy period. The record evidence contains dozens of documents that confirm that Schein enforced a policy of not discounting to buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

215. Schein discussed Synergy again in July 2011 (still before the beginning of the alleged conspiracy), and came to the same conclusion that it was not a good fit for Schein. (CX 0185-001).

Response to Proposed Finding No. 215

Complaint Counsel has no specific response to the attribution of the statement to CX0185.

However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that the 2010 Guidance was applied or followed *during* the

conspiracy period. The record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). Prior to the conspiracy period, by September 2010, Sullivan explained that any risks posed by buying groups were outweighed by the opportunity to increase overall gross profit for Schein. (CCFF ¶¶ 432-438). Schein worked with buying groups before the conspiracy period to gain sales and customers, and those buying group relationships established prior to the conspiracy period were profitable. (CCFF ¶¶ 440-453). Further, even if Schein evaluated buying groups on a case-by-case basis prior to the conspiracy or applied the 2010 Guidance, the record evidence shows that Schein did not do so during the conspiracy period. The record evidence contains dozens of documents that confirm that Schein enforced a policy of not discounting to buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

216. Ultimately, Synergy Dental signed with Schein's business affiliate, Darby Dental. (CX 0185-001; Sullivan, Tr. 4171).⁵

⁵ Complaint Counsel cites Mr. Sullivan's opinion reflected in CX 0185 that "[t]hat's where they [Darby] belong. I don't think you will ever see a full service dealer get involved with GPOs." (CX 0185-001). But mail-order/internet distributors do not have commission-based sales teams, so they do not have the same conflicts that full-service distributors do. (JF 31). In any event, CX 0185 is *before* the alleged conspiracy period, and Complaint Counsel has not shown that Mr. Sullivan's opinion was informed by any competitor contact, having identified no such buying-group-related communication prior to this time.

Response to Proposed Finding No. 216

Complaint Counsel has no specific response to the attribution of the statement to CX0185. However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that the 2010 Guidance was applied or followed *during* the conspiracy period. The record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). Prior to the conspiracy period, by September 2010, Sullivan explained that any risks posed by buying groups were outweighed by the opportunity to increase overall gross profit for Schein. (CCFF ¶¶ 432-438). Schein worked with buying groups before the conspiracy period to gain sales and customers, and those buying group relationships established prior to the conspiracy period were profitable. (CCFF ¶¶ 440-453). Further, even if Schein evaluated buying groups on a case-by-case basis prior to the conspiracy or applied the 2010 Guidance, the record evidence shows that Schein did not do so during the conspiracy period. In fact, as seen in CX0185, Sullivan's tone regarding buying groups changed by July 2011. (CCFF ¶¶ 700-707). In addition, the assertion that Darby Dental is "Schein's business affiliate" is vague, and it is misleading to the extent it asserts or implies anything about Schein from Darby's relationship. Darby Dental is a separate company from Schein, and Schein does not run the day-to-day business of Darby Dental. (Sullivan, Tr. 4348). Darby Dental has its own President and its own executives who are in charge of its sales force. (Sullivan, Tr. 4348).

As to footnote 5 (to the extent Schein intends to include it in its Proposed Finding), it is misleading and contrary to the weight of the record evidence to the extent it asserts or suggests that this change in approach was unrelated to communications with Benco. The record evidence shows that Cohen and Sullivan communicated and had numerous opportunities to communicate between January 2011 and throughout the conspiracy period. (CCFF ¶¶ 327-351). The record evidence also shows that by July 2011, as shown in CX0185, Sullivan changed his tone regarding buying groups. Indeed, the record evidence contains dozens of documents that confirm that Schein enforced a policy of not discounting to buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

217. Schein had another opportunity to apply the 2010 Guidance in May 2010, when the Intermountain Dental Associates came to Schein with a buying group offering. Mr. Foley described the mechanism by which a buying group could satisfy the compliance requirement: “When Hal and I met with Tim and Dave we decided: ... on Buying Groups ... they need to ... have complete control of purchasing policy that would force the distributor purchases to Schein.” (CX 2153-002).

Response to Proposed Finding No. 217

The Proposed Finding is inaccurate and misleading in asserting that Schein applied the 2010 Guidance in May 2010 in relation to IDA, and to the extent it asserts that IDA is a buying group. First, the record evidence shows that Schein viewed IDA to be a DSO with centralized purchasing. (CCFF ¶ 751). It also shows that Schein executives stated that they would not work with IDA if it were a buying group/GPO. (CCFF ¶ 751; *see also* Responses to Proposed Finding Nos. 739-740). The record evidence also shows that Schein rejected IDA’s buying group arm in January 2012 because it had a policy against buying groups. On January 26, 2012, Cavaretta wrote to Melanie Bingham and Hight regarding IDA: “It is dangerously

close but I told him we would not do business with a GPO.” (CCFF ¶¶ 750 (quoting CX0168 at 001); *see also* CCFF ¶¶ 751-753). As such, the Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it implies or asserts that the 2010 Guidance was applied or followed *during* the conspiracy period to a *buying group*.

218. Messrs. Sullivan, Steck, Muller, and Foley also discussed working with DSOs that had “at least 35 percent ownership,” such as Pacific Dental. (Foley, Tr. 4641, 4643-45).

Response to Proposed Finding No. 218

Complaint Counsel has no specific response. However, the Proposed Finding is irrelevant, as conduct regarding DSOs has no bearing on Schein’s conduct regarding buying groups during the conspiracy period.

219. After confirming that the IDA buying group could drive compliance, Schein entered into a partnership with IDA. (Foley, Tr. 4645-47).

Response to Proposed Finding No. 219

The Proposed Finding is inaccurate and misleading in asserting that Schein applied the 2010 Guidance in May 2010 to IDA. It is also inaccurate and misleading in its assertion that IDA was viewed as a buying group. As set forth above in Response to Proposed Finding No. 218, the record evidence shows that Schein considered IDA to be a DSO with centralized purchasing. (CCFF ¶ 751). Schein executives stated that they would not work with IDA if it were a buying group/GPO. On January 26, 2012, Cavaretta wrote to Melanie Bingham and Hight regarding IDA: “It is dangerously close but I told him we would not do business with a GPO.” (CCFF ¶ 750). On January 26, 2012, Cavaretta then wrote: “The difference here is that they will force any customer to purchase from Schein which is more along the lines of a corp account.” (CCFF ¶ 751). By “corp account,” Cavaretta meant corporate practice or a DSO. (CCFF ¶ 751). As such, the Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it implies or asserts that the 2010 Guidance was applied

or followed *during* the conspiracy period to a *buying group*. That is consistent with the record evidence, which contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

220. Schein’s careful skepticism towards buying groups continued. In a September 2010 internal email, for example, Mr. Sullivan wrote (a year before the alleged conspiracy began) that buying groups present a “risk to overall HSI [Schein],” including “margin erosion, image, as well as competitors then following suite [*sic*] and a huge price war break[ing] out.” (CX 2113).

Response to Proposed Finding No. 220

Complaint Counsel has no specific response.

221. Mr. Sullivan’s concerns reflect legitimate, unilateral decision-making in a concentrated industry. (Carlton, Tr. 5385-90).

Response to Proposed Finding No. 221

First, this Proposed Finding is misleading and inaccurate because the testimony cited does not support the Proposed Finding: Dr. Carlton’s cited testimony does not mention and is not related to Mr. Sullivan’s concerns. Second, to the extent that this Proposed Finding is referencing Dr. Carlton’s formula or equation about Schein’s decision-making about buying groups, it is unreliable, misleading, and inaccurate because Dr. Carlton failed to do any quantitative analysis to support this assertion. While Dr. Carlton identified a formula in paragraph 75 of his expert report purporting to show opportunity and profitability costs related to Schein working with or not working with Kois Buyers Group (RX2832 at 051 (¶ 75) (Carlton Expert Report)), Dr. Carlton never actually applied the formula to any data to support his assertion. (RX2966 (Carlton, Dep. at 269-270) (“Q. Now, in the scope of your report, or in the four corners of your report have you attempted to perform this calculation? A. I don’t perform this calculation.”)). The support and foundation for Dr. Carlton’s

purported “formula” is unreliable because it is solely based on Dr. Carlton’s memory and interpretation of facts conveyed to him by Schein executives. Dr. Carlton testified that his understanding of the formula is based solely on his interviews with Schein executives where he did not even bother to keep his notes. (Carlton, Tr. 5427-5428, 5458-5466). He describes that the formula is “based on his understanding of speaking to Schein executives.” (Carlton, Tr. 5460-5461). In Dr. Carlton’s own words, the formula is “basically, my summary of what [Schein executives]’re telling me.” (Carlton, Tr. 5460-5461). Dr. Carlton admitted that he never showed this equation to anybody at Schein, nor did he ask whether Schein executives used this equation to make business decisions. (Carlton, Tr. 5464; *see also* RX2966 (Carlton, Dep. at 270, 281) (“Q. Are there any examples in this report that would show that Schein performed these, this calculation that you set forth in paragraph 75?...A. I don’t know that there was such a, that Schein had enough time to do such a calculation. I’m not aware of such a calculation...Q. Okay. But you didn’t ask specific questions that would explain how Schein would carry out the, understanding the values for the inputs into your equation. Correct?...A. I didn’t go over each element and ask them how they form expectations of each element.”)). Dr. Carlton further admitted that he solely relied on the interviews and does not cite any other evidence or sources to support his formula. (Carlton, Tr. 5465-5466).

Third, Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). To the extent that Schein claims that these profitability analyses are not representative of other buying groups, Dr. Marshall explained

that he studied five different relationships with the Kois Buyers Group and Smile Source because, in addition to having gotten off the ground, these buying groups operate in geographies (Seattle and Atlanta) in which Schein, Patterson, and Benco are likely to have their lowest collective share of sales and another distributor was likely to have a high share of sales. (CX7101 at 045-046, 064 (¶¶ 107-112, 165) (Marshall Expert Rebuttal Report)). These facts addressed potential concerns that the relative sizes of Schein and Patterson make it more costly for them to supply buying groups, both because (1) Schein and Patterson are likely to find itself more profitable to discount when they have a lower share of sales and (2) where Burkhart and Atlanta Dental are large, it illuminates whether a full-service distributor found it profitable to supply a buying group so in a geographic area in which its share of sales was relatively large. (CX7101 at 64 (¶ 165) (Marshall Expert Rebuttal Report)).

Differences between the Kois Buyers Group, with its single regional full-service distributor, and Smile Source, with its changing network of distributors over time, provide further reasons to believe that the experiences of distributors with these two groups provides some information about likely outcomes with other potential buying groups that went nowhere as a result of being rejected by Schein, Patterson, and/or Benco. (CX7101 at 64 (¶ 166) (Marshall Expert Rebuttal Report)). Dr. Marshall also explained that a common feature of the buying groups that he studied and other buying groups was that [REDACTED]

[REDACTED]

[REDACTED]; *see also* CX8040

(Marshall, Dep. at 212) (explaining that Kois Buyers Group and Smile Source are “the same in the sense of the definition I offer in paragraph 139.”)). Dr. Marshall elaborated that for buying groups generally “[a]ll these groups will have different management and they’ll be

issues that are different between them. But, again, these fall within what's identified in paragraph 139 of my report.” (CX8040 (Marshall, Dep. at 212)). Dr. Marshall also explained that for the buying groups in his profitability studies and buying groups generally, he

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

222. Many groups did show enough promise for Schein to partner with, and Schein continued its partnerships with, for example, Comfort Dental, Smile Source, the Dental Co-Op, and others. (CX 2109-002; RX 2712; Sullivan, Tr. 4131, 4181-82). However, that is not to say those relationships did not create their own conflicts and issues within Schein, particularly Smile Source.

Response to Proposed Finding No. 222

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that the 2010 Guidance was applied or followed *during* the conspiracy period, and to the extent the phrase “continued its partnerships” asserts or implies that Schein entered into relationships with the listed entities during the conspiracy period. The record evidence is clear—it did not do either. The record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). Moreover, none of the asserted relationships in the Proposed Finding disprove Schein’s participation in a conspiracy. First, Schein’s relationship with Smile Source is consistent with the record evidence establishing Schein’s participation in a

conspiracy. It was a pre-existing relationship established in 2008 that ended at the beginning of 2012, which made “Sullivan [] happy that we are less one more BG.” (CCFF ¶¶ 758, 899). Schein did not work with Smile Source during the conspiracy period. (*See* Responses to Proposed Finding Nos. 1105-1186). Second, the Dental Co-Op of Utah is another example of a pre-existing buying group relationship formed in 2007. (CCFF ¶¶ 442; *see also* Responses to Proposed Finding Nos. 581-633). The record evidence shows that Schein shut-down its relationship with the Dental Co-Op of Utah. (*See* Responses to Proposed Finding Nos. 581-633 (Dental Co-op of Utah)). Third, the record evidence shows that Comfort Dental was considered to be an elite DSO, and is thus irrelevant to Schein’s conduct regarding buying groups. (*See* Responses to Proposed Finding Nos. 493-511). Finally, the second sentence of the Proposed Finding is not supported by any citations to the evidence and should be disregarded.

2. *Continued Conflicts Between Special Markets and HSD, Implementation of the 2010 Guidance, and the Transfer of Smile Source from Special Markets to HSD in January 2011.*

223. Schein was the first distributor to contract with Smile Source, entering into a relationship with Smile Source in or around 2008 through its Special Markets division. (Goldsmith, Tr. 2071).

Response to Proposed Finding No. 223

Complaint Counsel has no specific response.

224. In August 2010, a field sales consultant raised concerns about Schein’s relationship with Smile Source. In an August 31, 2010 email, Schein Regional Manager Mike Finnan sent an email to, among others, Special Markets President Hal Muller and HSD President Tim Sullivan, expressing concerns about Smile Source and its attempt to recruit an existing HSD customer served by Florida FSC Scott Schenker. (CX 2111-010 (“One of Scott Schenker’s customers, Dr. Roy Greenberg ... is being recruited by a company called Smile Source.... The main purpose ... will be to recruit other dentists to purchase through this buying club....”)). Mr. Finnan explained that the “customer is not a corporate accounts customers[,] [h]e is simply a solo practitioner,” and noted the resulting conflict: “This appears to be another situation similar to Pugh Dental Alliance that is playing us against each other,” and “[a]ll that can be accomplish[ed] by allowing this activity is deterioration in our [g]ross profit.” (CX 2111-010).

Response to Proposed Finding No. 224

Complaint Counsel has no specific response.

225. After receiving this email, Mr. Sullivan and Mr. Muller worked to develop a plan for addressing these concerns. Mr. Muller noted Smile Source was more than just a buying group and “expects more [than] just purchases.” (CX 2111-009 (“Unlike Pugh, this group expects more [than] just purchases.... Smile Source is trying to emulate OCA with management services for dental offices for a percentage of revenue or actual fees for each admin function...”)).

Response to Proposed Finding No. 225

Complaint Counsel has no specific response.

226. Mr. Muller explained that, if Smile Source had changed into a just a discount-only buying group (meaning that it was primarily focused on offering discounted supplies), then it might not be an attractive business partner because without these value propositions any “FSC can say ‘I can put you on the same program, save your fee to them’. Then we will be pushing them to the competition.” (CX 2117-006).

Response to Proposed Finding No. 226

Complaint Counsel has no specific response.

227. Mr. Muller recommended “continu[ing] the relationship with Smile Source.” (CX 2111-007). He explained that Smile Source “is much more than [just] a buying group,” and that doing business with Smile Source was consistent with the guidance they had developed earlier in the year that Schein would entertain buying groups that could “force compliance.” (CX 2111-001 (“I feel that this much more than a buying group... We also determined at the beginning of the year (Dave, Tim, Randy, and myself) that we would entertain organizations that could force compliance.”)).

Response to Proposed Finding No. 227

Complaint Counsel has no specific response.

228. Mr. Sullivan, however, expressed continued concern about cannibalization, explaining that he does “not agree with” allowing Smile Source “to market to other practices ... discounts from Schein [that would] not otherwise [be] available.” (CX 2111-006). Unable to find “common ground,” Mr. Muller and Mr. Sullivan scheduled a sit down. (CX 2111-001). Two weeks later, Mr. Sullivan summarized the understanding that he and Mr. Muller had reached concerning Smile Source and the HSD account that Smile Source was recruiting. Specifically, Mr. Sullivan and Mr. Muller “agreed” that “neither of us support the concept of buying groups” due to “the risk ... for margin erosion” and the potential for “other competitors (CX 2113).

Response to Proposed Finding No. 228

Complaint Counsel has no specific response.

229. They agreed to work out a “mutually beneficial plan” to “allow” Smile Source to proceed, which ultimately involved transferring the account from Special Markets to HSD. (CX 2113; *see also* Sullivan, Tr. 4132, 4138-40). This transfer was designed to resolve conflicts with the FSCs and better serve Smile Source. (Sullivan, Tr. 3926-28, 4132, 4134-35, 4138-40). On October 13, 2010, Schein had a “very positive” conference call with Smile Source to discuss Schein’s proposal to transfer the Smile Source account to HSD. (Sullivan, Tr. 4135-36). Schein also wanted to set up another meeting with Smile Source so that it could “pitch [Schein’s] total value story,” as Schein believed that it could add value to Smile Source’s members other than just pricing discounts. (Sullivan, Tr. 4136).

Response to Proposed Finding No. 229

Complaint Counsel has no specific response.

230. In January 2011, Smile Source was transferred to HSD. (CX 2454; CX 0238). As Mr. Foley recounted to his team: “We were doing fine with Smile Source until they offered to enroll a dentist in Miami. As this was an existing HSD customer, the FSC went ballistic and voiced his concerns all the way up to Stan [Bergman, Chairman and CEO of Henry Schein, Inc.] Hal and I then met with Tim Sullivan and Dave Steck, and decided to move Smile Source to HSD. As there was no central purchasing, and all 15 Smile Source customers were private dentists, we made this happen in January 2011.” (CX 0238-001).

Response to Proposed Finding No. 230

Complaint Counsel has no specific response.

231. Complaint Counsel offered no evidence to show that the Smile Source transfer from Schein’s Special Markets division to HSD was the result of any conspiracy with Patterson or Benco. Complaint Counsel did not even claim the conspiracy had started in late 2010 or January 2011. There was no evidence of any communications at this time – or any time – between Schein and Patterson or Benco about Smile Source. Rather, the evidence shows that Schein’s decision was consistent with its unilateral self-interest, and that the transfer of Smile Source from Special Markets to HSD reflected a good faith effort to address multiple competing interests, including the desire to continue the Smile Source relationship and to resolve conflicts with FSCs. (SF 223-36).

Response to Proposed Finding No. 231

The third sentence of the Proposed Finding is inaccurate and contrary to the weight of the record evidence. The record evidence shows interfirm communications about Smile Source between Schein and Benco. (CCFF ¶¶ 1005-1021). The fourth sentence of the Proposed Finding, as to the portion asserting a “desire to continue the Smile Source relationship,” is

misleading and contrary to the weight of the record evidence to the extent it implies that Schein continued to work with Smile Source during the conspiracy. The record shows that after Smile Source was transferred to Special Markets from HSD in 2011, [REDACTED]

[REDACTED], the relationship ended at the beginning of 2012. (CCFF ¶¶ 899-913). Regardless of who terminated whom, the record evidence shows that Schein did not work with Smile Source during the conspiracy and that Sullivan was pleased when the relationship ended at the beginning of 2012. (CCFF ¶¶ 914-924). Finally, evidence regarding Schein's conduct in relation to the pre-existing Smile Source relationship does not disprove Schein's participation in a conspiracy. The record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322). ; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

232. As part of the transfer to HSD, HSD continued providing the same discounts to Smile Source members that Special Markets had provided. (CX 2454 (“[W]e have just received a major account Smile Source from our special markets team.... They have special pricing based on the Special market formulary pricing.”); RX 2714-001 (“Since Smile Source has been moved over to [HSD,] these accounts need to be moved over [to HSD] and kept on the same Sales Plan.”)).

Response to Proposed Finding No. 232

The Proposed Finding is misleading and contrary to the weight of the record evidence. The record shows that after Smile Source was transferred to Special Markets from HSD in 2011,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], the relationship ended at the beginning of 2012. (CCFF ¶¶ 899-913). Regardless of who terminated whom, the record evidence shows that Schein did not work with Smile Source during the conspiracy and that Sullivan was pleased when the relationship ended at the beginning of 2012. (CCFF ¶¶ 914-924). Finally, evidence regarding Schein’s conduct in relation to the pre-existing Smile Source relationship does not disprove Schein’s participation in a conspiracy. The record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

233. In February 2011, senior leadership for HSD, including Tim Sullivan, met with senior leadership for Smile Source. At this meeting, the parties expressed their mutual desire for the relationship to grow. (CX 2687; CX 2899). Todd Nickerson, Smile Source’s National Director of Business Development, thanked Schein for “extending such a WARM welcome to us,” and

noted Smile Source's "excite[ment] about the future of our business relationship...." Mr. Sullivan responded, "I remain very excited about our future together and the business model you have created," explaining that their service-oriented approach "lines up extremely well with [HSD's] approach." (CX 2899-001). However, due to Smile Source only having 25 members, Mr. Sullivan remained skeptical of whether Smile Source could provide value to its members. (Sullivan, Tr. 4142). This grew into a concern when around eight months after Schein's positive meeting with Smile Source in February 2011, Schein did not see any growth in Smile Source's membership or "additional penetration in the existing members." (Sullivan, Tr. 4143; CX 2299-001).

Response to Proposed Finding No. 233

Complaint Counsel has no specific response.

234. As Schein worked to resolve the conflicts posed by Smile Source, it continued to evaluate other buying group requests. In July 2012, for example, an FSC brought a buying group opportunity to Jake Meadow's attention. (CX 0170). He did not reject the request but instead asked a "standard group of questions" to evaluate the opportunity: "Who is the leader here with [this] group? How many offices is this? ... Were the service discounts approved, by who? How much will each office buy?" (CX 0170; Meadows, Tr. 2468-70).

Response to Proposed Finding No. 234

The Proposed Finding is inaccurate, misleading, and contrary to the weight of the record evidence in its assertion that Schein "continued to evaluate other buying group requests" and that Meadows "did not reject the request." First, the Proposed Finding omits the following portion of CX0170, where on July 17, 2012, Meadows wrote to a Henry Schein field sales consultant, Patty Delikat: "I have to tell you Ron and Dan made a decision that is against what Tim Sullivan has directed us to do in regards to supporting Buying groups. We do not want our customers organizing and creating what are known as GPOs it takes the value away from the distributor." (CCFF ¶ 773 (quoting CX0170 at 001)). In February 2012, Sullivan informed employees that he wanted to "KILL the buying group model," and Meadows directed the sales force to refuse to sell to buying groups. CX0170 and Delikat's request in that exhibit is an example of this conduct. (CCFF ¶¶ 728-781). The record evidence also shows that Schein did not evaluate buying groups during the conspiracy period. The record

evidence contains dozens of documents that confirm that Schein enforced a policy against working with buying groups during the conspiracy and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

235. When Mr. Meadows heard that the discounts had already been approved, he expressed frustration that it had not been forwarded to the Special Markets team first, as they had primary responsibility for buying groups at the time and the ability to write centralized purchaser contracts and establish formularies. (Meadows, Tr. 2470-72, 2474-76 (explaining that he told the FSC that they had not followed the process Mr. Sullivan had directed as to doing business with buying groups)).

Response to Proposed Finding No. 235

The Proposed Finding is inaccurate, misleading, and contrary to the weight of the record evidence to the extent it asserts or implies that what “Mr. Sullivan had directed” involved approval by Special Markets. First, the record evidence shows that Meadows’ statement in CX0170 related to Sullivan’s instruction to reject buying groups. On July 17, 2012, Meadows wrote to a Henry Schein field sales consultant, Patty Delikat: “I have to tell you Ron and Dan made a decision that is against what Tim Sullivan has directed us to do in regards to supporting Buying groups. We do not want our customers organizing and creating what are known as GPOs it takes the value away from the distributor.” (CCFF ¶ 773 (quoting CX0170 at 001)). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Meadows directed the sales force to refuse to sell to buying groups. CX0170 and Delikat’s request in that exhibit is an example of this conduct. (CCFF ¶¶ 728-781). Second, Special Markets was not the only division that could contract with buying groups, and the Proposed Finding is misleading to the extent it asserts or implies that Special Markets approval was necessary. (*See* Responses to Proposed Finding Nos. 104-106).

236. Complaint Counsel relies on a May 2013 email where Mr. Cavaretta wrote to a Special Markets employee that “[w]e try to avoid buying groups at all costs and therefore don’t really recognize them. I’m not aware of any groups in the US where we sell to an association and they in turn sell to their members.” (CX 2509-001). However, in the email, Mr. Cavaretta was addressing a very specific type of buying group, in which the group takes title to the supplies, makes one or two purchases a year, and presumably warehouses them before reselling to individual members, and noting that it was not a type of buying group that Schein had a relationship with. (CX 2509-001-02; Cavaretta, Tr. 5655-65). Complaint Counsel has not identified any buying group fitting that description that approached Schein for a contract. Moreover, Mr. Cavaretta’s statement that Schein doesn’t “really recognize [buying groups]” is merely an explanation to a Special Markets employee for why, if HSD “manages customers who are buying groups,” its “account data” systems do not “track [those groups] specifically.” (CX 2509-001).

Response to Proposed Finding No. 236

Complaint Counsel has no specific response to the first sentence of the Proposed Finding.

The assertion that Cavaretta was referring to a specific type of buying group with his statement “We try to avoid buying groups at all costs and don’t really recognize them,” is contrary to the weight of the evidence. (*See* CX2509 at 001). Cavaretta’s trial testimony, on which the Proposed Finding relies, is contradicted by Cavaretta’s prior sworn deposition testimony, where he provided a different explanation for his statement that Schein avoids buying groups. Cavaretta previously testified “at that time, we didn't completely understand buying groups . . . So, therefore, from a business standpoint, it didn't make sense. And we weren't really doing business with buying groups at that time, so—and in not really recognizing them, they didn't fit either in HSD at that time or special markets. . . .” (CX8033 (Cavaretta, Dep. at 204-205); CX2509 at 001). Moreover, CX2509 shows that Cavaretta’s statement “I’m not aware of any groups in the US where we sell to an association and they in turn sell to their members. They may exist but I’m not aware of any,” was a point separate and apart from his statement about avoiding buying groups. (CX2509 at 001).

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein avoided certain type of buying groups but not others

during the conspiracy period. The record evidence clearly shows Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups regardless of type. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). By February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives, including Cavaretta, directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against working with buying groups during the conspiracy and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). Indeed, Cavaretta’s statements in CX2509 is another example of Schein’s compliance with a policy to reject buying groups during the conspiracy period.

3. *Project Pyramid, the Creation of Mid-Market in April 2014, and the Shift of Primary Responsibility for Buying Groups from Special Markets to HSD.*

237. Prior to 2014, Special Markets had primary responsibility of buying groups. (Foley, Tr. 4607-08; Cavaretta, Tr. 5588; Sullivan, Tr. 4091; Titus, Tr. 5336).

Response to Proposed Finding No. 237

The Proposed Finding is inaccurate, misleading, and contrary to the weight of the record evidence to the extent it asserts or implies that “primary responsibility” belonged only to Special Markets. The record evidence shows that both HSD and Special Markets had responsibility for buying groups. (Foley, Tr. 4523; *see also* Responses to Proposed Finding Nos. 104-106). HSD had primary responsibility for buying groups beginning in 2010 or

2011. (Steck, Tr. 3735-3737). During the conspiracy, buying groups of private practices that approached Schein would be directed toward HSD. (CX0309 (Muller, IHT at 94-95) (“Q. Prior to 2014, when a buying group was interested in working with Henry Schein, which division would that buying group be directed toward? A. If it was for the private practitioner, it would go to Henry Schein dental. If it was for a special markets world type of customer, it would go to me”)). Buying groups were better served by HSD. (CX2504 (In 2011, Special Markets Manager Kathleen Titus stated that GPOs are “a better fit for HSD than SM”)).

238. However, the Elite DSO segment was growing and Special Markets did not have the resources to continue to properly serve all of its current customers, including a growing buying group segment. (Foley, Tr. 4608-4609).

Response to Proposed Finding No. 238

Complaint Counsel has no specific response.

239. Elite Account status included groups that were doing over \$1 million in sales or had ten or more practice locations. (RX 2392-006).

Response to Proposed Finding No. 239

Complaint Counsel has no specific response.

240. Schein decided to create a new division within HSD, called Mid-Market, to allow Special Markets to focus primarily on Elite DSO’s and allow HSD to serve other growing customer segments, including buying groups. (RX 2392-002; Foley, Tr. 4607; Sullivan, Tr. 4106-4107; *see also* Cavaretta, Tr. 5584-85).

Response to Proposed Finding No. 240

Complaint Counsel has no specific response.

241. Schein began developing its strategy for the formation of Mid-Market in late 2013. (Cavaretta, Tr. 5583).

Response to Proposed Finding No. 241

Complaint Counsel has no specific response.

242. On December 9, 2013, HSD started a two-day offsite meeting attended by Tim Sullivan, Dave Steck, Jake Meadows, and Joe Cavaretta, among others (“2013 Offsite Meeting”). (CX 2461-001).

Response to Proposed Finding No. 242

Complaint Counsel has no specific response.

243. HSD typically holds offsite meetings once or twice a year outside of the HSD offices, which provides the opportunity for uninterrupted discussion about important action items. (Meadows, Tr. 2582; Sullivan, Tr. 4107).

Response to Proposed Finding No. 243

Complaint Counsel has no specific response.

244. At the 2013 Offsite Meeting, Tim Sullivan presented on the topic of “how do we change our operating model to allow for investment in key priorities,” which included discussion on the impact of the growth of Corporate Accounts Group business and the growth of GPOs. (CX 2461-005 (“GPOs are growing” and Schein needed to “brainstorm[]” about how “to allow for [further] investment in [that space].”); Sullivan, Tr. 4107-08). The topic of the growth of GPOs was on the agenda because Schein was being approached more often with buying group inquiries, and, due to past internal conflict between HSD and Special Markets, wanted to determine its go-to-market strategy. (Sullivan, Tr. 4108; Foley, Tr. 4608-09).

Response to Proposed Finding No. 244

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein created or had a “go-to-market strategy” to work with buying groups during the conspiracy period. The record evidence is clear—Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups regardless of type. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). By February 2012, Sullivan informed

employees that he wanted to “KILL the buying group model,” and Schein executives, including Cavaretta, directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

Furthermore, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the Mid-Market group was created to serve or served buying groups. The record evidence shows that the Mid-Market group was formed to serve small DSOs, group practices, and community health centers. (Steck, Tr. 3690). Brady, who developed protocols for engaging with buying groups that came to be in September 2015 (after the agreement began to fall apart), testified that this was a “sidebar task” that “didn’t have to do with my -- my main focus, the majority focus of my job” which was to work with Mid-Market group practice customers, not buying groups. (CX8020 (Brady, Dep. at 148-149)). Brady testified that he did not recall Schein having any buying groups in the Mid-Market group when he took over in January 2015. (CX8020 (Brady, Dep. at 128) (“Q. Were there any buying groups of independent dentists that existed in Mid Market when you took over in January of 2015? A. Not when I took over in 2015 that I can recall.”)). In September 2015, Brady sent an email to Schein executives about plans to engage with buying groups. (CX0192 at 002). Brady wrote: “[t]raditionally, Schein has rarely engaged with these groups, but times are changing rapidly in the dental market and we must begin to engage.” (CX0192 at 002). The record evidence also shows that even as of January 2016, Schein still

had to “figure out if the [Mid-Market] is going to be responsible for [buying groups].”

(CX2280 at 001; Cavaretta, Tr. 5637-5638).

245. After the 2013 Offsite Meeting, HSD realized it did not have a specific offering for customers with three to twenty practice locations nor did it have a formal strategy on buying groups. (Cavaretta, Tr. 5531, 5583-85).

Response to Proposed Finding No. 245

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not have a “formal strategy on buying groups.”

The record evidence is clear—Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups regardless of type. The record evidence shows that Schein worked with some buying groups prior to 2011, but by

December 2011, it had changed course and “no longer participate[d] in Buying Groups.”

(CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy.

(Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

Furthermore, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the Mid-Market group was created to serve or served buying groups. The record evidence shows that the Mid-Market group was formed to serve small DSOs, group practices, and community health centers. (Steck, Tr. 3690). Brady, who developed protocols for engaging with buying groups that came to be in September 2015 (after the agreement began to fall apart), testified that this was a “sidebar task” that

“didn't have to do with my -- my main focus, the majority focus of my job” which was to work with Mid-Market group practice customers, not buying groups. (CX8020 (Brady, Dep. at 148-149)). Brady testified that he did not recall Schein having any buying groups in the Mid-Market group when he took over in January 2015. (CX8020 (Brady, Dep. at 128) (“Q. Were there any buying groups of independent dentists that existed in Mid Market when you took over in January of 2015? A. Not when I took over in 2015 that I can recall.”)). In September 2015, Brady sent an email to Schein executives about plans to engage with buying groups. (CX0192 at 002). Brady wrote: “[t]raditionally, Schein has rarely engaged with these groups, but times are changing rapidly in the dental market and we must begin to engage.” (CX0192 at 002). The record evidence also shows that even as of January 2016, Schein still had to “figure out if the [Mid-Market] is going to be responsible for [buying groups].” (CX2280 at 001; Cavaretta, Tr. 5637-5638).

246. Given that DSOs were increasing in popularity, more offices wanted multisite locations, and buying groups were approaching Schein more frequently, Schein wanted to develop a strategy to better serve these customers in an evolving market. (Cavaretta, Tr. 5584-85; Sullivan, Tr. 4106-08).

Response to Proposed Finding No. 246

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein developed a strategy for serving buying groups during the conspiracy period. The record evidence is clear—Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups regardless of type. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein

executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

Furthermore, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the Mid-Market group was created to serve or served buying groups. The record evidence shows that the Mid-Market group was formed to serve small DSOs, group practices, and community health centers. (Steck, Tr. 3690). Brady, who developed protocols for engaging with buying groups that came to be in September 2015 (after the agreement began to fall apart), testified that this was a "sidebar task" that "didn't have to do with my -- my main focus, the majority focus of my job" which was to work with Mid-Market group practice customers, not buying groups. (CX8020 (Brady, Dep. at 148-149)). Brady testified that he did not recall Schein having any buying groups in the Mid-Market group when he took over in January 2015. (CX8020 (Brady, Dep. at 128) ("Q. Were there any buying groups of independent dentists that existed in Mid Market when you took over in January of 2015? A. Not when I took over in 2015 that I can recall.")). In September 2015, Brady sent an email to Schein executives about plans to engage with buying groups. (CX0192 at 002). Brady wrote: "[t]raditionally, Schein has rarely engaged with these groups, but times are changing rapidly in the dental market and we must begin to engage." (CX0192 at 002). The record evidence also shows that even as of January 2016, Schein still had to "figure out if the [Mid-Market] is going to be responsible for [buying groups]." (CX2280 at 001; Cavaretta, Tr. 5637-5638).

247. Schein's desire to formulate such a strategy to serve growing customer segments, including buying groups, led to the creation of Project Pyramid. (Cavaretta, Tr. 5584-5586; Sullivan, Tr. 4106-08).

Response to Proposed Finding No. 247

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts Schein wanted to serve or did serve buying groups during the conspiracy period. Regardless of Schein's "desire," the record evidence is clear—Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to "KILL the buying group model," and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

Furthermore, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the Mid-Market group was created to serve or served buying groups. The record evidence shows that the Mid-Market group was formed to serve small DSOs, group practices, and community health centers. (Steck, Tr. 3690). Brady, who developed protocols for engaging with buying groups that came to be in September 2015 (after the agreement began to fall apart), testified that this was a "sidebar task" that "didn't have to do with my -- my main focus, the majority focus of my job" which was to work with Mid-Market group practice customers, not buying groups. (CX8020 (Brady, Dep.

at 148-149)). Brady testified that he did not recall Schein having any buying groups in the Mid-Market group when he took over in January 2015. (CX8020 (Brady, Dep. at 128) (“Q. Were there any buying groups of independent dentists that existed in Mid Market when you took over in January of 2015? A. Not when I took over in 2015 that I can recall.”)). In September 2015, Brady sent an email to Schein executives about plans to engage with buying groups. (CX0192 at 002). Brady wrote: “[t]raditionally, Schein has rarely engaged with these groups, but times are changing rapidly in the dental market and we must begin to engage.” (CX0192 at 002). The record evidence also shows that even as of January 2016, Schein still had to “figure out if the [Mid-Market] is going to be responsible for [buying groups].” (CX2280 at 001; Cavaretta, Tr. 5637-5638).

248. The purpose of Project Pyramid was to create a structure within Schein to properly serve these growing customer segments, including resources such as a pricing plan, value proposition, personnel, and data analytics. (Sullivan, Tr. 4106-08; Cavaretta, Tr. 5585).

Response to Proposed Finding No. 248

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein created a structure to serve buying groups during the conspiracy period. The record evidence is clear—Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.”

(CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy.

(Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

Furthermore, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the Mid-Market group was created to serve or served buying groups. The record evidence shows that the Mid-Market group was formed to serve small DSOs, group practices, and community health centers. (Steck, Tr. 3690). Brady, who developed protocols for engaging with buying groups that came to be in September 2015 (after the agreement began to fall apart), testified that this was a "sidebar task" that "didn't have to do with my -- my main focus, the majority focus of my job" which was to work with Mid-Market group practice customers, not buying groups. (CX8020 (Brady, Dep. at 148-149)). Brady testified that he did not recall Schein having any buying groups in the Mid-Market group when he took over in January 2015. (CX8020 (Brady, Dep. at 128) ("Q. Were there any buying groups of independent dentists that existed in Mid Market when you took over in January of 2015? A. Not when I took over in 2015 that I can recall.")). In September 2015, Brady sent an email to Schein executives about plans to engage with buying groups. (CX0192 at 002). Brady wrote: "[t]raditionally, Schein has rarely engaged with these groups, but times are changing rapidly in the dental market and we must begin to engage." (CX0192 at 002). The record evidence also shows that even as of January 2016, Schein still had to "figure out if the [Mid-Market] is going to be responsible for [buying groups]." (CX2280 at 001; Cavaretta, Tr. 5637-5638).

249. Shortly after the 2013 Offsite Meeting, HSD and Special Markets met to discuss their "Collaboration Plan" relating to Project Pyramid and the internal structure that was being developed to appropriately serve customer segments. (RX 2392-001; Sullivan, Tr. 4108-09; Cavaretta, Tr. 5585-86).

Response to Proposed Finding No. 249

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein created an “internal structure” to serve buying groups during the conspiracy period. The record evidence is clear—Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

Furthermore, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the Mid-Market group was created to serve or served buying groups. The record evidence shows that the Mid-Market group was formed to serve small DSOs, group practices, and community health centers. (Steck, Tr. 3690). Brady, who developed protocols for engaging with buying groups that came to be in September 2015 (after the agreement began to fall apart), testified that this was a “sidebar task” that “didn’t have to do with my -- my main focus, the majority focus of my job” which was to work with Mid-Market group practice customers, not buying groups. (CX8020 (Brady, Dep. at 148-149)). Brady testified that he did not recall Schein having any buying groups in the Mid-Market group when he took over in January 2015. (CX8020 (Brady, Dep. at 128) (“Q.

Were there any buying groups of independent dentists that existed in Mid Market when you took over in January of 2015? A. Not when I took over in 2015 that I can recall.”)). In September 2015, Brady sent an email to Schein executives about plans to engage with buying groups. (CX0192 at 002). Brady wrote: “[t]raditionally, Schein has rarely engaged with these groups, but times are changing rapidly in the dental market and we must begin to engage.” (CX0192 at 002). The record evidence also shows that even as of January 2016, Schein still had to “figure out if the [Mid-Market] is going to be responsible for [buying groups].” (CX2280 at 001; Cavaretta, Tr. 5637-5638).

250. A main goal for Project Pyramid was to “[c]reate clearly defined customer segments” to ensure that Schein had the right resources to address the needs of its customers. (RX 2392-002; Sullivan, Tr. 4108-09; Meadows, Tr. 2584). Another goal was to “[c]reate a sales organization within HSD to support” various groups that were centralized purchasers, such as large group practices, CHCs, and institutional customers that HSD had not typically served in the past. (RX 2392-002; Sullivan, Tr. 4109-10).

Response to Proposed Finding No. 250

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein developed Project Pyramid to “address the needs of” buying groups during the conspiracy period. The record evidence is clear—Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the

conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

Furthermore, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the Mid-Market group was created to serve or served buying groups. The record evidence shows that the Mid-Market group was formed to serve small DSOs, group practices, and community health centers. (Steck, Tr. 3690). Brady, who developed protocols for engaging with buying groups that came to be in September 2015 (after the agreement began to fall apart), testified that this was a “sidebar task” that “didn’t have to do with my -- my main focus, the majority focus of my job” which was to work with Mid-Market group practice customers, not buying groups. (CX8020 (Brady, Dep. at 148-149)). Brady testified that he did not recall Schein having any buying groups in the Mid-Market group when he took over in January 2015. (CX8020 (Brady, Dep. at 128) (“Q. Were there any buying groups of independent dentists that existed in Mid Market when you took over in January of 2015? A. Not when I took over in 2015 that I can recall.”)). In September 2015, Brady sent an email to Schein executives about plans to engage with buying groups. (CX0192 at 002). Brady wrote: “[t]raditionally, Schein has rarely engaged with these groups, but times are changing rapidly in the dental market and we must begin to engage.” (CX0192 at 002). The record evidence also shows that even as of January 2016, Schein still had to “figure out if the [Mid-Market] is going to be responsible for [buying groups].” (CX2280 at 001; Cavaretta, Tr. 5637-5638).

251. This transfer of responsibility would allow Special Markets to “focus primarily on Elite DSO, Federal and Dental School customers,” as the DSO segment was growing and Special Markets was struggling to handle its existing customer segments. (RX 2392-002; Foley, Tr. 4607-08).

Response to Proposed Finding No. 251

Complaint Counsel has no specific response to the attribution of the statement to RX2392.

However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent that the phrase “a transfer of responsibility” asserts or implies that certain divisions within Schein did or did not work with buying groups. The record evidence shows that both HSD and Special Markets had responsibility for buying groups. (Foley, Tr. 4523; *see also* Responses to Proposed Finding Nos. 104-106). HSD had primary responsibility for buying groups beginning in 2010 or 2011. (Steck, Tr. 3735-3737). During the conspiracy, buying groups of private practices that approached Schein would be directed toward HSD. (CX0309 (Muller, IHT at 94-95) (“Q. Prior to 2014, when a buying group was interested in working with Henry Schein, which division would that buying group be directed toward? A. If it was for the private practitioner, it would go to Henry Schein dental. If it was for a special markets world type of customer, it would go to me”)). Buying groups were better served by HSD. (CX2504 (In 2011, Special Markets Manager Kathleen Titus stated that GPOs are “a better fit for HSD than SM”)). Furthermore, the Proposed Finding is misleading to the extent it asserts or implies that Schein created a structure to serve buying groups during the conspiracy period. The record evidence is clear—the policy was one where Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups regardless of type. By February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives, including Cavaretta, directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-781). The record evidence is replete with buying groups that Schein rejected during the conspiracy period. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint

Counsel's Post-Trial Brief, at Attachment C). Furthermore, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the Mid-Market group was created to serve or served buying groups. The record evidence shows that the Mid-Market group was formed to serve small DSOs, group practices, and community health centers. (Steck, Tr. 3690). The record evidence also shows that even as of January 2016, Schein still had to "figure out if the [Mid-Market] is going to be responsible for [buying groups]." (CX2280 at 001; Cavaretta, Tr. 5637-5638).

252. At the time, HSD did not have a formal system in place to serve centralized purchasers, and Project Pyramid aimed to address that issue. (Sullivan, Tr. 4110; Meadows, Tr. 2585).

Response to Proposed Finding No. 252

The Proposed Finding is vague as to the phrase "centralized purchasers," as it is not described or defined. In addition, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent that it asserts or implies that HSD created a formal system for a particular division to serve buying groups during the conspiracy period. The record evidence is clear—Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to "KILL the buying group model," and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

Furthermore, the record evidence shows that both HSD and Special Markets had responsibility for buying groups. (Foley, Tr. 4523; *see also* Responses to Proposed Finding Nos. 104-106). HSD had primary responsibility for buying groups beginning in 2010 or 2011. (Steck, Tr. 3735-3737). During the conspiracy, buying groups of private practices that approached Schein would be directed toward HSD. (CX0309 (Muller, IHT at 94-95) (“Q. Prior to 2014, when a buying group was interested in working with Henry Schein, which division would that buying group be directed toward? A. If it was for the private practitioner, it would go to Henry Schein dental. If it was for a special markets world type of customer, it would go to me”)). Buying groups were better served by HSD. (CX2504 (In 2011, Special Markets Manager Kathleen Titus stated that GPOs are “a better fit for HSD than SM”)). Moreover, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the Mid-Market group was created to serve or served buying groups. The record evidence shows that the Mid-Market group was formed to serve small DSOs, group practices, and community health centers. (Steck, Tr. 3690). Brady, who developed protocols for engaging with buying groups that came to be in September 2015 (after the agreement began to fall apart), testified that this was a “sidebar task” that “didn't have to do with my -- my main focus, the majority focus of my job” which was to work with Mid-Market group practice customers, not buying groups. (CX8020 (Brady, Dep. at 148-149)). Brady testified that he did not recall Schein having any buying groups in the Mid-Market group when he took over in January 2015. (CX8020 (Brady, Dep. at 128) (“Q. Were there any buying groups of independent dentists that existed in Mid Market when you took over in January of 2015? A. Not when I took over in 2015 that I can recall.”)). In September 2015, Brady sent an email to Schein executives about plans to engage with buying

groups. (CX0192 at 002). Brady wrote: “[t]raditionally, Schein has rarely engaged with these groups, but times are changing rapidly in the dental market and we must begin to engage.”

(CX0192 at 002). The record evidence also shows that even as of January 2016, Schein still had to “figure out if the [Mid-Market] is going to be responsible for [buying groups].”

(CX2280 at 001; Cavaretta, Tr. 5637-5638).

253. With the Mid-Market space developed through Project Pyramid, HSD took responsibility for a diverse range of customers, from DSOs that did not qualify as Elite – which “owned the practices..., could drive compliance and wanted certain pricing” – to “buying groups that did not own the practices,” creating “a problem with compliance, yet they wanted pricing.” (Cavaretta, Tr. 5591). This required “a lot of balancing ... in the field,” as HSD continued to learn how to deal with these various kinds of customers. (Cavaretta, Tr. 5591).

Response to Proposed Finding No. 253

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent that the phrase “HSD took responsibility for” buying groups implies or asserts that HSD served buying groups during the conspiracy period. The record evidence is clear—Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

254. Buying groups were not called out as a specific customer segment in documentation relating to Project Pyramid because it was not a large enough customer segment at that time to be specifically identified on the presentation. (Sullivan, Tr. 4110-11; Meadows, Tr. 2586).

Response to Proposed Finding No. 254

Complaint Counsel has no specific response to the statement that “Buying groups were not called out as a specific customer segment in documentation relating to Project Pyramid.”

However, the remainder of the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein, through Project Pyramid or otherwise, created a structure to serve buying groups during the conspiracy period. The record evidence is clear—Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

255. However, buying groups were definitely a part of Project Pyramid. (Cavaretta, Tr. 5587). While Schein planned to address buying groups within Project Pyramid, at that time it was simply not a key strategic priority. (Sullivan, Tr. 4110-11 (“It was a tactical thing we were going to address within this project, but it was not going to make the key priority list.”); Cavaretta, Tr. 5587 (“I was the leader of that space, so I know for a fact that it [buying groups] was part of the mid-market space.”)).

Response to Proposed Finding No. 255

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein, through Project Pyramid or otherwise, created a structure to serve buying groups during the conspiracy period. (*See also* Response to Proposed Finding No. 254). The record evidence is clear—Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

256. Schein originally planned to name the new HSD division serving certain Project Pyramid groups as “Henry Schein Dental Special Markets.” (Sullivan, Tr. 4111-12). However, Schein decided against that name and instead named the new division “Mid-Market.” (Sullivan, Tr. 4112; Meadows, Tr. 2587).

Response to Proposed Finding No. 256

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the Mid-Market group was created to serve or served buying groups. The record evidence shows that the Mid-Market group was formed to serve small DSOs, group practices, and community health centers. (Steck, Tr. 3690). Brady, who developed protocols for engaging with buying groups that came to be in September 2015

(after the agreement began to fall apart), testified that this was a “sidebar task” that “didn't have to do with my -- my main focus, the majority focus of my job” which was to work with Mid-Market group practice customers, not buying groups. (CX8020 (Brady, Dep. at 148-149)). Brady testified that he did not recall Schein having any buying groups in the Mid-Market group when he took over in January 2015. (CX8020 (Brady, Dep. at 128) (“Q. Were there any buying groups of independent dentists that existed in Mid Market when you took over in January of 2015? A. Not when I took over in 2015 that I can recall.”)). In September 2015, Brady sent an email to Schein executives about plans to engage with buying groups. (CX0192 at 002). Brady wrote: “[t]raditionally, Schein has rarely engaged with these groups, but times are changing rapidly in the dental market and we must begin to engage.” (CX0192 at 002). The record evidence also shows that even as of January 2016, Schein still had to “figure out if the [Mid-Market] is going to be responsible for [buying groups].” (CX2280 at 001; Cavaretta, Tr. 5637-5638).

The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that HSD served buying groups during the conspiracy period. It did not. The record evidence is clear—Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying

groups and shows that Schein rejected numerous buying groups during the conspiracy.

(Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

257. In early 2014, the Mid-Market division was created within HSD to serve groups consisting of large group practices, CHCs, a portion of institutional customers, buying groups, and customers interested in having multisite locations. (Sullivan, Tr. 4112; Cavaretta, Tr. 5585-87; RX 2392).

Response to Proposed Finding No. 257

Complaint Counsel has no specific response to the statement that the "Mid-Market division was created within HSD" in early 2014. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the Mid-Market group was created to serve or served buying groups. The record evidence shows that the Mid-Market group was formed to serve small DSOs, group practices, and community health centers. (Steck, Tr. 3690). Brady, who developed protocols for engaging with buying groups that came to be in September 2015 (after the agreement began to fall apart), testified that this was a "sidebar task" that "didn't have to do with my -- my main focus, the majority focus of my job" which was to work with Mid-Market group practice customers, not buying groups. (CX8020 (Brady, Dep. at 148-149)). Brady testified that he did not recall Schein having any buying groups in the Mid-Market group when he took over in January 2015. (CX8020 (Brady, Dep. at 128) ("Q. Were there any buying groups of independent dentists that existed in Mid Market when you took over in January of 2015? A. Not when I took over in 2015 that I can recall.")). In September 2015, Brady sent an email to Schein executives about plans to engage with buying groups. (CX0192 at 002). Brady wrote: "[t]raditionally, Schein has rarely engaged with these groups, but times are changing rapidly in the dental market and we must begin to engage." (CX0192 at 002). The record evidence also shows that

even as of January 2016, Schein still had to “figure out if the [Mid-Market] is going to be responsible for [buying groups].” (CX2280 at 001; Cavaretta, Tr. 5637-5638).

The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that HSD served buying groups during the conspiracy period.

It did not. The record evidence is clear—Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

258. Large group practices or smaller DSOs that fell under Mid-Market consisted of groups that were doing \$150,000 to \$1 million in sales per year or had three to nine practice locations. (RX 2392-006).

Response to Proposed Finding No. 258

Complaint Counsel has no specific response to the attribution of the statement to RX2392.

However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Mid-Market served buying groups. The record evidence shows that the Mid-Market group was formed to serve small DSOs, group practices, and community health centers. (Steck, Tr. 3690). Brady, who developed protocols for engaging with buying groups that came to be in September 2015 (after the agreement

began to fall apart), testified that this was a “sidebar task” that “didn't have to do with my -- my main focus, the majority focus of my job” which was to work with Mid-Market group practice customers, not buying groups. (CX8020 (Brady, Dep. at 148-149)). Brady testified that he did not recall Schein having any buying groups in the Mid-Market group when he took over in January 2015. (CX8020 (Brady, Dep. at 128) (“Q. Were there any buying groups of independent dentists that existed in Mid Market when you took over in January of 2015? A. Not when I took over in 2015 that I can recall.”)). In September 2015, Brady sent an email to Schein executives about plans to engage with buying groups. (CX0192 at 002). Brady wrote: “[t]raditionally, Schein has rarely engaged with these groups, but times are changing rapidly in the dental market and we must begin to engage.” (CX0192 at 002). The record evidence also shows that even as of January 2016, Schein still had to “figure out if the [Mid-Market] is going to be responsible for [buying groups].” (CX2280 at 001; Cavaretta, Tr. 5637-5638).

Indeed, the record evidence is clear—Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

259. Prior to the creation of Mid-Market, Special Markets had primary responsibility for CHCs, institutional customers, buying groups, and large group practices. (Foley, Tr. 4607).

Response to Proposed Finding No. 259

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent that it asserts or implies that “Special Markets had primary responsibility for . . . buying groups” prior to the creation of the Mid-Market group or division. The record evidence does not establish that any division of Schein served buying groups during the conspiracy.

The record evidence is clear—Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

In addition, the record evidence shows that both HSD and Special Markets had responsibility for buying groups before 2014, and that both rejected buying groups during the conspiracy period pursuant to a policy. (Foley, Tr. 4523; CCFF ¶¶ 661-1100, 1159-1166, 1316-1322; Complaint Counsel’s Post-Trial Brief, at Attachment C; *See* Responses to Proposed Finding Nos. 104-106).

260. The result of Project Pyramid was that Special Markets would now mainly serve Elite Accounts, such as Elite DSO's, Federal Government accounts, and Dental Schools. (RX 2392-006). Individual private practice dentists would continue to be served by HSD. (RX 2392-006).

Response to Proposed Finding No. 260

Complaint Counsel has no specific response.

261. With the creation of Mid-Market, the primary responsibility for buying groups transferred from Special Markets to Mid-Market. (Sullivan, Tr. 4112-13; Foley, Tr. 4608; Meadows, Tr. 2590; Cavaretta, Tr. 5586-87).

Response to Proposed Finding No. 261

Proposed Finding is inaccurate, misleading, and contrary to the weight of the record evidence. The record evidence does not show that responsibility for buying groups was specifically assigned to any one division as the Proposed Finding asserts, or that Mid-Market served buying groups. The record evidence shows that the Mid-Market group was formed to serve small DSOs, group practices, and community health centers. (Steck, Tr. 3690). Brady, who developed protocols for engaging with buying groups that came to be in September 2015 (after the agreement began to fall apart), testified that this was a "sidebar task" that "didn't have to do with my -- my main focus, the majority focus of my job" which was to work with Mid-Market group practice customers, not buying groups. (CX8020 (Brady, Dep. at 148-149)). Brady testified that he did not recall Schein having any buying groups in the Mid-Market group when he took over in January 2015. (CX8020 (Brady, Dep. at 128) ("Q. Were there any buying groups of independent dentists that existed in Mid Market when you took over in January of 2015? A. Not when I took over in 2015 that I can recall.")). In September 2015, Brady sent an email to Schein executives about plans to engage with buying groups. (CX0192 at 002). Brady wrote: "[t]raditionally, Schein has rarely engaged with these groups, but times are changing rapidly in the dental market and we must begin to engage." (CX0192 at 002). The record evidence also shows that even as of January 2016, Schein still

had to “figure out if the [Mid-Market] is going to be responsible for [buying groups].” (CX2280 at 001; Cavaretta, Tr. 5637-5638).

The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that any division of Schein served buying groups during the conspiracy period. It did not. The record evidence is clear—Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

262. As a result, some of the buying groups that previously resided in Special Markets transferred over to Mid-Market. (Foley, Tr. 4635). Breakaway, a Special Markets buying group, transferred to Mid-Market in 2014. (Foley, Tr. 4635; Titus, Tr. 5249). Steadfast, another Special Markets buying group, transferred to Mid-Market in 2014. (Titus, Tr. 5249).

Response to Proposed Finding No. 262

Complaint Counsel has no specific response to the third sentences of the Proposed Finding.

The second sentence is inaccurate. Schein considered Breakaway to be a combination of a DSO and an MSO that centrally managed and controlled its members’ dental products purchases, not a buying group, and that Schein did not believe that Breakaway was a buying

group or had a buying group component. (CCFF ¶¶ 75, 1755-1756; CX2482 at 001; CX8033 (Cavaretta, Dep. at 238-239); *see also* Responses to Proposed Finding Nos. 402-445).

As to the first sentence, it is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Mid-Market was created to serve buying groups, or that any transfers to Mid-Market were “as a result” of that purpose. The record evidence shows that the Mid-Market group was formed to serve small DSOs, group practices, and community health centers. (Steck, Tr. 3690). Brady, who developed protocols for engaging with buying groups that came to be in September 2015 (after the agreement began to fall apart), testified that this was a “sidebar task” that “didn't have to do with my -- my main focus, the majority focus of my job” which was to work with Mid-Market group practice customers, not buying groups. (CX8020 (Brady, Dep. at 148-149)). Brady testified that he did not recall Schein having any buying groups in the Mid-Market group when he took over in January 2015. (CX8020 (Brady, Dep. at 128) (“Q. Were there any buying groups of independent dentists that existed in Mid Market when you took over in January of 2015? A. Not when I took over in 2015 that I can recall.”)). In September 2015, Brady sent an email to Schein executives about plans to engage with buying groups. (CX0192 at 002). Brady wrote: “[t]raditionally, Schein has rarely engaged with these groups, but times are changing rapidly in the dental market and we must begin to engage.” (CX0192 at 002). The record evidence also shows that even as of January 2016, Schein still had to “figure out if the [Mid-Market] is going to be responsible for [buying groups].” (CX2280 at 001; Cavaretta, Tr. 5637-5638).

263. However, not all of the Special Markets buying groups transferred to Mid-Market. (Foley, Tr. 4609). Instead, Special Markets continued to work with OrthoSynetics, Comfort Dental, and Intermountain Dental Associates, among other buying groups, because Special Markets determined that it could serve these customers better than Mid-Market. (Foley, Tr. 4619-4620, 4634, 4646-47). Despite the shift in primary responsibility, Special Markets

continued to work with and enter into relationships with buying groups after the formation of Mid-Market. (Sullivan, Tr. 4112-13; Cavaretta, 5588-5589; Foley, Tr. 4609).

Response to Proposed Finding No. 263

Complaint Counsel has no specific response to the first sentence of the Proposed Finding.

The second sentence is irrelevant. Comfort Dental, OrthoSynetics, and Intermountain Dental Associates are DSOs or MSOs, and they are irrelevant to Schein’s conduct regarding buying groups. (*See* Responses to Proposed Finding Nos. 493-511 (Comfort Dental), 1026-1037 (OrthoSynetics), 732-748 (Intermountain Dental Associates)). To the extent the second sentence asserts that these groups show Schein worked with buying groups during the conspiracy, that is misleading and contrary to the weight of the record evidence. The third sentence is also misleading and contrary to the weight of the record evidence to the extent it asserts any division of Schein entered into relationships with buying groups during the conspiracy. The record evidence is clear—Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

264. In 2014, Kathleen Titus and Andrea Hight both transferred from the Special Markets division to work in the Mid-Market division of HSD. (Meadows, Tr. 2587-90; CX 2352-002

(“We just have to keep sending to Andrea, KT, and Mr. X so they can review requests.”); Sullivan, Tr. 4112-13; Foley, Tr. 4608-10; Cavaretta, Tr. 5586-88). Andrea Hight moved to the role of Director of the Central United States for Mid-Market because she was an expert on CHCs. (Foley, Tr. 4610; RX 2392-005). Kathleen Titus was transferred to the role of Director of the Western United States for Mid-Market because she was strong with large group practices or smaller DSOs. (Foley, Tr. 4610; Titus, Tr. 5198; RX 2392-005).

Response to Proposed Finding No. 264

Complaint Counsel has no specific response.

265. Joe Cavaretta became the Western Area Director for HSD and had primary responsibility over the newly formed Mid-Market division and buying groups specifically. (Cavaretta, Tr. 5540, 5587-5589).

Response to Proposed Finding No. 265

Complaint Counsel has no specific response to the statement that Cavaretta became the Western Area Director. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein served buying groups during the conspiracy by or because of Cavaretta’s change in title. (*See Responses to Proposed Finding Nos. 141-142*). The record evidence is clear—Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also Responses to Proposed Finding Nos. 142, 148, 150, 152, 154*).

266. With the creation of Mid-Market, Schein developed an approach for the “emerging groups” that were larger than Schein’s traditional customer base of small solo practitioners, but not large enough for Special Markets. (CX 8010 (Titus, Dep. at 28-29)).

Response to Proposed Finding No. 266

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Mid-Market was created to serve buying groups during the conspiracy period. The record evidence shows that the Mid-Market group was formed to serve small DSOs, group practices, and community health centers. (Steck, Tr. 3690). Brady, who developed protocols for engaging with buying groups that came to be in September 2015 (after the agreement began to fall apart), testified that this was a “sidebar task” that “didn’t have to do with my -- my main focus, the majority focus of my job” which was to work with Mid-Market group practice customers, not buying groups. (CX8020 (Brady, Dep. at 148-149)). Brady testified that he did not recall Schein having any buying groups in the Mid-Market group when he took over in January 2015. (CX8020 (Brady, Dep. at 128) (“Q. Were there any buying groups of independent dentists that existed in Mid Market when you took over in January of 2015? A. Not when I took over in 2015 that I can recall.”)). In September 2015, Brady sent an email to Schein executives about plans to engage with buying groups. (CX0192 at 002). Brady wrote: “[t]raditionally, Schein has rarely engaged with these groups, but times are changing rapidly in the dental market and we must begin to engage.” (CX0192 at 002). The record evidence also shows that even as of January 2016, Schein still had to “figure out if the [Mid-Market] is going to be responsible for [buying groups].” (CX2280 at 001; Cavaretta, Tr. 5637-5638).

267. In 2014, Tim Sullivan tasked Joe Cavaretta, in his role as Western Area Director for HSD, with developing a strategy on working with buying groups. (Cavaretta, Tr. 5530-31).

Response to Proposed Finding No. 267

Complaint Counsel has no specific response to the attribution of the statement to Cavaretta. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein, Mid-Markets or any division, contracted with buying groups during the conspiracy period. The record evidence is clear—Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

268. The Mid-Market team vetted buying groups as it compiled questions and a loose protocol to use when approached by buying groups. (CX 8033 (Cavaretta, Dep. at 95-98)).

Response to Proposed Finding No. 268

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that “Mid-Market vetted buying groups” or created a “protocol” for buying groups during the conspiracy period. First, the record evidence shows that the Mid-Market group was formed to serve small DSOs, group practices, and community health centers. (Steck, Tr. 3690). Brady, who developed protocols for engaging with buying groups that came to be in September 2015 (after the agreement began to fall apart), testified that this was a “sidebar task” that “didn’t have to do with my -- my main focus, the majority focus of

my job” which was to work with Mid-Market group practice customers, not buying groups. (CX8020 (Brady, Dep. at 148-149)). Brady testified that he did not recall Schein having any buying groups in the Mid-Market group when he took over in January 2015. (CX8020 (Brady, Dep. at 128) (“Q. Were there any buying groups of independent dentists that existed in Mid Market when you took over in January of 2015? A. Not when I took over in 2015 that I can recall.”)). In September 2015, Brady sent an email to Schein executives about plans to engage with buying groups. (CX0192 at 002). Brady wrote: “[t]raditionally, Schein has rarely engaged with these groups, but times are changing rapidly in the dental market and we must begin to engage.” (CX0192 at 002). The record evidence also shows that even as of January 2016, Schein still had to “figure out if the [Mid-Market] is going to be responsible for [buying groups].” (CX2280 at 001; Cavaretta, Tr. 5637-5638).

Second, Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

4. *The Dental Gator Conflict and HSD's Decision to Make the Development of a Formal Buying Group Offering a "Strategic Priority" for 2015.*

269. The creation and implementation of Mid-Market was time-consuming and continued throughout 2014 and 2015. (Cavaretta, Tr. 5534-35, 85).

Response to Proposed Finding No. 269

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein, Mid-Markets or any division, contracted with buying groups during the conspiracy period. Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to "KILL the buying group model," and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

270. Joe Cavaretta worked closely with Kathleen Titus, Andrea Hight, Keith Gauzza, and Jake Meadows in developing the Mid-Market space. (Cavaretta, Tr. 5587-88).

Response to Proposed Finding No. 270

Complaint Counsel has no specific response.

271. At the time Mid-Market was created, Schein did not have a formal strategy for buying groups. (Cavaretta, Tr. 5590; Titus, Tr. 5215-16). Instead, Schein evaluated buying groups on a case-by-case basis. (Cavaretta, Tr. 5590-91; Steck, Tr. 3741).

Response to Proposed Finding No. 271

The Proposed Finding is misleading and contrary to the weight of the record evidence. The record evidence does not show that Schein evaluated buying groups during the conspiracy period or that it created some formal strategy for working with buying groups during the conspiracy period. The record evidence clearly shows that Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups during the conspiracy period. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

272. On May 8, 2014, Ms. Titus emailed Joe Cavaretta that they needed “to develop our policy on these Dental Management Companies that have a GPO component” as they are “coming out of the woodwork and have a leg in both worlds.” (RX 2385-001). Later that month, Ms. Titus and Mr. Cavaretta had a discussion regarding buying groups and how Schein needed to create a document that could be distributed throughout HSD to aid in evaluating buying groups and to provide guidance on when a buying group relationship made business sense for Schein. (Titus, Tr. 5213, RX 2105-001).

Response to Proposed Finding No. 272

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Titus emailed Cavaretta to “develop our policy” regarding buying groups or that Schein attempted to “create a document . . . to aid in evaluating buying groups” during the conspiracy period. RX2385 contained a list of “hot topics,” including

“Breakaway, Dental Coop, SmileSource, Steadfast (I need to circle back with Randy for approval to shut them down).” (RX2385 at 001). As set forth in Responses to Proposed Finding Nos. 581-633, it demonstrates Titus’ termination of a pre-existing, profitable buying group relationship with Steadfast during the conspiracy period. That evidence is consistent with the evidence showing that Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups during the conspiracy period. The record evidence clearly shows that Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups during the conspiracy period. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

273. Ms. Titus and Ms. Hight undertook developing the criteria Schein should consider when evaluating a buying group so that all buying groups could be evaluated by the same “yardstick.” They “agreed ... in writing when [a buying group] relationship make[s] sense and when it does not.” (Titus, Tr. 5213-14; RX 2105-001). The goal was to collectively brainstorm a strategy to grow Schein’s buying group segment in a healthy way that made business sense for Schein. (Titus, Tr. 5214-15).

Response to Proposed Finding No. 273

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts that Schein “undertook developing the criteria Schein should consider when

evaluating a buying group” during the conspiracy period. The record evidence is clear that Schein did not evaluate buying groups in any way during the conspiracy period. Rather, the record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154)

274. As part of developing Schein’s buying group strategy, Ms. Titus developed a set of questions to aid in vetting groups that approached Schein. (CX 2809-005; Titus, Tr. 5219-20). The “due diligence” questions included how many members the group had, what services it offered its members, if the group could drive compliance, and whether the group was willing to be exclusive, among others. (CX 2809-005; Titus, Tr. 5218-5219). These questions were to become a standard practice in Schein’s evaluation of buying groups. (Titus, Tr. 5220-22; CX 2809-001).

Response to Proposed Finding No. 274

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts that “Schein’s buying group strategy,” any “vetting,” or any “due diligence” regarding buying groups was developed or applied during the conspiracy period. In fact, CX2809 shows Schein’s conduct regarding PGMS, a buying group that Sullivan “shot down” during the conspiracy period. (CCFF ¶¶ 799-805). In CX2809, Titus informed her boss, Cavaretta on June 12, 2014 that PGMS was “(yet another) potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees compliance, exclusivity and the opportunity to market Schein business solutions. I sent them some tough questions thinking it would

scare them off, but alas, they raised the stakes by moving to Dir of Ops.” (CCFF ¶ 794 (citing CX2809 at 002)). To the extent the Proposed Finding asserts that this documents shows the creation of a standard set of questions used to vet buying groups during the conspiracy, that is inaccurate and misleading. The cited evidence here is consistent with the record evidence, which shows that Schein did not evaluate buying groups in any way during the conspiracy period, but that it rejected them outright. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

275. While Schein was making strides in developing its strategy around what made a good buying group partner, it still needed to develop a standard offering for buying groups. (Titus, Tr. 5219-5221; CX 2809-002 (“we need to make sure we have our systems and offering down cold and the team understands how to present”)).

Response to Proposed Finding No. 275

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts that it developed a “strategy” or “standard offering for buying groups” during the conspiracy period. In fact, CX2809 shows Schein’s conduct regarding PGMS, a buying group that Sullivan “shot down” during the conspiracy period. (CCFF ¶¶ 799-805). In CX2809, Titus informed her boss, Cavaretta on June 12, 2014 that PGMS was “(yet another)

potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees compliance, exclusivity and the opportunity to market Schein business solutions. I sent them some tough questions thinking it would scare them off, but alas, they raised the stakes by moving to Dir of Ops.” (CCFF ¶ 794 (citing CX2809 at 002)). To the extent the Proposed Finding asserts that this document shows the creation of “strategy” or “standard offering for buying groups” during the conspiracy period, that is inaccurate and misleading. The cited evidence here is actually consistent with the record evidence, which shows that Schein did not evaluate buying groups in any way during the conspiracy period, but that it rejected them outright. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

276. As of June 2014, Schein did not have a formal offering with respect to buying groups. (Titus, Tr. 5221; CX 2809-001). However, Schein was working on developing specific sales plans for buying groups to ensure that Schein was treating buying groups consistently by giving them similar discounts “across the board.” (Titus, Tr. 5220-5221).

Response to Proposed Finding No. 276

Complaint Counsel has no specific response to the first sentence of the Proposed Finding.

The second sentence of the Proposed Finding is misleading and contrary to the weight of the record evidence, which does not establish that Schein offered sales plans or discount plans

for buying groups during the conspiracy period. The record evidence, in fact, establishes that Schein indiscriminately rejected buying groups during the conspiracy. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

277. On October 3, 2014, HSD had an internal meeting to discuss Mid-Market and “GPO/MSO strategy” with Mr. Sullivan. (RX 2409-002; Cavaretta, Tr. 5589, 5591-92).

Response to Proposed Finding No. 277

Complaint Counsel has no specific response to the assertion that HSD had an internal meeting. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein applied a “GPO/MSO strategy” and contracted with buying groups during the conspiracy period. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected

numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

278. With the creation of Mid-Market and certain buying groups being transferred over from Special Markets, HSD was receiving more inquiries from its FSCs and customers regarding buying groups, and "from a resource standpoint[,] [was] becoming overwhelmed." (Cavaretta, Tr. 5590).

Response to Proposed Finding No. 278

Complaint Counsel has no specific response.

279. In late 2014, HSD was still evaluating buying groups on an "ad hoc" basis. (Cavaretta, Tr. 5590-91).

Response to Proposed Finding No. 279

The Proposed Finding is misleading and contrary to the weight of the record evidence. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to "KILL the buying group model," and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log

all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 1159-1166, 1316-1322).

280. HSD needed a more consistent approach to engaging with buying groups and determining what type of offering to provide them. (Cavaretta, Tr. 5590-91). This was not a simple task and created a balancing act for Schein, because buying groups did not own offices – and therefore had a harder time with compliance than a DSO – yet they wanted the same pricing. (Cavaretta, Tr. 5590-91).

Response to Proposed Finding No. 280

The Proposed Finding is misleading and contrary to the weight of the record evidence. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 1159-1166, 1316-1322).

281. While buying groups were not a top priority for Schein from a growth standpoint, Mr. Cavaretta continued to develop Schein’s buying group strategy throughout 2014. (Cavaretta, Tr. 5592-94).

Response to Proposed Finding No. 281

The Proposed Finding is misleading and contrary to the weight of the record evidence in its assertion that Schein “continued to develop [its] buying group strategy throughout 2014.”

The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.”

(CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 1159-1166, 1316-1322).

282. Even as Schein fine-tuned its strategy and offering to buying groups, Schein continued to work with buying groups with which it already had established relationships. (Cavaretta, Tr. 5593). These included Alpha Omega, Stark County Dental Supply, Long Island Dental Forum, Dental Partners of Georgia, OrthoSynetics, Comfort Dental, Advantage Dental, The Denali Group, Dentists for a Better Huntington, and Intermountain Dental Associates. (SF 377-98, 493-511, 548-71, 676-89, 717-25, 732-48, 937-49, 1187-98).

Response to Proposed Finding No. 282

The Proposed Finding is misleading and contrary to the weight of the record to the extent that it asserts Schein’s relationships with the listed entities, if any, shows it “continued to work

with buying groups.” In fact, the listed entities, some of which are not buying groups or were not considered to be buying groups, do not disprove Schein’s participation in a conspiracy. (See Responses to Proposed Finding Nos. 395-398 (Alpha Omega), 493-511 (Comfort Dental), 1187-1198 (Stark County Dental Supply), 937-949 (Long Island Dental Forum), 676-689 (Dental Partners of Georgia), 1026-1037 (OrthoSynetics), 377-394 (Advantage Dental), 548- 571 (The Denali Group), 717-725 (Dentists for a Better Huntington), and 732-748 (Intermountain Dental Associates)).

283. Schein also continued to engage with new buying groups in 2014, such as Klear Impakt and Dental Gator. (R. Johnson, Tr. 5479; Puckett, Tr. 2228-31).

Response to Proposed Finding No. 283

The Proposed Finding is inaccurate and misleading as to the assertion that Schein “continued to engage” with Klear Impakt in 2014, as the record evidence shows that Schein entered into an agreement with Klear Impakt in August 2015. (SF 807). In addition, Sullivan was unaware of any discussions with Klear Impakt during the conspiracy period, making this evidence irrelevant to Schein’s conduct during the conspiracy. (See Responses to Proposed Finding Nos. 802-838). As to Dental Gator, the record evidence shows that Schein never bid on Dental Gator, viewed MB2’s creation of Dental Gator as a breach of its agreement with MB2, did not have a separate contract with Dental Gator, and that Dental Gator became a Schein customer without its knowledge but was tolerated to keep MB2’s business. (See Responses to Proposed Finding Nos. 634-675). The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent that it asserts Schein’s relationship with Klear Impakt or Dental Gator disproves its participation in a conspiracy.

In fact, the record evidence regarding both is consistent with the record evidence showing that Schein had a policy to turn down buying groups during the conspiracy and did so, and

then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (*See* Responses to Proposed Finding Nos. 634-375 (Dental Gator), 802-838 (Klear Impakt); *see also* CCFF ¶¶ 661-954, 1159-1166, 1316-1322; Complaint Counsel's Post-Trial Brief, at Attachment C). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

284. Around this time, Joe Cavaretta, Tim Sullivan, Dave Steck, Randy Foley and Hal Muller agreed that Special Markets and HSD needed to be "aligned on a strategy with existing [buying groups]" within Schein. (CX 2761-002).

Response to Proposed Finding No. 284

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts or implies that HSD and Special Market did not both turn down buying groups during the conspiracy period. The record evidence establishes that both HSD and Special Market rejected buying groups pursuant to a policy or instruction not to contract with buying groups during the conspiracy period. (CCFF ¶¶ 767-770, 661-954; Complaint Counsel's Post-Trial Brief, at Attachment C). In addition, the record evidence shows that Schein terminated some pre-existing buying group relationships. (CCFF ¶¶ 871-898; *see also* Responses to Proposed Finding Nos. 1199-1242 (Steadfast), 581-633 (Dental Co-op of Utah)). Those pre-existing relationships that were not terminated flew under the radar, Schein executives were not aware of their existence, and they were referred to as "inherited messes" when they were discovered post-conspiracy. (CCFF ¶ 1767).

285. The Dental Gator buying group created conflict between the divisions that needed to be resolved. (CX 2475-006; Sullivan, Tr. 3991, 3994-95). Special Markets had formed a relationship with Dental Gator in March 2014, as Dental Gator was formed by some of the owners of MB2, one of Special Markets' largest DSO customers. (SF 634-46; Sullivan, Tr. 3987, 3990).

Response to Proposed Finding No. 285

The statement that "Special Markets formed a relationship with Dental Gator in March 2014" is misleading and contrary to the weight of the record evidence. Dental Gator became a customer of Schein Special Markets when MB2 Solutions ("MB2"), an elite DSO customer of Schein that created Dental Gator, extended the pricing it received from Schein under a 2014 agreement ("2014 MB2 Agreement") to Dental Gator, *initially without Schein's knowledge*. (CCFF ¶¶ 1778, 1783, 1789-1796). The 2014 MB2 Agreement limited MB2 from extending Schein's MB2-specific pricing and prohibited MB2 from forming a buying group. (CCFF ¶¶ 1791-1792). When Schein learned that MB2 formed buying group Dental Gator without its permission and extended its Schein pricing to it, Schein deemed it a breach of the 2014 MB2 agreement. (CCFF ¶¶ 1796). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

286. Dental Gator began to cannibalize existing Schein customers. (CX 2360-001 ("[s]o far, the Gator gains have been good HSD customers ... the hook is [discounted] supplies ... [t]his will spread fast when the word is out."); CX 2761-001 ("Patrick [Dental Gator President and CEO] was originally hired to TARGET NON-Schein customers only ... obviously that is not happening now."); Meadows, Tr. 2513 ("good HSD customers...[w]ho already buy from us and this is the cannibalization.")).

Response to Proposed Finding No. 286

Complaint Counsel has no specific response.

287. In October 2014, HSD began receiving complaints from its FSCs about the fact that Dental Gator was receiving the same pricing as MB2, even though Dental Gator was not a DSO. (Meadows, Tr. 2532-34; CX 2761; CX 2354; CX 2370; CX 0260; CX 2032; CX 2362; CX 2033; Foley, Tr. 4572-73).

Response to Proposed Finding No. 287

Complaint Counsel has no specific response.

288. Complaint Counsel cites an October 25, 2014 email in which Mr. Meadows states that “we are NOT participating in GPOs.” (CX 2354). As Mr. Meadows explained, he was getting numerous complaints from the field about Dental Gator, and wanted to calm his team by noting that Dental Gator was a Special Markets customer and his strategy of not promoting buying groups had not changed. (Meadows, Tr. 2428-30).

Response to Proposed Finding No. 288

Complaint Counsel has no specific response to the first sentence of the Proposed Finding or to the portion of the second sentence that asserts Meadows’ “strategy of not promoting buying groups had not changed.” As to the remainder of the second sentence of the Proposed Finding, if it asserts or implies that CX2354 is limited to Dental Gator or an explanation that Dental Gator was not an HSD customer, that is misleading and contrary to the weight of the record evidence. The record evidence shows that Meadows’ statement in CX2354 referred to “group purchasing organizations” not just Dental Gator. (CCFF ¶¶ 816-827). This document and statement is just one example of many where Schein instructed its sales force to refuse to sell to buying groups. (CCFF ¶¶ 743-870).

289. Like the 2010 conflicts that arose with Pugh Dental and Smile Source, Schein FSCs were concerned that they would now be competing with both Dental Gator and Special Markets and ultimately receive reduced commissions. (Meadows, Tr. 2574-75).

Response to Proposed Finding No. 289

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts that Schein did not attempt to terminate the Dental Gator buying group relationship. The record evidence shows that Sullivan and other HSD executives wanted to end the relationship with Dental Gator. (*See* Responses to Proposed Finding Nos. 634-675).

290. Schein's partnership with Dental Gator also created conflicts with Schein's other DSO and buying group customers. In May 2014, Floss Dental, a DSO customer of Schein's, wanted to "mimic MB2" with the creation of a buying group arm, like MB2 did with Dental Gator. (RX 2105; CX 2084).

Response to Proposed Finding No. 290

The Proposed Finding is not supported by the cited evidence. Neither RX2105 nor CX2084 support the assertion that Floss Dental was a "DSO customer of Schein's." In addition, the Proposed Finding is misleading to the extent it asserts or implies that Floss Dental was a buying group customer of Schein, as there is no evidence cited to support that assertion. In fact, the record evidence does not support an assertion that Schein had any contractual relationship with Floss Dental, its buying group arm, or otherwise. (*See Responses to Proposed Finding Nos. 757-764*).

291. Floss Dental had both fully owned offices and "members that were individual or independent practices...." (Titus, Tr. 5212).

Response to Proposed Finding No. 291

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it asserts or implies that Schein had any contractual relationship with Floss Dental, its buying group arm, or otherwise. (*See Responses to Proposed Finding Nos. 757-764*). The record evidence does not support that assertion.

292. By that point in 2014, Ms. Titus and Mr. Cavaretta had been working on a document on which everyone had consensus that could be used to "evaluate more efficiently and create more parity on those relationships with buying groups that made ... good business sense for us." (Titus, Tr. 5213; RX 2105-001 ("Andrea and I have agreed to in writing when these relationships make sense and when it does not.")).

Response to Proposed Finding No. 292

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts that Schein "had been working on a document . . . to 'evaluate' . . . buying groups" during the conspiracy period. Schein did not evaluate buying groups in any way

during the conspiracy period and rejected them outright. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

293. That guidance helped Schein develop a program with Floss Dental that allowed its independent practices to “have reduced Schein pricing on the G plan,” contingent on those practices purchasing 80% of their supplies from Schein. (RX 2105; CX 2084).

Response to Proposed Finding No. 293

The Proposed Finding is not supported by the cited evidence, which discusses Floss Dental but do not state or establish that a contractual relationship actually existed. (CX2084 at 001). It is also misleading to the extent it asserts or implies that Schein had any contractual relationship with Floss Dental, its buying group arm, or otherwise. The record evidence does not support that assertion. (*See* Responses to Proposed Finding Nos. 757-764).

294. In November 2014, HSD had another offsite meeting during which it discussed its strategic priority to collaborate with Special Markets on a “GPO/MSO strategy” so that both divisions would be better aligned on how to approach buying groups. (CX 2365; CX 2475-006; Sullivan, Tr. 4115-16). All “agreed there was conflict and the current [ad hoc] approach was unacceptable.” (CX 2034-001).

Response to Proposed Finding No. 294

Complaint Counsel has no specific response to the assertion that HSD had an offsite meeting. However, the Proposed Finding mischaracterizes CX2034 by inserting the term “ad hoc,”

which is not referenced and does not appear in the documents. The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein had an “ad hoc” approach to evaluating buying groups during the conspiracy period, applied a “GPO/MSO strategy” during the conspiracy period, or contracted with buying groups during the conspiracy period. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 1159-1166, 1316-1322).

295. At the November 2014 offsite meeting, HSD also created a strategic priority for 2015 to develop a template and structure for buying groups, including creating a pricing plan for buying groups. (CX 2475-009; Sullivan, Tr. 4116-17; Meadows, Tr. 2602).

Response to Proposed Finding No. 295

Complaint Counsel has no specific response to the assertion that HSD had an offsite meeting. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein created a strategy because it didn’t

have an approach to buying groups during the conspiracy period, or to the extent it asserts or implies that it applied that strategy and contracted with buying groups during the conspiracy period. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 1159-1166, 1316-1322).

5. *Resolution of the Dental Gator Conflict, Klear Impakt, and Implementation of the 2015 Strategic Buying Group Plan.*

296. After the strategic priority was set in December 2014 to create a more “organized and consistent way to approach” buying groups more actively, Schein continued work to develop that template at the same time it was finding solutions with existing and new buying group partners and considered establishing a Schein-owned GPO. (Steck, Tr. 3739-41, 3754; Meadows, Tr. 2609-10; CX 2475-009 (listing “Strategic Priorities: 2015,” and inaugurating a task force to “develop a template/structure for prospective GPOs.”)).

Response to Proposed Finding No. 296

Complaint Counsel has no specific response to the attribution of the statement to Steck, Meadows, and CX2475. However, the Proposed Finding is misleading and contrary to the

weight of the record evidence to the extent it asserts or implies that Schein created a “more ‘organized and consistent’ way to approach” buying groups during conspiracy period, or to the extent it asserts or implies that Schein had “new buying group partners” during the conspiracy period. It did neither. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 1159-1166, 1316-1322).

297. A separate task force was established to develop the “HSD GPO response plan,” led by John Chatham and Brian Brady. (RX 2097-001-02). On January 29, 2015 – during the alleged conspiracy period – Mr. Chatham told his team that developing a standardized GPO program “is the most important program [Schein] will work on this year and it is priority one.” (RX 2097-001).

Response to Proposed Finding No. 297

Complaint Counsel has no specific response to the attribution of the statements to RX2097.

However, the Proposed Finding is misleading and contrary to the weight of the record

evidence to the extent it asserts or implies that Schein had a “standard GPO program” or that

it entered into agreements with buying groups during the conspiracy period. The record evidence, in fact, establishes that Schein indiscriminately rejected buying groups during the conspiracy in order to ensure internal compliance with the overarching conspiracy, and that it did so by instructing its sales force to refuse to sell to all buying groups. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 1159-1166, 1316-1322).

298. At around the same time, the Mid-Market team was also working on developing a standard agreement for DSO-affiliated buying groups. On December 29, 2014, the team had an internal call to “develop our policy.” (CX 2762-002). As Ms. Titus explained, there are many different buying group models, and Schein needed to develop a “generic PVA [Prime Vendor Agreement]” to cover each one. (CX 2762-003). A month later, Mr. Meadows sought to avoid duplication and potential conflict between the Mid-Market team and the separate task force led by Mr. Chatham and Mr. Brady. (CX 2372-001 (“I sat in a few minutes [on] the DGPS meeting yesterday and they were discussing a plan to support GPOs. I interjected and told them we were working on this and [they] needed ... to ‘hold the line’ *while we build a plan.*”))).

Response to Proposed Finding No. 298

Complaint Counsel has no specific response to the attribution of the statements to the exhibits cited. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein entered into agreements with buying groups during the conspiracy period. The record evidence, in fact, establishes that Schein indiscriminately rejected buying groups during the conspiracy period in order to ensure internal compliance with the overarching conspiracy, and that it did so by instructing its sales force to refuse to sell to all buying groups. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322, 1178-1198).

299. “All throughout 2015,” Schein was “setting [the] infrastructure up” for its buying group protocol, and it brought Brian Brady in to help with that effort. (Cavaretta, Tr. 5653-54, 5594; Sullivan, Tr. 4123-26).

Response to Proposed Finding No. 299

Complaint Counsel has no specific response to the attribution of the statements to Cavaretta.

However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein entered into agreements with buying groups during the conspiracy period. The record evidence, in fact, establishes that Schein indiscriminately rejected buying groups during the conspiracy period in order to ensure internal compliance with the overarching conspiracy, and that it did so by instructing its sales force to refuse to sell to all buying groups. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322, 1178-1198).

300. Brian Brady noted in June 2015 that Mid-Market expected to “have several [buying groups] topping \$1.5M in the next 6-12 mos.” (CX 2133-001).

Response to Proposed Finding No. 300

Complaint Counsel has no specific response.

301. In an effort to ensure that Schein's buying group approach was consistent across divisions, Mr. Sullivan and Mr. Muller discussed what to do with Dental Gator. (RX 2097-004-05; Sullivan, Tr. 3991, 3994, 4344).

Response to Proposed Finding No. 301

Complaint Counsel has no specific response to the statement that Sullivan and Muller discussed Dental Gator. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that "Schein's buying group approach" during the conspiracy period was not consistent across divisions. It was consistent in that both HSD and Special Markets indiscriminately rejected buying groups during the conspiracy period in order to ensure internal compliance with the overarching conspiracy, and that it did so by instructing its sales force to refuse to sell to all buying groups. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to "KILL the buying group model," and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728- 870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log

all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322, 1178-1198).

302. As Special Markets ran into problems with the pricing it could extend to Dental Gator because it was not a DSO, Mr. Muller proposed placing Dental Gator on a new pricing plan that was used for other Mid-Market customers. (RX 2097-005; Foley, Tr. 4697-98). Mr. Sullivan believed Mr. Muller's proposal "was a good compromise" and a way to resolve the internal conflict between Special Markets and HSD. (CX 2370; CX 8025 (Sullivan, Dep. at 318-19); Meadows, Tr. 2566-67). Schein subsequently placed Dental Gator on a new pricing plan and Special Markets continued its relationship with the group. (Sullivan, Tr. 4096-97; Foley, Tr. 4697-98). There was also some discussion within HSD about transitioning the group to Schein's new buying group offering once it was formally created. (RX 2097-002).

Response to Proposed Finding No. 302

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent that it asserts Sullivan and Muller agreed on how to handle Dental Gator, or that Schein wanted to "continue[] its relationship with the group." (*See* Responses to Proposed Finding Nos. 634-675). In fact, the record evidence shows that Schein tried to prohibit MB2 Solutions ("MB2") from creating a buying group and that it tried to terminate its relationship with Dental Gator.

The record evidence shows that Dental Gator became a customer of Schein Special Markets when MB2, an elite DSO customer of Schein that created Dental Gator, extended the pricing it received from Schein under a 2014 agreement ("2014 MB2 Agreement") to Dental Gator, initially without Schein's knowledge. (CCFF ¶¶ 1778, 1783, 1789-1796). The 2014 MB2 Agreement prohibited MB2 from forming a buying group, and Schein inserted these provisions into the agreement to prevent Dental Gator from becoming a "typical GPO." (CCFF ¶¶ 1791-1793). When Schein learned that MB2 formed buying group Dental Gator, Schein deemed it a breach of the 2014 MB2 agreement. (CCFF ¶¶ 1796). Schein informed Dental Gator that if "it looks at any time like a GPO [Schein] will disenroll" and imposed advertising guidelines to ensure that Dental Gator did not "represent in their marketing

anything that looks like a GPO.” (CCFF ¶¶1797-1800; *see also* CCFF ¶¶1812-1817). The record also shows that Sullivan approached Muller to discuss shutting down Dental Gator. (CCFF ¶ 1806 (quoting CX0246 at 001)). Muller testified that while he does not recall this discussion with Sullivan, he had no reason to doubt that Sullivan approached him about shutting down Dental Gator. (CX0309 (Muller, IHT at 176)). Sullivan and other executives had sought to end the relationship with Dental Gator, but Schein was worried about losing MB2’s business in doing so, which was a long-term and top 50 customer for Special Markets. (CCFF 1801-1806, 1776-1782). Schein was “accommodating [Dental Gator] for unique reasons” but feared “open[ing] the floodgates on buying groups.” (CCFF ¶¶ 1811 (citing CX0188 at 001), 1802-1810; *see also* CX0309 (Muller, IHT at 102) (“we supported it because we hoped our customer [MB2] would buy those offices. So in that case, yes, but Dental Gator really didn’t go anywhere”)). Indeed, Schein would not have tolerated Dental Gator but for its relationship with MB2, and the record evidence shows that Schein never bid on Dental Gator, did not have a separate contract with Dental Gator, and that Dental Gator became a Schein customer without its knowledge. (CCFF ¶¶ 1790, 1795, 1810).

303. At the time, some within HSD still had concerns related to Schein’s offering to Dental Gator and the FSCs’ perception that Schein was working against them by giving Dental Gator an advantage in the market that they may not have – namely, more aggressive pricing. (Meadows, Tr. 2574-75). Specifically, Jake Meadows was concerned that Schein would be “arming dental gator with a more aggressive offer to [the] average practice than [HSD’s] FSCs” could offer, putting them at a competitive disadvantage against their own company. (CX 2370-001). Mr. Sullivan acknowledged the concerns, but noted that Mr. Muller was “trying.” (CX 2372-003).

Response to Proposed Finding No. 303

Complaint Counsel has no specific response.

304. Senior leadership for Special Markets and HSD met in late November 2014 to discuss resolutions to the Dental Gator conflicts. (SF 290-95; CX 2365; CX 8025 (Sullivan, Dep. at 335-36); Meadows, Tr. 2563-65; CX 2032).

Response to Proposed Finding No. 304

Complaint Counsel has no specific response.

305. Schein ultimately reached a consensus on an ongoing plan for Dental Gator in January 2015: “continue to support [Dental Gator by] allowing them to use the G plan pricing going forward,” which was the “same pricing HSD can offer groups of offices” with FSCs keeping full commission. (CX 2372-004; CX 2370-002; Meadows, Tr. 2572-74; *see also* Meadows, Tr. 2566-67 (“[A]t this time, 2015, the G plan was Henry Schein Dental’s first attempt to build a private practice formulary.”)).

Response to Proposed Finding No. 305

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent that it asserts Sullivan and Muller agreed on how to handle Dental Gator, or that Schein wanted to “continue[] its relationship with the group.” (*See* Responses to Proposed Finding Nos. 634-675). In fact, as set forth above in Proposed Finding No. 302, Schein tried to prohibit MB2 from creating a buying group and it tried to terminate its relationship with Dental Gator. (CCFF ¶¶ 1769-1823; *see also* Responses to Proposed Finding Nos. 634-675).

306. Mr. Sullivan noted that, given Schein was working on its “GPO response plan,” the new Dental Gator approach would need to be “grandfather[ed]” in or “transition[ed] ... to our new plan once created.” (CX 2372-001).

Response to Proposed Finding No. 306

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent that it asserts or implies that Schein had a “GPO response plan” under which it worked with buying groups or that its relationship with Dental Gator was part of that response plan. (*See* Responses to Proposed Finding Nos. 634-675). In fact, as set forth above in Response to Proposed Finding No. 302, Schein tried to prohibit MB2 from creating a buying group and it tried to terminate its relationship with Dental Gator. (CCFF ¶¶ 1769-1823; *see also* Responses to Proposed Finding Nos. 634-675).

307. The fact that DSOs were entering the buying group business was an eye-opener for Schein. “I understand the thought that we must support [the Dental Gator compromise,]” Vice

President John Chatham exclaimed, but “it’s not a slippery slope we are going down, it’s a cliff with no ropes.” (RX 2097-001).

Response to Proposed Finding No. 307

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies that Schein supported Dental Gator. As set forth above in Response to Proposed Finding No. 302, Schein tried to prohibit MB2 from creating a buying group and it tried to terminate its relationship with Dental Gator. (CCFF ¶¶ 1769-1823; *see also* Responses to Proposed Finding Nos. 634-675).

308. On January 28, 2015 – during the alleged conspiracy period – Mr. Sullivan wrote to his boss Jim Breslawski that he was going to “approve moving forward with [Mr. Muller’s] proposal.” for Dental Gator, and that doing so would mean Schein was “‘in’ on approving Buying Groups.” (CX 2144-001; CX 2372; Meadows, Tr. 2568).

Response to Proposed Finding No. 308

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent that it asserts Sullivan agreed with Muller’s proposal, approved the Dental Gator relationship, or that he approved buying groups during the conspiracy period. (*See* Responses to Proposed Finding Nos. 634-675, 154 (showing lack of evidence of Sullivan’s approval of buying groups during the conspiracy period)). As set forth above in Response to Proposed Finding No. 302, Schein tried to prohibit MB2 from creating a buying group and it tried to terminate its relationship with Dental Gator. (CCFF ¶¶ 1769-1823; *see also* Responses to Proposed Finding Nos. 634-675).

309. Jake Meadows “support[ed] the decision” and also suggested discussing whether the G plan should be “offered at a lower dollar level (\$75K) and/or ... creating a Private Practice formulary” because there was still a potential for conflicts with Schein’s private practice customers (CX 2372-002; Meadows, Tr. 2574-75 (“The concern is that the FSCs would feel as if Dental Gator had an advantage in the market that they didn’t have or that special markets group had an advantage in the market that they wouldn’t have and that special markets and Dental Gator would be competing directly with the FSC and then ultimately lowering commission....”))).

Response to Proposed Finding No. 309

Complaint Counsel has no specific response to the attribution of the statement to Meadows. However, The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent that it asserts or implies that there was consensus or agreement regarding Dental Gator. (*See Responses to Proposed Finding Nos. 634-675*). However, the Proposed Finding is misleading to the extent it implies that Schein supported Dental Gator. As set forth above in Response to Proposed Finding No. 302, Schein tried to prohibit MB2 from creating a buying group and it tried to terminate its relationship with Dental Gator. (CCFF ¶¶ 1769-1823; *see also Responses to Proposed Finding Nos. 634-675*).

310. Mr. Meadows’s recommendation ultimately came to fruition, as Schein built a private practice formulary that its FSCs could offer to private practice customers, as well as a buying group, or “BG,” formulary. (Meadows, Tr. 2575-77).

Response to Proposed Finding No. 310

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein entered into agreements with buying groups during the conspiracy period. The record evidence shows that Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups during the conspiracy period. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also CCFF ¶¶ 661-732*). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C;

see also Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 1159-1166, 1316-1322).

311. While Schein continued its work on its new buying group protocol, it also continued to engage with buying groups in the field. Indeed, at the same time Schein was working to find a resolution to the Dental Gator conflicts, it was also negotiating a new partnership with Klear Impakt. Discussions between Schein and Klear Impakt began in 2014. (R. Johnson, Tr. 5479, 5490; Titus, Tr. 5269). By the time Ms. Titus met with Dr. Richard Johnson and the Klear Impakt leadership in January 2015, Schein's strategic priority to develop a buying group template and structure was in place. (CX 2208-002; CX 2475-009; Steck, Tr. 3739-41; Meadows, Tr. 2601-02; Sullivan, Tr. 4116-18).

Response to Proposed Finding No. 311

The Proposed Finding is misleading and contrary to the weight of the record evidence in its assertions that Schein continued to "engage with buying groups in the field" or that it created or had a "structure" that allowed it to engage with buying groups during the conspiracy period. The record evidence shows that Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups during the conspiracy period. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to "KILL the buying group model," and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the

conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 1159-1166, 1316-1322).

Moreover, evidence regarding Klear Impakt does not establish that Schein entered into an agreement with a buying group during the conspiracy period. The record evidence shows that Schein contracted with Klear Impakt in August 2015, or after the conspiracy became difficult to maintain. In addition, any evidence regarding negotiations with Klear Impakt in 2014 is irrelevant because Sullivan did not know about Schein's work with Klear Impakt even as of November 2015. (CCFF ¶¶ 843-849; *see* Responses to Proposed Finding Nos. 802-838).

312. Following the evaluation protocol she had been developing since she started in Mid-Market, Ms. Titus collected information on Klear Impakt: who they were, what their value proposition was, who their members were, and whether they would offer exclusivity and compliance. (R. Johnson, Tr. 5493-94; Titus, Tr. 5269; RX 2062-003).

Response to Proposed Finding No. 312

Complaint Counsel has no specific response. However, evidence regarding Klear Impakt does not establish that Schein entered into an agreement with a buying group during the conspiracy period. The record evidence shows that Schein contracted with Klear Impakt in August 2015, or after the conspiracy became difficult to maintain. (CCFF ¶ 1318). In addition, any evidence regarding negotiations with Klear Impakt in 2014 is irrelevant because Sullivan did not know about Schein's work with Klear Impakt even as of November 2015. (CCFF ¶¶ 843-849; *see also* Responses to Proposed Finding Nos. 802-838).

313. Ms. Titus's evaluation allowed her to quickly determine that Klear Impakt was one of the few groups that could rise to the top and fit Schein's criteria for engaging with buying groups. (CX 2208-002; Titus, Tr. 5270-71).

Response to Proposed Finding No. 313

Complaint Counsel has no specific response. However, evidence regarding Klear Impakt does not establish that Schein entered into an agreement with a buying group during the conspiracy period. The record evidence shows that Schein contracted with Klear Impakt in August 2015, or after the conspiracy became difficult to maintain. (CCFF ¶ 1318). In addition, any evidence regarding negotiations with Klear Impakt in 2014 is irrelevant because Sullivan did not know about Schein's work with Klear Impakt even as of November 2015. (CCFF ¶¶ 843-849; *see also* Responses to Proposed Finding Nos. 802-838).

314. As it did with Dental Gator, Schein offered Klear Impakt a modified version of the G Plan. (CX 2392). Klear Impakt's August 17, 2015 agreement with Schein provided Klear Impakt members with a formulary price on "over [REDACTED] items most commonly used" plus [REDACTED] off on merchandise not on the formulary. (RX 2162; R. Johnson, Tr. 5501-02).

Response to Proposed Finding No. 314

The Proposed Finding is irrelevant, as evidence regarding an agreement that occurred after the conspiracy became difficult to maintain has no bearing on Schein's conduct during the conspiracy. (*See* Responses to Proposed Finding Nos. 802-838). The statement in the Proposed Finding, "As it did with Dental Gator," is also misleading and contrary to the weight of the record evidence to the extent it asserts Schein bid on or had an agreement with Dental Gator. The record evidence shows otherwise. As set forth above in Response to Proposed Finding No. 302, Schein tried to prohibit MB2 from creating a buying group and it tried to terminate its relationship with Dental Gator. (CCFF ¶¶ 1769-1823; *see also* Responses to Proposed Finding Nos. 634- 675).

315. On August 26, 2015, Dave Steck met with zone general managers at Schein to discuss a number of topics, including Schein's strategic buying group plan. (RX 2402-002-03; Steck, Tr. 3750-51).

Response to Proposed Finding No. 315

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein's approach to buying groups was consistent during and after the conspiracy period. It was not consistent. The record evidence shows that Schein had a policy to turn down buying groups during the conspiracy and did so. The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). When the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein, the record evidence shows Schein competing for buying groups. (CCFF ¶¶ 1159-1166, 1316-1322).

316. Mr. Steck summarized the discussion, noting: "We expect to 'launch' our buying group plan shortly after Labor Day" with "two offerings; one for groups that we want to work with, but are not cohesive..., and the other for real groups that can commit volume The second will obviously be used ... only in situations where a large amount of business is either coming our way or threatening to leave us." (RX 2402-003). FSC commission rates would be different for the two different offerings. (RX 2402-003).

Response to Proposed Finding No. 316

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein's approach to buying groups was consistent during and after the conspiracy period. It was not consistent. The record evidence shows that Schein had a policy to turn down buying

groups during the conspiracy and did so. The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). When the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein, the record evidence shows Schein competing for buying groups. (CCFF ¶¶ 1159-1166, 1316-1322).

317. As Mr. Steck explained at trial, this was "not a change" in whether Schein would do business with buying groups, but rather "a new tactic ... in terms of how we were going to actually launch and go to market with it." (Steck, Tr. 3752; CX 8016 (Meadows, Dep. at 101 (explaining that Schein's approach "has always been case-by-case even today for buying groups" based on "their ability to help us grow our business, retain our business, and bring our mission to life"))); *see also* Sullivan, Tr. 4125).

Response to Proposed Finding No. 317

Complaint Counsel has no specific response to the attribution of the statement to Steck.

However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein's approach to buying groups was consistent during and after the conspiracy period. It was not consistent. The record evidence shows that Schein had a policy to turn down buying groups during the conspiracy and did so. The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). When the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors,

including Schein, the record evidence shows Schein competing for buying groups. (CCFF ¶¶ 1159-1166, 1316-1322).

318. On September 4, 2015, “HSD senior management ... gave ... the green light to proceed” to implement the new standard buying group offer. (CX 0192-002) (observing that “Schein has rarely engaged with these groups, but times are changing,” and Schein wanted to “begin to engage [them] in an organized and uniform way....”).

Response to Proposed Finding No. 318

Complaint Counsel has no specific response. However, Schein’s conduct after the conspiracy became difficult to maintain does not disprove its participation in a conspiracy. Indeed, the record does show that Schein competed for buying groups after the conspiracy became difficult to maintain. (CCFF ¶¶ 1159-1166, 1316-1322). However, Schein had a policy to turn down buying groups during the conspiracy and did so. The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

319. Nine months after the strategic priority was set to develop a buying group plan and template, Brian Brady announced the plan in a September 9, 2015 email titled, “Henry Schein Dental & Existing Buying Groups.” (CX 0192; Steck, Tr. 3752-54).

Response to Proposed Finding No. 319

Complaint Counsel has no specific response. However, Schein’s conduct after the conspiracy became difficult to maintain does not disprove its participation in a conspiracy. Indeed, the record does show that Schein competed for buying groups after the conspiracy became difficult to maintain. (CCFF ¶¶ 1159-1166, 1316-1322). However, Schein had a policy to turn down buying groups during the conspiracy and did so. The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and

shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

320. After "months" of working on Schein's "approach to existing buying groups and how we handle them when they come to us for engagement," HSD senior management held a "final meeting" and settled on a strategy to engage buying groups with "a set protocol in place for each group as they come to us (when we determine they are worth engaging with)." (CX 0192-002; Meadows, Tr. 2611-13; Sullivan, Tr. 4124-25).

Response to Proposed Finding No. 320

Complaint Counsel has no specific response. However, Schein's conduct after the conspiracy became difficult to maintain does not disprove its participation in a conspiracy. Indeed, the record does show that Schein competed for buying groups after the conspiracy became difficult to maintain. (CCFF ¶¶ 1159-1166, 1316-1322). However, Schein had a policy to turn down buying groups during the conspiracy and did so. The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

321. The protocol formalized Schein's process of determining which buying groups were worth engaging with that had started with the more informal 2010 Guidance developed by Tim Sullivan, Dave Steck, Randy Foley, and Hal Muller in early 2010. (CX 0192-002 (Schein "will analyze a variety of factors before engaging, including looking at a list of members to see who / who is not already purchasing from us."); Meadows, Tr. 2609-10, 2611-12 (it "was very important ... to make sure that we're not positioning ourselves to cannibalize our business but focusing on new customers"); Steck, Tr. 3756-57 (explaining that "if we have a large number of customers that are already in the group, and the amount of business that we're going to gain by engaging with them is actually less than the amount of business we're going to further discount, it really doesn't make economic sense"); Sullivan, Tr. 4126).

Response to Proposed Finding No. 321

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein's approach to buying groups was consistent during and after the conspiracy period and to the extent it asserts that the 2010 Guidance (defined in SF 210 as "if a buying group 'could drive compliance, then ... they could be a good opportunity for Schein'") was applied during the conspiracy period. Schein's conduct during and after the conspiracy was not consistent. The record evidence shows that Schein had a policy to turn down buying groups during the conspiracy and did so. The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). When the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein, the record evidence shows Schein competing for buying groups. (CCFF ¶¶ 1159-1166, 1316-1322).

322. Schein modified the existing G Plan, which was given to Dental Gator, to create the "BG12 and BG14" plans for use with buying groups. The new pricing plans were "[l]iterally the exact G plan just duplicated with same formulary items and 12 and 14[%] off non-formulary items, respectively." (CX 0192-002; Meadows, Tr. 2612; Steck, Tr. 3757-58; Sullivan, Tr. 4126).

Response to Proposed Finding No. 322

The Proposed Finding is misleading as to statement, "which was given to Dental Gator," to the extent it asserts Schein bid on or had an agreement with Dental Gator. The record evidence shows Schein would not have tolerated Dental Gator but for its relationship with MB2, and the record evidence shows that Schein never bid on Dental Gator, tried to prohibit

MB2 from creating a buying groups, did not have a separate contract with Dental Gator, and that Dental Gator became a Schein customer initially without its knowledge. (CCFF ¶¶ 1783-1823; *see also* Responses to Proposed Finding Nos. 634-675). The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein’s approach to buying groups was consistent during and after the conspiracy period and to the extent it asserts that the 2010 Guidance (defined in SF 210 as “if a buying group ‘could drive compliance, then ... they could be a good opportunity for Schein’”) was applied during the conspiracy period. Schein’s conduct during and after the conspiracy was not consistent. The record evidence shows that Schein had a policy to turn down buying groups during the conspiracy and did so. The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). When the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein, the record evidence shows Schein competing for buying groups. (CCFF ¶¶ 1159-1166, 1316-1322).

323. The plan also required the buying group members to make a volume commitment – “at least \$15K a year for example” – and the group as a whole to spend at least “\$250K,” to receive the discounts. (CX 0192-003).

Response to Proposed Finding No. 323

The Proposed Finding is vague as to the time-period of the “plan” referenced. CX0192 is an email dated September 9, 2015. Schein’s conduct after the conspiracy became difficult to maintain in April 2015 does not disprove its participation in a conspiracy. Indeed, the record does shows that Schein competed for buying groups after the conspiracy became difficult to

maintain. (CCFF ¶¶ 1159-1166, 1316-1322). However, Schein had a policy to turn down buying groups during the conspiracy and did so. The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy.

(Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

324. The protocol also created a unified approach to administrative fees and rebates tied to compliance, as well as internal accounting processes so that Schein could track the group’s purchases. (CX 0192-002-03; Steck, Tr. 3759-61 (explaining the rebate structure as designed to help Schein “grow our business” and “be sure that the buying group is delivering the volume that they promised us as part of the agreement”); Sullivan, Tr. 4126-27). The new plan also disincentivized cannibalization by limiting the administrative fee, or rebate, to “incremental sales from the group above and beyond what the members are spending now.” (CX 0192-002).

Response to Proposed Finding No. 324

The Proposed Finding is vague as to the time-period of the “protocol” referenced. CX0192 is an email dated September 9, 2015. Schein’s conduct after the conspiracy became difficult to maintain in April 2015 does not disprove its participation in a conspiracy. Indeed, the record does shows that Schein competed for buying groups after the conspiracy became difficult to maintain. (CCFF ¶¶ 1159-1166, 1316-1322). However, Schein had a policy to turn down buying groups during the conspiracy and did so. The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy.

(Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154)

325. Schein planned to routinely monitor purchases from a buying group’s members and their compliance with volume commitments. (CX 0192-003; Sullivan, Tr. 4126-27).

Response to Proposed Finding No. 325

The Proposed Finding is vague as to the time-period of when “Schein planned to routinely monitor purchases.” CX0192 is an email dated September 9, 2015. Schein’s conduct after the conspiracy became difficult to maintain in April 2015 does not disprove its participation in a conspiracy. Indeed, the record does show that Schein competed for buying groups after the conspiracy became difficult to maintain. (CCFF ¶¶ 1159-1166, 1316-1322). However, Schein had a policy to turn down buying groups during the conspiracy and did so. The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154)

326. Schein ultimately implemented this plan. (Sullivan, Tr. 4127-28; Meadows, Tr. 2615 (“We ultimately created the BG plan, ultimately created a prime vendor agreement for buying groups, and ultimately created a minimum that members would have to spend.”)).

Response to Proposed Finding No. 326

Proposed Finding is vague as to the time-period of the “plan” that was “implemented.” If the Proposed Finding references the “protocol” described in CX0192, that is an email dated September 9, 2015. Schein’s conduct after the conspiracy became difficult to maintain in April 2015 does not disprove its participation in a conspiracy. Indeed, the record does show that Schein competed for buying groups after the conspiracy became difficult to maintain. (CCFF ¶¶ 1159-1166, 1316-1322). However, Schein had a policy to turn down buying groups during the conspiracy and did so. The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint

Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

327. In addition to formalizing a uniform approach, pricing plans, and contracts for buying groups after the December 2014 strategic priority, Schein also worked on developing its own buying group. (CX 2475-009; CX 0192-003; RX 2617; CX 2683; Steck, Tr. 3742-43; Sullivan, Tr. 4116-17, 4121-22; Meadows, Tr. 2603-04).

Response to Proposed Finding No. 327

The Proposed Finding is vague and unintelligible as to the phrase “after the December 2014 strategic priority.” Complaint Counsel has no specific response to the statement that CX2475 contained the statement, “Develop own GPO?” However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent the phrase “formalizing a uniform approach” asserts or implies that Schein’s approach to buying groups was consistent during and after the conspiracy period. It was not consistent. The record evidence shows that Schein had a policy to turn down buying groups during the conspiracy and did so, and it also shows that Schein competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 661-954, 1159-1166, 1316-1322). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

328. In early 2015, Schein was working on its own buying group offering called “Henry’s Club.” (RX 2097-001).

Response to Proposed Finding No. 328

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that “working on its own buying group” means Schein served buying groups during the conspiracy period. It did not. The record evidence shows that Schein had a policy to turn down buying groups during the conspiracy and did so, and it also shows that Schein competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 661-954, 1159-1166, 1316-1322). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

329. The goal of Henry’s Club was to allow Schein to have a buying group-like program to offer its customers who wanted to join a buying group but did not want to pay the high fees associated with joining a group. (Sullivan, Tr. 4121-4122; Meadows, Tr. 2603-04).

Response to Proposed Finding No. 329

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein served buying groups during the conspiracy period. It did not. The record evidence shows that Schein had a policy to turn down buying groups during the conspiracy and did so, and it also shows that Schein competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 661-954, 1159-1166, 1316-1322). The record evidence contains dozens of documents that

confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

330. Though Schein worked on its own buying group offering through most of 2015 (*see* CX 0192), it did not ultimately come to fruition, particularly because of legal hurdles from the Sunshine Act. (Sullivan, Tr. 4121-23; Meadows, Tr. 2603).

Response to Proposed Finding No. 330

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent the phrase “worked on its own buying group” asserts or implies that Schein served buying groups during the conspiracy period. It did not. The record evidence shows that Schein had a policy to turn down buying groups during the conspiracy and did so, and it also shows that Schein competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 661-954, 1159-1166, 1316-1322). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

331. The work on Schein's buying group did not go to waste, however. Schein used what it built for its Henry's Club offering and “rolled that into our existing offering and our loyalty program.” (Meadows, Tr. 2603-04).

Response to Proposed Finding No. 331

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent the phrase “existing offering

and our loyalty program” asserts or implies that Schein had an offering for or worked with buying groups that approached it during the conspiracy period. The record evidence shows that Schein had a policy to turn down buying groups during the conspiracy and did so, and it also shows that Schein competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

332. As to Schein’s protocol for evaluating and partnering with other buying groups, the next step was to put the structure in place that could be “duplicated throughout the country” and “roll[ed] ... out to [the] entire field team.” (CX 0192-002-03; Steck, Tr. 3762-63).

Response to Proposed Finding No. 332

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein evaluated or partnered with buying groups that approached it during the conspiracy period. It did not. The record evidence shows that Schein had a policy to turn down buying groups during the conspiracy and did so, and it also shows that Schein competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 661-954, 1159-1166, 1316-1322). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

333. It soon became clear, however, that Mid-Market's resources were not sufficient to cover the national roll-out. (Cavaretta, Tr. 5653-54; Titus, Tr. 5274-75; *see also* Steck, Tr. 3763).

Response to Proposed Finding No. 333

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Mid-Markets was created to serve buying groups or that it entered into agreements with buying groups during the conspiracy period. The record evidence shows that the Mid-Market group was formed to serve small DSOs, group practices, and community health centers. (Steck, Tr. 3690). Brady, who developed protocols for engaging with buying groups that came to be in September 2015 (after the agreement began to fall apart), testified that this was a “sidebar task” that “didn't have to do with my -- my main focus, the majority focus of my job” which was to work with Mid-Market group practice customers, not buying groups. (CX8020 (Brady, Dep. at 148-149)). Brady testified that he did not recall Schein having any buying groups in the Mid-Market group when he took over in January 2015. (CX8020 (Brady, Dep. at 128) (“Q. Were there any buying groups of independent dentists that existed in Mid Market when you took over in January of 2015? A. Not when I took over in 2015 that I can recall.”)). In September 2015, Brady sent an email to Schein executives about plans to engage with buying groups. (CX0192 at 002). Brady wrote: “[t]raditionally, Schein has rarely engaged with these groups, but times are changing rapidly in the dental market and we must begin to engage.” (CX0192 at 002). The record evidence also shows that even as of January 2016, Schein still had to “figure out if the [Mid-Market] is going to be responsible for [buying groups].” (CX2280 at 001; Cavaretta, Tr. 5637-5638).

The record evidence is clear—Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups during the conspiracy period.

The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

6. *Schein’s Decision to Devote Dedicated Resources to Buying Groups with the Creation of the Alternative Purchasing Channel in 2016.*

334. The massive effort that HSD undertook to develop Schein’s formal buying group strategy beginning in late 2013 eventually led to Schein creating a dedicated division within HSD to evaluate and engage in business with buying groups, known as the Alternative Purchasing Channel (“APC”). (Titus, Tr. 5275; Steck, Tr. 3764; Cavaretta, Tr. 5535, 5653-54).

Response to Proposed Finding No. 334

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that HSD developed a formal buying group program starting in late 2013 that served buying groups during the conspiracy period, or that it otherwise entered into agreements with buying groups during the conspiracy period. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). Complaint Counsel has no specific response to the statement that Schein created APC in 2016.

335. In January 2016, Schein began internal discussions about whether Mid-Market would continue to “be responsible for BGs” in the future. (CX 2280-001).

Response to Proposed Finding No. 335

The Proposed Finding is inaccurate because it mischaracterizes the cited evidence. In CX2280, an email dated January 6, 2016, Cavaretta stated: “We also have to figure out if the MM is going to be responsible for BGs.” It does not support the assertion that Mid-Market was ever responsible for buying groups, or “would continue” to be responsible for buying groups.

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Mid-Markets was created to serve buying groups or that it entered into agreements with buying groups during the conspiracy period. The record evidence shows that the Mid-Market group was formed to serve small DSOs, group practices, and community health centers. (Steck, Tr. 3690). Brady, who developed protocols for engaging with buying groups that came to be in September 2015 (after the agreement began to fall apart), testified that this was a “sidebar task” that “didn't have to do with my -- my main focus, the majority focus of my job” which was to work with Mid-Market group practice customers, not buying groups. (CX8020 (Brady, Dep. at 148-149)). Brady testified that he did not recall Schein having any buying groups in the Mid-Market group when he took over in January 2015. (CX8020 (Brady, Dep. at 128) (“Q. Were there any buying groups of independent dentists that existed in Mid Market when you took over in January of 2015? A. Not when I took over in 2015 that I can recall.”)). In September 2015, Brady sent an email to Schein executives about plans to engage with buying groups. (CX0192 at 002). Brady wrote: “[t]raditionally, Schein has rarely engaged with these groups, but times are changing rapidly in the dental market and we must begin to engage.” (CX0192 at 002). The

record evidence also shows that even as of January 2016, Schein still had to “figure out if the [Mid-Market] is going to be responsible for [buying groups].” (CX2280 at 001; Cavaretta, Tr. 5637-5638).

336. Because Mid-Market did not have the proper resources to devote to the buying group space, Schein created the APC. (Titus, Tr. 5274-75; Steck, Tr. 3763; Cavaretta, Tr. 5653-54). Darci Wingard was hired to run the APC division within HSD. (Cavaretta, Tr. 5654; Steck, Tr. 3765).

Response to Proposed Finding No. 336

Complaint Counsel has no specific response to the statement that Schein created APC or that Wingard was hired to run APC. However, those statements are vague as to the time-period at issue. APC was created in the beginning of 2016, and Wingard was hired in March 2016. (Steck, Tr. 3764; Cavaretta, Tr. 5654).

The remainder of the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Mid-Markets was created to serve buying groups or that it entered into agreements with buying groups during the conspiracy period. The record evidence shows that the Mid-Market group was formed to serve small DSOs, group practices, and community health centers. (Steck, Tr. 3690). Brady, who developed protocols for engaging with buying groups that came to be in September 2015 (after the agreement began to fall apart), testified that this was a “sidebar task” that “didn't have to do with my -- my main focus, the majority focus of my job” which was to work with Mid-Market group practice customers, not buying groups. (CX8020 (Brady, Dep. at 148-149)). Brady testified that he did not recall Schein having any buying groups in the Mid-Market group when he took over in January 2015. (CX8020 (Brady, Dep. at 128) (“Q. Were there any buying groups of independent dentists that existed in Mid Market when you took over in January of 2015? A. Not when I took over in 2015 that I can recall.”)). In September 2015,

Brady sent an email to Schein executives about plans to engage with buying groups.

(CX0192 at 002). Brady wrote: “[t]raditionally, Schein has rarely engaged with these groups, but times are changing rapidly in the dental market and we must begin to engage.” (CX0192 at 002). The record evidence also shows that even as of January 2016, Schein still had to “figure out if the [Mid-Market] is going to be responsible for [buying groups].” (CX2280 at 001; Cavaretta, Tr. 5637-5638).

337. Ms. Wingard fosters and manages current buying group relationships, engages in discovery to find new potential buying group relationships, vets buying group proposals, and creates formularies and prime vendor agreements for buying groups. (CX 8009 (Wingard, Dep. at 42); RX 2249-001). Ms. Wingard is also responsible for the “launch, marketing creation and then the on-boarding process” for buying groups. (CX 8009 (Wingard, Dep. at 42)).

Response to Proposed Finding No. 337

The Proposed Finding is vague as to the time-period at issue. Wingard was hired in March 2016. (Cavaretta, Tr. 5654). Complaint Counsel otherwise has no specific response.

338. The APC was developed to further formalize Schein’s processes for evaluating and conducting due diligence on a buying group to ensure that the group is a good business partner and can drive incremental sales volume to Schein. (Steck, Tr. 3763; CX 8020 (Brady, Dep. at 146); CX 8010 (Titus, Dep. at 75)).

Response to Proposed Finding No. 338

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent the phrase “further formalize Schein’s processes for evaluating and conducting due diligence on a buying group” asserts that Schein had such a process during the conspiracy period. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence

contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

339. The APC is primarily focused on buying groups and has allowed Schein to accelerate its communications and enhance its offering to buying groups. (Cavaretta, Tr. 5654).

Response to Proposed Finding No. 339

The Proposed Finding is vague as to the time-period at issue. APC was created in the beginning of 2016. (Steck, Tr. 3764). To the extent the Proposed Finding asserts or implies that there was any "offering to buying groups" during the conspiracy period, it is misleading and contrary to the weight of the record evidence. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to "KILL the buying group model," and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322, 1178-1198).

340. Since forming the new division, the APC has formalized new buying group relationships with Mastermind and Teeth Tomorrow, among others, and has nurtured the buying group relationships that Schein began during and before the alleged conspiracy period, such as Klear Impakt and others. (CX 8009 (Wingard, Dep. at 175)).

Response to Proposed Finding No. 340

The Proposed Finding is misleading and contrary to the weight of the record evidence as to the phrase “buying group relationships that Schein began during . . . the alleged conspiracy period, such as Klear Impakt.” Schein did not enter into an agreement with Klear Impakt during the conspiracy period. The record evidence shows that Schein contracted with Klear Impakt in August 2015, or after the conspiracy became difficult to maintain. (CCFF ¶ 1318). In addition, to the extent the Proposed Finding refers to negotiations with Klear Impakt in 2014 as the start of the relationship, that is misleading. It is also irrelevant because Sullivan did not know about Schein’s work with Klear Impakt even as of November 2015. (CCFF ¶¶ 843-849; *see also* Responses to Proposed Finding Nos. 802-838). Moreover, Schein entered into agreements with Mastermind and Teeth Tomorrow in 2017, or after the conspiracy became difficult to maintain. (*See* Responses to Proposed Finding Nos. 950-962 (Mastermind), 1250-1262 (Teeth Tomorrow)). The Proposed Finding is also misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it entered into an agreement with a buying group *after* the conspiracy period. In fact, this is consistent with the record evidence that shows Schein’s conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of buying groups during the conspiracy, and then to competing for buying groups when the conspiracy became difficult to maintain following Benco’s April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see* Complaint Counsel’s Post-Trial Brief, at Attachment C)

341. Schein led the way in developing the buying group space, as evidenced through its efforts in its Mid-Market division and eventual creation of the APC. (Cavaretta, Tr. 5525 (“I feel proud and I want to look back and say that I was the leader of creating the mid-market space, I was the leader of creating the buying group space.”)).

Response to Proposed Finding No. 341

The Proposed Finding is vague as to the time-period at issue. Complaint Counsel does not object to the statement that Schein was the first to work with buying groups before the conspiracy. However, to the extent the Proposed Finding asserts or implies that Schein “led the way in developing the buying group space” during the conspiracy period, that is inaccurate, misleading, and contrary to the weight of the record evidence. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

F. Schein’s Buying Group Practices Differed Substantially from Patterson’s and Benco’s.

1. *Benco’s No Buying Group Policy.*

342. Since 1996, Benco has had a policy not to work with buying groups of independent dentists. (Cohen, Tr. 780 (“[O]ur policy has been consistent, no middleman between us and our clients, ... and therefore, we don’t work with buying groups.”), 999 (confirming the policy has been in place since 1996); CX 1112-046-48).

Response to Proposed Finding No. 342

Complaint Counsel has no specific response.

343. Benco's policy is still in place today. (Cohen, Tr. 693).

Response to Proposed Finding No. 343

Complaint Counsel has no specific response.

344. As part of its policy, Benco [REDACTED] (CX 1100-003; Cohen, Tr. 981).

Response to Proposed Finding No. 344

Complaint Counsel has no specific response.

345. Benco developed its no buying group or "no-middleman" policy independent of Schein. (Cohen, Tr. 692-93, 853).

Response to Proposed Finding No. 345

Complaint Counsel has no specific response to the attribution of the statement to Cohen.

However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it suggests that Benco, Schein, and Patterson were not part of an overarching conspiracy. The record evidence shows that Benco orchestrated an agreement with Schein that neither would discount to buying groups, informed Schein of Benco's no buying group policy, exchanged assurances that neither would discount to buying group, confronted Schein when it suspected Schein of discounting to buying groups, and communicated competitively sensitive information to Schein to show it was not deviating from prior assurance. (CCFF ¶¶ 661-1100). Moreover, the record evidence shows that Benco reached out to Schein on no fewer than six occasions from 2011 to 2014 and gained an understanding that Schein did not work with buying groups during the conspiracy period. (CCFF ¶¶ 679-681; *see also* Responses to Proposed Finding Nos. 136-140). The record

evidence also shows the Big Three were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups. (CCFF ¶¶ 661-1100, 1178-1198). Furthermore, Benco, Patterson, and Schein’s internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195).

346. Benco’s no buying group policy differs substantially from Schein’s practice of evaluating each buying group case-by-case, doing business with some and declining others. (Sullivan, Tr. 4020, 4086-87; Meadows, Tr. 2467, 2578; Titus, Tr. 5192, 5232; Steck, Tr. 3709; Foley, Tr. 4523, 4646-48; Cavaretta, Tr. 5531, 5536).

Response to Proposed Finding No. 346

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that during the conspiracy period Schein evaluated each buying group and that it decided to do business with some and decline others. The record evidence is clear—it shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications

with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322, 1178-1198).

2. *Patterson’s No Buying Group Practice.*

347. During the alleged conspiracy period, buying groups or GPOs were not part of Patterson’s strategy. (Misiak, Tr. 1394 (“[A]t a corporate level GPOs were not part of the strategy for the [Patterson] special markets group”); CX 3075). Instead, Patterson focused its efforts on building an infrastructure to compete with Schein in the DSO space, while continuing to compete for the business of private practice dentists. (Misiak, Tr. 1342 (“[O]ur strategy is focused on private practice and DSOs,” not GPOs), 1424-25 (“Our largest competitor had been in [the DSO space] for twenty years.”), 1464 (“Henry Schein had the largest percent of market share in this space, somewhere in the 90 percent market share of DSOs.”), 1489-90; Guggenheim, Tr. 1782 (Patterson wanted to “create disruption in Henry Schein’s business particularly because they were the dominant player”), 1863; McFadden, Tr. 2785-86).

Response to Proposed Finding No. 347

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Patterson did not have the resources or infrastructure to do business with buying groups both before and after the creation of Special Markets. Evidence in the record shows that Patterson had the resources and infrastructure to work with buying groups both before it established its Special Markets division and after Special Markets was formed in 2013. (Misiak, Tr. 1510). Neal McFadden, the President of Special Markets moreover testified that, when the Special Markets division was formed, he was interested in any entity that would bring in business, including GPOs. (CCFF ¶¶ 601-602).

In addition, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that claims about Patterson’s infrastructure disprove Schein’s participation in an overarching conspiracy. The record evidence shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein’s internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195).

348. Nevertheless, Patterson’s trial witnesses testified that Patterson independently evaluated buying groups that approached Patterson. (Guggenheim, Tr. 1794-95, 1807; Misiak, Tr. 1352-53; Rogan, Tr. 3646-47, 3666; McFadden, Tr. 2704-06, 2725-26, 2806, 2846).

Response to Proposed Finding No. 348

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the testimony disproves Schein’s participation in an overarching conspiracy. The record evidence establishes an overarching conspiracy. (*See* Response to Proposed Finding No. 347).

The Proposed Finding is also misleading and contrary to the weight of the record evidence, to the extent it asserts Patterson evaluated buying groups independently during the conspiracy.

The record evidence shows that prior to communications with Cohen, Patterson considered partnering with buying groups, like the New Mexico Dental Cooperative; three days after communications with Cohen, Patterson ended negotiations with the New Mexico Dental Cooperative and informed its team that the Big Three stayed out of buying groups, ensured compliance with the agreement internally, and instructed its sales force to refuse buying groups. (CCFF ¶¶ 454-660).

349. In practice, Patterson summarily rejected many groups based on the fact that they were buying groups or GPOs, which did not fit Patterson’s strategy. (Guggenheim, Tr. 1573-75 (“And I think the evidence is clear we didn’t really entertain these [GPOs].”); McFadden, Tr. 2685 (“I believe pretty much every inquiry I received from buying groups or GPOs and such, I always told them thank you, but no thanks. It’s not a good business decision for us.”); CX 0093-001 (“When I get these calls directly I politely say that I appreciate the opportunity, but currently we do [not] participate in group purchasing organizations.”); Misiak, Tr. 1338-39 (“What was coming up through this [Atlantic Dental Care] RFP was not part of our strategy....”); CX 3116-001 (“We have said no [to GPOs] at every turn, including to Delta dental.”); CX 3080-001 (regarding a group out of New Hampshire: “Typical approach of an upstart buying group. We pass on these as a matter of protecting [Patterson’s] business model.”); CX 3168-001 (“We don’t sell to buying groups. Let’s talk live.”); CX 3004-001 (“For now – I am electing to not participate with these [buying] groups – we have said no to several already....”); CX 0137-001 (“I again explained to [Dentistry Unchained] very nicely that we are not going to participate in a GPO type program at this point.”); CX 3045 (regarding Dr. Narducci’s GPO: “[D]oes he own all these offices – if not then he is a GPO – we don’t deal with GPO’s....”); CX 3010-001 (regarding Ascension Health GPO: “And yes, as of now we are not working with GPO’s.”)).

Response to Proposed Finding No. 349

The Proposed Finding is misleading and not supported by the cited evidence to the extent it asserts that Patterson had a pre-existing “strategy” not to do business with buying groups, and that such a strategy prevented Patterson from serving buying groups during the conspiracy period. Guggenheim testified that Patterson could serve customer segments that were not part of Patterson’s corporate strategy. (Guggenheim, Tr. 1587-1589).

In addition, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Patterson rejected buying groups during the conspiracy pursuant to an existing strategy, which buying groups did not fit into, rather than pursuant to its participation in a conspiracy. The record evidence shows that Patterson believed that the Big Three would reject buying groups during the conspiracy period. The record evidence shows that Cohen communicated Benco’s no buying group policy to Guggenheim on February 8, 2013 and that Guggenheim immediately forwarded Cohen’s email regarding its no buying group policy to Misiak and Rogan. (CCFF ¶¶ 484, 491-495).

The evidence shows that, a few hours after Guggenheim received Cohen’s email about Patterson’s involvement with NMDC and Benco’s no buying group policy, Guggenheim responded to Cohen: “Thanks for the heads up. I’ll investigate the situation. We feel the same way about these.” (CCFF ¶ 495 (quoting CX0090 at 001)). Shortly after this exchange, Misiak instructed his team not to bid for a group he believed was a buying group:

“Confidential and not for discussion . . . our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me.” (CCFF ¶ 549 (quoting CX0093 at 001 (emphasis in original)); *see also* CCFF ¶ 1187). The record evidence also shows that prior to communications with Cohen, Patterson considered

partnering with buying groups, like the New Mexico Dental Cooperative; three days after communications with Cohen, Patterson ended negotiations with the New Mexico Dental Cooperative and informed its team that the Big Three stayed out of buying groups, ensured compliance with the agreement internally, and instructed its sales force to refuse buying groups. (CCFF ¶¶ 454-660). Patterson's documents continued to refer to an overarching conspiracy. For example, the record also shows that Misiak was also concerned that Schein and Benco would submit bids for buying groups and deny doing so. On February 27, 2013, Misiak wrote to Guggenheim, "I've coached [Regional Manager Fruehauf] on how to stay out of this [buying group] with grace. I'm concerned that Schein and Benco sneak into these co-op bids and deny it. . . ." (CCFF ¶ 1188 (quoting CX0092 at 001), 1189). Then on August 4, 2013, Rogan (Patterson) wrote to McFadden (Patterson): "Neal, we don't need GPO's in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry." (CCFF ¶ 1190 (quoting CX0106 at 001)).

350. Unlike Schein, Patterson never developed or pursued a buying group strategy. (Guggenheim, Tr. 1602 ("The guidance has always been that while we give our branches and our general managers tremendous leeway to evaluate customers individually, the guidance has always been that we don't do business with buying groups."); Misiak, Tr. 1339, 1349 ("GPOs are not currently part of our plan."), 1324 ("DSOs were in the strategic plan, GPOs were not..."), 1352-54 ("GPOs were not part of the strategy, so we would ... [p]olitely turn them down and stay focused on the existing strategy."), 1419, 1493, 1499; CX 3127-001 ("As a rule we are trying our best to steer clear of all buying groups.")).

Response to Proposed Finding No. 350

The Proposed Finding is misleading and contrary to the weight of the record evidence in asserting that Schein served buying groups during the conspiracy period. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed

employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322, 1178-1198).

As set forth above in the Response to Proposed Finding No. 349, the Proposed Finding is contrary to the weight of the record evidence to the extent it asserts that Patterson’s rejection of buying groups during the conspiracy was pursuant to a preexisting policy and not pursuant to a conspiracy.

351. Mr. Rogan, Vice President and General Manager for North America at Patterson testified at trial that: “Even today” buying groups are “not an opportunity” Patterson is pursuing. (Rogan, Tr. 3605, 3609 (confirming that buying groups have never been part of Patterson’s core strategy); Misiak, Tr. 1500).

Response to Proposed Finding No. 351

The Proposed Finding is misleading and contrary to the weight of the evidence, including other testimony by Mr. Rogan. It is misleading to the extent that it implies that Patterson’s decisions about doing business with buying group prior to the conspiracy contravenes the evidence that is joined an agreement with its competitors to reject buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013

that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). Rogan’s testimony that “even today . . . it’s not an opportunity” that Patterson is pursuing, is factually incorrect. Rogan testified specifically that Patterson bid for the Smile Source buying group contract in 2017. (Rogan, Tr. 3542). [REDACTED]

[REDACTED]. Thus, Rogan’s testimony that Patterson is not pursuing buying group opportunities today is contrary to the evidence.

352. None of Patterson’s trial witnesses could identify a specific buying group that Patterson worked with. (Guggenheim, Tr. 1568; Misiak, Tr. 1396; Rogan, Tr. 3468-69; McFadden, Tr. 2703-04).

Response to Proposed Finding No. 352

The Proposed Finding is vague as to the time-period at issue. Complaint Counsel does not object that Patterson did not work with any buying groups during the conspiracy period. Indeed, the weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). The record evidence shows that Patterson sought or entered into agreements with buying groups before and after the conspiracy period. Before the conspiracy period, Patterson discussed a potential partnership with buying group New Mexico Dental Cooperative but informed the group it would not bid after communications with Benco. (CCFF ¶¶ 454-503).

After the conspiracy became difficult to maintain, the record shows that Patterson sought or obtained contracts with buying groups. (CCFF ¶¶ 1323-1365).

353. Patterson's no buying group practice differs substantially from Schein's practice of evaluating each buying group, doing business with some and declining others. (Sullivan, Tr. 4020, 4086-87; Meadows, Tr. 2467-70; Titus, Tr. 5192, 5232; Steck, Tr. 3709; Foley, Tr. 4523, 4646-48; Cavaretta, Tr. 5531, 5536).

Response to Proposed Finding No. 353

The Proposed Finding is misleading and contrary to the weight of the record evidence regarding "Schein's practice" and "Patterson's no buying group practice." First, as to Schein, the record evidence shows that Schein did not evaluate certain characteristics of buying groups to decide whether or not to do business with them during the conspiracy period. The record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts that Patterson's rejection of buying groups during the conspiracy was pursuant to a preexisting policy and not pursuant to a conspiracy. As set forth in Responses

to Proposed Finding Nos. 347-352, the record evidence shows otherwise. (*See* Responses to Proposed Finding Nos. 347-352).

G. Schein's Conduct Was Consistent with Burkhart's, a Distributor Complaint Counsel Says Declined the Alleged Invitation to Collude.

354. According to Complaint Counsel, "Burkhart did what it was supposed to do" and "was not a part of the conspiracy." (Kahn, Tr. 20-21). It "did not agree to join and continued selling to buying groups." (CC Pretrial Br. at 36). The same is true of Schein – it continued to sell to buying groups throughout the alleged conspiracy.

Response to Proposed Finding No. 354

The third sentence of the Proposed Finding is not supported by any citation to the record evidence and should be disregarded. Nonetheless, the Proposed Finding is contrary to the weight of the evidence and misleading to the extent it asserts that Schein's actions were comparable to Burkhart during the conspiracy. The record evidence shows that Burkhart and Schein acted differently and pursued different courses of conduct toward Cohen and buying groups: (1) Sullivan did not rebuff Cohen's communications about buying groups, but Reece did; (2) Schein participated in an agreement targeting buying groups, but Burkhart did not; and (3) Schein and Sullivan instructed its sales force not to deal with buying groups and rejected them, but Burkhart had no policy against buying groups and pursued them. The Proposed Finding is also irrelevant, and does not negate the record of evidence pointing to Schein's participation in the agreement.

The record evidence shows that Sullivan acted in accordance with the agreement. Sullivan provided mutual assurances to Cohen about buying groups, as Cohen understood through his communications with Sullivan that Schein also had a policy not to deal with buying groups. (CCFF ¶¶ 674-677). Sullivan continued communicating with and reaching out to Cohen about buying groups when Cohen contacted him. (CCFF ¶¶ 1051-1080, 1088-1090). Sullivan's testimony that he admonished Cohen about buying groups is contradicted by

Cohen's testimony and Sullivan's prior sworn testimony. Cohen testified at trial that he did not recall Sullivan ever telling Cohen to stop contacting him about buying groups or ever giving Cohen the impression that the two men should not be talking about buying groups. (CCFF ¶ 1090). Sullivan's testimony that he told Cohen not to discuss buying groups is contrary to sworn testimony that he provided at his investigational hearing, where Sullivan testified that he did not know what his April 3, 2013 call with Cohen was about, but that he did not believe it was possible that the call related to Atlantic Dental Care. (CCFF ¶ 1089). Sullivan never reported or documented his communications with Cohen about ADC or Dental Alliance in 2013 to Schein's legal department or anyone else, as he was required to do under Schein's antitrust policy. (CCFF ¶¶ 1049-1050). The record evidence shows that Sullivan complied with the agreement by enforcing a policy against buying groups during the conspiracy, and Schein rejected buying groups as a result. (CCFF ¶¶ 661-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). Benco's (and Patterson's) internal documents further confirm that Schein was a participant in the agreement, while Burkhart was not. (CCFF ¶¶ 1183-1195). Schein's internal documents also reference a common understanding among the Big Three about buying groups—none mention Burkhart. (CCFF ¶ 1185).

The record evidence also shows that Burkhart rejected Benco's invitation and pursued a different course of conduct from Schein by pursuing buying groups. Burkhart did not change its policy or strategy of working with buying groups after its communications with Benco, and continued selling to buying groups following three of Benco's attempts to persuade Burkhart not to deal with buying groups. (CCFF ¶ 1240). Benco's contemporaneous documents show that Burkhart rejected the invitation to join the pre-existing agreement with

Schein and Patterson. (CCFF ¶¶ 1183 (quoting CX0023 at 001), 1101-1108, 1217-1218).

Burkhart's Vice President of Sales, Jeff Reece, did not continue communicating with Benco about buying groups when Benco reached out to Burkhart. (CX0319 (Reece, IHT at 161)).

Reece's testimony's regarding his conversation with Cohen about buying groups has been consistent throughout this case. (*See* Reece, Tr. at 4384-4385; CX8021 (Reece, Dep. at 112, 114); CX0319 (Reece, IHT at 154-155)). Reece saw buying groups as a growth opportunity, did not enforce a policy against them, pursued them beginning in 2011, and [REDACTED]

[REDACTED]. (CCFF ¶¶ 255, 1246-1249; Reece, Tr. 4370-4371, 4452; CX4259 at 016 (article about GPOs quoting Reece: "I want to make sure they think of Burkhart/HRS first.")). During the conspiracy, Burkhart worked with buying groups like Smile Source and Kois, and Schein did not. (CCFF ¶¶ 166, 179, 1427, 1662).

355. Burkhart began working with buying groups in 2012, working with only two buying groups over the course of the alleged conspiracy period, and currently works with about six buying groups. (Reece, Tr. 4394, 4409, 4460, 4369-70). Similarly, Schein's leadership could not remember a time that Schein was not working with buying groups (*E.g.*, Sullivan, Tr. 4020; Foley, Tr. 4606), and the evidence discussed above indicates Schein has consistently worked with buying groups for even longer. (SF 159, 375-1335). In comparison to Burkhart's six buying groups, Schein worked with at least 25 buying groups during the alleged conspiracy. (SF 375-1335).

Response to Proposed Finding No. 355

The Proposed Finding is contrary to the weight of the evidence and misleading to the extent it asserts that Schein's actions were comparable to Burkhart during the conspiracy. The record evidence shows that Burkhart and Schein acted differently and pursued different courses of conduct toward Cohen and buying groups: (1) Sullivan did not rebuff Cohen's communications about buying groups, but Reece did; (2) Schein participated in an agreement targeting buying groups, but Burkhart did not; and (3) Schein and Sullivan instructed its sales

force not to deal with buying groups and rejected them, but Burkhart had no policy against buying groups and pursued them. The Proposed Finding is also irrelevant, and does not negate the record of evidence pointing to Schein's participation in the agreement. (*See* Response to Proposed Finding No. 354).

The Proposed Finding is misleading and irrelevant, to the extent it asserts that Schein's longer history with buying groups has any relevance to whether Schein was part of an agreement. Schein historically worked with buying groups before 2011, but began enforcing a policy against them in 2011. (CCFF ¶¶ 687-716, 733-954). The Proposed Finding is also misleading to the extent it asserts Schein worked with twenty-five buying groups during the conspiracy. The record evidence shows that these groups are "legacy" pre-conspiracy buying group relationships, post-conspiracy relationships, or not buying groups. (*See* Responses to Proposed Finding Nos. 375-1335). Of Schein's asserted entities, just four buying groups originated during the conspiracy period, and none were approved by Sullivan, and all were against Sullivan's instructions not to deal with buying groups. (*See* Responses to Proposed Finding Nos. 634-675 (Dental Gator), 1309-1335 (Dental Alliance), 969-981 (MeritDent), 1093-1104 (Schulman Group)).

356. Both Burkhart and Schein expressed interest in doing business with Smile Source in 2012. (Reece, Tr. 4394-95; RX 2090; Sullivan, Tr. 4162).

Response to Proposed Finding No. 356

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts that Schein was interested in doing business with Smile Source in 2012. The record evidence shows that Schein did not work with Smile Source during the conspiracy, that Sullivan was against working with buying groups during the alleged conspiracy, and that Sullivan was pleased when the relationship ended at the beginning of 2012. (CCFF ¶¶ 728-

732, 914-924). Smile Source was a pre-existing relationship established in 2008 that ended at the beginning of 2012, which made “Sullivan [] happy that we are less one more BG.” (CCFF ¶¶ 758, 899). Schein did not work with Smile Source during the conspiracy period. (See Responses to Proposed Finding Nos. 1105-1186). After the relationship with Smile Source ended, Sullivan stated: “I’m really less concerned about the actual revenues...rather more about what we can do to KILL the buying group model!!” (CCFF ¶ 728 (quoting CX0199 at 001 (emphasis in original))). Sullivan testified that he would not otherwise instruct his team that he wanted to “KILL” the business model of other types of customers if he was trying to win them back. (CCFF ¶ 730-732; Sullivan, Tr. 3935). Documents in the record confirm that Sullivan was pleased when the Smile Source relationship ended. On February 20, 2012, Foley wrote regarding the end of the Schein’s relationship with Smile Source: “Tim Sullivan is happy that we are less one more BG.” (CCFF ¶ 758 (quoting CX0238 at 001)). Complaint Counsel has no specific response to the remainder of the Proposed Finding. The Proposed Finding is contrary to the weight of the evidence and misleading to the extent it asserts that Schein’s actions were comparable to Burkhart during the conspiracy. The record evidence shows that Burkhart and Schein acted differently and pursued different courses of conduct toward Cohen and buying groups: (1) Sullivan did not rebuff Cohen’s communications about buying groups, but Reece did; (2) Schein participated in an agreement targeting buying groups, but Burkhart did not; and (3) Schein and Sullivan instructed its sales force not to deal with buying groups and rejected them, but Burkhart had no policy against buying groups and pursued them. The Proposed Finding is also irrelevant, and does not negate the record of evidence pointing to Schein’s participation in the agreement. (See Response to Proposed Finding No. 354).

357. Both Burkhart and Schein bid for Smile Source's business during the alleged conspiracy period – Burkhart in 2012 and Schein in 2014. (Reece, Tr. 4396-97; RX 2213; SF 1111-12, 1156-86).

Response to Proposed Finding No. 357

The Proposed Finding is contrary to the weight of the evidence and misleading. Complaint Counsel contends that Schein's 2014 proposal to Smile Source was an attempt at cheating on the agreement. (Kahn, Tr. 61). The record evidence shows that Schein's interactions with Smile Source in 2014 was an attempt at cheating—Schein knew Benco and Patterson would not be bidding, offered Smile Source a low, non-competitive bid, instructed its team not to do business with buying groups at the time it was allegedly working on that bid, and Sullivan continued instructing against buying groups after the bid. First, the record evidence shows that by 2014, the Big Three already knew that they would not discount to buying groups. (CCFF ¶¶ 674-676, 700, 1178-1198). Second, the record evidence also shows that the proposed discount in 2014 was non-competitive at 7%, a discount that was significantly lower than what Schein gave to Smile Source in the pre-conspiracy relationship. (CCFF ¶¶ 1829-1837). [REDACTED]

[REDACTED]. (CCFF ¶ 1835, 1843-1847). Schein's 2014 partnership proposal to do business with Smile Source members offered [REDACTED]

[REDACTED]

[REDACTED]. Both Dr. Goldsmith and Maurer expected [REDACTED]

[REDACTED]

[REDACTED]. (CCFF ¶¶ 1835-1836). Third, just several months after the proposal, Sullivan told other Schein executives internally that he was "Not interested" in the arrangement that Smile Source had been seeking and continued instructing against buying groups like Kois. (CCFF ¶¶ 1849, 809). Sullivan stated: "I still believe this is

a slippery slope . . . don't plan to take the lead role.” (CCFF ¶ 809). Fourth, even at the same time Schein was allegedly working on a bid for Smile Source, it was instructing its team not to do business with buying groups: “Just for clarity, we are NOT participating in any GPOs regardless of what they promise to bring us.” (CCFF ¶ 816 (quoting CX2354 at 001) (emphasis in original)). Finally, the record evidence shows that Schein's meeting with Smile Source was private, took place on Schein's premises, and only involved the heads of Schein and Smile Source. (CCFF ¶ 1826; Maurer, Tr. 4941). [REDACTED]

[REDACTED] There is also no evidence that Benco or Patterson ever learned of Schein's meeting with Smile Source in 2014.

The Proposed Finding is also contrary to the weight of the evidence to the extent it asserts that Schein's actions were comparable to Burkhart during the conspiracy. The record of evidence shows that Burkhart and Schein acted differently and pursued different courses of conduct toward Cohen and buying groups: (1) Sullivan did not rebuff Cohen's communications about buying groups, while Reece did; (2) Schein participated in an agreement targeting buying groups and Burkhart did not; and (3) Schein and Sullivan instructed its salesforce not to deal with buying groups and rejected them, while Burkhart no policy against buying groups and pursued them. The Proposed Finding is also irrelevant, and does not negate the record of evidence pointing to Schein's participation in the agreement. (See Response to Proposed Finding No. 354).

358. Burkhart and Schein offered Smile Source members similar discounts during the alleged conspiracy period. (Maurer, Tr. 4942-43 (“Q. [D]id you consider this to be a competitive proposal by Henry Schein? A. Yes. It was similar to the deal we had in place with Burkhart.”); CX 4105).

Response to Proposed Finding No. 358

The Proposed Finding is contrary to the weight of the evidence, which shows that Schein's 2014 proposal was not competitive with Burkhart. First, Maurer's testimony that the 2014 proposal was "objectively similar" to the Burkhart discount is not supported by the record evidence. [REDACTED]

[REDACTED] which is not similar to the 7% discount Schein offered in 2014. (*Compare* CCFF ¶ 181 *with* Maurer, Tr. 4945). Second, the record establishes that Dr. Goldsmith's testimony is more reliable than Maurer's testimony, and that more reliable testimony and the record evidence establishes that Schein's 2014 proposal for a 7% discount was not competitive. As Schein concedes, and as Schein witnesses testified, Schein's partnership proposal to Smile Source in early 2014 offered a 7% discount off of catalog for private label brand merchandise. (*See* SF 1163, 1176; CCFF ¶ 1829; CX2508 at 011; CX2536 at 014;

[REDACTED]; Steck, Tr. 3790). Maurer's testimony about the 2014 proposal is contradicted by the contemporaneous documents and witness testimony. Dr. Goldsmith's testimony about the 2014 proposal discounts, by contrast, is consistent with Schein's contemporaneous documents and witness testimony. Maurer testified that he believed the 2014 Smile Source proposal offered a [REDACTED] off of a catalog discount, which is factually inaccurate and contradicted by the record evidence. (Maurer, Tr. 5004-5005).

[REDACTED]

[REDACTED]. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

359. Both Burkhart and Schein currently work with Smile Source. (Reece, Tr. 4397-98, 4461; Steck, Tr. 3687; Sullivan, Tr. 4181).

Response to Proposed Finding No. 359

The Proposed Finding is misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it entered into an agreement with Smile Source in 2017, or after the conspiracy became difficult to maintain following Benco's April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161, 1319). It is also misleading because Schein did not continuously work with Smile Source from 2008 through the present. The record evidence shows that Schein did not contract with Smile Source during the conspiracy, that Sullivan was happy that Schein's relationship with Smile Source ended, and that Schein's 2014 proposal to Smile Source was an attempt at cheating on the agreement. (CCFF ¶¶ 923-924, 1824-1852; *see also* Responses to Proposed Finding Nos. 1105-1186). Burkhart, on the other hand, partnered with Smile Source in 2012 and continued to supply Smile Source. (CCFF ¶¶ 179, 1248-1249, 1662). As such, the comparison is misleading and inaccurate. Complaint Counsel has no specific response to the assertion that Burkhart currently works with Smile Source.

360. Both Burkhart and Schein look for "stickiness" when evaluating potential buying group relationships. (Reece, Tr. 4456-58; Meadows, Tr. 2488, 2495, 2505-06, 2544-45; Sullivan, Tr. 4004).

Response to Proposed Finding No. 360

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts or implies that Schein served buying groups during the conspiracy or looked for

“stickiness” during the conspiracy. It did not, but Burkhart did. The record evidence shows that Sullivan acted in accordance with the agreement by enforcing a policy against buying groups during the conspiracy. (CCFF ¶¶ 728-781). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy without any analysis of “stickiness.” (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). Burkhart, on the other hand, partnered with buying groups during the conspiracy period. (CCFF ¶¶ 1300, 1694). As such, the comparison is misleading and inaccurate. Moreover, an assertion about Schein’s *current* policies concerning buying groups, or a comparison of those current policies to Burkhart, does not disprove its participation in a conspiracy. (*See* Response to Proposed Finding No. 359). In fact, it is consistent with evidence showing that Schein changed course and began competing for buying groups after the conspiracy became difficult to maintain. (CCFF ¶¶ 1159-1166, 1316-1322).

361. Both Burkhart and Schein look at whether a buying group can deliver volume. (Reece, Tr. 4484-85; Meadows, Tr. 2490-92, 2500, 2559; Steck, Tr. 3729-30, 3748; Titus, Tr. 5218-19).

Response to Proposed Finding No. 361

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts that Schein served buying groups during the conspiracy or that it looked at whether a buying group could deliver volume. It did not because it did not serve buying groups at all during the conspiracy. (CCFF ¶¶ 661-1100). Burkhart, on the other hand, partnered with buying groups during the conspiracy period. (CCFF ¶¶ 1300, 1694). The record evidence shows that Sullivan acted in accordance with the agreement by enforcing a policy against buying groups during the conspiracy. (CCFF ¶¶ 728-781). The record evidence contains

dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). Moreover, an assertion about Schein's *current* policies concerning buying groups, or a comparison of those current policies to Burkhart, does not disprove its participation in a conspiracy. (*See* Response to Proposed Finding No. 359). In fact, it is consistent with evidence showing that Schein changed course and began competing for buying groups after the conspiracy became difficult to maintain. (CCFF ¶¶ 1159-1166, 1316-1322).

362. Both Burkhart and Schein recognize that not all buying groups are the same, not all will exhibit stickiness, not all can deliver volume, and some are likely to fail. (Reece, Tr. 4460, 4484, 4487-88; CX 0319 (Reece, IHT at 76 (“[T]hen there are other ones that are ... a couple of guys that over cocktails decided they wanted to save money on supplies, so they formed a group of buddies”)); Titus, Tr. 5270 (“Klearimpakt is a testimony that not all are created equal[.]” (quoting CX 2208)); Meadows, Tr. 2489 (“Not all buying groups could provide us with new customers....”)).

Response to Proposed Finding No. 362

For the same reasons set forth in Responses to Proposed Finding Nos. 360-361, the Proposed Finding is misleading and contrary to the weight of the evidence in its comparison of Schein and Burkhart. The record evidence shows that Schein did not serve buying groups during the conspiracy but that Burkhart did. (CCFF ¶¶ 661-110, 1300, 1694). In fact, Sullivan acted in accordance with the agreement by enforcing a policy against buying groups during the conspiracy. (CCFF ¶¶ 728-781). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy without any analysis of a buying groups characteristics. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). Moreover, an

assertion about Schein's *current* policies concerning buying groups, or a comparison of those current policies to Burkhart, does not disprove its participation in a conspiracy. (*See* Response to Proposed Finding No. 359). In fact, it is consistent with evidence showing that Schein changed course and began competing for buying groups after the conspiracy became difficult to maintain. (CCFF ¶¶ 1159-1166, 1316-1322).

363. Some of Burkhart's buying group relationships deteriorated over time, such as its relationship with Amerinet. (Reece, Tr. 4449-50). Similarly, Schein's relationship with the Dental Co-Op and Steadfast deteriorated over time. (SF 592-614, 1213-36).

Response to Proposed Finding No. 363

The Proposed Finding is contrary to the weight of the evidence and misleading to the extent it asserts that Schein's actions were comparable to Burkhart during the conspiracy. The record evidence shows that Burkhart and Schein acted differently and pursued different courses of conduct toward Cohen and buying groups: (1) Sullivan did not rebuff Cohen's communications about buying groups, but Reece did; (2) Schein participated in an agreement targeting buying groups, but Burkhart did not; and (3) Schein and Sullivan instructed its sales force not to deal with buying groups and rejected them, but Burkhart had no policy against buying groups and pursued them. (CCFF ¶¶ 1051-1080, 1088-1090, 1217-1218, 661-1100, 1240, 1251). The Proposed Finding is also irrelevant, and does not negate the record of evidence pointing to Schein's participation in the agreement.

The Proposed Finding is also contrary to the weight of the evidence, which shows that Schein targeted buying groups for termination and terminated pre-existing relationships, pursuant to Sullivan's instructions not to deal with buying groups. (CCFF ¶¶ 871-898, 799). Schein also tried to terminate other buying groups, like Dental Gator, and threatened to terminate other customers that it suspected of being a buying group. (CCFF ¶ 1806; *see* Responses to

Proposed Finding Nos. 634- 675 Dental Gator, 402-445 (Breakaway)). There is no evidence that Burkhart had any similar policy of targeting buying groups for termination.

364. Neither Schein nor Burkhart had a relationship with the Texas Dental Association regarding discounts to its members. (Reece, Tr. 4488-89; SF 1557-60).

Response to Proposed Finding No. 364

The Proposed Finding is irrelevant to Complaint Counsel’s allegations about an agreement among Benco, Schein, and Patterson. Moreover, the Proposed Finding is misleading to the extent it implies that Burkhart was against working with buying groups, such as the one created by the Texas Dental Association. Unlike Benco, Schein, and Patterson, Burkhart kept attending the Texas Dental Association’s annual trade show after the Texas Dental Association announced the formation of a buying group in 2013. (CX0319 (Reece, IHT at 173-174)).

365. In November 2013, Burkhart listed GPOs among its “key strategies.” (CX 4214). Similarly, in December 2014, Schein listed its “GPO Strategy” as a “Strategic Priorit[y].” (CX 2475-009).

Response to Proposed Finding No. 365

The Proposed Finding is misleading and contrary to the weight of the evidence in its comparison of Schein and Burkhart. The record evidence shows that Schein did not serve buying groups during the conspiracy but that Burkhart did. (CCFF ¶¶ 661-110, 1300, 1694). Moreover, the Proposed Finding is misleading to the extent it implies that listing “GPO Strategy” in a document means Schein served buying groups. It did not. In fact, the record evidence shows that Sullivan acted in accordance with the agreement by enforcing a policy against buying groups during the conspiracy. (CCFF ¶¶ 728-781). The record evidence is replete with evidence that Schein rejected buying groups during the conspiracy period, that Schein rejected buying groups categorically, and that it did not analyze whether a buying

group could deliver volume. (CCFF ¶¶ 661-954; Complaint Counsel’s Post-Trial Brief, at Attachment C). As such, the comparison is misleading and inaccurate. Complaint Counsel has no specific response to the remainder of the Proposed Finding.

366. In 2014, neither Burkhart nor Schein had a formalized strategy for working with buying groups, but both were working on such a formalized strategy, including how to evaluate potential buying group opportunities. (CX 4247 (Dave Anderson at Burkhart recognizing “the importance of developing a strategy for working with GPOs,” and asking for “some help in developing criteria to use for filtering these opportunities as they come up”); Reece, Tr. 4482-84; Meadows, Tr. 2591; CX 2352 (Jake Meadows: “I’d like to discuss GPO strategies at some point.”); RX 2409 (September 24, 2014 agenda listing “buying groups ... discussion around what our strategy should be”); Cavaretta, Tr. 5590 (“[W]e didn’t really have a strategy. It was almost ad hoc.”)).

Response to Proposed Finding No. 366

The Proposed Finding is misleading and contrary to the weight of the evidence in its comparison of Schein and Burkhart. The record evidence shows that Schein did not serve buying groups during the conspiracy but that Burkhart did. (CCFF ¶¶ 661-110, 1300, 1694). Moreover, the Proposed Finding is misleading to the extent it implies Schein did not have an approach to buying groups during the conspiracy period. It did, and it was one of indiscriminate rejection pursuant to a policy. In fact, the record evidence shows that Sullivan acted in accordance with the agreement by enforcing a policy against buying groups during the conspiracy. (CCFF ¶¶ 728-781). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). As such, the comparison is misleading and inaccurate. Complaint Counsel has no specific response to the remainder of the Proposed Finding.

367. Burkhart never contacted Benco, Patterson, or Schein to see if they were discounting to buying groups, never let them know what Burkhart’s policy was, and never initiated a communication with a competitor about buying groups. (Reece, Tr. 4375, 4386). Likewise,

Schein never contacted Benco or Patterson to see if they were discounting to buying groups, never let them know what Schein's policy was, and never initiated a communication with a competitor about buying groups. (SF 1396-93).

Response to Proposed Finding No. 367

Complaint Counsel has no specific response to the first sentence of the Proposed Finding.

The second sentence is inaccurate and contrary to the weight of the evidence, which shows that Schein exchanged assurances with Benco about buying groups. During the conspiracy, Benco understood that Schein was not working with buying groups, and that Benco was not competing with Schein or Patterson for buying groups. (CCFF ¶¶ 674-678). The Proposed Finding is contrary to the weight of the evidence and misleading to the extent it asserts that Schein's actions were comparable to Burkhart during the conspiracy. The record evidence shows that Burkhart and Schein acted differently and pursued different courses of conduct toward Cohen and buying groups: (1) Sullivan did not rebuff Cohen's communications about buying groups, but Reece did; (2) Schein participated in an agreement targeting buying groups, but Burkhart did not; and (3) Schein and Sullivan instructed its sales force not to deal with buying groups and rejected them, but Burkhart had no policy against buying groups and pursued them. (CCFF ¶¶ 1051-1080, 1088-1090, 1217-1218, 661-1100, 1240, 1251). The Proposed Finding is also irrelevant, and does not negate the record of evidence pointing to Schein's participation in the agreement. (*See* Response to Proposed Finding No. 354).

368. Both Schein and Burkhart, however, were contacted by Benco about buying groups. (Reece, Tr. 4375-81; SF 1396-578).

Response to Proposed Finding No. 368

Complaint Counsel has no specific response.

369. Neither Mr. Reece nor Mr. Sullivan reported those communications to their lawyers or anyone else in their respective companies. (Reece, Tr. 4486; Sullivan, Tr. 3952-54).

Response to Proposed Finding No. 369

The Proposed Finding is misleading and contrary to the weight of the evidence. The record evidence shows that Reece did tell others within Burkhart about Cohen's communications. (CX8021 (Reece, Dep. at 113)). By contrast, Sullivan never reported or documented his communications with Cohen about ADC or Dental Alliance in 2013 to Schein's legal department or anyone else, as he was required to do under Schein's antitrust policy. (CCFF ¶¶ 1049-1050).

370. One thing the two did differently in response to Benco's communications, however, is that Mr. Sullivan told Benco they should not be talking about buying groups, while Mr. Reece did not. (Reece, Tr. 4486; Sullivan, Tr. 4206-07; SF 1330, 1492, 1509). Burkhart's Jeff Reece was contacted by Benco about buying groups on at least three occasions. (Reece, Tr. 4375, 4381, 4386)). Mr. Reece did not instruct Mr. Cohen to refrain from discussing such matters with him, and did not report the conversation. (Reece, Tr. 4486).

Response to Proposed Finding No. 370

The Proposed Finding is contrary to the weight of the record evidence, which shows that Sullivan never told Cohen to refrain from discussing buying groups, and that Sullivan and Reece acted differently in response to Cohen's communications about buying groups. (*See* Response to Proposed Finding No. 354). Cohen testified at trial that he did not recall Sullivan ever telling Cohen to stop contacting him about buying groups or ever giving Cohen the impression that the two men should not be talking about buying groups. (CCFF ¶ 1090). Sullivan's trial testimony that he told Cohen that they should not be talking about buying groups is also contradicted by Sullivan's prior sworn testimony. (CCFF ¶ 1089). At trial, Sullivan claimed that during the April 3, 2013 call, Sullivan told Cohen that he should "stop sending me information about customers." (CCFF ¶ 1089 (quoting Sullivan, Tr. 3966)). At his investigational hearing, Sullivan testified that he did not know what his April 3, 2013 call with Cohen was about, but that he did not believe it was possible that the call related to

Atlantic Dental Care. (CCFF ¶ 1089 (quoting CX0311 (Sullivan, IHT at 310-311))). When Cohen contacted Sullivan about ADC and buying groups on March 25, 2013, Sullivan thanked Cohen for the call, joked with him, continued communicating with him about buying groups, and even called Cohen again. (CCFF ¶¶ 1051-1080, 1088-1090). Despite testifying that Cohen's communications to him about buying groups raised a "red flag," Sullivan never reported or documented his communications with Cohen about ADC or Dental Alliance in 2013 to Schein's legal department or anyone else, as he was required to do under Schein's antitrust policy. (CCFF ¶¶ 1049-1050).

The Proposed Finding is contrary to the weight of the evidence and misleading to the extent it asserts that Schein's actions were comparable to Burkhardt during the conspiracy. The record evidence shows that Burkhardt and Schein acted differently and pursued different courses of conduct toward Cohen and buying groups: (1) Sullivan did not rebuff Cohen's communications about buying groups, but Reece did; (2) Schein participated in an agreement targeting buying groups, but Burkhardt did not; and (3) Schein and Sullivan instructed its sales force not to deal with buying groups and rejected them, but Burkhardt had no policy against buying groups and pursued them. (CCFF ¶¶ 1051-1080, 1088-1090, 1217-1218, 661-1100, 1240, 1251). The Proposed Finding is also irrelevant, and does not negate the record of evidence pointing to Schein's participation in the agreement. (*See* Response to Proposed Finding No. 354).

371. Benco's communications did not affect either Schein's or Burkhardt's strategy with buying groups. (Reece, Tr. 4379-81, 4446, 4487; SF 1396-578).

Response to Proposed Finding No. 371

The Proposed Finding is contrary to the weight of the record evidence in its assertion that "Benco's communications did not affect Schein's . . . strategy with buying groups." The

record evidence shows that Schein adopted and enforced a policy against buying groups in 2011, following Sullivan's communications with Cohen. (CCFF ¶¶ 717-781). Sullivan acted in accordance with the agreement by enforcing a policy against buying groups during the conspiracy. (CCFF ¶¶ 728-781). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

By contrast, Burkhart did not change its policy or strategy with regard to working with buying groups as a result of the communications with Benco. (CCFF ¶ 1240 (citing Reece, Tr. 4446, 4487)). Burkhart continued selling to buying groups following the three Benco attempts to persuade the company to change its course from working with buying groups. (CCFF ¶ 1240 (citing Reece, Tr. 4397-4398 (Smile Source), Reece, Tr. 4409-4410 (Kois))).

372. Neither Burkhart nor Schein ever had a conversation with anyone at Patterson regarding buying groups. (Reece, Tr. 4490; SF 1579-84).

Response to Proposed Finding No. 372

The Proposed Finding is contrary to the weight of the evidence, which shows that Schein executive Dave Steck and Patterson executive Dave Misiak communicated in 2014 about the Texas Dental Association and a response to the Texas Dental Association's launch of a buying group, TDAPerks. (CCFF ¶¶ 1123-1132). The evidence also shows that Schein was aware of an overarching agreement among Benco, Schein, and Patterson relating to buying groups. (CCFF ¶¶ 1178-1187). Schein's internal documents reference a common understanding among the Big Three about buying groups. (CCFF ¶ 1185). The Proposed Finding is also irrelevant as to Burkhart, as Complaint Counsel does not allege that Burkhart

participated in any conspiracy. In addition, Complaint Counsel alleges that Schein entered into an overarching agreement relating to buying groups through communications with Benco. (Complaint ¶¶ 32-34; CCFF ¶¶ 1178-1187). Each of Respondents' contemporaneous documents confirm that there was an overarching agreement targeting buying groups among Benco, Schein, and Patterson. (CCFF ¶¶ 1178-1198).

The Proposed Finding is contrary to the weight of the evidence and misleading to the extent it asserts that Schein's actions were comparable to Burkhart during the conspiracy. The record evidence shows that Burkhart and Schein acted differently and pursued different courses of conduct toward Cohen and buying groups: (1) Sullivan did not rebuff Cohen's communications about buying groups, but Reece did; (2) Schein participated in an agreement targeting buying groups, but Burkhart did not; and (3) Schein and Sullivan instructed its sales force not to deal with buying groups and rejected them, but Burkhart had no policy against buying groups and pursued them. (CCFF ¶¶ 1051-1080, 1088-1090, 1217-1218, 661-1100, 1240, 1251). The Proposed Finding is also irrelevant, and does not negate the record of evidence pointing to Schein's participation in the agreement. (*See* Response to Proposed Finding No. 354).

373. Neither Burkhart nor Schein has knowledge of Schein entering the agreement alleged by Complaint Counsel. (Reece, Tr. 4463, 4490; JF 89-96, 111).

Response to Proposed Finding No. 373

The Proposed Finding is also misleading, lacks foundation, and is irrelevant to the extent that it suggests that a conspiracy did not exist because Reece or Burkhart, who were not a party to the conspiracy, denied having knowledge of an agreement. As third party, who had no involvement in perpetrating the agreement, Reece is not a reliable source regarding Schein's conduct.

Moreover, the Proposed Finding is not supported by a citation to JF 89-96 or JF 111, as the testimony of Schein witnesses disclaiming an agreement cannot disprove Schein's participation in a conspiracy. (*See* Responses to Joint Finding Nos. 89-96, 111). The record evidence shows that Benco orchestrated an agreement with Schein and with Patterson, that the Big Three understood that none would discount to buying groups, that Benco and Patterson shared assurances, that Patterson confronted Benco when it suspected it of discounting to buying groups, that Benco and Schein also exchanged assurances and shared competitively sensitive information in doing so, that Benco confronted Schein when it suspected it of discounting to buying groups, and that all three Respondents ensured compliance with the agreement internally, and that all three Respondents rejected buying groups pursuant to the agreement. (CCFF ¶¶ 196-1852).

The Proposed Finding is also contrary to the weight of the evidence and misleading to the extent it asserts that there was no agreement among Respondents. The record evidence shows that (1) Schein was a part of the agreement targeting buying groups and Burkhart was not, and (2) Schein and Burkhart acted differently toward buying groups during the conspiracy—Schein rejected them and Burkhart pursued them. (CCFF ¶¶ 661-110, 1300, 1694). Schein and Burkhart acted differently in response to Cohen's communications about buying groups. Sullivan acted in accordance with the agreement, while Burkhart did not. (*See* Response to Proposed Finding No. 354). Each of Respondents' contemporaneous documents confirm that there was an overarching agreement targeting buying groups among Benco, Schein, and Patterson. (CCFF ¶¶ 1178-1198).

374. In light of the facts, there are no meaningful differences between the actions of Schein and Burkhart with respect to buying groups, except that Schein (an alleged co-conspirator) actually did business with substantially more buying groups than did Burkhart (not alleged to be a conspirator).

Response to Proposed Finding No. 374

The Proposed Finding is not supported by any citation to the record evidence and should be disregarded. Nonetheless, the Proposed Finding is contrary to the weight of the evidence as set forth here and above in Responses to Proposed Finding Nos. 354-373. The record evidence is clear—it shows that Schein was a part of the agreement targeting buying groups and that it enforced a policy to reject buying groups during the conspiracy. (CCFF ¶¶ 661-110). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). In contrast, Burkhart was not part of an agreement targeting buying groups and it, in fact, worked with buying groups throughout the conspiracy. (CCFF ¶¶ 1298-1311, 1240).

III. AN INDEX OF SCHEIN’S BUYING GROUP DEALINGS.

375. Complaint Counsel defines buying groups as “organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products.” (Complaint ¶ 3). As described below, Schein did business with dozens of such groups during the alleged conspiracy period.

Response to Proposed Finding No. 375

Complaint Counsel has no specific response to the first sentence. The second sentence is not supported by any citation to the record evidence and should be disregarded. Nonetheless, the second sentence is contrary to the weight of the record evidence. In fact, the record evidence shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its

competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

376. Complaint Counsel also claims Respondents “were not willing to engage” in “a negotiation process” with buying groups. (Kahn, Tr. 24). The evidence as to Schein is to the contrary – Schein evaluated and negotiated with numerous buying groups throughout the relevant period.

Response to Proposed Finding No. 376

Complaint Counsel has no specific response to the first sentence. The second sentence is not supported by any citation to the record evidence and should be disregarded. Nonetheless, the second sentence is contrary to the weight of the record evidence. In fact, the record evidence shows clearly shows that Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups during the conspiracy period. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). By February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728- 954). The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period. (CCFF ¶¶ 661-954; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications

with its competitors, including Schein. (CCFF ¶¶ 432-453, 1159-1166, 1316-1322, 1178-1198).

Below, Schein provides a long list of entities it claims are buying groups and contends that it routinely pursued buying groups. (SF 377-1335). Of this list, only four are buying groups with which Schein reached an agreement *during* the conspiracy, but *none* were approved by Sullivan and all were against Sullivan’s instructions not to deal with buying groups. Those are Dental Gator, Dental Alliance, Schulman Group, and MeritDent. (See Responses to Proposed Finding Nos. 634-675 (Dental Gator), 1309-1335 (Dental Alliance), 1093-1104 (Schulman Group), 969-981 (MeritDent)). As explained below, none of the four disprove Schein’s participation in a conspiracy. Aside from four buying groups, all of the groups Schein identifies are either (1) not buying groups (e.g., Comfort Dental), (2) pre-conspiracy “legacy” relationships (e.g., Smile Source), or (3) post-conspiracy relationships (e.g., Klear Impakt). Moreover, the record evidence shows that Schein’s pre-conspiracy, legacy buying groups that were not terminated flew under the radar, and Schein executives were not aware of their existence, referring to them as “inherited messes” when they were discovered post-conspiracy. (CCFF ¶ 1767).

A. Advantage Dental Group.

377. Advantage Dental is an insurance provider network with a separate buying group component and DSO component. (Foley, Tr. 4562-63; CX 0306 (Foley, IHT at 215-16)).

Response to Proposed Finding No. 377

Complaint Counsel has no specific response.

378. Advantage Dental offered membership in its buying group program to “dental practices that were independently owned without any equity ownership by Advantage Dental.” (CX 8014 (Lauerman, Dep. at 42-43)).

Response to Proposed Finding No. 378

Complaint Counsel has no specific response.

379. Advantage Dental provides no “management services” to these “independently owned dental practices.” (CX 8014 (Lauerman, Dep. at 44)).

Response to Proposed Finding No. 379

Complaint Counsel has no specific response.

380. Schein worked with Advantage Dental’s buying group from at least 2009 to 2017. (RX 2668-001; CX 7101-140 (showing sales to Advantage Dental from 2009-2017)).

Response to Proposed Finding No. 380

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts or implies that Schein entered into an agreement with the buying group arm of Advantage Dental during the conspiracy period.

The record evidence establishes that Schein’s relationship with the buying group arm of Advantage Dental predated the conspiracy period. (CCFF ¶ 1752). Consistent with that fact, both Brady and Titus referred to the buying group portion of Advantage Dental as a “legacy” group. (CX2204 at 001; CX8020 (Brady, Dep. 266)). The evidence also establishes that the only signed agreements between Schein and Advantage Dental during the time of the conspiracy explicitly applied only to the DSO members, not buying group members. (CCFF ¶¶ 863-864). The evidence also shows that Schein was unwilling to provide discounts to buying groups at the time those agreements were signed and thus excluded buying groups from those agreements. (CX2312 (February 21, 2016 email in which Hight says that at the time of the agreement with Advantage Dental, Schein was “specifically avoiding Buying Groups and the [agreement] language made that clear.”)).

Moreover, the record evidence shows that Schein executives were not aware of Advantage Dental’s buying group component during the conspiracy, that the buying group component

was established a Schein local sales team, and that Schein executives later discovered its existence sometime in 2016. (CX2312 at 001 (February 21, 2016 email in which Hight discovers Advantage Dental's buying group component: "The [Prime Vendor Agreement] I put in place for Advantage some years ago was only for the Advantage owned offices. At that time we were specifically avoiding Buying Groups and the [Prime Vendor Agreement] language made that clear. So the metamorphosis described below and in their marketing piece has happened since my relationship."); CCFF ¶ 865 (quoting CX2081 at 002) (Foley email in 2014 indicating that the Advantage Dental DSO arm worked with Schein but buying group arm worked with the "competition," and that Advantage Dental adhered to the 2014 Advantage Dental Agreement "by not bringing in the BG component."); CX2263 at 001 (February 4, 2016 email in which Foley appears to be discover that Advantage Dental had a buying group arm); CX8020 (Brady, Dep. at 264-265 (Schein's Brian Brady discovered Advantage Dental buying group at some point after May 2016); CX2287 at 001).

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that any sales during the conspiracy period to the buying group arm of Advantage Dental, of which Schein was not aware, disproves Schein's participation in a conspiracy, because it has no bearing on Schein's conduct regarding buying groups during the conspiracy period. In addition, RX2668 at 001 does not support the Proposed Finding, as it includes data covering only 2012 through 2016 and, even for this limited period, it does not specify whether the fee figures relate to business with the buying group arm or the DSO arm of Advantage Dental.

This Proposed Finding is also misleading to the extent that it suggests that Dr. Marshall considered [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]; *see also* RX2832 at 021 (¶¶ 28-29) (explaining that “Other Buying Groups” were separated out from his Table 1 calculation of Schein sales to “Buying Groups of Independent Dentists” because these “Other Buying Groups” are “buying groups other than buying groups of independent dentists.”)).

381. In addition to Advantage Dental’s buying group, HSD also formed a relationship with the DSO component of Advantage Dental. (CX 8003 (Foley, Dep. at 4562-63)).

Response to Proposed Finding No. 381

The Proposed Finding is not supported by the evidence cited because the citation does not exist in the record.

382. “[I]nitially, ... both components of Advantage Dental fell under HSD, but when they needed some help on the software in creating rebates ..., [Schein] moved ... the DSO component ... to Special Markets.” (Foley, Tr. 4562-63).

Response to Proposed Finding No. 382

The Proposed Finding is misleading and contrary to the weight of the evidence for the reasons set forth in Response to Proposed Finding No. 380.

383. Advantage Dental’s buying group was a regionally-based buying group managed by the local Schein regional manager for the state of Washington. (RX 2638-001).

Response to Proposed Finding No. 383

Complaint Counsel has no specific response.

384. Schein began discussing a relationship with the Advantage Dental buying group as early as 2002. (RX 2752-001).

Response to Proposed Finding No. 384

Complaint Counsel has no specific response.

385. HSD provided discounted pricing to the Advantage Dental buying group through a volume purchase agreement which included various discounts on supplies. (Foley, Tr. 4699-700; RX 2638-001).

Response to Proposed Finding No. 385

The Proposed Finding is vague because it provides no time-period for the assertion. The Proposed Finding is also misleading and contrary to the weight for the reasons set forth in Response to Proposed Finding No. 380.

386. HSD also provided a 10% cash rebate back to the Advantage Dental buying group based on the volume of its member purchases. (RX 2502-001; RX 2638-001; RX 2639-001; RX 2668-001).

Response to Proposed Finding No. 386

The Proposed Finding is vague because it provides no time-period for the assertion. The Proposed Finding is also misleading and contrary to the weight of the evidence for the reasons set forth in Response to Proposed Finding No. 380.

387. Around 2011, HSD needed assistance with its software offering to Advantage Dental and brought in Special Markets to help with related rebates. (Foley, Tr. 4563).

Response to Proposed Finding No. 387

The Proposed Finding is vague and ambiguous as to “Advantage Dental,” as it does not specify whether it refers to the buying group or DSO arm of Advantage Dental.

388. Around this time, HSD’s relationship with Advantage Dental’s DSO was transferred to Special Markets. (Foley, Tr. 4563). The Advantage Dental buying group remained with HSD. (Foley, Tr. 4563).

Response to Proposed Finding No. 388

The first sentence of the Proposed Finding is irrelevant, as Schein’s conduct regarding a DSO at any point in time has no bearing on its conduct regarding buying groups at any point in

time. (*See* CCFF ¶¶ 72-76 (explaining differences between buying group and DSO)). The second sentence of the Proposed Finding is misleading and contrary to the weight of the evidence for the reasons set forth in Response to Proposed Finding No. 380.

389. On August 1, 2011, Special Markets entered into a written agreement with Advantage Dental's DSO ("2011 Advantage Dental Agreement") effective through July 31, 2014. (RX 2291-001).

Response to Proposed Finding No. 389

Complaint Counsel has no specific response to the statement. However, the Proposed Finding is irrelevant to the extent it implies or asserts that an agreement with a DSO disproves Schein's participation in a conspiracy, as Schein's conduct regarding a DSO at any point in time has no bearing on its conduct regarding buying groups at any point in time. (*See* CCFF ¶¶ 72-76 (explaining difference between buying group and DSO)).

390. The agreement specified that the pricing offered to Advantage Dental's DSO could not be extended to the Advantage Dental buying group. (RX 2291-002; Foley, Tr. 4567-68). This was because Schein's vendor partners did not allow the rebates and pricing structures Schein offered to be extended outside of the DSO segment. (Foley, Tr. 4567-68; CX 8003 (Foley, Dep. at 214, 246)). Moreover, these vendor partners only allowed chargebacks for business done with DSOs. (Foley, Tr. 4701; CX 8003 (Foley, Dep. at 246)).

Response to Proposed Finding No. 390

Complaint Counsel has no specific response to the statement. However, the Proposed Finding is irrelevant to the extent it implies or asserts that an agreement with a DSO disproves Schein's participation in a conspiracy, as Schein's conduct regarding a DSO at any point in time has no bearing on its conduct regarding buying groups at any point in time. (*See* CCFF ¶¶ 72-76 (explaining difference between buying group and DSO)).

391. Special Markets entered into a subsequent agreement with Advantage Dental's DSO effective August 1, 2014 through July 31, 2017 ("2014 Advantage Dental Agreement"). (RX 2274-002).

Response to Proposed Finding No. 391

Complaint Counsel has no specific response to the statement. However, the Proposed Finding is irrelevant to the extent it implies or asserts that an agreement with a DSO disproves Schein's participation in a conspiracy, as Schein's conduct regarding a DSO at any point in time has no bearing on its conduct regarding buying groups at any point in time. (*See* CCFF ¶¶ 72-76 (explaining difference between buying group and DSO)).

392. While the 2011 Advantage Dental Agreement and 2014 Advantage Dental Agreement did not cover the buying group, HSD nevertheless extended discounts and rebates to the Advantage Dental buying group. (Foley, Tr. 4567-68, 4699-700; RX 2502-001; RX 2638-001; RX 2639-001; RX 2668-001; RX 2751-001; RX 2752-001).⁶

Response to Proposed Finding No. 392

The Proposed Finding is misleading and contrary to the weight of the record evidence for the reasons set forth in Response to Proposed Finding No. 380. It omits the fact that the discounts to the buying group arm of Advantage Dental occurred 5+ years prior to the 2011 agreement with the DSO arm of Advantage Dental. (RX2668 at 002; CCFF ¶ 1752). Finally, to the extent that Schein includes footnote 6 as part of its Proposed Finding, it is irrelevant. Whether Darby provided discounts or supplies to the buying group arm of Advantage Dental is irrelevant. Darby is a separate company from Schein. (Sullivan, Tr. 4348). Schein does not run the day-to-day business of Darby. Sullivan does not run the day-to-day business of Darby. (Sullivan, Tr. 4348). Darby has its own President and its own executives that are in

⁶ Complaint Counsel claims that the Advantage buying group arm is supplied by Darby, relying on a quick reply email from Mr. Foley drafted just 7 minutes after the original. (CX2641). Mr. Foley testified that the inclusion of Advantage in the list of Darby buying groups was a "mistake." (Foley, Tr. 4565-66). Importantly, [REDACTED]. Also, Complaint Counsel's expert, Dr. Marshall listed total annual sales from Schein to Advantage Dental of over [REDACTED] in 2014, of which [REDACTED] came from the buying group arm served by HSD, which Mr. Foley referred to as the "competition." (CX2081-002; CX7101 at 140 [REDACTED]; Foley, Tr. 4564).

charge of its sales force. (Sullivan, Tr. 4348). The footnote is also misleading to the extent that it suggests that Dr. Marshall considered [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; *see also* RX2832 at 021

(¶¶ 28-29) (explaining that “Other Buying Groups” were excluded from his Table 1

calculation of Schein sales to “Buying Groups of Independent Dentists” because these “Other Buying Groups” are “buying groups other than buying groups of independent dentists.”)..

393. As a group of independent dentists receiving discounts and rebates based on the group’s collective purchases, the Advantage Dental buying group meets Complaint Counsel’s definition of a buying group. (Complaint ¶ 3).

Response to Proposed Finding No. 393

Complaint Counsel has no specific response to the statement that the buying group arm of Advantage Dental is a buying group. However, the Proposed Finding mischaracterizes the definition of buying group set forth in the Complaint. The definition does not equate “a group of independent dentists receiving a discount on dental supplies” to a buying group. The definition states that “Buying Groups are organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products.” (Complaint ¶ 3). Moreover, the extent the Proposed Finding asserts that Schein did business with Advantage

Dental's buying group arm, that is misleading and contrary to the record evidence for the reasons set forth in Response to Proposed Finding No. 380.

394. Schein's relationship with the Advantage Dental buying group is inconsistent with the alleged conspiracy. (Complaint ¶ 1).

Response to Proposed Finding No. 394

The Proposed Finding is not supported by the cited evidence and should be disregarded, as the Complaint does not state that any conduct is inconsistent with a conspiracy. Nonetheless, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein entered into an agreement with the buying group arm of Advantage Dental during the conspiracy period, for the reasons set forth in Response to Proposed Finding No. 380.

B. Alpha Omega.

395. Alpha Omega is a dental fraternity composed of independent dentist members. (Steck, Tr. 3765-66).

Response to Proposed Finding No. 395

Complaint Counsel has no specific response.

396. As a group of independent dentists receiving a discount on dental supplies, Alpha Omega meets Complaint Counsel's definition of a buying group. (Complaint ¶ 3).

Response to Proposed Finding No. 396

The Proposed Finding is inaccurate because it mischaracterizes the definition of buying group set forth in the Complaint. The definition does not equate "a group of independent dentists receiving a discount on dental supplies" to a buying group. The definition stated is: "Buying Groups are organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products." (Complaint ¶ 3). The Proposed

Finding is also inaccurate and misleading in asserting that Alpha Omega is a buying group, as it is inconsistent with Schein's own characterization of Alpha Omega as a "dental fraternity." (SF 395). The record evidence does not clearly establish that Alpha Omega is a buying group. (Steck, Tr. 3765 (Q. Let's start with Alpha Omega. Are you familiar with an entity named Alpha Omega? A. I am. Q. Is that a buying group. A. It is actually a fraternity, a dental fraternity.'')).

397. In the early 2000s, Schein began offering a rebate and a discount program to dentist members of Alpha Omega as a result of their membership in Alpha Omega and continues to do so today. (Steck, Tr. 3765; Meadows, Tr. 2843, 2650-51; Cavaretta, Tr. 5576; CX 2927-001 (showing Alpha Omega sales and rebates in 2012 and 2013); *see also* CX 7101-140 (identifying Alpha Omega sales in Schein's sales data from 2009 through 2016)).

Response to Proposed Finding No. 397

The Proposed Finding is irrelevant, as Schein's conduct at any point in time regarding a "dental fraternity" has no bearing on its conduct regarding buying groups at any point in time. (*See* Response to Proposed Finding No. 396). Even if Alpha Omega were a buying group, the record evidence shows that Schein's discounting arrangement to Alpha Omega as an entity began in 2003 or 2004, well before the conspiracy period, and likely ceased in 2005, again well before the conspiracy period. (Steck, Tr. 3766; RX2738 at 001 ("Long-term program with commitment from Henry Schein through 2005"); RX2166 at 001 ("The agreement with AO organization that also gave the organization a rebate ceased many years ago" but Schein "continued with the sales plan for the enrolled accounts.")). Even if discounts continued into the conspiracy period, the record evidence shows that such discounts were extended to individual members of Alpha Omega, not as a result of any discounting arrangement with the entity. (RX2738 at 001; RX2166 at 001). Any continuation of discounts to Alpha Omega's members after the discounting arrangement with Alpha Omega ceased is irrelevant because discounts to independent discounts are not the same as

discounts to a buying group. As such, the assertion that Schein “continues” to offer rebates today is irrelevant, as it is not evidence regarding sales or discounts to a buying group and has no bearing on Schein’s conduct with respect to buying groups.

The Proposed Finding is misleading to the extent that it suggests that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; *see also* CX7101 at 137-139, Appendix C identifying Alpha Omega as an entity that might not be a buying group and citing related evidence)). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (*See* February 21, 2019 Order on Post-Trial Briefs).

Moreover, for reasons explained in more detail in Responses to Proposed Finding Nos. 1611-1612, this Proposed Finding is also unreliable, inaccurate, and misleading to the extent that it suggests that Schein purported sales to buying groups during the relevant period show lack of parallel conduct or structural break for Schein. As explained in Responses to Proposed Finding Nos. 1611-1612, some buying group relationships and sales that occurred during the relevant period are either pre-existing, legacy relationships formed prior the conspiracy or those that were entered into after the conspiracy became difficult to maintain and Schein began competing for buying groups. (CCFF ¶¶ 440-444, 1159-1166, 1398, 1400, 1403, 1717-1719, 1730, 1734-1735). Schein executives did not even know that some of these

“legacy” buying groups were customers and referred to some as “inherited messes.”

(CX2287 at 001; CX2286 at 001).

398. Schein’s relationship and sales to Alpha Omega are inconsistent with the alleged conspiracy. (Complaint ¶ 1).

Response to Proposed Finding No. 398

The Proposed Finding is not supported by the evidence cited and should be disregarded.

However, the Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it implies or asserts the following: (1) that Alpha Omega is a buying group; (2) that Schein’s discounting arrangement during the conspiracy period to Alpha Omega disproves its participation in a conspiracy; and/or (3) that continuation of discounts to independent dentists, which was not as a result of any discounting arrangement to Alpha Omega, disproves its participation in a conspiracy. (*See* Response to Proposed Finding No. 397). The record evidence does not support any such assertion. Schein’s conduct at any point in time regarding a “dental fraternity” has no bearing on its conduct regarding buying groups at any point in time. (*See* Response to Proposed Finding No. 396). Similarly, Schein’s sales to a “dental fraternity” that predate the conspiracy and any continued sales to its individual members, which were not as a result of any discounting arrangement with the entity, cannot disprove Schein’s participation in a conspiracy. (*See* Response to Proposed Finding Nos. 396-397).

C. Blue Chip Dental from Michigan.

399. Schein’s Jake Meadows and his team considered partnering with Blue Chip Dental, a start-up buying group, around 2016. (CX 8016 (Meadows, Dep. at 65)).

Response to Proposed Finding No. 399

The Proposed Finding is irrelevant, as Schein's consideration and rejection of Blue Chip Dental in 2016, which occurred after April 2015 when the conspiracy became difficult to maintain, has no bearing on Schein's conduct during the conspiracy period.

400. After engaging with the founders, Mr. Meadows concluded that Blue Chip Dental would not be a good fit for Schein. (CX 8016 (Meadows, Dep. at 65)). Mr. Meadows had concerns about the organizational structure of the start-up group and that they were unable to provide information on how they would bring value to their members. (CX 8016 (Meadows, Dep. at 66)). Mr. Meadows ultimately concluded that it would not be a good business decision for Schein to partner with Blue Chip Dental. (CX 8016 (Meadows, Dep. at 66)).

Response to Proposed Finding No. 400

The Proposed Finding is irrelevant, as Schein's consideration and rejection of Blue Chip Dental in 2016, which occurred after April 2015 when the conspiracy became difficult to maintain, has no bearing on Schein's conduct during the conspiracy period.

401. Schein's evaluation of and decision not to do business with Blue Chip Dental further supports Schein's position that it continued to evaluate buying groups case-by-case based on each group's value proposition and ability to drive compliance, as it had done before and during the alleged conspiracy. (Titus, Tr. 5199-202, 5274; Meadows, Tr. 2495, 2506, 2544; Sullivan, Tr. 4088, 4098-99; Cavaretta, Tr. 5574-76; Foley, Tr. 4638-39, 4614-15).

Response to Proposed Finding No. 401

The Proposed Finding is factually inaccurate and contrary to the weight of the record evidence, which establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of buying groups during the conspiracy, and then to competing for buying groups when the conspiracy became difficult to maintain following Benco's April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see* Complaint Counsel's Post-Trial Brief, at Attachment C).

Schein's conduct regarding Blue Chip Dental, which occurred after April 2015, is also irrelevant, as it has no bearing on Schein's conduct during the conspiracy period.

D. Breakaway.

402. Joe Cavaretta, former Schein Vice President of Sales for the West and “now [P]resident of the company that owns Breakaway,” testified he would “classify Breakaway as a buying group.” (Cavaretta, Tr. 5599).

Response to Proposed Finding No. 402

The Proposed Finding is irrelevant and misleading as Cavaretta’s testimony that, at the time of trial, he would classify Breakaway as a buying group has no bearing on whether it was in fact a buying group during the conspiracy period and, more importantly, whether Schein recognized it as a buying group during that time. The weight of the evidence establishes that as of August 2015, Schein considered Breakaway to be a combination of a DSO and an MSO that centrally managed and controlled its members’ dental products purchases, not a buying group, and that Schein did not believe that Breakaway was a buying group or had a buying group component. (CCFF ¶¶ 75, 1755-1756; CX2482 at 001; CX8033 (Cavaretta, Dep. at 238-239) (“Q. So as of the time of this email in August 2015, you weren't aware of the buying group component? A. No.”)). In August 2015, Cavaretta told Sullivan: “Break away is a DSO/MSO combo with complete control of the check book.” (CCFF ¶ 1755 (quoting CX2482 at 001)). By “complete control of the check book,” Cavaretta testified that he meant that Breakaway owned or controlled the practices. (CCFF ¶ 1755 (quoting CX8033 (Cavaretta, Dep. at 237-238))). The evidence also establishes that even at the time of trial, Sullivan considered Breakaway to be an MSO that controlled its members and contractually drove volume. (Sullivan, Tr. 3902-3903). Moreover, Schein contractually prohibited a GPO. Schein’s June 29, 2015 agreement with Breakaway’s owned practices included express language prohibiting use of the agreement “to grow any Group Purchasing Organization (GPO) type relationship.” (RX2348 at 001). Schein executives also discussed terminating Schein’s relationship with Breakaway when they suspected Breakaway of moving toward a

buying group. (CX0246 at 002 (In July 2015, Cavaretta told Sullivan: “We did discuss shutting [Breakaway] down but once [Titus] visited their facility, it was not a small buying group at all...more of a MSO.”); CX2133 at 002 (In June 2015, Special Markets President Hal Muller wrote: “Last I heard about Breakaway, [Titus] was going to close them down as a buying group.”)).

403. Breakaway is a buying group that also has some DSO and MSO-like characteristics. For instance, a few Breakaway offices are owned by the group’s founder (DSO-like), some offices receive Breakaway’s suite of nonclinical business support services (MSO-like), and other offices elect to receive discounts only (buying group). (CX 2190-003 (an internal Schein document listing Breakaway’s “several divisions”)).

Response to Proposed Finding No. 403

The Proposed Finding is factually inaccurate and contrary to the weight of the record evidence to the extent it asserts Breakaway is a buying group in any way, as set forth in Response to Proposed Finding No. 402.

404. As Dave Steck testified, there are groups “that do both” buying group and managed services. (Steck, Tr. 3745).

Response to Proposed Finding No. 404

Complaint Counsel has no Finding is factually inaccurate and contrary to the weight of the record evidence to the extent it asserts Breakaway is a buying group in any way, as set forth in Response to Proposed Finding No. 402.

405. Breakaway’s “smallest arm” is their owned offices, while the group’s “largest arm” are its “support members, which [is] similar to ... a buying group arm.” (CX 8009 (Wingard, Dep. at 156)). Breakaway also has “affiliates and de novos,” for which members can “sign a contract with Breakaway to help them expand and grow and actually build practices from the ground up.” (CX 8009 (Wingard, Dep. at 156-57); *see also* RX 2645-001, RX 2646-001 (describing Breakaway’s “several divisions”); RX 2647-002 (describing the “exclusive distributor partnership with Henry Schein”); Titus, Tr. 5331 (Breakaway’s members included “individually owned practices”)).

Response to Proposed Finding No. 405

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it asserts or implies that Breakaway is a buying group, or that Schein viewed it as a buying group during the relevant period. (*See* Response to Proposed Finding No. 402).

Further, the Proposed Finding is contradicted by the evidence cited, which repeatedly categorizes Breakaway as a “hybrid DSO.” (RX2645 at 001 (2017 email); RX2646 at 001 (2015 Schein document)).

406. Schein’s Randy Foley referred to Breakaway as the “anti-DSO,” because the group’s “whole premise ... is that they assist dentists, private dentists, that are working with DSOs on how to break away from the DSO and go into practice by themselves.” (Foley, Tr. 4634).

Response to Proposed Finding No. 406

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it suggests Breakaway is a buying group, or that Schein viewed it as such during the relevant period. The weight of the evidence establishes that as of August 2015, Schein considered Breakaway to be a combination of a DSO and an MSO that centrally managed and controlled its members’ dental products purchases, not a buying group, and that Schein did not believe that Breakaway was a buying group or had a buying group component. (Response to Proposed Finding No. 402).

407. Breakaway offers independent dentists the option to utilize nothing but Breakaway’s discounts (“handled much like a buying group”), or to take advantage of more comprehensive nonclinical business services as well. (CX 2190-003).

Response to Proposed Finding No. 407

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it suggests Breakaway is a buying group, or that Schein viewed it as such during the relevant period. The weight of the evidence establishes that as of August 2015, Schein considered Breakaway to be a combination of a DSO and an MSO that centrally managed

and controlled its members' dental products purchases, not a buying group, and that Schein did not believe that Breakaway was a buying group or had a buying group component.

(Response to Proposed Finding No. 402)

408. While Brian Brady emailed Hal Muller on June 30, 2015 that Ms. Titus told him Breakaway initially started as a "pure GPO model" but was no longer a "GPO" by June 2015, Mr. Brady testified that Breakaway was "a buying group," with "a couple different buckets" of members, some owned by the group's founder, and some independently owned (only some of which received management services from Breakaway). (CX 8020 (Brady, Dep. at 243-44); CX 2133-001, -003). Moreover, Ms. Titus does not recall telling Mr. Brady that Breakaway was not a "GPO." (Titus, Tr. 5238). Ms. Titus also testified that Mr. Brady's statement that Breakaway was not a "GPO" never came to be true – they continued to operate as a buying group. (Titus, Tr. 5238).

Response to Proposed Finding No. 408

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it suggests Breakaway is a buying group, or that Schein viewed it as such during the relevant period. The weight of the evidence establishes that as of August 2015, Schein considered Breakaway to be a combination of a DSO and an MSO that centrally managed and controlled its members' dental products purchases, not a buying group, and that Schein did not believe that Breakaway was a buying group or had a buying group component.

(Response to Proposed Finding No. 402). The citation to CX2133, an email chain reflecting Titus's view as of June 2015 that Breakaway was not a buying group, directly contradicts Titus's trial testimony that she could not "recall saying that one way or the other." (Titus, Tr. 5328). The Proposed Finding also mischaracterizes Brady's deposition testimony. Although initially Brady called Breakaway a buying group, he also testified that Breakaway was "not a GPO" (CX8020 (Brady, Dep. at 251)); that it changed its model over time (CX8020 (Brady, Dep. at 244-245)); that it started out at as a DSO/MSO hybrid and then later added other "buckets" (CX8020 (Brady, Dep. at 245, 248)); that Breakaway was described to him in 2015 as having a DSO subset and an MSO subset (CX8020 (Brady, Dep. at 244-245)); and

that he would not consider an organization described that way to be a buying group (CX8020 (Brady, Dep. at 250). With respect to Titus' trial testimony, the Proposed Finding is not supported by the cited portion of the transcript.

409. Moreover, while Mr. Cavaretta described Breakaway to Mr. Sullivan on August 18, 2015, as "a DSO/MSO combo" while Smile Source is "a flat out buying group," Mr. Cavaretta explained at trial that his statement reflected his understanding of Breakaway's make-up at the time, but that he later learned that Breakaway did in fact maintain a buying group component and was "really more of a buying group." (Cavaretta, Tr. 5633-34, 5655; (CX 2482-001)).

Response to Proposed Finding No. 409

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it suggests Breakaway is a buying group, or that Schein viewed it as such during the relevant period. The weight of the evidence establishes that as of August 2015, Schein considered Breakaway to be a combination of a DSO and an MSO that centrally managed and controlled its members' dental products purchases, not a buying group, and that Schein did not believe that Breakaway was a buying group or had a buying group component.

(Response to Proposed Finding No. 402). Cavaretta's trial testimony that at some point after August 2015 he began to view Breakaway as a buying group is irrelevant to how Schein viewed Breakaway *during* the conspiracy period. Moreover, Schein contractually prohibited a GPO. Schein's June 29, 2015 agreement with Breakaway's owned practices included express language prohibiting use of the agreement "to grow any Group Purchasing Organization (GPO) type relationship." (RX2348 at 001). Schein executives also discussed terminating Schein's relationship with Breakaway when they suspected Breakaway of moving toward a buying group. (CX0246 at 002 (In July 2015, Cavaretta told Sullivan: "We did discuss shutting [Breakaway] down but once [Titus] visited their facility, it was not a small buying group at all...more of a MSO."); CX2133 at 002 (In June 2015, Special

Markets President Hal Muller wrote: “Last I heard about Breakaway, [Titus] was going to close them down as a buying group.”)).

410. Schein considers and treats Breakaway as a buying group. (Meadows, Tr. 2484 (“I would consider [Breakaway] a buying group.”); Steck, Tr. 3774; Foley, Tr. 4644 (“Breakaway is a buying group.”); Titus, Tr. 5263 (“Breakaway is a buying group.”); Cavaretta, Tr. 5599 (“I’d classify Breakaway as a buying group.”); CX 2515-001 (“Please add Breakaway Dental, Denali Dental and Dental Gator to the GPO list.”)).

Response to Proposed Finding No. 410

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it suggests Breakaway is a buying group, or that Schein viewed it as such during the relevant period. The weight of the evidence establishes that as of August 2015, Schein considered Breakaway to be a combination of a DSO and an MSO that centrally managed and controlled its members’ dental products purchases, not a buying group, and that Schein did not believe that Breakaway was a buying group or had a buying group component.

(Response to Proposed Finding No. 402). The evidence also establishes that even at the time of trial, Sullivan considered Breakaway to be an MSO that controlled its members and contractually drove volume. (Sullivan, Tr. 3902-3903 (“Q. Can you give me an example of an MSO? A. Breakaway Dental”)). Moreover, Schein contractually prohibited a GPO.

Schein’s June 29, 2015 agreement with Breakaway’s owned practices included express language prohibiting use of the agreement “to grow any Group Purchasing Organization (GPO) type relationship.” (RX2348 at 001). Schein executives also discussed terminating Schein’s relationship with Breakaway when they suspected Breakaway of moving toward a buying group. (CX0246 at 002 (In July 2015, Cavaretta told Sullivan: “We did discuss shutting [Breakaway] down but once [Titus] visited their facility, it was not a small buying group at all...more of a MSO.”); CX2133 at 002 (In June 2015, Special Markets President

Hal Muller wrote: “Last I heard about Breakaway, [Titus] was going to close them down as a buying group.”)).

411. Complaint Counsel claims Breakaway is not a buying group because it also has DSO and MSO-like components. (CC Pretrial Br. at 37). But the fact that Breakaway does more than just function as a discount-only buying group does not mean that it is not a buying group. (Cavaretta, Tr. 5599-600, 5655; Foley, Tr. 4634-35 (“Breakaway is a buying group,” whose “whole premise, and hence the name Breakaway, is that they assist dentists, private dentists, that are working at DSOs on how to break away from the DSO and go into practice by themselves.... [T]hey were completely anti DSO.”); Titus, Tr. 5327, 5531, 5341). One of Breakaway’s primary functions is to help independent dental offices leverage their buying power to obtain lower prices on dental products. (CX 2190-001, -003). To the extent there was any prior confusion about the nature of Breakaway, Mr. Cavaretta’s testimony clarified and confirmed at trial that Breakaway is a buying group. (Cavaretta, Tr. 5599). Breakaway therefore meets Complaint Counsel’s definition of a buying group. (Complaint ¶ 3).

Response to Proposed Finding No. 411

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it suggests Breakaway is a buying group, or that Schein viewed it as such during the relevant period. The weight of the evidence establishes that as of August 2015, Schein considered Breakaway to be a combination of a DSO and an MSO that centrally managed and controlled its members’ dental products purchases, not a buying group, and that Schein did not believe that Breakaway was a buying group or had a buying group component.

(Response to Proposed Finding No. 402). Trial testimony of Cavaretta, Foley, and Titus about their *current* views on Breakaway has no bearing on how Schein viewed Breakaway *during* the conspiracy period, which is established by the contemporaneous documents and record evidence set forth in Response to Proposed Finding No. 402. Further, their current views are contradicted by Sullivan, who testified that Breakaway was an MSO. (Sullivan, Tr. 3902-3903). Similarly, the documents cited in the Proposed Finding, CX2190 at 001 (2017 email) and CX2190 at 003 (mid-2015 internal document describing Breakaway as a “hybrid

DSO”), are irrelevant to how Schein viewed Breakaway during the conspiracy period.

Finally, the Proposed Finding is not supported by the citation to the Complaint.

412. Randy Foley testified that Schein’s Special Markets formed a relationship with Breakaway in 2010 or 2011. (Foley, Tr. 4634; Cavaretta, Tr. 5600-01).

Response to Proposed Finding No. 412

Complaint Counsel has no specific response.

413. When Schein created the Mid-Market division in 2014, it transferred Breakaway from Special Markets to the Mid-Market division, under HSD. (Foley, Tr. 4635; Cavaretta, Tr. 5599; Titus, Tr. 5249, 5263). While Breakaway was a Special Markets customer, Special Markets extended discounts to Breakaway. (Foley, Tr. 4635). After Breakaway transferred to Mid-Market, it continued to receive discounts from HSD and actually received a greater discount than it was getting in Special Markets. (Titus, Tr. 5249, 5263, 5267-68; Foley, Tr. 4635 (HSD “added another 5 percent to an admin fee” for the group)).

Response to Proposed Finding No. 413

Complaint Counsel has no specific response.

414. In 2014, Kathleen Titus, the “new director for [Schein’s] Mid-Market emerging group practice,” wanted to learn more about Breakaway so she “could understand their needs more thoroughly.” (Titus, Tr. 5249).

Response to Proposed Finding No. 414

Complaint Counsel has no specific response.

415. At the time Ms. Titus started to “collect information,” she “didn’t know very much about Breakaway other than they were a buying group.” (Titus, Tr. 5264).

Response to Proposed Finding No. 415

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it suggests Breakaway is a buying group, or that Schein viewed it as such during the relevant period. The weight of the evidence establishes that as of August 2015, Schein considered Breakaway to be a combination of a DSO and an MSO that centrally managed and controlled its members’ dental products purchases, not a buying group, and that Schein did not believe that Breakaway was a buying group or had a buying group component.

(Response to Proposed Finding No. 402; Titus, Tr. 5327 (trial testimony confirming that it was her conclusion that Breakaway was “more of an MSO” than a buying group); *see also* RX2660 at 001 (April 20, 2015 email from Titus to Breakaway Practice Team touting Schein’s “15 years in the DSO space”)).

416. Ms. Titus took it upon herself to “develop a relationship with Breakaway” and learn more about them – she was not instructed to do so by her boss Joe Cavaretta or anyone else at Schein. (Titus, Tr. 5264-65, 5288).

Response to Proposed Finding No. 416

Complaint Counsel has no specific response.

417. Ms. Titus confirmed that the group’s founder, Dr. Leune, had a majority share in eight locations while the “rest [were] solo providers” that made their own purchasing decisions. (CX 2077-003-04; Titus, Tr. 5340).

Response to Proposed Finding No. 417

The Proposed Finding is not supported by the evidence cited with respect to the assertion that the solo providers “made their own purchasing decisions.” Complaint Counsel has no specific response with respect to the rest of the Proposed Finding.

418. At the time, “Breakaway had an extremely large national footprint. They were doing business with private practice dentists, and those dentists were building practices throughout the United States.” (Titus, Tr. 5266-67).

Response to Proposed Finding No. 418

Complaint Counsel has no specific response.

419. As Ms. Titus continued her due diligence, she reported on May 20, 2014 that the Breakaway relationship was creating some confusion with local Schein teams that needed to be resolved. (CX 2077-003 (“Breakaway Practice LLC is creating a lot of chatter and disruption across our entire org in multiple geographies.... My goal was to put a critical eye to the relationship and discover a way to live harmoniously with the ‘deal’ they have been (verbally) offered.”); Titus, Tr. 5266-67)).

Response to Proposed Finding No. 419

Complaint Counsel has no specific response.

420. Breakaway's rapid growth created some logistical difficulties for Schein. (Titus, Tr. 5266). When a "new Breakaway [office] was opening in a location that had a distant geography from the home office in San Antonio, Texas, there was no communication with the local [Schein] team that was required to engage with the practice." (Titus, Tr. 5266-67).

Response to Proposed Finding No. 420

Complaint Counsel has no specific response.

421. Ms. Titus also noted the lack of a formal agreement with Breakaway and the lack of exclusivity. (CX 2077 at 004 (noting that "Breakaway promotes a number of our competitors," and to her knowledge there had "been no discussion with Dr. Leune about making Schein an exclusive partner"); *see also* RX 2323 at 002 (informing Hal Muller and Randy Foley that Breakaway was receiving Special Markets pricing without a formal agreement, and asking if they wanted to continue under that arrangement)).

Response to Proposed Finding No. 421

Complaint Counsel has no specific response.

422. Ms. Titus's report sparked an internal conversation at Schein about Breakaway. (CX 2077-001-02). Hal Muller wrote that Breakaway "sounds like a cross between Comfort Dental and Smile Source," and Ms. Titus agreed saying, "I would say Smile Source is a reasonable facsimile." (CX 2077-001-02).

Response to Proposed Finding No. 422

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it suggests Breakaway is a buying group, or that Schein viewed it as such during the relevant period. The weight of the evidence establishes that as of August 2015, Schein considered Breakaway to be a combination of a DSO and an MSO that centrally managed and controlled its members' dental products purchases, not a buying group, and that Schein did not believe that Breakaway was a buying group or had a buying group component.

(Response to Proposed Finding No. 402).

423. Ms. Titus asked for guidance on how to handle the relationship because "the Affiliates present as solo providers," but they were receiving Special Markets pricing, and Schein's FSCs had difficulty understanding how to deal with individual practices getting pricing and support from an entirely different division within Schein. (CX 2077 at 001).

Response to Proposed Finding No. 423

Complaint Counsel has no specific response.

424. Ms. Titus recognized that Breakaway was a good partner. She wanted to “work together to introduce more Henry Schein products and services into their environment” and to coordinate communication between the group and Schein’s local sales teams across the country. (Titus, Tr. 5264-65, 5267; RX 2718-001 (“Looks like [Breakaway] started as a consulting group, however, ... it appears they have morphed into something slightly different... There is no question [that it] has a GPO component and we are supporting it.... RM/ZRM’s are getting heat from their teams ... about why ... a private practice is set up as a SM customer with all the bennies.... I need to put a system of communication in place so that we have the cooperation from our local teams. I want to assure this is a *win/win* for all the stakeholders and if it’s falling short, seek to turn it around. ***For the record, Breakaway appears to be a solid partner and Schein supporter***.... [S]o I’m being extremely cautious not to alarm Breakaway.” (emphasis added))).

Response to Proposed Finding No. 424

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it suggests Breakaway is a buying group, or that Schein viewed it as such during the relevant period. The weight of the evidence establishes that as of August 2015, Schein considered Breakaway to be a combination of a DSO and an MSO that centrally managed and controlled its members’ dental products purchases, not a buying group, and that Schein did not believe that Breakaway was a buying group or had a buying group component.

(Response to Proposed Finding No. 402). Moreover, the edited quote cited is misleading to the extent it implies that Breakaway may have “morphed” from a consulting group into a buying group. The full clause reads: “[i]t appears they have morphed into something slightly different where they actually have ownership in about 7-8 of their associated JDE’s.”

(RX2718 at 001). Regardless, the record evidence shows that Schein did not believe that Breakaway was a buying group or had a buying group component. (Response to Proposed Finding No. 402).

425. The May 2014 email exchange within Schein reflects the challenges and internal conflicts that buying groups posed to Schein’s divisions, and Schein’s deliberate efforts to find

solutions to those problems, by moving buying groups like Breakaway into Mid-Market, and investigating and rationally discussing the merits and difficulties of particular groups. (CX 2077-001-04).

Response to Proposed Finding No. 425

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it suggests Breakaway is a buying group, or that Schein viewed it as such during the relevant period. The weight of the evidence establishes that as of August 2015, Schein considered Breakaway to be a combination of a DSO and an MSO that centrally managed and controlled its members' dental products purchases, not a buying group, and that Schein did not believe that Breakaway was a buying group or had a buying group component. (Response to Proposed Finding No. 402). The Proposed Finding is not supported by the evidence cited to the extent it suggests that moving Breakaway into Mid-Market was somehow a solution to "problems" that buying groups posed to Schein. The record evidence shows that Mid-Markets was created to serve buying groups or that it entered into agreements with buying groups during the conspiracy period. The Mid-Market group was formed to serve small DSOs, group practices, and community health centers. (Steck, Tr. 3690). Even as of January 2016, Schein still had to "figure out if the [Mid-Market] is going to be responsible for [buying groups]." (CX2280 at 001; Cavaretta, Tr. 5637-5638).

426. Despite the challenges, Schein continued working with the Breakaway buying group and offered its members discounts throughout 2014. (RX 2114 (noting in February 2015 that Schein was adding new members for Breakaway); Titus, Tr. 5267-68; Foley, Tr. 4635).

Response to Proposed Finding No. 426

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it suggests Breakaway is a buying group, or that Schein viewed it as such during the relevant period. The weight of the evidence establishes that as of August 2015, Schein considered Breakaway to be a combination of a DSO and an MSO that centrally managed

and controlled its members' dental products purchases, not a buying group, and that Schein did not believe that Breakaway was a buying group or had a buying group component.

(Response to Proposed Finding No. 402). The Proposed Finding is also misleading to the extent that it conflates the one division of Breakaway with Breakaway as a whole. (CX2190 at 003 (2015 internal Schein document describing Breakaway's "several divisions," including one that "will be handled much like a buying group"). Regardless, the record evidence shows that Schein did not believe that Breakaway was a buying group or had a buying group component. (Response to Proposed Finding No. 402).

427. In early 2015, Ms. Titus again began evaluating Schein's relationship with Breakaway to determine how Schein could help better meet the needs of Breakaway's members and grow the business. (RX 2114-001; Titus, Tr. 5264-65).

Response to Proposed Finding No. 427

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein worked with Breakaway, as a buying group, during the conspiracy period. The weight of the evidence establishes that as of August 2015, Schein considered Breakaway to be a combination of a DSO and an MSO that centrally managed and controlled its members' dental products purchases, not a buying group, and that Schein did not believe that Breakaway was a buying group or had a buying group component. (Response to Proposed Finding No. 402).

428. On April 16, 2015, Ms. Titus and Kip Rowland, a Schein Regional Account Manager, met with the Breakaway team in person. (RX 2660-001).

Response to Proposed Finding No. 428

Complaint Counsel has no specific response.

429. Ms. Rowland's notes of the meeting described Breakaway's "three divisions": a "Seminars" division offering seminars on building a new office and business matters; a "Virtual

Services” division that covered “Front Office Tasks,” “Insurance,” “IT Support,” “Search Engine Marketing,” and more; and an “Affiliates” division of start-up dental offices funded with a \$50,000 initial investment and put on a 5-year contract with Breakaway. (CX 2815-002).

Response to Proposed Finding No. 429

Complaint Counsel has no specific response.

430. Breakaway made all of its virtual services “a la carte,” giving members the option to choose which services they wanted. (CX 2815-001-02).

Response to Proposed Finding No. 430

Complaint Counsel has no specific response.

431. Mr. Cavaretta and Tim Sullivan were forwarded Ms. Roland’s notes on Schein’s meeting with Breakaway. (CX 2815-001).

Response to Proposed Finding No. 431

Complaint Counsel has no specific response.

432. After meeting with Breakaway, Ms. Titus described Breakaway as much more than just a buying group. (CX 2240-001).

Response to Proposed Finding No. 432

The Proposed Finding is misleading to the extent it suggests that prior to the April 2015 meeting, Titus viewed Breakaway as “just a buying group.” The cited document is an April 16, 2015 e-mail from Titus to Cavaretta in which she states: “From the outside looking in, they look like a consulting firm, with a core group of owned offices with a GPO offer to affiliate partners.” (CX2240 at 001). To the extent this language can be read as Titus expressing a preconceived notion about Breakaway that was subsequently disproven by her visit, that notion was that Breakaway was a consulting firm with some owned offices, not that Breakaway was a buying group. (CX2240 at 001) (Titus explained to Cavaretta that Breakaway was not a GPO: “Throw that assumption away. It’s wrong.”). In fact, the weight of the evidence establishes that as of August 2015, Schein considered Breakaway to be a

combination of a DSO and an MSO that centrally managed and controlled its members' dental products purchases, not a buying group, and that Schein did not believe that Breakaway was a buying group or had a buying group component. (Response to Proposed Finding No. 402).

433. On April 20, 2015, Ms. Titus followed up with Breakaway and indicated that she was "blown away" by Breakaway and had immediately called Joe Cavaretta to describe the group's innovative model. (RX 2660-001). Ms. Titus also thanked Breakaway for its "sincere partnership up to now" and for the "the steady flow of business you drive to Henry Schein." (RX 2660-001).

Response to Proposed Finding No. 433

Complaint Counsel has no specific response.

434. On June 29, 2015, Schein entered a Prime Managed Group Dental Supplier Distributor Agreement with Breakaway's owned practices, as well as "a separate agreement" with the group's buying group arm of "individually owned practices." (Titus, Tr. 5331; RX 2348-001).

Response to Proposed Finding No. 434

The Proposed Finding is not supported by the evidence cited to the extent it suggests that Schein entered into an agreement with Breakaway's buying group arm on June 29, 2015. No such agreement exists in the record. Complaint Counsel has no specific response with respect to the June 29, 2015 agreement with Breakaway's owned practices, except to note that it included express language prohibiting use of the agreement "to grow any Group Purchasing Organization (GPO) type relationship." (RX2348 at 001).

435. The agreement required that Breakaway provide "business services" to the independent practices and have "the ability to require offices to comply with the purchasing commitment" of [REDACTED] (RX 2348-001). As such, Breakaway was prohibited from offering its discounts to dentists "without commitment to ... the prime vendor agreement." (RX 2348-001). Breakaway's commitment was set at [REDACTED], and it received discounts of up to [REDACTED]. (RX 2348).

Response to Proposed Finding No. 435

The Proposed Finding is not supported by the evidence cited to the extent it suggests that the June 29, 2015 Prime Managed Group Dental Supplier Distributor Agreement (RX 2348) related to “independent practices.” The June 29, 2015 agreement expressly “covers practices which are BA [Breakaway Alliance],” *i.e.* owned practices. (RX2348 at 001). To the extent that this agreement can be read to cover individually-owned practices as well, it expressly prohibited use of the agreement “to grow any Group Purchasing Organization (GPO) type relationship.” (RX2348 at 001). The Proposed Finding is misleading to the extent it suggests that RX 2348 is the “separate agreement” with Breakaway’s buying group arm referenced by Titus. (Titus, Tr. 5331). The record evidence does include an unsigned Prime Vendor Agreement Buying Group between Schein and Breakaway Practice (not Breakaway Alliance) dated June 1, 2016 (RX2266 at 001-002), but Schein’s conduct in June 2016 with respect to Breakaway Practice is also irrelevant, as it has no bearing on Schein’s conduct with Breakaway Alliance during the conspiracy period.

436. Brian Brady, Director of Group Practices in the Mid-Market Division, called the contract a “significant win” poised for \$10 to \$13 million of growth. (CX 2133-003). The contract was so significant that Mr. Muller asked whether Breakaway should be an Elite account in Special Markets rather than Mid-Market. (CX 2133-001). However, Breakaway stayed with Schein’s Mid-Market division and was eventually transferred to Schein’s APC division because it was “more of a buying group” than a “Special Markets DSO customer.” (Cavaretta, Tr. 5655; RX 2947 (Cavaretta, Dep. at 31-32)).

Response to Proposed Finding No. 436

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it suggests Breakaway is a buying group, or that Schein viewed it as such during the relevant period. The weight of the evidence establishes that as of August 2015, Schein considered Breakaway to be a combination of a DSO and an MSO that centrally managed and controlled its members’ dental products purchases, not a buying group, and that Schein

did not believe that Breakaway was a buying group or had a buying group component.

(Response to Proposed Finding No. 402). The Proposed Finding is also misleading to the extent that it suggests that June 29, 2015 Prime Managed Group Dental Supplier Distributor Agreement relates to anything beyond Breakaway's owned practices or is the "separate agreement" with Breakaway's buying group arm referenced by Titus. (RX2348 at 001; Titus, Tr. 5331). Complaint Counsel has no response with respect to the remainder of this Proposed Finding.

437. Schein's Mid-Market group nourished Schein's relationship with Breakaway and Schein continued working with Breakaway until it was purchased by Dental Whale in 2018. (Titus, Tr. 5265, 5268; RX 2947 (Cavaretta, Dep. at 31-32); Cavaretta, Tr. 5599-601; Foley, Tr. 4635).

Response to Proposed Finding No. 437

The Proposed Finding is not relevant to establish how Schein categorized Breakaway during the relevant period. The weight of the evidence establishes that as of August 2015, Schein considered Breakaway to be a combination of a DSO and an MSO that centrally managed and controlled its members' dental products purchases, not a buying group, and that Schein did not believe that Breakaway was a buying group or had a buying group component. (Response to Proposed Finding No. 402).

438. Schein's sales and discounts to Breakaway, both during and after the alleged conspiracy, contradict Complaint Counsel's claims. (Complaint ¶ 1).

Response to Proposed Finding No. 438

The Proposed Finding is not supported by the cited evidence and should be disregarded, as the Complaint does not state that any conduct is inconsistent with a conspiracy. Nonetheless, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it suggests Breakaway is a buying group, or that Schein viewed it as such during the relevant period. The weight of the evidence establishes that as of August 2015, Schein

considered Breakaway to be a combination of a DSO and an MSO that centrally managed and controlled its members' dental products purchases, not a buying group, and that Schein did not believe that Breakaway was a buying group or had a buying group component. (Response to Proposed Finding No. 402). With respect to Schein's purported sales and discounts to Breakaway after the conspiracy, the Proposed Finding is irrelevant because any subsequent sales or discounts have no bearing on Schein's conduct during the conspiracy period.

439. Patterson and Benco also viewed Breakaway as a buying group and knew Schein was doing business with Breakaway. (McFadden, Tr. 2847 (equating Breakaway to Smile Source); RX 0597-001 (internal Patterson email from April 13, 2016, indicates Patterson concluded Henry Schein "is treating [Breakaway] as a buying group"); (Ryan, Tr. 1207 ("[Breakaway is] a group of practice coaches... and as part of what they do they do a GPO within that."); CX 0010-001-02 (Benco email describing Breakaway as a "buying club" and "buying group"))).

Response to Proposed Finding No. 439

The Proposed Finding is misleading and irrelevant. The cited trial testimony from McFadden and Ryan regarding their *current* views on Breakaway, an internal Patterson document from *April 2016* regarding how Schein was treating Breakaway in that time period, and an internal Benco document regarding its views of Breakaway have no bearing on how Schein viewed Breakaway *during* the conspiracy period. The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it suggests Breakaway is a buying group, or that Schein viewed it as such during the relevant period. The weight of the evidence establishes that as of August 2015, Schein considered Breakaway to be a combination of a DSO and an MSO that centrally managed and controlled its members' dental products purchases, not a buying group, and that Schein did not believe that Breakaway was a buying group or had a buying group component. (Response to Proposed Finding No. 402). Moreover, the Proposed Finding is not supported by the McFadden trial testimony cited.

McFadden testified that he would categorize Breakaway as “a non-equity DSO.” (McFadden, Tr. 2847).

440. On January 15, 2015, Benco’s Regional Manager for the Carolinas Region, Brad Bingaman, emailed Benco’s Patrick Ryan to ask if he knew about Schein working with Breakaway. (CX 0010-002).

Response to Proposed Finding No. 440

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it asserts or implies that an internal Benco document referring to Breakaway and Schein considered Breakaway to be a buying group and worked with it. The weight of the evidence establishes that as of August 2015, Schein considered Breakaway to be a combination of a DSO and an MSO that centrally managed and controlled its members’ dental products purchases, not a buying group, and that Schein did not believe that Breakaway was a buying group or had a buying group component. (Response to Proposed Finding No. 402).

441. Despite being aware that Schein was working with Breakaway, Mr. Ryan never “reach[ed] out to anyone at Schein” regarding Breakaway. (Ryan, Tr. 1207-08).

Response to Proposed Finding No. 441

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it asserts or implies that an internal Benco document referring to Breakaway and Schein means Schein considered Breakaway to be a buying group and worked with a buying groups during the conspiracy. The weight of the evidence establishes that as of August 2015, Schein considered Breakaway to be a combination of a DSO and an MSO that centrally managed and controlled its members’ dental products purchases, not a buying group, and that Schein did not believe that Breakaway was a buying group or had a buying group component. (Response to Proposed Finding No. 402). Furthermore, the Proposed Finding is misleading to the extent it asserts or implies that Schein and Benco were not part of an overarching

conspiracy. The record evidence establishes that Benco orchestrated an agreement with Schein and an agreement with Patterson. The record evidence establishes that Benco's Cohen informed Sullivan of Benco's position with regard to bidding on buying groups and reached an understanding that Schein would not align itself with buying groups. (CCFF ¶¶ 661-684). Schein, in turn, ensured compliance by instructing its sales force to reject buying groups. (CCFF ¶¶ 686-954). Benco confronted Schein when it suspected Schein was discounting to buying groups, and Schein and Benco communicated when they were uncertain whether a customer qualified as a buying group. (CCFF ¶¶ 955-1100). Moreover, contemporaneous, internal documents of Benco, Patterson, and Schein refer to the overarching conspiracy among the Big Three. (CCFF ¶¶ 1178-1198).

442. Benco's Chuck Cohen also never discussed Breakaway with anyone at Schein. (Cohen, Tr. 914).

Response to Proposed Finding No. 442

The Proposed Finding is misleading to the extent it asserts or implies that Schein and Benco were not part of an overarching conspiracy. The record evidence establishes that Benco orchestrated an agreement with Schein and an agreement with Patterson. The record evidence establishes that Benco's Cohen informed Sullivan of Benco's position with regard to bidding on buying groups and reached an understanding that Schein would not align itself with buying groups. (CCFF ¶¶ 661-684). Schein, in turn, ensured compliance by instructing its sales force to reject buying groups. (CCFF ¶¶ 686-954). Benco confronted Schein when it suspected Schein was discounting to buying groups, and Schein and Benco communicated when they were uncertain whether a customer qualified as a buying group. (CCFF ¶¶ 955-1100). Moreover, contemporaneous, internal documents of Benco, Patterson, and Schein refer to the overarching conspiracy among the Big Three. (CCFF ¶¶ 1178-1198).

443. Benco's conduct after learning about Schein's relationship with Breakaway contradicts Complaint Counsel's conspiracy allegations. (Complaint ¶ 8).

Response to Proposed Finding No. 443

The Proposed Finding is not supported by the cited evidence and should be disregarded, as the Complaint does not state that any conduct is inconsistent with a conspiracy. Nonetheless, the Proposed Finding is misleading to the extent it asserts or implies that Schein and Benco were not part of an overarching conspiracy. The record evidence establishes that Benco orchestrated an agreement with Schein and an agreement with Patterson. The record evidence establishes that Benco's Cohen informed Sullivan of Benco's position with regard to bidding on buying groups and reached an understanding that Schein would not align itself with buying groups. (CCFF ¶¶ 661-684). Schein, in turn, ensured compliance by instructing its sales force to reject buying groups. (CCFF ¶¶ 686-954). Benco confronted Schein when it suspected Schein was discounting to buying groups, and Schein and Benco communicated when they were uncertain whether a customer qualified as a buying group. (CCFF ¶¶ 955-1100). Moreover, contemporaneous, internal documents of Benco, Patterson, and Schein refer to the overarching conspiracy among the Big Three. (CCFF ¶¶ 1178-1198).

444. In contrast to Schein's partnership with Breakaway, when approached by the group, Benco refused to work with Breakaway citing Benco's policy that "we don't work with GPOs." (Ryan, Tr. 1207).

Response to Proposed Finding No. 444

Complaint Counsel has no response to the statement that Benco refused to work with Breakaway. However, the Proposed Finding is misleading to the extent it asserts or implies that Schein and Benco were not part of an overarching conspiracy. The record evidence establishes that Benco orchestrated an agreement with Schein and an agreement with Patterson. The record evidence establishes that Benco's Cohen informed Sullivan of Benco's

position with regard to bidding on buying groups and reached an understanding that Schein would not align itself with buying groups. (CCFF ¶¶ 661-684). Schein, in turn, ensured compliance by instructing its sales force to reject buying groups. (CCFF ¶¶ 686-954). Benco confronted Schein when it suspected Schein was discounting to buying groups, and Schein and Benco communicated when they were uncertain whether a customer qualified as a buying group. (CCFF ¶¶ 955-1100). Moreover, contemporaneous, internal documents of Benco, Patterson, and Schein refer to the overarching conspiracy among the Big Three. (CCFF ¶¶ 1178-1198).

445. The different approaches Schein and Benco took with respect to Breakaway is an example of non-parallel conduct and is inconsistent with Complaint Counsel's alleged conspiracy. (*See* Complaint ¶ 1).

Response to Proposed Finding No. 445

The Proposed Finding is not supported by the cited evidence and should be disregarded, as the Complaint does not state that any conduct is inconsistent with a conspiracy. In addition, the Proposed Finding is misleading to the extent it asserts or implies that Schein and Benco were not part of an overarching conspiracy. The record evidence establishes that Benco orchestrated an agreement with Schein and an agreement with Patterson. The record evidence establishes that Benco's Cohen informed Sullivan of Benco's position with regard to bidding on buying groups and reached an understanding that Schein would not align itself with buying groups. (CCFF ¶¶ 661-684). Schein, in turn, ensured compliance by instructing its sales force to reject buying groups. (CCFF ¶¶ 686-954). Benco confronted Schein when it suspected Schein was discounting to buying groups, and Schein and Benco communicated when they were uncertain whether a customer qualified as a buying group. (CCFF ¶¶ 955-1100). Moreover, contemporaneous, internal documents of Benco, Patterson, and Schein refer to the overarching conspiracy among the Big Three. (CCFF ¶¶ 1178-1198).

E. Business Intelligence Group.

446. Complaint Counsel claims Schein declined to enter into an agreement with Business Intelligence Group (“B.I.G.”) “as a result” of the alleged conspiracy. (RX 3087-004).

Response to Proposed Finding No. 446

Complaint Counsel does not object that RX3087 included B.I.G. as a group that Schein did not enter into an agreement with between 2011 and 2015. However, Complaint Counsel does not allege that Schein rejected B.I.G. pursuant to a conspiracy. Rather, the record evidence regarding B.I.G. establishes that prior to 2011, Schein did not have a policy to turn down buying groups despite viewing buying groups as a threat to its margins. (CX0165 at 001: (Statement of Cavaretta: “Dealing with GPOs is incredibly risky” because “as soon as we start doing this, we will turn into medical. Margins will go down. . . . This is a bad deal all the way around.”); CCFF ¶ 262; *see also* CCFF ¶¶ 196-368). In fact, in early 2011, when B.I.G. approached Special Markets, it passed it along to Sullivan’s division, HSD despite the recognition of the risk of buying groups. (RX2311 at 001). This is consistent with the weight of the record evidence, which shows that Schein worked with buying groups before the conspiracy but then indiscriminately turned down these groups during the conspiracy pursuant to a policy. (CCFF ¶¶ 432-453, 661-954; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

447. On February 1, 2011 – before any alleged agreement between the Respondents – HSD’s Bret McCarroll inquired internally if there was any interest in “a marketing and consulting group called Business Intelligence Group that is interested in forming a buying group for dentists.” (CX 0165-002-03).

Response to Proposed Finding No. 447

Complaint Counsel has no specific response. However, Complaint Counsel does not allege that Schein rejected B.I.G. pursuant to a conspiracy. Rather, the record evidence regarding B.I.G. establishes that prior to 2011, Schein did not have a policy to turn down buying groups

despite viewing buying groups as a threat to its margins. (CX0165 at 001: (Statement of Cavaretta: “Dealing with GPOs is incredibly risky” because “as soon as we start doing this, we will turn into medical. Margins will go down. . . . This is a bad deal all the way around.”); CCFF ¶ 262; *see also* CCFF ¶¶ 196-368). In fact, in early 2011, when B.I.G. approached Special Markets, it passed it along to Sullivan’s division, HSD despite the recognition of the risk of buying groups. (RX2311 at 001). This is consistent with the weight of the record evidence, which shows that Schein worked with buying groups before the conspiracy but then indiscriminately turned down these groups during the conspiracy pursuant to a policy. (CCFF ¶¶ 432-453, 661-954; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

448. According to Mr. McCarroll, B.I.G. ran marketing campaigns for over 150 dental clients. (CX 0165-002).

Response to Proposed Finding No. 448

Complaint Counsel has no specific response.

449. Mr. McCarroll described B.I.G.’s buying group concept as linked to its marketing campaigns. For example, if B.I.G. ran a “whitening campaign for \$49.00 through Groupon...[,] [e]ach of the dental practices will need to get their [whitening] supplies from somewhere.” (CX 0165-003).

Response to Proposed Finding No. 449

Complaint Counsel has no specific response.

450. As described by Mr. McCarroll, B.I.G.’s goal was not to enter into an agreement with Schein covering all of Schein’s thousands of products and offerings, but rather “to supply the ... product[s] for any campaign they run.” (CX 0165-003).

Response to Proposed Finding No. 450

Complaint Counsel has no specific response.

451. Kathleen Titus, who at the time was the Western Zone Manager for Special Markets, responded “I can tell you ... with authority that [B.I.G.] is not something [Special Markets] would be interested in[,]” explaining that, even though Special Markets had primary

responsibility for buying groups at the time, “[t]he participants are Private Practice customers which rules [Special Markets] out.” (CX 0165-002; Titus, Tr. 5335-36 (“[T]he characteristics of the customer described was more focused on interface with our field sales consultants and our regional managers, as well it was highly regionalized, so this would be a much better fit for our HSD division where those things could be assured.”)).

Response to Proposed Finding No. 451

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts that Special Markets had primary responsibility for buying groups in 2011. When B.I.G. approached Special Markets, it passed B.I.G. along to Sullivan’s division, HSD.

(RX2311 at 001). The record evidence shows both HSD and Special Markets had responsibility for buying groups. (Foley, Tr. 4523; *see also* Responses to Proposed Finding Nos. 104-106). HSD had primary responsibility for buying groups beginning in 2010 or 2011. (Steck, Tr. 3735-3737). HSD and Special Markets also coordinated regarding buying group strategy, both adhered to policy not to work with buying groups during the conspiracy period, and indeed, both rejected buying groups during the conspiracy period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

452. Furthermore, Ms. Titus noted B.I.G.’s “targets [were] invariably going to be existing HSD customers,” raising the risk that Schein would be cannibalizing its own business. (CX0165-002).

Response to Proposed Finding No. 452

Complaint Counsel does not allege that Schein rejected B.I.G. pursuant to a conspiracy. (*See* Responses to Proposed Finding Nos. 446-447). However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein rejected buying groups during the conspiracy period because of risks related to “cannibalization.” That is contrary to the record evidence, which is replete with examples of buying groups that Schein turned down pursuant to its policy and regardless of the group’s characteristics. (CCFF ¶¶ 717-954; Complaint Counsel’s Post-Trial Brief, at Attachment C).

453. Despite the testimony from Schein witnesses that Special Markets had primary responsibility for buying groups prior to mid-2014, Complaint Counsel claims the opposite, relying on Ms. Titus's email regarding B.I.G. (CX 0165-002). However, this opportunity was referred to Special Markets by HSD Regional Manager Bret McCarroll in keeping with Special Markets primary responsibility. (CX0165-003). That Special Markets turned down this group because Ms. Titus felt, as she testified, that it was a "better fit" for HSD does not undermine the apportionment of primary responsibility. (Titus, Tr. 5335-36).

Response to Proposed Finding No. 453

Complaint Counsel does not allege that Schein rejected B.I.G. pursuant to a conspiracy. (*See* Responses to Proposed Finding Nos. 446-447). However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts that Special Markets had primary responsibility for buying groups in 2011. When B.I.G. approached Special Markets, it passed B.I.G. along to Sullivan's division, HSD. (RX2311 at 001). The record evidence shows both HSD and Special Markets had responsibility for buying groups. (Foley, Tr. 4523; *see also* Responses to Proposed Finding Nos. 104-106). HSD had primary responsibility for buying groups beginning in 2010 or 2011. (Steck, Tr. 3735-3737). HSD and Special Markets also coordinated regarding buying group strategy, both adhered to policy not to work with buying groups during the conspiracy period, and indeed, both rejected buying groups during the conspiracy period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

454. Ms. Titus copied Joe Cavaretta to allow him the opportunity to evaluate whether B.I.G. might be a fit for Henry Schein Dental. Mr. Cavaretta responded – again, before the start of the alleged conspiracy – that “[d]ealing with GPOs is incredibly risky on many fronts ... margins will go down and commissions of course will follow.... This is the very abbreviated version and if you would like to talk live please let me know.” (CX 0165-001-02; *see also* Sullivan, Tr. 3918-19).

Response to Proposed Finding No. 454

The Proposed Finding is incomplete in that it omits the portion of Cavaretta's response in which he expresses his concern that “as soon as we start doing this we will turn into

medical,” which is essential context for understanding Schein’s motives in entering the conspiracy. (CCFF ¶¶ 206-213; 1389). At trial, Cavaretta testified that it was his understanding that the medical supply industry operated at lower margins as compared to dental. (CCFF ¶ 262).

455. Mr. Cavaretta explained in more detail at trial. The risks he was referring to in his February 1, 2011 email included the lack of compliance or a value proposition, as well as the risk of cannibalization given Schein’s high market share. (Cavaretta, Tr. 5644-45).

Response to Proposed Finding No. 455

The Proposed Finding is misleading in that it omits margin erosion as one of the risks Cavaretta addressed in his February 1, 2011 email. Cavaretta specifically cited “turning into medical, margins will go down” in that e-mail. (CX0165 at 001). At trial, Cavaretta testified that it was his understanding that the medical supply industry operated at lower margins as compared to dental. (CCFF ¶ 262). The record evidence also establishes that Schein as a whole was deeply concerned about its margins decreasing if it worked with buying groups. (CCFF ¶¶ 206-213; 1389). The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein rejected buying groups during the conspiracy period because of a group’s particular characteristics, like “lack of compliance or a value proposition.” That is contrary to the record evidence, which is replete with examples of buying groups that Schein turned down pursuant to its policy and regardless of the group’s characteristics. (CCFF ¶¶ 717-954; Complaint Counsel’s Post-Trial Brief, at Attachment C)

456. In Mr. Cavaretta’s mind, buying groups were not a part of the market that Schein was targeting at the time, in February 2011. (CX 0305 (Cavaretta, IHT at 134)).

Response to Proposed Finding No. 456

The Proposed Finding is misleading in that it omits the reason Cavaretta provided for why buying groups were not being targeted – because “it could cause a decrease in margins.” (CX0305 (Cavaretta, IHT at 134)). The record evidence also establishes that Schein as a whole was deeply concerned about its margins decreasing if it worked with buying groups. (CCFF ¶¶ 206-213; 1389).

457. Tim Sullivan was forwarded the email chain regarding B.I.G. (CX 2455).

Response to Proposed Finding No. 457

Complaint Counsel has no specific response.

458. As Mr. Sullivan testified, the email “highlights an internal challenge and conflict that we had” between divisions as to how to deal with and approach buying groups. (Sullivan, Tr. 3915-16 (Schein was “working to set some guidelines around who was going to approach groups, whether it was Special Markets or HSD” and if B.I.G. joined Special Markets, “then those private practices that are currently in HSD’s P&L, those FSCs would move over to Special Markets, which creates internal challenges for us.”), 3918).

Response to Proposed Finding No. 458

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein created a formal strategy for working with buying groups in response to internal conflicts in order to work with buying groups during the conspiracy period. The record evidence does not show that Schein evaluated buying groups during the conspiracy period or that it created some formal strategy for working with buying groups during the conspiracy period. The record evidence clearly shows that Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups regardless of type during the conspiracy period. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also*

CCFF ¶¶ 661-732). By February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period. (CCFF ¶¶ 432-453, 661-954; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322, 1178-1198).

459. B.I.G. tried again in May 2011, still before Complaint Counsel alleges the conspiracy began. Schein’s Philip Toh spoke with the CEO of B.I.G., Alex Dastmalchi, long enough to draft a detailed summary of B.I.G.’s proposal. (RX 2311). Mr. Toh explained that B.I.G. wanted to “start to charge the dentists for ... better pricing” on supplies and equipment so that B.I.G. could “make money on patients and the dentist.” (RX 2311-002).

Response to Proposed Finding No. 459

Complaint Counsel has no specific response.

460. Hal Muller, head of Special Markets, which had primary responsibility for buying groups at the time, responded that it was a “nice write up[,]” but it was “[n]ot our type of account.” (RX 2311-001).

Response to Proposed Finding No. 460

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts that Special Markets was the only division that interacted with buying groups.

(Response to Proposed Finding No. 453).

461. As Ms. Titus did in February 2011, Mr. Muller advised to “pass this on to Dave Steck” so that HSD could evaluate the opportunity. (RX 2311).

Response to Proposed Finding No. 461

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts that Special Markets was the only division that interacted with buying groups.

(Response to Proposed Finding No. 453).

462. Mr. Toh did pass the note on to Mr. Steck, and then on to Mr. Cavaretta, who said, “I’m willing to sign an[] NDA to learn more[,]” while also noting “[y]ou know where I stand on Co-Ops and GPOs and to me this potentially sounds like the same thing but with a different spin.” (CX 2686-001).

Response to Proposed Finding No. 462

The Proposed Finding is irrelevant because Cavaretta’s willingness to “learn more” about B.I.G., or any other buying group, in February 2011, has no bearing on Schein’s actions during the conspiracy period, particularly here where there is no evidence that Schein ultimately entered into any relationship with B.I.G.

463. Mr. Toh introduced Mr. Cavaretta to B.I.G.’s CEO, Mr. Dastmalchi, by email, noting Mr. Cavaretta “would like to discuss potential opportunities with you.” (RX 2664).

Response to Proposed Finding No. 463

Complaint Counsel has no specific response.

464. Mr. Cavaretta responded that he was “very interested in learning more about what [B.I.G. was] doing.” (RX 2664-001).

Response to Proposed Finding No. 464

Complaint Counsel has no specific response.

465. There is no evidence that Schein ultimately entered into a relationship with B.I.G., but, in any event, Schein’s interactions with B.I.G. are all before the alleged conspiracy period. (See Complaint ¶ 32).

Response to Proposed Finding No. 465

Complaint Counsel has no specific response.

466. Complaint Counsel presented no evidence that Schein's decision with respect to B.I.G. was unreasonable, against its unilateral interests, or in concert with Benco or Patterson. (*See* Marshall, Tr. 2987-88, 2990; CX 7100-211, n. 851).

Response to Proposed Finding No. 466

Complaint Counsel does not allege that Schein rejected B.I.G. pursuant to a conspiracy.

(Response to Proposed Finding No. 446).

467. Schein's interest in learning more about B.I.G. is inconsistent with the alleged conspiracy (Complaint ¶ 1).

Response to Proposed Finding No. 467

The Proposed Finding is not supported by the cited evidence and should be disregarded, as the Complaint does not state that any conduct is inconsistent with a conspiracy. However, as set forth in Response to Proposed Finding No. 446, Complaint Counsel does not allege that Schein rejected B.I.G. pursuant to a conspiracy.

F. California Dental Association – The Dentists' Service Company ("TDSC").

468. In June 2015, the California Dental Association ("CDA") formed a subsidiary named The Dentists' Service Company ("TDSC") to provide its California-licensed member dentists with services such as "marketing, practice advising, human resources, group purchasing, and assistance with forming group practices." (CX 2954-002; Steck, Tr. 3717).

Response to Proposed Finding No. 468

Complaint Counsel has no specific response.

469. Complaint Counsel claims Schein refused "to provide discounts to or otherwise compete for the business of" TDSC as a result of the alleged agreement. (RX 3087-004). The evidence does not support this claim.

Response to Proposed Finding No. 469

Complaint Counsel has no specific response. The second sentence is not supported by any citation to the record evidence and should be disregarded. Nonetheless, the record evidence shows that even as of June 2015 Schein's discussions with TDSC, which formed in June 2015, were not related to group purchasing. (Steck, Tr. 3853; CX2264 at 001 (Statement of

Brady: “Joe and I did not include anything on group purchasing as Joe prefers delaying this as long as possible.”). It also shows that Schein responded to the TDSC proposal in March 2016, long after the conspiracy became difficult to maintain. (Steck, at 3851-3852).

470. Complaint Counsel’s own expert, Dr. Marshall, did not list CDA or TDSC as a buying group that Schein “turned down.” (CX 7100-209-13).

Response to Proposed Finding No. 470

The Proposed Finding is misleading and contrary to the record evidence to the extent it asserts Schein did not turn down TDSC. (*See* Response to Proposed Finding No. 469). The Proposed Finding should be disregarded because expert testimony cannot be used to establish facts, as set forth in the Court’s Order On Post-Trial Briefs. (Order On Post-Trial Briefs at 3 (“Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.”); *see also* Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses.”)).

471. Before TDSC was created, Schein met with CDA representatives on at least two occasions in 2014 regarding the formation of TDSC and a potential buying group program for CDA members. (Steck, Tr. 3717-18, 3857-59; Sullivan, Tr. 4235-36).

Response to Proposed Finding No. 471

The Proposed Finding is irrelevant, as Schein’s exploratory meetings regarding a buying group that had not even been formed have no bearing on its conduct regarding TDSC. In addition, the evidence establishes that CDA initially introduced the concept as an MSO, not a buying group. (CX2901 (March 18, 2014 letter from CDA’s James Stephens)). Moreover, the Proposed Finding is misleading and contrary to the weight of the record evidence, which shows Schein did not discuss group purchasing with TDSC even as of June 2015 and did not respond to its RFP until March 2016. (*See* Response to Proposed Finding No. 469).

472. In October 2014, Mr. Sullivan internally proposed providing the CDA with an offering similar to what Schein presented to Smile Source in 2014, including both business solutions and discounts on supplies. (RX 2338-002; Sullivan, Tr. 4236).

Response to Proposed Finding No. 472

The Proposed Finding is misleading to the extent it suggests that Sullivan's 2014 internal discussion about a potential buying group that had not yet launched is relevant to whether Schein worked with buying groups during the conspiracy. Moreover, the Proposed Finding is misleading and contrary to the weight of the record evidence, which shows Schein did not discuss group purchasing with TDSC even as of June 2015 and did not respond to its RFP until March 2016. (*See* Response to Proposed Finding No. 469). In fact, the record evidence shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

473. After learning of the TDSC launch in June 2015, Schein drafted a follow-up letter to Peter DuBois, Executive Director of the CDA, in which Schein offered to provide an administrative fee to the CDA, business solutions services, a TDSC sales and pricing plan, and a pricing formulary for TDSC members. (CX 2264-002; Steck, Tr. 3859-60).

Response to Proposed Finding No. 473

The Proposed Finding is misleading to the extent it suggests that the pricing plans offered to TDSC members were somehow group purchasing discounts. The evidence establishes that the follow-up letter to Peter DuBois excluded group purchasing, (Steck, Tr. 3853-3854

(Schein did not offer TDSC a group purchasing service); CX2264 at 001 (“Joe and I did not include anything on group purchasing.”).

474. Despite Schein’s proposal, TDSC later issued a “Request for Proposal of Dental Supplies for CDA members” (RFP) on January 4, 2016. (RX 2131-001; RX 2132-007; RX 2227-003).

Response to Proposed Finding No. 474

Complaint Counsel has no specific response.

475. Schein submitted a response to the RFP on January 27, 2016 and thereafter met with the CDA to present its proposal on March 3, 2016. (Sullivan, Tr. 4236-37; Steck, Tr. 3725-26; RX 2234-001, -003-99; CX 2486-001).

Response to Proposed Finding No. 475

The Proposed Finding is misleading to the extent it suggests that Schein’s January 27, 2016 response to the RFP is relevant to whether Schein worked with buying groups during the conspiracy. (*See* Response to Proposed Finding No. 469). In fact, the record evidence shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

476. On April 1, 2016, TDSC awarded Schein certain categories of products to sell in connection with TDSC’s supply program and provided a proposed agreement. (RX 2246-001-03).

Response to Proposed Finding No. 476

Complaint Counsel has no specific response.

477. TDSC’s proposed agreement was problematic for Schein as it would require Schein to limit its sales to CDA members (i.e., California dentists) to only certain categories of products for which it was the winning bidder. (Sullivan, Tr. 4237-38).

Response to Proposed Finding No. 477

Complaint Counsel has no specific response.

478. TDSC's proposal posed further problems in that it contemplated that customer orders would be placed directly with TDSC, not Schein. (Sullivan, Tr. 4237-38; RX 2927-001). Schein had not agreed to or even discussed allowing its customers' orders to be placed directly with the CDA. (Sullivan, Tr. 4237-38).

Response to Proposed Finding No. 478

Complaint Counsel has no specific response. Complaint Counsel also notes that per the Parties' Joint Stipulations and Admissibility of Exhibits submitted on December 19, 2018, "Third party websites will be admitted into evidence for any non-hearsay purpose." RX2927, a third party website, is admitted into evidence but cannot be used for any non-hearsay purpose, and thus, cannot support the first sentence of the Proposed Finding.

479. As Schein explained to TDSC at the time: "Our issues are with the membership enrollment and ordering process and removing the positive influence Henry Schein Dental has with customers. With our current market share in California, the TDSC and Henry Schein will become competitors using this process. We cannot encourage good HSD customers to join the TDSC plan without endangering the majority of our business with them." (RX 2608-002; CX 0305 (Cavaretta, IHT at 178-79); Cavaretta, Tr. 5608 (noting that Schein had over fifty percent market share in California)).

Response to Proposed Finding No. 479

Complaint Counsel has no specific response.

480. Despite its concerns, Schein nevertheless continued to negotiate with TDSC and alternatively offered to: (1) construct a Schein formulary that would mirror the TDSC formulary (including identical products and pricing); (2) offer the formulary to any customer who joins the TDSC plan; and (3) allow the "mutual" customers to place orders through the Schein system and Schein would still pay TDSC the 3% administrative fee. (RX 2608-002; Sullivan, Tr. 4237-38).

Response to Proposed Finding No. 480

The Proposed Finding is misleading to the extent it suggests that Schein's attempts to negotiate with TDSC in April 2016 are relevant to whether Schein worked with buying groups during the conspiracy. In fact, the record evidence shows that Schein worked with

buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

481. TDSC rejected Schein's alternative offer. (Sullivan, Tr. 4238).

Response to Proposed Finding No. 481

Complaint Counsel has no specific response.

482. Schein's negotiations, bids, proposals, and decision-making with regard to CDA had nothing to do with Benco or Patterson, but rather Schein's own business. (Sullivan, Tr. 4238-39; Steck, Tr. 3727).

Response to Proposed Finding No. 482

The Proposed Finding is misleading, as Schein's decision making in 2016, or after the conspiracy became difficult to maintain, does not disprove its participation in a conspiracy.

483. There is no evidence of any communications between Schein, Benco, and/or Patterson regarding the CDA or TDSC. (Sullivan, Tr. 4238; CX 8023 (Guggenheim, Dep. at 407-08)).

Response to Proposed Finding No. 483

The Proposed Finding is misleading to the extent it suggests that Schein's lack of communications with Benco or Patterson about CDA after the June 2015 launch of TDSC are relevant to disproving the conspiracy or disprove a conspiracy. The record evidence shows that the two were part of an overarching conspiracy. Complaint Counsel has identified, and the record evidence is replete with, examples of inter-firm communications between Cohen and Sullivan between 2011 and 2015 that establish Benco orchestrated an agreement with Schein. (CCFF ¶¶ 327-354; *see also* CCFF ¶¶ 284-326). Moreover, the record evidence

establishes that Benco's Cohen informed Sullivan of Benco's position with regard to bidding on buying groups and reached an understanding that Schein would not align itself with buying groups. (CCFF ¶¶ 661-684). Schein, in turn, ensured compliance by instructing its sales force to reject buying groups. (CCFF ¶¶ 686-954). Benco confronted Schein when it suspected Schein was discounting to buying groups, and Schein and Benco communicated when they were uncertain whether a customer qualified as a buying group. (CCFF ¶¶ 955-1100). The record evidence also shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein's internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195).

484. Benco responded to the CDA and TDSC entirely differently than Schein: "We appreciate you considering us for this opportunity, however, Benco Dental, as a matter of policy, does not participate in GPOs." (RX 1065-002).

Response to Proposed Finding No. 484

Complaint Counsel has no specific response to the statement that Benco refused TDSC.

However, the Proposed Finding is misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because Benco's approach differed from Schein's after the conspiracy became difficult to maintain following Benco's April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161). The fact that Benco and Schein took different approaches with respect to CDA and TDSC after the conspiracy became difficult to maintain is consistent with the conspiracy. Moreover, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it suggest that Benco and Schein did not participate in a conspiracy. The record evidence shows that both participated in a conspiracy. (*See* Response to Proposed Finding No. 483).

485. Patterson also responded to the CDA and TDSC entirely differently than Schein: “we cannot participate in this current RFP.” (RX 0551-001).

Response to Proposed Finding No. 485

Complaint Counsel has no specific response to the attribution of the statement to RX0551. However, the Proposed Finding is misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because Patterson’s approach differed from Schein’s after the conspiracy became difficult to maintain following Benco’s April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein and Benco. (CCFF ¶¶ 1159-1161). The fact that Patterson and Schein took different approaches with respect to CDA and TDSC after the conspiracy became difficult to maintain is consistent with the conspiracy. Moreover, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it suggests that Patterson and Schein did not participate in an overarching conspiracy orchestrated by Benco. The record evidence shows that both participated in a conspiracy. The record evidence also shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein’s internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195).

486. Schein’s willingness to do business with the CDA and TDSC, and its efforts to do so, differed substantially from Benco and Patterson and are inconsistent with the alleged conspiracy. (Complaint ¶ 1; RX 1065-002; RX 0551-001; RX 2234-001, -003-99).

Response to Proposed Finding No. 486

The Proposed Finding is not supported by the cited evidence and should be disregarded, as the Complaint does not state that any conduct is inconsistent with a conspiracy. Moreover, the Proposed Finding is misleading to the extent it asserts that Schein did not participate in the conspiracy because it negotiated or was willing to do business with a buying group after

the conspiracy became difficult to maintain following Benco's April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. In fact, Schein's willingness to do business with CDA and TDSC after April 2015 is consistent with the conspiracy. The evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of buying groups during the conspiracy, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

G. Columbia University Medical Center.

487. In 2015, Schein worked with the Columbia University Dental School faculty to set up a buying group of independent dentists. (RX 2739-003; RX 2740-001 (listing Columbia faculty members); RX 2741-001).

Response to Proposed Finding No. 487

The Proposed Finding is not supported by the cited evidence to the extent it asserts that Schein's interactions with Columbia University Dental School faculty related to a buying group of independent dentists, took place during the conspiracy period, or were in any other way relevant to Schein's conduct with respect to buying groups during the relevant period. There is no trial testimony with respect to Columbia University Medical Center or Columbia University Dental School, and the documents cited are undated, incomplete, lacking in context, and is not supported by the record testimony. The cited evidence does not establish whether the faculty members comprised a buying group, whether they sought to establish a buying group, whether any such faculty group was in fact composed of "independent dentists," or when Schein purportedly "worked with" this faculty group. Therefore, the Proposed Finding should be disregarded.

488. Schein developed a “customized offering [for] the Faculty of Columbia” that included a “10% catalog discount” in exchange for a “\$15,000 yearly merchandise commitment,” a “12% catalog discount” for a “\$36,000 yearly merchandise commitment,” and a “15% catalog discount” for a “\$75,000 yearly merchandise commitment.” (RX 2741-001-02).

Response to Proposed Finding No. 488

The Proposed Finding is misleading to the extent it suggests that the offer described in the cited document relates to a buying group of independent dentists, was made during the conspiracy period, or was in any other way relevant to Schein’s conduct with respect to buying groups during the relevant period. There is no trial testimony with respect to Columbia University Medical Center or Columbia University Dental School, and the offer cited is undated, lacking in context, and is not supported by trial testimony. Further, there is no evidence that the cited document is final or that it was shared with Columbia University Dental School. The cited evidence does not establish whether the faculty members comprised a buying group, whether they sought to establish a buying group, whether any such faculty group was in fact composed of “independent dentists,” or when Schein purportedly “worked with” this faculty group. Therefore, the Proposed Finding should be disregarded.

489. Schein also prepared promotional materials for the Columbia buying group listing “Benefits – for every Adjunct Faculty Member!” and an offering to place each adjunct faculty member “on a customized formulary for the group.” (RX 2739-003).

Response to Proposed Finding No. 489

The Proposed Finding is not supported by the cited evidence to the extent it asserts that Schein’s interactions with Columbia University Dental School faculty related to a buying group of independent dentists, took place during the conspiracy period, or were in any other way relevant to Schein’s conduct with respect to buying groups during the relevant period. There is no trial testimony with respect to Columbia University Medical Center or Columbia University Dental School, and the documents cited are undated, incomplete,

lacking in context, and is not supported by record testimony. The cited evidence does not establish whether the faculty members comprised a buying group, whether they sought to establish a buying group, whether any such faculty group was in fact composed of “independent dentists,” or when Schein purportedly “worked with” this faculty group.

Therefore, the Proposed Finding should be disregarded.

490. Schein’s promotional materials advertised “[m]any of our supplier partners are willing and anxious to work with Henry Schein and your group to organize continuing education events.” (RX 2739-003).

Response to Proposed Finding No. 490

The Proposed Finding is not supported by the cited evidence to the extent it asserts that Schein’s interactions with Columbia University Dental School faculty related to a buying group of independent dentists, took place during the conspiracy period, or were in any other way relevant to Schein’s conduct with respect to buying groups during the relevant period. There is no trial testimony with respect to Columbia University Medical Center or Columbia University Dental School, and the documents cited are undated, incomplete, lacking in context, and is not supported by record testimony. The cited evidence does not establish whether the faculty members comprised a buying group, whether they sought to establish a buying group, whether any such faculty group was in fact composed of “independent dentists,” or when Schein purportedly “worked with” this faculty group.

Therefore, the Proposed Finding should be disregarded.

491. Schein tracked interest from the Columbia professors, but found the dentists did not want to meet, or were “not interested” in the program. (RX 2740 (tab titled “People That Call In,” column “AE”)).

Response to Proposed Finding No. 491

The Proposed Finding is not supported by the cited evidence to the extent it asserts that Schein’s interactions with Columbia University Dental School faculty related to a buying

group of independent dentists, took place during the conspiracy period, or were in any other way relevant to Schein's conduct with respect to buying groups during the relevant period. There is no trial testimony with respect to Columbia University Medical Center or Columbia University Dental School, and the documents cited are undated, incomplete, lacking in context, and not supported by record testimony. The cited evidence does not establish whether the faculty members comprised a buying group, whether they sought to establish a buying group, whether any such faculty group was in fact composed of "independent dentists," or when Schein purportedly "worked with" this faculty group. Therefore, the Proposed Finding should be disregarded.

492. Schein's willingness and efforts to establish a buying group with the Columbia University Dental School Faculty is inconsistent with Complaint Counsel's alleged conspiracy. (Complaint ¶ 1; RX 2741-001-02).

Response to Proposed Finding No. 492

The Proposed Finding is not supported by the citation to the Complaint and should be disregarded, as the Complaint does not state that any conduct is inconsistent with a conspiracy. Further, the Proposed Finding is misleading to the extent it suggests that the offer described in the RX2741 relates to a buying group of independent dentists, was made during the conspiracy period, or was in any other way relevant to Schein's conduct with respect to buying groups during the relevant period. There is no trial testimony with respect to Columbia University Medical Center or Columbia University Dental School, and the offer cited is undated, lacking in context, and is not supported by trial testimony. Further, there is no evidence that the cited document is a final draft or that it was shared with Columbia University Dental School. The cited evidence does not establish whether the faculty members comprised a buying group, whether they sought to establish a buying group, whether any such faculty group was in fact composed of "independent dentists," or when Schein

purportedly “worked with” this faculty group. Therefore, the Proposed Finding should be disregarded.

H. Comfort Dental.

493. Comfort Dental describes itself as a dental franchise, with its locations independently owned and operated. (RX 2877).

Response to Proposed Finding No. 493

Per the Parties’ Joint Stipulations and Admissibility of Exhibits submitted on December 19, 2018, “Third party websites will be admitted into evidence for any non-hearsay purpose.” RX2877, a third party website, is admitted into evidence but cannot be used for any non-hearsay purpose. Complaint Counsel does not object to the assertion that the statement appears on RX2877. However, the Proposed Finding is improper to the extent it asserts that the statement is true or to the extent it uses the hearsay statement to assert or imply that Comfort Dental is a buying group. Moreover, the record evidence establishes that Schein and Sullivan considered Comfort Dental to be an “Elite DSO,” not a buying group. (CCFF ¶¶ 1098-1099; Sullivan, Tr. 3903 (Sullivan testified that Schein used the term “Elite DSO” to refer to Schein’s largest DSO customers); CCFF ¶¶ 72-76 (distinguishing DSOs from Buying Groups)).

494. Comfort Dental’s members consist of private practices focused on pediatric dentistry. (Foley, Tr. 4632-33).

Response to Proposed Finding No. 494

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Schein viewed Comfort Dental as a buying group because its members were private practices. The record evidence establishes that Schein and Sullivan considered Comfort Dental to be an “Elite DSO,” not a buying group. Moreover, the record evidence establishes that Schein and Sullivan considered Comfort Dental to be an “Elite DSO,” not a

buying group. (CCFF ¶¶ 1098-1099; Sullivan, Tr. 3903 (Sullivan testified that Schein used the term “Elite DSO” to refer to Schein’s largest DSO customers); CCFF ¶¶ 72-76 (distinguishing DSOs from Buying Groups)). Furthermore, one of the ways Schein distinguished Comfort Dental from buying groups was that Comfort Dental provided management services to its franchisees. (RX2947 (Cavaretta, Dep. at 36)).

495. Comfort Dental is a “franchisee/franchisor-type buying group, similar to Smile Source.” (Foley, Tr. 4632-33).

Response to Proposed Finding No. 495

The Proposed Finding is contrary to the weight of the evidence to the extent that it asserts or implies that Schein viewed Comfort Dental as a buying group during the relevant period. The record evidence establishes that Schein and Sullivan considered Comfort Dental to be an “Elite DSO,” not a buying group. Moreover, the record evidence establishes that Schein and Sullivan considered Comfort Dental to be an “Elite DSO,” not a buying group. (CCFF ¶¶ 1098-1099; Sullivan, Tr. 3903 (Sullivan testified that Schein used the term “Elite DSO” to refer to Schein’s largest DSO customers); CX2934 at 004 (2015 email from John Cox referring to Comfort Dental as one of “these larger DSO accounts”); CCFF ¶¶ 72-76 (distinguishing DSOs from Buying Groups)). Further, one of the ways Schein distinguished Comfort Dental from buying groups was that Comfort Dental provided management services to its franchisees. (RX2947 (Cavaretta, Dep. at 36)).

496. Comfort Dental has agreements with each of its members allowing them to operate as a franchisee. (Foley, Tr. 4633).

Response to Proposed Finding No. 496

The Proposed Finding is contrary to the weight of the evidence to the extent that it asserts or implies that Schein viewed Comfort Dental as a buying group during the relevant period. The record evidence establishes that Schein and Sullivan considered Comfort Dental to be an

“Elite DSO,” not a buying group Moreover, the record evidence establishes that Schein and Sullivan considered Comfort Dental to be an “Elite DSO,” not a buying group. (CCFF ¶¶ 1098-1099; Sullivan, Tr. 3903 (Sullivan testified that Schein used the term “Elite DSO” to refer to Schein’s largest DSO customers); CX2934 at 004 (2015 email from John Cox referring to Comfort Dental as one of “these larger DSO accounts”); CCFF ¶¶ 72-76 (distinguishing DSOs from Buying Groups)). Further, one of the ways Schein distinguished Comfort Dental from buying groups was that Comfort Dental provided management services to its franchisees. (RX2947 (Cavaretta, Dep. at 36)).

497. Comfort Dental advertises its offerings to members as including “economics [*sic*] of scale, prime locations, mass marketing, and overhead control.” (RX 2877-001).

Response to Proposed Finding No. 497

Per the Parties’ Joint Stipulations and Admissibility of Exhibits submitted on December 19, 2018, “Third party websites will be admitted into evidence for any non-hearsay purpose.” RX2877, a third party website, is admitted into evidence but cannot be used for any non-hearsay purpose. Complaint Counsel does not object to the assertion that the statement appears on RX2877. However, the Proposed Finding is improper to the extent it asserts that the statement is true or to the extent it uses the hearsay statement to assert or imply that Comfort Dental is a buying group. Moreover, the Proposed Finding is contrary to the weight of the evidence to the extent that it asserts or implies that Schein viewed Comfort Dental as a buying group during the relevant period. The record evidence establishes that Schein and Sullivan considered Comfort Dental to be an “Elite DSO,” not a buying group Moreover, the record evidence establishes that Schein and Sullivan considered Comfort Dental to be an “Elite DSO,” not a buying group. (CCFF ¶¶ 1098-1099; Sullivan, Tr. 3903 (Sullivan testified that Schein used the term “Elite DSO” to refer to Schein’s largest DSO customers); CX2934

at 004 (2015 email from John Cox referring to Comfort Dental as one of “these larger DSO accounts”); CCFF ¶¶ 72-76 (distinguishing DSOs from Buying Groups)). Further, one of the ways Schein distinguished Comfort Dental from buying groups was that Comfort Dental provided management services to its franchisees. (RX2947 (Cavaretta, Dep. at 36)).

498. Comfort Dental’s relationship with Schein began with HSD in the late 1990s, and the relationship remains in place today. (CX 2947 (Cavaretta, Dep. at 35); Foley, Tr. 4633; *see also* CX 7101-140 (identifying Comfort Dental’s sales in Schein’s sales data from 2009 through 2017)).

Response to Proposed Finding No. 498

The Proposed Finding is not supported by the evidence cited. CX2947 does not provide any support for the Proposed Finding. Similarly, the Foley testimony cited confirms only that Comfort Dental “originally formed in [Schein’s] HSD Division” but provides no support for the timing set forth in the Proposed Finding, nor for the proposition that “the relationship remains in place today.”

Additionally, this Proposed Finding is misleading to the extent that it suggests that Dr. Marshall considered Comfort Dental in his analysis – rather, Dr. Marshall crossed-out Comfort Dental in the sales data chart cited because he observed evidence suggesting that Comfort Dental might not be a buying group. (CX7101 at 137-138 (Appendix C) and 140-141 (Appendix D)). Moreover, for reasons explained in more detail in Responses to Proposed Finding Nos. 1611-1612, this Proposed Finding is also unreliable, inaccurate, and misleading to the extent that it suggests that Schein’s purported sales to buying groups during the relevant period show lack of parallel conduct or structural break for Schein. As explained in Responses to Proposed Finding Nos. 1611-1612, some buying group relationships and sales that occurred during the relevant period are either pre-existing, legacy relationships formed prior the conspiracy or those that were entered into after the conspiracy became

difficult to maintain and Schein began competing for buying groups. (CCFF ¶¶ 440-444, 1159-1166, 1398, 1400, 1403, 1717-1719, 1730, 1734-1735). Schein executives did not even know that some of these “legacy” buying groups were customers and referred to some as “inherited messes.” (CX2287 at 001; CX2286 at 001).

499. Comfort Dental was initially an HSD customer, but as they grew, they required more centralized support. (CX 2109-002; Foley, Tr. 4632-33).

Response to Proposed Finding No. 499

Complaint Counsel has no response to Comfort Dental being an HSD customer initially. However, Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein considered Comfort Dental to be a buying group. The record evidence shows Schein and Sullivan considered Comfort Dental to be an elite DSO. (*See* Responses to Proposed Finding Nos. 494-495).

500. Comfort Dental sent the business out to bid in April 2010, and Schein decided that “it would be best to have [Special Markets] respond.” (CX 2109-002; Foley, Tr. 4632-33).

Response to Proposed Finding No. 500

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein considered Comfort Dental to be a buying group. The record evidence shows Schein and Sullivan considered Comfort Dental to be an elite DSO. (*See* Responses to Proposed Finding Nos. 494-495).

501. Schein won the business with an “aggressive” “new plan that was designed to save them nearly \$1M in merchandise spend.” (CX 2109-002; Foley, Tr. 4632-33). Comfort Dental eventually became one of Schein’s largest buying groups, with over [REDACTED] in annual purchases by 2015. (*See* CX 7101-140 (Figure 13)).

Response to Proposed Finding No. 501

The Proposed Finding is not supported by the evidence cited. CX2109 is a 2010 document that states that Schein planned to present Comfort Dental with a new proposal, but the

document does not support the fact that Schein “won the business.” Similarly, the Foley testimony cited provides no support for the Proposed Finding. [REDACTED]

[REDACTED], as that fact should be established by fact witnesses or documents, not through expert testimony. (*See* February 21, 2019 Order on Post-Trial Briefs). The record evidence shows Schein and Sullivan considered Comfort Dental to be an elite DSO. (*See* Responses to Proposed Finding Nos. 494-495).

Additionally, this Proposed Finding is misleading to the extent that it suggests that Dr. Marshall considered Comfort Dental in his analysis – rather, Dr. Marshall crossed-out Comfort Dental in the sales data chart cited because he observed evidence suggesting that Comfort Dental might not be a buying group. (CX7101 at 137-138 (Appendix C) and [REDACTED]). Moreover, for reasons explained in more detail in Responses to Proposed Finding Nos. 1611-1612, this Proposed Finding is also unreliable, inaccurate, and misleading to the extent that it suggests that Schein’s purported sales to buying groups during the relevant period show lack of parallel conduct or structural break for Schein. As explained in Responses to Proposed Finding Nos. 1611-1612, some buying group relationships and sales that occurred during the relevant period are either pre-existing, legacy relationships formed prior the conspiracy or those that were entered into after the conspiracy became difficult to maintain and Schein began competing for buying groups. (CCFF ¶¶ 440-444, 1159-1166, 1398, 1400, 1403, 1717-1719, 1730, 1734-1735). Schein executives did not even know that some of these “legacy” buying groups were customers and referred to some as “inherited messes.” (CX2287 at 001; CX2286 at 001).

502. Special Markets has provided discounts to Comfort Dental since at least 2012. (Foley, Tr. 4634).

Response to Proposed Finding No. 502

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein considered Comfort Dental to be a buying group. The record evidence shows Schein and Sullivan considered Comfort Dental to be an elite DSO. (See Responses to Proposed Finding Nos. 494-495). For the same reasons, the Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it uses Comfort Dental as an example of a buying group that Schein worked with during the conspiracy period.

503. In addition to providing discounts to Comfort Dental, Special Markets also paid Comfort Dental an administrative fee. (Foley, Tr. 4634).

Response to Proposed Finding No. 503

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein considered Comfort Dental to be a buying group. The record evidence shows Schein and Sullivan considered Comfort Dental to be an elite DSO. (See Responses to Proposed Finding Nos. 494-495). For the same reasons, the Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it uses Comfort Dental as an example of a buying group that Schein worked with during the conspiracy period.

504. Complaint Counsel points to internal Schein documents labeling Comfort Dental as an “Elite DSO.” (CX 2021). Mr. Sullivan testified that while Mr. Porro, a zone manager, was “digging into this,” Mr. Sullivan felt Comfort Dental exhibited “primarily buying group type attributes.” (Sullivan, Tr. 3969). In any event, Schein’s categorization of Comfort Dental for internal accounting purposes between divisions does not impact the actual nature and characteristics of Comfort Dental as a group of independent dentists. (See RX 2767-002 (explaining that the language Schein used to describe accounts was in part to delineate which groups “should be HSD” and which “should fall into [Special Markets]”)). As Mr. Meadows testified at trial, a group that Complaint Counsel agrees is a buying group – Dental Gator – was also “rolled into the elite DSO” category within Schein. (Meadows, Tr. 2657).

Response to Proposed Finding No. 504

The Proposed Finding is misleading and contrary the cited evidence with respect to Sullivan's views regarding Comfort Dental. The cited portion of Sullivan's trial testimony does not include the quote attributed to him. Moreover, the quote ("primarily buying group type attributes") refers to Atlantic Dental Care not Comfort Dental. (Sullivan, Tr. 4209-4210). The Proposed Finding is further misleading with respect to RX2767, which does not in any way reference buying groups but instead focuses on how to delineate between different types of DSOs and group practices. The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein considered Comfort Dental to be a buying group. The record evidence shows Schein and Sullivan considered Comfort Dental to be an elite DSO. (*See Responses to Proposed Finding Nos. 494-495*). Finally, Meadows' vague testimony that, as of March 2014, Dental Gator was "rolled into the elite DSO" category is contrary to the weight of the evidence which establishes that (a) Schein did not even meet with MB2 about Dental Gator until January or February of 2014 (CCFF ¶¶ 1785-1786); (b) Dental Gator initially became a Schein customer without Schein's knowledge (CCFF ¶¶ 1795-1796); and (c) Schein's subsequent agreement with MB2 expressly prohibited using the agreement "to grow any Group Purchasing Organization (GPO) type relationship." (CCFF ¶¶ 1792).

505. A buying group with "500 offices moving to 1500 clearly fall into the elite-DSO model" even though "they are all individually owned" "like Comfort Dental." (CX 2119-001).

Response to Proposed Finding No. 505

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein considered Comfort Dental to be a buying group. The

record evidence shows Schein and Sullivan considered Comfort Dental to be an elite DSO.

(*See Responses to Proposed Finding Nos. 494-495*).

506. Mr. Muller explained that groups like this were “sophisticated buying group[s] – their goal is to help offices compete with the DSOs.” (CX 2119-001).

Response to Proposed Finding No. 506

The Proposed Finding is misleading to the extent it implies that Muller is categorizing Comfort Dental as a buying group, when in fact Muller is referring specifically to Smile Source. CX 2119 is an email exchange about Smile Source in which Sullivan asks Muller: “Is this really a buying group?” Muller responds: “Yes it is a sophisticated buying group.” (CX2119 at 001). The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein considered Comfort Dental to be a buying group. The record evidence shows Schein and Sullivan considered Comfort Dental to be an elite DSO. (*See Responses to Proposed Finding Nos. 494-495*).

507. Despite internal Schein documents labeling Comfort Dental as an “Elite DSO,” Mr. Foley confirmed at trial that Comfort Dental is not a DSO, and instead is a “very anti DSO” group that “never attended any DSO meetings.” (Foley, Tr. 4633). Mr. Foley consistently describes Comfort Dental’s business model as “more of a GPO, Franchisor-Franchisee.” (CX 2109-002).

Response to Proposed Finding No. 507

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein considered Comfort Dental to be a buying group. The record evidence shows Schein and Sullivan considered Comfort Dental to be an elite DSO. (*See Responses to Proposed Finding Nos. 494-495*). Further, one of the ways Schein distinguished Comfort Dental from buying groups was that Comfort Dental provided management services to its franchisees. (RX2947 (Cavaretta, Dep. at 36)). Foley’s vague description, in 2010, of Comfort Dental as “more of a GPO, Franchisor-Franchisee”

(CX2109) and his self-serving testimony at trial regarding his current view that Comfort was not a DSO (Foley, Tr. 4633) is belied by the weight of the evidence.

508. Complaint Counsel also points to deposition testimony from some Schein witnesses suggesting that Comfort Dental might own some practices, but not all of their member practices. (CX 0311 (Sullivan, IHT at 331-32 (“[T]hey own some of their practices. They don’t own all of them.”)); CX 8033 (Cavaretta, Dep. at 36)). At most, this testimony from HSD executives indicates that at least some if not most Comfort Dental members are independent dental offices, which is not inconsistent with Complaint Counsel’s definition of a buying group. (Complaint ¶ 3). Nevertheless, Special Markets managed the relationship, and as stated above, Special Markets confirmed that Comfort Dental is a buying group. (Foley, Tr. 4632-33).

Response to Proposed Finding No. 508

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Schein viewed Comfort Dental as a buying group. The record evidence shows Schein and Sullivan considered Comfort Dental to be an elite DSO. (*See Responses to Proposed Finding Nos. 494-495*). Further, one of the ways Schein distinguished Comfort Dental from buying groups was that Comfort Dental provided management services to its franchisees. (RX2947 (Cavaretta, Dep. at 36)). Foley’s trial testimony regarding his current view that Comfort was not a DSO (Foley, Tr. 4633) is belied by the weight of the evidence.

509. More importantly, Comfort Dental itself asserts that “[a]ll of [its] locations are independently owned and operated.” (RX 2877-001).

Response to Proposed Finding No. 509

Per the Parties’ Joint Stipulations and Admissibility of Exhibits submitted on December 19, 2018, “Third party websites will be admitted into evidence for any non-hearsay purpose.” RX2877, a third party website, is admitted into evidence but cannot be used for any non-hearsay purpose. Complaint Counsel does not object to the assertion that the statement appears on RX2877. However, the Proposed Finding is improper to the extent it asserts that the statement is true or to the extent it uses the hearsay statement to assert or imply that Comfort Dental is a buying group. Indeed, the record evidence shows Schein and Sullivan

considered Comfort Dental to be an elite DSO. (*See* Responses to Proposed Finding Nos. 494-495). Further, one of the ways Schein distinguished Comfort Dental from buying groups was that Comfort Dental provided management services to its franchisees. (RX2947 (Cavaretta, Dep. at 36)).

510. The weight of the evidence supports Schein's position that Comfort Dental, like Smile Source, meets Complaint Counsel's definition of a buying group. (Complaint ¶ 3).

Response to Proposed Finding No. 510

The Proposed Finding is not supported by the cited evidence and should be disregarded, as the Complaint does not state that Comfort Dental meets the definition of a buying group. Moreover, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Schein viewed Comfort Dental as a buying group. The record evidence shows Schein and Sullivan considered Comfort Dental to be an elite DSO. (*See* Responses to Proposed Finding Nos. 494-495).

511. Schein's relationship with Comfort Dental is inconsistent with the alleged conspiracy. (Complaint ¶ 1).

Response to Proposed Finding No. 511

The Proposed Finding is not supported by the cited evidence and should be disregarded, as the Complaint does not state that any conduct is inconsistent with a conspiracy. Moreover, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Schein viewed Comfort Dental as a buying group. The record evidence shows Schein and Sullivan considered Comfort Dental to be an elite DSO. (*See* Responses to Proposed Finding Nos. 494-495). Thus, Schein's conduct regarding Comfort Dental does not disprove its participation in a conspiracy.

I. Corydon Palmer Dental Society.

512. Schein has done business with the Corydon Palmer Dental Society (“Corydon Palmer”) since January 1, 2015. (CX 4092-001 (contract effective January 1, 2015); Baytosh, Tr. 1912).

Response to Proposed Finding No. 512

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Corydon Palmer is a buying group or that Schein offered discounts on its products to members of Corydon Palmer. The record evidence establishes that Corydon Palmer is not a buying group; that Schein provided only rebates, not discounts, to Corydon Palmer; that Schein received free exhibit space as part of the rebate agreement; that the rebates went directly to Corydon Palmer, not member dentists; and that Schein provided no pricing discounts to member dentists. (CCFF ¶¶ 1764-1766). Finally, the record evidence establishes that Schein’s executives were unaware of the rebate agreements with Corydon Palmer until long after April 2015 when the conspiracy became difficult to maintain. (CCFF ¶ 1767).

513. The 2015 agreement between Schein and Corydon Palmer was renewed January 1, 2017 with a contract titled “Primary Vendor Agreement, Buying Group.” (RX 2033-001; Baytosh, Tr. 1916-17).

Response to Proposed Finding No. 513

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Corydon Palmer is a buying group or that Schein offered discounts on its products to members of Corydon Palmer. The record evidence establishes that Corydon Palmer is not a buying group; that Schein provided only rebates, not discounts, to Corydon Palmer; that Schein received free exhibit space as part of the rebate agreement; that the rebates went directly to Corydon Palmer, not member dentists; and that Schein provided no pricing discounts to member dentists. (CCFF ¶¶ 1764-1766).

514. Under both the 2015 and 2017 agreements, Schein agreed to pay Corydon Palmer a rebate calculated as a percentage on members' "total merchandise purchases" from Schein. (CX 4092-001; RX 2033-001).

Response to Proposed Finding No. 514

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Corydon Palmer is a buying group or that Schein offered discounts on its products to members of Corydon Palmer. The record evidence establishes that Corydon Palmer is not a buying group; that Schein provided only rebates, not discounts, to Corydon Palmer; that Schein received free exhibit space as part of the rebate agreement; that the rebates went directly to Corydon Palmer, not member dentists; and that Schein provided no pricing discounts to member dentists. (CCFF ¶¶ 1764-1766).

515. The more Corydon Palmer members purchase from Schein, the greater the rebate. (Baytosh, Tr. 1913).

Response to Proposed Finding No. 515

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Corydon Palmer is a buying group or that Schein offered discounts on its products to members of Corydon Palmer. The record evidence establishes that Corydon Palmer is not a buying group; that Schein provided only rebates, not discounts, to Corydon Palmer; that Schein received free exhibit space as part of the rebate agreement; that the rebates went directly to Corydon Palmer, not member dentists; and that Schein provided no pricing discounts to member dentists. (CCFF ¶¶ 1764-1766).

516. Corydon Palmer is the local component of the Ohio Dental Association, which is the state component of the American Dental Association. (Baytosh, Tr. 1876-78).

Response to Proposed Finding No. 516

Complaint Counsel has no specific response.

517. In order to be a member of Corydon Palmer, membership in all three (national, state, and local) is required. (Baytosh, Tr. 1878-79).

Response to Proposed Finding No. 517

Complaint Counsel has no specific response.

518. The majority of Corydon Palmer members are independent dentists. (Baytosh, Tr. 1898-99).

Response to Proposed Finding No. 518

Complaint Counsel has no specific response to the statement. However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Corydon Palmer is a buying group. The record evidence establishes that Corydon Palmer is not a buying group. (CCFF ¶ 1764).

519. Corydon Palmer does not have any ownership interest in its member practices. (Baytosh, Tr. 1899).

Response to Proposed Finding No. 519

Complaint Counsel has no specific response. The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Corydon Palmer is a buying group. The record evidence establishes that Corydon Palmer is not a buying group. (CCFF ¶ 1764).

520. Corydon Palmer represents about 230 dentists in three counties in the state of Ohio. (Baytosh, Tr. 1877, 1898-99).

Response to Proposed Finding No. 520

Complaint Counsel has no specific response.

521. Corydon Palmer's mission is to represent and promote its members' collective interests. (Baytosh, Tr. 1899; *see also* RX 2852 ("The mission of the Corydon Palmer Dental Society is to collectively promote, educate and represent members of the dental society and thereby better serve the health of our community.")).

Response to Proposed Finding No. 521

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that because Corydon Palmer is a buying group because promotes “its members collective interests.” The record evidence establishes that Corydon Palmer is not a buying group. (CCFF ¶ 1764). In addition, per the Parties’ Joint Stipulations and Admissibility of Exhibits submitted on December 19, 2018, “Third party websites will be admitted into evidence for any non-hearsay purpose.” RX2852, a third party website, is admitted into evidence but cannot be used for any non-hearsay purpose. Complaint Counsel does not object to the assertion that the statement appears on RX2852. However, the Proposed Finding is improper to the extent it asserts that the statement is true or to the extent it uses the statement to assert or imply that Corydon Palmer is a buying group. It is not a buying group. (CCFF ¶ 1764).

522. In furthering its mission, Corydon Palmer incurs operating costs, which include putting on education programs and paying the executive director’s salary. (Baytosh, Tr. 1903-04).

Response to Proposed Finding No. 522

Complaint Counsel has no specific response.

523. One of the major sources of revenue to pay for those operating costs comes from members’ pockets in the form of membership dues. (Baytosh, Tr. 1904).

Response to Proposed Finding No. 523

Complaint Counsel has no specific response.

524. One aspect of Corydon Palmer’s mission to benefit its members is keeping membership dues low. (Baytosh, Tr. 1904).

Response to Proposed Finding No. 524

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that because Corydon Palmer is a buying group because it tries to provide a

benefit to its members by keeping its dues low. The record evidence establishes that Corydon Palmer is not a buying group. (CCFF ¶ 1764).

525. As part of its mission, Corydon Palmer has entered into arrangements with a number of vendors to obtain rebates, discounts, or both. (Baytosh, Tr. 1900-03). These include Diagnostic Direct for gloves, Kettenbach for impression materials, and Henry Schein for its full range of merchandise. (Baytosh, Tr. 1900-03).

Response to Proposed Finding No. 525

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Corydon Palmer is a buying group because it sought discounts from other vendors. The record evidence establishes that Corydon Palmer is not a buying group; that Schein provided only rebates, not discounts, to Corydon Palmer; that Schein received free exhibit space as part of the rebate agreement; that the rebates went directly to Corydon Palmer, not member dentists; and that Schein provided no pricing discounts to member dentists. (CCFF ¶¶ 1764-1766). With respect to Corydon Palmer's arrangements with Diagnostic Direct and Kettenbach, Complaint Counsel has no specific response.

526. Corydon Palmer thus meets Complaint Counsel's definition of a buying group as "independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products." (Complaint ¶ 3).

Response to Proposed Finding No. 526

The Proposed Finding is not supported by the cited evidence and should be disregarded, as the Complaint does not state that Corydon Palmer meets the definition of a buying group. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent that it states that Corydon Palmer is a buying group. The record evidence establishes that Corydon Palmer is not a buying group; that Schein provided only rebates, not discounts, to Corydon Palmer; that Schein received free exhibit space as part of the rebate agreement; that the rebates went directly to Corydon Palmer, not member dentists; and that Schein

provided no pricing discounts to member dentists. (CCFF ¶¶ 1764-1766). Finally, the record evidence establishes that Schein's executives were unaware of the rebate agreements with Corydon Palmer until long after April 2015 when the conspiracy became difficult to maintain. (CCFF ¶ 1766).

527. There are two general ways a vendor can offer a discount program: (1) through up-front discounts on the purchase price of supplies; and (2) through rebates that are paid back after the fact. (Baytosh, Tr. 1901).

Response to Proposed Finding No. 527

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Schein offered discounts on its products to members of Corydon Palmer either through up-front discounts or through post-purchase rebates. The record evidence establishes that Schein provided only rebates, not discounts, to Corydon Palmer; that Schein received free exhibit space as part of the rebate agreement; that the rebates went directly to Corydon Palmer, not member dentists; and that Schein provided no pricing discounts to member dentists. (CCFF ¶¶ 1764-1766).

528. In November 2014, Dr. Joseph Baytosh, who was President of the Corydon Palmer Society, began negotiations with Schein on behalf of the Corydon Palmer members. (Baytosh, Tr. 1879-82, 1900, 1906).

Response to Proposed Finding No. 528

Complaint Counsel has no specific response.

529. Dr. Baytosh approached Mark Sirney – a regional manager at Schein – with an idea for “a buying club ... as well as a rebate program.” (Baytosh, Tr. 1883).

Response to Proposed Finding No. 529

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that because Dr. Baytosh discussed an idea for a buying club with Schein, it is

therefore a buying group. The record evidence establishes that Corydon Palmer is not a buying group. (CCFF ¶ 1764).

530. The rebate program was akin to a program Schein already had established with another local dental society in Ohio, the Stark County Dental Society, under which Schein would pay a rebate to the society based on a percentage of the members' total purchases from Schein. (Baytosh, Tr. 1883, 1890).

Response to Proposed Finding No. 530

Complaint Counsel has no specific response.

531. Dr. Baytosh sought to use the fact that Corydon Palmer had a large number of member dentists purchasing from Schein to obtain a rebate from Schein based on those collective purchases. (Baytosh, Tr. 1905-06).

Response to Proposed Finding No. 531

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Corydon Palmer is a buying group or that Schein offered discounts on its products to members of Corydon Palmer. The record evidence establishes that Corydon Palmer is not a buying group; that Schein provided only rebates, not discounts, to Corydon Palmer; that Schein received free exhibit space as part of the rebate agreement; that the rebates went directly to Corydon Palmer, not member dentists; and that Schein provided no pricing discounts to member dentists. (CCFF ¶¶ 1764-1766).

532. The buying club idea would have provided up-front discounts, allowing "dentists to purchase supplies at a lower rate than they could by themselves." (Baytosh, Tr. 1883, 1906-07).

Response to Proposed Finding No. 532

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts or implies that Corydon Palmer is a buying group because it discussed a "buying club idea" with Schein. The record evidence establishes that Corydon Palmer is not a buying group. (CCFF ¶ 1764).

533. Schein’s response was that a buying club was something that could be “put together” but “the logistics and the time that it would take to set it up would be pretty time consuming.” (Baytosh, Tr. 1884, 1907).

Response to Proposed Finding No. 533

Complaint Counsel has no specific response.

534. Forming a buying club would have required studying member purchase history in order to create a custom formulary for the group. (Baytosh, Tr. 1907-08).

Response to Proposed Finding No. 534

Complaint Counsel has no specific response.

535. The rebate program, on the other hand, was something that could be “implement[ed] right away [to] give some kind of benefit to [the] society.” (Baytosh, Tr. 1885).

Response to Proposed Finding No. 535

Complaint Counsel has no specific response.

536. Schein “offered both avenues” – the rebate program and the buying club program to Corydon Palmer. (Baytosh, Tr. 1910-11).

Response to Proposed Finding No. 536

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts or implies that Corydon Palmer is a buying group because a “buying club program” was offered. The record evidence establishes that Corydon Palmer is a buying group. (CCFF ¶ 1764). Moreover, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that one Schein representative’s initial offer to support a buying club program is evidence of Schein’s position with respect to buying groups in November 2014. The record evidence establishes that Schein had a policy not to do business with buying groups that approached it during the conspiracy period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

537. However, the ability to implement a program quickly was “appealing” to Dr. Baytosh, and he chose to pursue the rebate program over setting up a buying club. (Baytosh, Tr. 1907, 1909; *see also* CX 8030 (Baytosh, Dep. at 51 (“I really wanted to come back with something to our membership that we could put into place very quickly, and the rebate program met that.”))).

Response to Proposed Finding No. 537

Complaint Counsel has no specific response. In addition, Schein’s conduct regarding a rebate program with Corydon Palmer, which is not a buying group, does not disprove its participation in a conspiracy. The extent the Proposed Finding asserts or implies as much, it is misleading.

538. After Corydon Palmer selected the rebate program, it never again inquired with Schein about setting up a buying club program. (Baytosh, Tr. 1910).

Response to Proposed Finding No. 538

Complaint Counsel has no specific response. In addition, Schein’s conduct regarding a rebate program with Corydon Palmer, which is not a buying group, does not disprove its participation in a conspiracy. The extent the Proposed Finding asserts or implies as much, it is misleading.

539. Dr. Baytosh did not have any interest in setting up an additional program with Schein beyond the rebate program. (CX 8030 (Baytosh, Dep. at 40-41)).

Response to Proposed Finding No. 539

Complaint Counsel has no specific response. In addition, Schein’s conduct regarding a rebate program with Corydon Palmer, which is not a buying group, does not disprove its participation in a conspiracy. The extent the Proposed Finding asserts or implies as much, it is misleading.

540. Schein did not reject the buying club idea or ever say no to it, and instead told Corydon Palmer that a buying club with up-front discounts could be implemented in the future. (Baytosh, Tr. 1911).

Response to Proposed Finding No. 540

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that because Schein did not reject the idea for a buying club with Corydon Palmer at some point in the future, Corydon Palmer is therefore a buying group. The record evidence establishes that Corydon Palmer is not a buying group. (CCFF ¶ 1764). Moreover, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that one Schein representative's willingness to consider a buying club program at some point in the future is evidence of Schein's position with respect to buying groups in November 2014. The record evidence establishes that Schein had a policy not to do business with buying groups that approached it during the conspiracy period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

541. Schein listened to Corydon Palmer's needs and presented the society with a proposal that met those needs. (Baytosh, Tr. 1911-12).

Response to Proposed Finding No. 541

Complaint Counsel has no specific response. In addition, Schein's conduct regarding a rebate program with Corydon Palmer, which is not a buying group, does not disprove its participation in a conspiracy. The extent the Proposed Finding asserts or implies as much, it is misleading.

542. While the rebate program did not provide a direct monetary benefit to member dentists in the form of a discount on supplies, the extra income to the society from the rebates helped "keep our dues down." (Baytosh, Tr. 1890-91).

Response to Proposed Finding No. 542

The Proposed Finding is misleading to the extent it implies that Corydon Palmer's ability to provide an indirect benefit its members by keeping membership dues down means that it is a buying group. Under the Complaint's definition of buying groups, the benefit to dentists should be "lower prices on dental products" (Complaint ¶ 3), not lower prices on a society's

membership dues. Moreover, the record evidence establishes that Corydon Palmer is not a buying group. (CCFF ¶ 1764).

543. Corydon Palmer's contracts with Schein do not restrict what Corydon Palmer can do with the rebates from Schein. (CX 4092-001; RX 2033-001-02; Baytosh, Tr. 1913).

Response to Proposed Finding No. 543

The Proposed Finding is misleading to the extent it implies that Corydon Palmer's ability to share the rebates with members means that it is a buying group. Dr. Baytosh testified that Corydon Palmer never shared the rebates with its members and never intended to do so.

(Baytosh, Tr. 1913). Moreover, the record evidence establishes that Corydon Palmer is not a buying group. (CCFF ¶ 1764).

544. Corydon Palmer decided to use the rebates to keep membership dues low rather than pass them on to member dentists. (Baytosh, Tr. 1903-04; *see also* CX 8030 (Baytosh, Dep. at 19, 29, 75 (rebate program was a benefit to members))).

Response to Proposed Finding No. 544

The Proposed Finding is misleading to the extent it implies that Corydon Palmer's ability to provide an indirect benefit its members by keeping membership dues down, or its ability to share rebates with its members, means that it is a buying group. Dr. Baytosh also testified that Corydon Palmer never shared the rebates with its members and never intended to do so.

(Baytosh, Tr. 1913). Moreover, the record evidence establishes that Corydon Palmer is not a buying group. (CCFF ¶ 1764).

545. Complaint Counsel argues that Corydon Palmer does not qualify as a buying group under its definition because Corydon Palmer did not negotiate direct discounts on supplies for its members. However, Schein considered Corydon Palmer to be a buying group. (CX 8020 (Brady, Dep. at 210-12 (Schein's Senior Director of Sales for Special Markets listing "Corydon Palmer Dental Society Buying Group" as among the buying groups Schein partnered with))).

Response to Proposed Finding No. 545

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Brady's 2018 testimony listing Corydon Palmer as a buying group is relevant to how Schein viewed Corydon Palmer during the conspiracy period. The record evidence establishes that Corydon Palmer is not a buying group; that Schein provided only rebates, not discounts, to Corydon Palmer; that Schein received free exhibit space as part of the rebate agreement; that the rebates went directly to Corydon Palmer, not member dentists; and that Schein provided no pricing discounts to member dentists. (CCFF ¶¶ 1764-1766). Finally, the record evidence establishes that Schein's executives were unaware of the rebate agreements with Corydon Palmer until long after April 2015 when the conspiracy became difficult to maintain. (CCFF ¶ 1766).

546. From Schein's perspective, its contracts with Corydon Palmer are in effect no different than a contract with a buying group that negotiated up-front discounts for its members or passes the rebates on to its members. (*See* CX 4092-001; RX 2033-001). By paying a rebate to Corydon Palmer, Schein sells dental supplies at a lower price to a group of independent dentists based on their collective purchases. (*See* CX 4092-001; RX 2033-001).

Response to Proposed Finding No. 546

The Proposed Finding is misleading in asserting that the rebate program with Corydon Palmer is akin to a buying group relationship when the record evidence clearly shows that Corydon Palmer is not a buying group. (CCFF ¶ 1764). It is also misleading because it ignores the fact that Schein received free exhibit space as part of the rebate agreement. (CCFF ¶ 1765). Schein provided no pricing discounts to member dentists and, in exchange for the rebates provided directly to Corydon Palmer, Schein received free exhibit space at the society's continuing education seminars. (CCFF ¶¶ 1765-1766). Even from Schein's perspective, this rebate arrangement was at least in part one in which Schein bought exhibit space using rebates instead of an up-front payment, not one where Schein sold dental

supplies at a lower price. Moreover, Schein's perspective with respect to its net revenues (total sales to Corydon Palmer members minus its rebate payments to Corydon Palmer) is irrelevant to whether Corydon Palmer was a buying group.

547. This further supports treatment of Corydon Palmer as a buying group under Complaint Counsel's definition. (Complaint ¶ 3). Henry Schein's conduct with respect to Corydon Palmer is inconsistent with Complaint Counsel's allegation that Schein refused to do business with or offer discounts to buying groups. (Complaint ¶ 1).

Response to Proposed Finding No. 547

The Proposed Finding is not supported by the cited evidence and should be disregarded, as the Complaint does not state that any conduct is inconsistent with a conspiracy. The Proposed Finding is also vague, but to the extent "this" in the first sentence refers to Proposed Finding 546 above, the Proposed Finding is misleading for the reasons set forth in response to Proposed Finding 546. Finally, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Corydon Palmer is a buying group. The record evidence establishes that Corydon Palmer is not a buying group; that Schein provided only rebates, not discounts, to Corydon Palmer; that Schein received free exhibit space as part of the rebate agreement; that the rebates went directly to Corydon Palmer, not member dentists; and that Schein provided no pricing discounts to member dentists. (CCFF ¶¶ 1764-1766). Finally, the record evidence establishes that Schein's executives were unaware of the rebate agreements with Corydon Palmer until long after April 2015 when the conspiracy became difficult to maintain. (CCFF ¶ 1766).

J. The Denali Group.

548. The Denali Group ("Denali") is a dental services company formed in January 2010 that serves independent dentists who are either starting, or relocating, a practice. (RX 2961 (Lowther, Dep. at 12-13, 15-16)).

Response to Proposed Finding No. 548

Complaint Counsel has no specific response.

549. Mr. Robert Lowther, owner and President of Denali, considers Denali to be a buying group. (RX 2961 (Lowther, Dep. at 117 (“I do consider us a buying group in the sense that we’ve leveraged all the work that we do on a national basis for our clients with the equipment providers, specifically Schein, so that we can leverage the overall buying capacity or power, if you will, of our overall client base.”), 126 (“We wanted to leverage the fact that although our dentists are independent practitioners, why not leverage their buying power as a group through Denali.”))).

Response to Proposed Finding No. 549

The Proposed Finding is inaccurate and contrary to the weight of the record evidence. The record evidence shows that Denali is not a buying group and does not consider itself to be a buying group. (CX4190 at 001 (“Denali Group isn’t a membership based buying club.”); RX2961 (Lowther, Dep. at 134)). Denali does not refer to itself as a buying group or a group purchasing organization with clients nor does Denali compete for business with dental buying groups. (RX 2961 (Lowther, Dep. at 141, 147)). Denali Lowther did not recall Patterson, Benco, or Schein ever referring to Denali as a buying group, buying club, or buying cooperative. (RX2961 (Lowther, Dep. at 118, 121-123)). Moreover, Schein considered Denali to be a consulting group, not a buying group. (RX2946 (Cavaretta, Dep. at 40-42) (“I can’t give you a definitive answer on whether it’s a buying group or not.”); CX8010 (Titus, Dep. at 184) (“Q. Did you view Denali as a GPO? A. No.”)). Finally,

550. Denali provides a number of services to its clients, including negotiating and managing its clients’ purchases of large equipment. (RX 2961 (Lowther, Dep. at 15, 24-27); RX 2848-001; RX 2849-001).

Response to Proposed Finding No. 550

Per the Parties’ Joint Stipulations and Admissibility of Exhibits submitted on December 19, 2018, “Third party websites will be admitted into evidence for any non-hearsay purpose.”

RX2848 and RX2849, third party websites, are admitted into evidence but cannot be used for

any non-hearsay purpose. The Proposed Finding cannot be supported by a citation to RX2848 or RX2849. The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Denali is a buying group. The record evidence shows that it is not a buying group and that Schein did not consider it to be a buying group. (Response to Proposed Finding No. 549).

551. Denali also provides clients with other physical consulting, dental practice management consulting, marketing, and a la carte services. (RX 2849-001).

Response to Proposed Finding No. 551

Complaint Counsel has no specific response. The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Denali is a buying group. The record evidence shows that it is not a buying group and that Schein did not consider it to be a buying group. (Response to Proposed Finding No. 549).

552. Denali's clients generally pay a flat fee per project for every new office start. (RX 2961 (Lowther, Dep. at 22)).

Response to Proposed Finding No. 552

Complaint Counsel has no specific response. The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Denali is a buying group. The record evidence shows that it is not a buying group and that Schein did not consider it to be a buying group. (Response to Proposed Finding No. 549).

553. Mr. Lowther testified that Denali's "job is to negotiate the very best pricing and for goods and services for our client as we can." (RX 2961 (Lowther, Dep. at 102, 120 ("I would say that we do, quite effectively, utilize our group buying power to the benefit of our – our clients."))).

Response to Proposed Finding No. 553

The Proposed Finding is misleading and incomplete. Complaint Counsel does not dispute that Lowther made the statement attributed to him. However, Denali does not negotiate

pricing and services for a group of clients. (RX2961 (Lowther, Dep. at 63 (“Q. Has Denali Group ever negotiated prices by consolidating clients’ purchases? A. No, that’s not how it works.”)). Denali customizes and requests pricing for each individual client’s practice. (RX2961 (Lowther, Dep. at 111)). The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Denali is a buying group. The record evidence shows that it is not a buying group and that Schein did not consider it to be a buying group. (Response to Proposed Finding No. 549).

554. After Denali was formed in 2010, it negotiated discounted equipment formulary pricing with Schein for Denali clients nationwide. (RX 2961 (Lowther, Dep. at 53, 83-84, 88 (“For the major overall pricing structures, yes, we had a significant ballpark of [Schein] discounts that we would see on behalf of our clients.”), 159-60; CX 4193-001 [REDACTED] [REDACTED]

Response to Proposed Finding No. 554

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it assert or implies that Denali was a buying group that sought discounted equipment formulary pricing with Schein. The record evidence shows that Denali is not a buying group and that Schein did not consider it to be a buying group. (*See* Response to Proposed Finding No. 549). In addition, Denali competitively bid for large equipment for Denali clients from the Big Three, and Denali chose the lowest bidder. Indeed, Benco’s participation in the competitive bidding process supports a finding that Denali is not a buying group, as the record evidence shows that Benco did not work with or bid on buying groups. (RX2961 (Lowther, Dep. at 69-70, 89-90, 185-86); [REDACTED]

[REDACTED] (CCFF ¶¶ 394-431).

555. [REDACTED] (CX 4191; RX 2961 (Lowther, Dep. at 106)).

Response to Proposed Finding No. 555

Complaint Counsel has no specific response.

556. With its expansion, Denali reached out to Schein about entering into a “national relationship” to standardize pricing offered to Denali’s clients nationwide that would provide them with “the same pricing access and service as [Schein’s] large group practice.” (CX 4191; RX 2961 (Lowther, Dep. at 106)).

Response to Proposed Finding No. 556

The Proposed Finding is misleading and incomplete in that it suggests Denali received standardized pricing from Schein. The record evidence shows that Denali did not receive a negotiated price point, discount, or pricing structure as part of its relationship with Schein. (RX2961 (Lowther, Dep. at 98-99)). Furthermore, Denali has no insight into how Schein determines pricing for large equipment to Denali clients or the factors Schein considers in that pricing. (RX2961 (Lowther, Dep. at 65-67)). The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Denali is a buying group. The record evidence shows that it is not a buying group and that Schein did not consider it to be a buying group. (*See Responses to Proposed Finding Nos. 549, 554*).

557. Schein, in an effort to further align with Denali, designated Special Markets employee Steve Aaron as the primary point of contact to manage pricing for Denali’s clients nationwide and provided pricing to Denali customers that was similar to pricing offered to Schein’s large group practices. (RX 2961 (Lowther, Dep. at 84, 106-07)).

Response to Proposed Finding No. 557

The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Denali is a buying group because Schein “provided pricing to Denali customers that was similar to pricing offered to Schein’s large group practices.” First, the record evidence shows that Denali is not a buying group and that Schein did not consider it to be a buying group. (*See Responses to Proposed Finding Nos. 549, 554*).

Second, Lowther, a third-party who is not an employee of Schein, is not a reliable witness to prove Schein's pricing practices. Furthermore, Lowther testified that he has no understanding of how Schein determines its pricing for large equipment to Denali clients or the factors or processes that Schein used in that pricing, and the Proposed Finding cannot be supported with his testimony. (RX2961 (Lowther, Dep. at 65-67)).

558. Between 2013 and August 2016, Denali became a "single shop [Schein] referral" and was "absolutely" able to leverage volume for better pricing with Schein. (RX 2961 (Lowther, Dep. at 101-03)).⁷

Response to Proposed Finding No. 558

The Proposed Finding is inaccurate contrary to the weight of the record evidence as to the statement that "Denali became a 'single shop [Schein referral]'." The evidence shows that between 2013 and 2016, Denali was still competitively bidding large equipment. (RX2961 (Lowther, Dep. at 102-03); *see also* Response to Proposed Finding No. 554). Footnote 7, to the extent Schein intends to include it in the Proposed Finding, is misleading, contrary to the weight of the record evidence, and irrelevant to the extent it asserts that Schein did not participate in a conspiracy because Titus denied knowledge of Patterson's policies or because "Complaint Counsel has not introduced any communications between Patterson and Schein regarding buying groups." Complaint Counsel need not prove communications between Schein and Patterson to prove an overarching conspiracy, but the record evidence shows that Schein's Steck and Patterson's Misiak did communicate about buying group. (*See Responses*

⁷ In August 2014, Ms. Titus wrote internally, discussing the Denali Group, that "PDCO is not on board for these type[s] of GPO relationships either." (CX 2220). As she testified, she was writing based on run-of-the-mill market intelligence – gained from her observations in the field that she was not running into Patterson in relation to buying groups. (Titus, Tr. 5234-35, 5284-85). Ms. Titus did not have any actual knowledge of what Patterson's policies were, is not aware of any communications between Patterson and Schein regarding buying groups, and Complaint Counsel has not introduced any communications between Patterson and Schein regarding buying groups. (Titus, Tr. 5234-35, 5284-85).

to Proposed Finding Nos. 1579-1584) And in fact, the record evidence shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein’s internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195).

559. After determining that approximately 95% of its clients were using Schein, Denali decided in August 2016 to partner exclusively with Schein to provide discounted equipment formularies for its clients. (RX 2961 (Lowther, Dep. at 53-54, 76-79)).

Response to Proposed Finding No. 559

The Proposed Finding is misleading and incomplete insofar as even after August 2016, a Denali client could still choose to work with another vendor. Denali did not enter a formal arrangement with Schein. (RX2961 (Lowther, Dep. at 54-55)). In fact, after 2016, at least one Denali client competitively bid his large equipment and ultimately chose to purchase from Benco. (RX2961 (Lowther Dep. at 54)).

560. After that time, Denali “no longer offer[ed] as an a la carte stand-alone service competitively negotiating equipment because it’s been our experience that in that process, Henry Schein has always been the one that really brought their A game.” (RX 2961 (Lowther, Dep. at 41)). In addition, “most of the [Denali clients’] initial consumable orders do go to Schein just for pricing and convenience sake.” (RX 2961 (Lowther, Dep. at 179)).

Response to Proposed Finding No. 560

The Proposed Finding is vague as to the phrase “at that time,” which is not defined. As such, it is misleading to the extent it implies that Schein contracted with a buying group during the conspiracy, as the record evidence shows that Denali is not a buying group and does not show that contracted with it during the relevant period. (*See Responses to Proposed Finding Nos. 549, 554, 559*). It is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Denali had a role in negotiating for its clients’ consumable products. Denali is not involved in negotiating pricing for its client’s consumable products or small equipment. (RX2961 (Lowther, Dep. at 22, 32-33, 37-38, 35 (“we don’t get involved in

negotiating those smaller items because it's so specific to the dentists and how they practice."))).

561. Denali advertises special pricing to its clients and "make[s] it very clear" that "the pricing our clients receives [*sic*] from Henry Schein at our referral is going to be better than what they would get walking in off the street." (RX 2961 (Lowther, Dep. at 45)).

Response to Proposed Finding No. 561

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Denali is a buying group based on the statement. The record evidence shows that it is not a buying group and that Schein did not consider it to be a buying group. (*See* Responses to Proposed Finding Nos. 549, 554). The Proposed Finding is also misleading and incomplete. The record evidence shows that Denali does not tell its clients that its better prices or services are based on any sort of volume, nor does Denali guarantee a percentage of savings to its clients. (RX2961 (Lowther Dep. at 147, 52)).

562. Denali informs potential new clients that "[t]hey can save easily anywhere from 15 to 25,000 based on our equipment formulary on what we've established with special markets at Henry Schein." (RX 2961 (Lowther, Dep. at 45)).

Response to Proposed Finding No. 562

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Denali is a buying group based on the statement. The record evidence shows that it is not a buying group and that Schein did not consider it to be a buying group. (*See* Responses to Proposed Finding Nos. 549, 554). The Proposed Finding is also misleading in that Schein does not give Denali clients "a blanket swath of discount." (RX2961 (Lowther, Dep. at 69)). The record shows that Denali cannot provide a specific price point or percentage that the client can expect to save, nor does Denali guarantee its clients specific savings for large equipment. (RX2961 (Lowther, Dep. at 49-50, 52)).

563. Additionally, Denali clients “don’t have to pay a deposit on the equipment” and “don’t have to come out of pocket until after it’s installed, which save[s] the client money, saves them access interest charges on their loans.” (RX 2961 (Lowther, Dep. at 49)).

Response to Proposed Finding No. 563

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Denali is a buying group. The record evidence shows that it is not a buying group and that Schein did not consider it to be a buying group. (*See Responses to Proposed Finding Nos. 549, 554*).

564. Denali leverages the volume of its independent dentist clients’ purchases to obtain competitive pricing from Schein. (RX 2961 (Lowther, Dep. at 91 (“It’s being able to leverage that volume of [Denali is] going to do eight practices this year, right, and I’m going to tell my clients that this is the best place to get that equipment.”), 107-08 (“We were trying to find a way to leverage Denali’s work with Schein so that everybody understood that this is a Denali client ..., to leverage our relationships with the individual practitioners as a leverage point with the equipment providers so that they could see that there is larger volume here.”))).

Response to Proposed Finding No. 564

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Denali is a buying group based on the statement. The record evidence shows that it is not a buying group and that Schein did not consider it to be a buying group. (*See Responses to Proposed Finding Nos. 549, 554*). The Proposed Finding is also misleading and incomplete in that it suggests Denali negotiates pricing based on a volume of purchases. The record evidence shows that Denali does not negotiate prices by consolidating clients’ purchases and that it does not nor does Denali tell its clients that its prices are based on any sort of volume. (RX2961 (Lowther, Dep. at 63, 147)). Rather, Schein provides pricing to Denali clients practice-by-practice. (RX2961 (Lowther, Dep. at 66, 111)). The discounts vary among clients. (RX2961 (Lowther, Dep. at 69-70 (“Whether that be through manufacturer rebates, whether that be through retail discounts or reseller discounts, how that

all formulates out is really different client to client because it's based on the what that client's nuanciveness is."))).

565. Denali's clients get access to formulary pricing from Schein "simply by being a Denali client." (RX 2961 (Lowther, Dep. at 47)).

Response to Proposed Finding No. 565

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Denali is a buying group. The record evidence shows that it is not a buying group and that Schein did not consider it to be a buying group. (*See* Responses to Proposed Finding Nos. 549, 554). The Proposed Finding is misleading and incomplete in that it suggests Denali's formularies grant specific discounts to Denali clients. The record evidence shows that Denali clients do not receive a blanket discount from Schein and that Denali clients benefit from specific savings for large equipment. (RX2961 (Lowther Dep. at 69, 49-50, 52)). Rather, Denali clients receive discounts that vary based on a client's needs. (RX2961 (Lowther, Dep. at 69-70; 66)).

566. Well over 90 percent of Denali's clients go forward with the equipment formulary that Denali establishes with Schein. (RX 2961 (Lowther, Dep. at 60)).

Response to Proposed Finding No. 566

Complaint Counsel has no specific response.

567. Mr. Lowther testified that Complaint Counsel's alleged conspiracy "i[s] not true or correct." (RX 2961 (Lowther, Dep. at 11)).

Response to Proposed Finding No. 567

The Proposed Finding is misleading to the extent it asserts that a third-party witness' denial of a conspiracy disproves the existence of one or Schein's participation in one. In fact, the record evidence shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for

buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

568. Mr. Lowther further explained that the Denali Group's dealings with Schein, Patterson, and Benco, including "negotiating significantly lower pricing structures for large equipment purchases for new start practices for individual practitioners nationwide," are "exactly what the FTC says that they do not do." (RX 2961 (Lowther, Dep. at 11-12)).

Response to Proposed Finding No. 568

The Proposed Finding is vague and unintelligible as to the phrase "exactly what the FTC says they do not do" and the reference to "they." To the extent the Proposed Finding asserts that Lowther's testimony establishes that the Big Three did not participate in a conspiracy, that is both unfounded and misleading. A third-party witness' denial of a conspiracy does not disprove the existence of a conspiracy or Schein's participation in one. In fact, the record evidence shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

569. As a group that leverages the volume of its independent dentist clients' purchases to obtain lower pricing through equipment formularies, Denali meets Complaint Counsel's definition of a buying group. (Complaint ¶ 3).

Response to Proposed Finding No. 569

The Proposed Finding is inaccurate, misleading, and contrary to the weight of the record evidence. First, the Proposed Finding mischaracterizes the definition of buying group set

forth in the Complaint, which stated that “Buying Groups are organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products.” (Complaint ¶ 3). Second, as set forth above, the record shows that Denali does not leverage the volume of its clients purchases to obtain lower pricing. (See Responses to Proposed Finding Nos. 553-565). Regardless, the record evidence shows that Denali is not a buying group and that Schein did not consider it to be a buying group. (See Responses to Proposed Finding Nos. 549, 554).

570. Complaint Counsel’s buying group definition is applicable to groups like Denali that seek lower prices on equipment. (Complaint ¶¶ 3, 19 (specifically defining “dental products” to include supplies and equipment)).

Response to Proposed Finding No. 570

The Proposed Finding is inaccurate, misleading, and contrary to the weight of the record evidence. First, the Proposed Finding mischaracterizes the definition of buying group set forth in the Complaint, which stated that “Buying Groups are organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products.” (Complaint ¶ 3). It does not state that groups that “seek lower prices on equipment” are buying groups. Regardless, the record evidence shows that Denali is not a buying group and that Schein did not consider it to be a buying group. (See Responses to Proposed Finding Nos. 549, 554).

571. Schein’s relationship with Denali is inconsistent with the alleged conspiracy. (Complaint ¶ 1).

Response to Proposed Finding No. 571

The Proposed Finding is not supported by a citation to the Complaint. Nonetheless, the Proposed Finding is inaccurate, misleading, and contrary to the weight of the record evidence, as the record evidence shows that Denali is not a buying group and that Schein did not consider it to be a buying group. (*See* Responses to Proposed Finding Nos. 549, 554). As such, Schein's conduct regarding Denali does not establish that it contracted with buying groups during the conspiracy period.

K. Dental Associates of Virginia

572. Debbie Foster, an East Central Zone Manager for Schein's Special Markets, testified that "Dental Associates is a buying group that was located in the northeast," and specifically in Virginia. (CX 8001 (Foster, Dep. at 178)).

Response to Proposed Finding No. 572

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it states that Dental Associates is a buying group rather than a DSO. Foster's 2018 deposition testimony in particular is contrary to the weight of the evidence, which establishes through Foster's own contemporaneous email that (a) Dental Associates was one of several groups that broke away from a much larger group called Mainstreet or Ciraden; (b) in 2010, Schein decided to approach each of the smaller groups, starting with Dental Associates, and work out a "game plan;" (c) Foster met with Jodi Rayford, the "purchasing person" for Dental Associates; (d) Rayford provided a list of "the offices that are under [Dental Associates'] management;" and (e) Foster then detached those offices from the larger Mainstreet/Ciraden group and made them "their own smaller group." (CX2774 at 002; *see also* CX8001 (Foster, Dep. at 168 (recalling that Dental Associates started out with "central location" and "central contact folks."))). The evidence also establishes that thereafter Schein categorized Dental

Associates internally as a DSO. (CX2775 at 006; CX2776 at 004). Complaint Counsel has no response with respect to the location of Dental Associates.

573. In 2010, Ms. Foster (formerly “Torgersen”) emailed her team to say she had “met with Jodi Rayford, [the] purchasing person at Dental Associates of VA,” and that the account was in a “mess” because “certain dr’s pulled away and several [had] formed smaller group practices.” (CX 8001 (Foster, Dep. at 7); CX 2774-002).

Response to Proposed Finding No. 573

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that Dental Associates is a buying group rather than a DSO. The record evidence shows that Schein considered it to be a DSO. (*See* Response to Proposed Finding No. 572).

574. Ms. Foster testified that the members of Dental Associates were comprised of independent dentists. (CX 8001 (Foster, Dep. at 179)).

Response to Proposed Finding No. 574

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that Dental Associates is a buying group rather than a DSO. The record evidence shows that Schein considered it to be a DSO. (*See* Response to Proposed Finding No. 572).

575. Though Dental Associates “didn’t do well financially ... Henry Schein decided to keep on the members,” by putting the individual members together “on a discount plan” sometime before 2015. (CX 8001 (Foster, Dep. at 168, 180)).

Response to Proposed Finding No. 575

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that Dental Associates is a buying group rather than a DSO. The record evidence shows that Schein considered it to be a DSO. (*See* Response to Proposed Finding No. 572).

In addition, any discounts to individual members of Dental Associates, has no bearing on Schein’s conduct regarding buying groups and is irrelevant.

576. Schein offered discounts to Dental Associates’ independent dentist members during the alleged conspiracy period. (CX 8001 (Foster, Dep. at 168, 180); CX 2776; CX 7101-140 (listing Dental Associates sales in Schein sales data)).

Response to Proposed Finding No. 576

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that Dental Associates is a buying group rather than a DSO. The record evidence shows that Schein considered it to be a DSO. (*See* Response to Proposed Finding No. 572). In addition, any discounts to individual members of Dental Associates, has no bearing on Schein's conduct regarding buying groups and is irrelevant.

With respect to [REDACTED], the citation should be disregarded by the Court to the extent Dr. Marshall, Complaint Counsel's expert, is being relied upon for a factual proposition that Dental Associates is a buying group. Facts must be established by fact witnesses or documents, not through expert testimony. (*See* February 21, 2019 Order on Post-Trial Briefs). Additionally, this Proposed Finding is misleading to the extent that it suggests that Dr. Marshall considered Dental Associates in his analysis – rather, Dr. Marshall crossed-out Dental Associates in the sales data chart cited because he observed evidence suggesting that Dental Associates might not be a buying group. (CX7101 at 138 (Appendix C) and 140-141 (Appendix D)). Moreover, for reasons explained in more detail in Responses to Proposed Finding Nos. 1611-1612, this Proposed Finding is also unreliable, inaccurate, and misleading to the extent that it suggests that Schein's purported sales buying groups during the relevant period show lack of parallel conduct or structural break for Schein. As explained in Response to Proposed Finding Nos. 1611-1612, some buying group relationships and sales that occurred during the relevant period are either pre-existing, legacy relationships formed prior the conspiracy or those that were entered into after the conspiracy became difficult to maintain and Schein began competing for buying groups. (CCFF ¶¶ 440-444, 1159-1166, 1398, 1400, 1403, 1717-1719, 1730, 1734-1735). Schein executives did not

even know that some of these “legacy” buying groups were customers and referred to some as “inherited messes.” (CX2287 at 001; CX2286 at 001).

577. As a group of independent dentists receiving a discount on dental supplies, Dental Associates fits Complaint Counsel’s definition of a buying group. (Complaint ¶ 3).

Response to Proposed Finding No. 577

The Proposed Finding is inaccurate because it mischaracterizes the definition of buying group set forth in the Complaint. The definition does not equate “group of independent dentists receiving a discount on dental supplies” to a buying group. The definition states that “Buying Groups are organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products.” (Complaint ¶ 3). In addition, the Proposed Finding is misleading and contrary to the weight of the evidence in asserting that Dental Associates is a buying group rather than a DSO. The record evidence shows that Schein considered it to be a DSO. (*See* Response to Proposed Finding No. 572).

578. To the extent Complaint Counsel claims Dental Associates was not a buying group by citing to two internal Schein documents including Dental Associates in a list of top 50 DSO accounts, Schein’s categorization of Dental Associates for internal accounting purposes between divisions does not impact the actual nature and characteristics of Dental Associates as a group of independent dentists. (CX 2775; CX 2776; CX 8001 (Foster, Dep. at 178-79); *see also* RX 2767 (explaining that the language Schein used to describe accounts was in part to delineate which groups “should be HSD” and which “should fall into [Special Markets]”). As Mr. Meadows testified at trial, a group that Complaint Counsel agrees is a buying group – Dental Gator – was also “rolled into the elite DSO” category within Schein. (Meadows, Tr. 2657).

Response to Proposed Finding No. 578

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts that “a group of independent dentists” is a buying group, and therefore, Dental Associates must be a buying group. The weight of the record evidence clearly shows that Dental Associates was considered to be a DSO and had DSO characteristics. The record

evidence establishes that Dental Associates had started out with a “central location” and “central contact folks,” and at least as of 2010, it had a centralized “purchasing person.” (CX8001 (Foster, Dep. at 168); CX2774 at 002). As of 2010, it also centrally managed its member offices. (CX2774 at 002). The Proposed Finding is further misleading with respect to RX2767, which does not in any way reference buying groups but instead focuses on how to delineate between different types of DSOs and group practices. Finally, Meadows’ vague testimony that, as of March 2014, Dental Gator was “rolled into the elite DSO” category is contrary to the weight of the evidence which establishes that (a) Schein did not even meet with MB2 about Dental Gator until January or February of 2014 (CCFF ¶¶ 1785-1786); (b) Dental Gator initially became a Schein customer without Schein’s knowledge (CCFF ¶¶ 1795-1796); and (c) Schein’s subsequent agreement with MB2 expressly prohibited using the agreement “to grow any Group Purchasing Organization (GPO) type relationship.” (CCFF ¶¶ 1792).

579. Dental Associates is a buying group that Schein did business with during the alleged conspiracy. (CX 8001 (Foster, Dep. at 178-79); CX 2776; [REDACTED]).

Response to Proposed Finding No. 579

The Proposed Finding is contrary to the weight of the evidence, which establishes that Dental Associates is a DSO, not a buying group. (*See* Response to Proposed Finding No. 572, 578). In addition, with respect to [REDACTED], the citation should be disregarded by the Court to the extent Dr. Marshall, Complaint Counsel’s expert, is being relied upon for a factual proposition that Dental Associates is a buying group. Facts must be established by fact witnesses or documents, not through expert testimony. (*See* February 21, 2019 Order on Post-Trial Briefs). Additionally, this Proposed Finding is misleading to the extent that it suggests that Dr. Marshall considered Dental Associates in his analysis – rather, Dr. Marshall

crossed-out Dental Associates in the sales data chart cited because he observed evidence suggesting that Dental Associates might not be a buying group. (CX7101 at 138 (Appendix C) and 140-141 (Appendix D)). (See Response to Proposed Finding No. 576). Moreover, for reasons explained in more detail in Response to Proposed Finding Nos. 1611-1612, this Proposed Finding is also unreliable, inaccurate, and misleading to the extent that it suggests that Schein's purported sales buying groups during the relevant period show lack of parallel conduct or structural break for Schein. As explained in Response to Proposed Finding Nos. 1611-1612, some buying group relationships and sales that occurred during the relevant period are either pre-existing, legacy relationships formed prior the conspiracy or those that were entered into after the conspiracy became difficult to maintain and Schein began competing for buying groups. (CCFF ¶¶ 440-444, 1159-1166, 1398, 1400, 1403, 1717-1719, 1730, 1734-1735). Schein executives did not even know that some of these "legacy" buying groups were customers and referred to some as "inherited messes." (CX2287 at 001; CX2286 at 001).

580. Schein's discounts to Dental Associates are inconsistent with the alleged conspiracy. (Complaint ¶ 1).

Response to Proposed Finding No. 580

The Proposed Finding is not supported by the cited evidence and should be disregarded, as the Complaint does not state that any conduct is inconsistent with a conspiracy. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it implies that Schein's conduct regarding a DSO, Dental Associates, disproves its participation in a conspiracy. Schein's conduct regarding a DSO has no bearing on its conduct regarding buying groups.

L. The Dental Co-Op of Utah.

581. Complaint Counsel admits that the Dental Cooperative of Utah (“Dental Co-Op”) is a buying group and that Schein did business with the Dental Co-Op. (RX 2956-004; RX 3087-004).

Response to Proposed Finding No. 581

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which listed “Breakaway, Dental Coop, SmileSource, Steadfast.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

582. However, Complaint Counsel claims that Schein ended its long-standing relationship with the Dental Co-Op in 2014 as a result of the alleged conspiracy. (RX 3087-004). Specifically, Complaint Counsel’s theory is that, “as a result of Schein executives instructing

sales managers and sales personnel not to provide discounts to or compete for the business of Buying Groups, Schein in 2014 terminated agreements it had formed with Buying Groups before the alleged agreement with Benco and Patterson, including the Dental Cooperative (Nevada & Utah)....” (RX 3087-004).

Response to Proposed Finding No. 582

Complaint Counsel has no specific response.

583. The Dental Co-Op, originally formed in Utah, is a buying group that Schein began working with as early as 2007. (RX 2232-001; CX 8033 (Cavaretta, Dep. at 159); Cavaretta, Tr. 5601; RX 2604-002).

Response to Proposed Finding No. 583

Complaint Counsel has no specific response.

584. Schein’s relationship with the Dental Co-Op was initially formed by Brian Peterson, the Schein Regional Manager for the Utah region. (RX 2947 (Cavaretta, Dep. at 69); RX 2232-001).

Response to Proposed Finding No. 584

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies that a regional manager’s relationship with a buying group, which predates the conspiracy, disproves Sullivan’s directives to the sales force *during* the conspiracy not to work with buying groups. A regional manager’s ability to enter into contracts with buying group prior to the conspiracy period has no bearing on the record evidence showing Schein’s rejection of buying groups during the conspiracy period pursuant to Sullivan’s directives. (*See* CCFF ¶¶ 661-1100; *see* Complaint Counsel’s Post-Trial Brief, at Attachment C).

585. The original focus of the Dental Co-Op was on insurance support, offering help “negotiating rates with PPOs” and “creat[ing] private dental insurance options for small business[,]” while also offering discounted dental supplies. (CX 2505-001).

Response to Proposed Finding No. 585

The Proposed Finding is misleading because it mischaracterizes the cited evidence. CX2505 does not state that the Dental Co-Op of Utah’s “original focus . . . was on insurance support.” (CX2505 at 001). The document lists “services” that the Dental Co-Op of Utah provided, including: “Get the best price on dental supplies based on the volume of their business.” (CX2505 at 001).

586. The Dental Co-Op eventually expanded into Nevada, Idaho, Arizona, New Mexico, and other states. (CX 2505-001; RX 2947 (Cavaretta, Dep. at 69-70); RX 2511-001).

Response to Proposed Finding No. 586

Complaint Counsel has no specific response.

587. When Joe Cavaretta first became aware of Schein’s relationship with the Dental Co-Op in 2009, he viewed it as a mutually beneficial relationship. (Cavaretta, Tr. 5601; CX 8033 (Cavaretta, Dep. at 177-178)). At that time, Schein had a relatively low market share in the Utah region. (CX 8033 (Cavaretta, Dep. at 104, 177-178); CX 2750).

Response to Proposed Finding No. 587

Complaint Counsel has no specific response to the first sentence of the Proposed Finding.

The second sentence is not supported by the cited evidence, which does not address Schein’s market share. (CX2750 at 001 (“This program has been a huge success in Utah because *they* had a low market share.”) (emphasis added)).

588. The Dental Co-Op introduced Schein, as its exclusive dealer, to its members, which enabled Schein to provide its Henry Schein Practice Analysis to the member offices to help drive incremental volume to Schein. (CX 8033 (Cavaretta, Dep. at 168-169, 177-178); Titus, Tr. 5337; CX 2750).

Response to Proposed Finding No. 588

The Proposed Finding is not supported by the cited evidence, as the testimony and document cited do not address the statement in the Proposed Finding.

589. In return, Schein offered rebates to the Dental Co-Op and its members for their purchases, along with a discount program. (RX 2947 (Cavaretta, Dep. at 69); CX 8033 (Cavaretta, Dep. at 179); (CX 0305 (Cavaretta, IHT at 157); RX 2525-001; RX 2485-001).

Response to Proposed Finding No. 589

Complaint Counsel has no specific response.

590. Schein supported the Dental Co-Op as it expanded into other states, even though the program was not having the same success as it did in Utah. (CX 2750-001 (noting that the Dental Co-Op program did not work in Nevada where Schein already sold to a large portion of Las Vegas dentists and “[t]he doctors [Schein was] trying to win over [did not] think an 8% discount [was] a big discount.”); CX 2646-004; RX 2511-001).

Response to Proposed Finding No. 590

Complaint Counsel has no specific response.

591. Schein’s relationship with the Dental Co-Op became problematic for Schein in 2014, when Schein learned the Dental Co-Op had entered into competitive partnerships with manufacturers like P&G and Komet for the purchase of dental products directly from those manufacturers. (Titus, Tr. 5239-40; Sullivan, Tr. 4233-34; Cavaretta, Tr. 5602).

Response to Proposed Finding No. 591

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which listed “Breakaway, Dental Coop, SmileSource, Steadfast.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing

business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

592. At that time, Schein had an exclusive relationship with Colgate (a manufacturer of toothbrushes, floss, paste, and other preventatives), meaning Schein did not sell competing P&G products. (Titus, Tr. 5236-37).

Response to Proposed Finding No. 592

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which listed “Breakaway, Dental Coop, SmileSource, Steadfast.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email

from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

593. The Dental Co-Op’s new partnership with P&G created a problem for Schein because the Dental Co-Op was canceling Schein’s business done through Colgate and redirecting it directly to P&G. (Titus, Tr. 5237-39; Sullivan, Tr. 4233-34; Cavaretta, Tr. 5602; CX 0305 (Cavaretta, IHT at 158-59); CX 8010 (Titus, Dep. at 126)).

Response to Proposed Finding No. 593

Complaint Counsel has no specific response to the attribution of the statement to Titus.

However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which listed “Breakaway, Dental Coop, SmileSource, Steadfast.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of

the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

594. In May 2014, Francis Keefe, National Corporate Accounts Manager for Colgate, noticed that there was a significant drop in sales of Colgate to Dental Co-Op members and reached out to Schein to express Colgate’s concerns over the Dental Co-Op’s relationship with P&G. (Titus, Tr. 5237-38; CX 8010 (Titus, Dep. at 139-141); CX 2807-002-03; CX 2239-002-04 (noting that the Dental Co-Op was “eating up base business” as Colgate/Schein had recently lost two accounts to its competitor Proctor & Gamble, maker of Crest/Oral-B)).

Response to Proposed Finding No. 594

Complaint Counsel has no specific response to the attribution of the statement to Titus.

However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which listed “Breakaway, Dental Coop, SmileSource, Steadfast.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of

the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

595. Schein agreed that “the moment [the Co-Op] signed on with P&G direct and Komet” was “tantamount to throwing down the gauntlet with Schein and acting as a competitor.” (CX 2239-002).

Response to Proposed Finding No. 595

Complaint Counsel has no specific response to the attribution of the statement to Titus in CX2239, but the document does not support the assertion that “Schein agreed.” In addition, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which listed “Breakaway, Dental Coop, SmileSource, Steadfast.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

596. The Dental Co-Op's new partnerships amounted to a "breach of trust," as the original commitments made by the Dental Co-Op to be exclusive with Schein were no longer being honored. (Cavaretta, Tr. 5602; CX 0305 (Cavaretta, IHT at 105-06); Titus, Tr. 5239, 5337; CX 8010 (Titus, Dep. at 127-28 ("[T]here was a tacit understanding from the Henry Schein Dental folks that the Dental Co-Op was only promoting Henry Schein.")); Sullivan, Tr. 4233-34).

Response to Proposed Finding No. 596

Complaint Counsel has no specific response to the attribution of the statement to Titus.

However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of "hot topics," which listed "Breakaway, Dental Coop, SmileSource, Steadfast." (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: "I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other." (CCFF ¶ 895).

597. Despite the concerns over the Dental Co-Op's new competitive partnerships, Jeff Harmon (Schein Regional Manager for Utah) and Joe Cavaretta asked Kathleen Titus to look into the Dental Co-Op to see if she could recreate the "win-win" relationship between Schein and

the Dental Co-Op. (Titus, Tr. 5235-36, 5241; Cavaretta, Tr. 5602). No one at Schein instructed Ms. Titus to shut down Schein's relationship with the Dental Co-Op. (Titus, Tr. 5245).

Response to Proposed Finding No. 597

The Proposed Finding is misleading and contrary to the weight of the record evidence. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014 in accordance with a policy not to do business with buying groups during the conspiracy period. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of "hot topics," which listed "Breakaway, Dental Coop, SmileSource, Steadfast." (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: "I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other." (CCFF ¶ 895).

598. In May 2014, Ms. Titus spoke with Andy Eberhardt, the Dental Co-Op's Chief Operating Officer, to discuss the Dental Co-Op and the new direction it was taking. (CX 2239-001-02 ("[Mr. Eberhardt] needed a wakeup call and in my sweetest voice, I also told him that we were very interested in exploring a healthy sustainable relationship, but it would not be in our interest to share the spotlight with competitors. "); Titus, Tr. 5238-39, 5236).

Response to Proposed Finding No. 598

Complaint Counsel has no specific response to the attribution of the statement to Titus.

However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which listed “Breakaway, Dental Coop, SmileSource, Steadfast.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

599. Ms. Titus explained to Mr. Eberhardt that by signing with P&G and Komet, the Dental Co-Op created a business conflict for Schein, because the Dental Co-Op was now acting as a competitor to Schein. (CX 2239-002; Titus, Tr. 5239).

Response to Proposed Finding No. 599

Complaint Counsel has no specific response to the attribution of the statement to Titus.

However, the Proposed Finding is misleading and contrary to the weight of the record

evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which listed “Breakaway, Dental Coop, SmileSource, Steadfast.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

600. In talking with Mr. Eberhardt, Ms. Titus learned that the Dental Co-Op planned to fill its portfolio with Schein’s direct competitors. (Titus, Tr. 5239).

Response to Proposed Finding No. 600

Complaint Counsel has no specific response to the attribution of the statement to Titus.

However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated

a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which listed “Breakaway, Dental Coop, SmileSource, Steadfast.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

601. While Mr. Eberhardt informed Ms. Titus that the Dental Co-Op had 400 members, those members only did \$2 million in collective volume with Schein. (CX 2239-002; Titus, Tr. 5240). This sales volume caused further concern for Schein because the average private practice dentist spends approximately \$35,000 per year on supplies, while Dental Co-Op members were only spending on average approximately \$5,000 a year with Schein. (CX 2239-002; Titus, Tr. 5240). For these reasons, Schein questioned if the Dental Co-Op could “drive compliance” with its members. (CX 2239-002; Titus, Tr. 5240).

Response to Proposed Finding No. 601

Complaint Counsel has no specific response to the attribution of the statement to Titus.

However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014. In

March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which listed “Breakaway, Dental Coop, SmileSource, Steadfast.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

602. Rather than terminate its relationship with the group, however, Schein remained “very interested in exploring a healthy sustainable relationship,” but one that would not include “shar[ing] the spotlight with competitors.” (CX 2239-002).

Response to Proposed Finding No. 602

Complaint Counsel has no specific response to the attribution of the statement to Titus in CX2239. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which listed “Breakaway,

Dental Coop, SmileSource, Steadfast.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

603. Ms. Titus asked Mr. Eberhardt if he would be willing to return to an exclusive relationship with Schein. (CX 2239-002). Mr. Eberhardt offered to consider it. (CX 2239-002).

Response to Proposed Finding No. 603

Complaint Counsel has no specific response to the attribution of the statement to Titus. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which listed “Breakaway, Dental Coop, SmileSource, Steadfast.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein

stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

604. Ms. Titus planned to meet with Mr. Eberhardt later in the summer after he was back from a trip to discover if Schein could return to a “healthy relationship” with the Dental Co-Op. (CX 2239-002; Titus, Tr. 5241; CX 2807-001-02).

Response to Proposed Finding No. 604

Complaint Counsel has no specific response to the attribution of the statement to Titus.

However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which listed “Breakaway, Dental Coop, SmileSource, Steadfast.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶

894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

605. Then, in June 2014, Schein learned that P&G was promoting the Dental Co-Op at the New Mexico state dental meeting. (RX 2209-001-02).

Response to Proposed Finding No. 605

Complaint Counsel has no specific response to the statement. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which listed “Breakaway, Dental Coop, SmileSource, Steadfast.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

606. Joe Cavaretta concluded that “Andy’s goals are not aligned with ours. This is the danger of a Co-op ... they want their brand front and center and when you help them build up a customer base they use it against you.” (RX 2209-001).

Response to Proposed Finding No. 606

Complaint Counsel has no specific response to the attribution of the statement to Cavaretta in RX2209. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which listed “Breakaway, Dental Coop, SmileSource, Steadfast.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

607. Despite this, Schein was still not ready to end its relationship with the Dental Co-Op. (RX 2209-002-03).

Response to Proposed Finding No. 607

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014 in accordance with that policy. (*See* Response to Proposed Finding No. 581). In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which included “Dental Coop.” (CCFF ¶ 873). Titus wanted to speak with her boss about the Dental Co-Op of Utah because it had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

608. However, Mr. Cavaretta wanted to set up a meeting internally to discuss an exit strategy with the Dental Co-Op, so that Schein would be prepared to walk away “if it comes to that.” (RX 2209-002-03).

Response to Proposed Finding No. 608

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship

with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which listed “Breakaway, Dental Coop, SmileSource, Steadfast.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

609. On June 16, 2014, Schein’s Paul Hinsch brought the issue of P&G’s direct relationship with the Dental Co-Op to the attention of Tim Sullivan. (CX 2467-001).

Response to Proposed Finding No. 609

Complaint Counsel has no specific response.

610. Prior to Mr. Hinsch raising the issue, Mr. Sullivan was not familiar with Schein’s relationship with the Dental Co-Op. (Sullivan, Tr. 4232-33). Upon learning of Schein’s relationship with the Dental Co-Op, Mr. Sullivan did not attempt to terminate Schein’s relationship with the group. (Sullivan, Tr. 4233).

Response to Proposed Finding No. 610

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship

with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014 in accordance with that policy. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which listed “Breakaway, Dental Coop, SmileSource, Steadfast.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

611. On July 2, 2014, Ms. Titus met Mr. Eberhardt for an in-person meeting. (Titus, Tr. 5222; CX 2807-001). At the meeting, Mr. Eberhardt informed Ms. Titus that, as alluded to in their conversation in May, he planned to add even more of Schein’s competitors to the Dental Co-Op portfolio. (Titus, Tr. 5243).

Response to Proposed Finding No. 611

Complaint Counsel notes that the first sentence of the Proposed Finding is not supported by the citation to Titus’ testimony, which is about PGMS not the Dental Co-Op of Utah.

Complaint Counsel does not otherwise object to the statement that Titus met with Eberhardt. The second sentence of the Proposed Finding relies upon a hearsay statement, or what Titus testified Eberhardt told her, and should not be adopted for the truth of the matter asserted. In

addition, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which listed “Breakaway, Dental Coop, SmileSource, Steadfast.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

612. In response, Ms. Titus proposed to Mr. Eberhardt that the Dental Co-Op sign an exclusive agreement with Schein, but his answer was a “definitive no.” (Titus, Tr. 5243-44).

Response to Proposed Finding No. 612

Complaint Counsel has no specific response to the attribution of the statement to Titus.

However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business

with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which listed “Breakaway, Dental Coop, SmileSource, Steadfast.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

613. Ms. Titus debriefed Kevin Upchurch (General Manager for the Western Zone) and Mr. Harmon on her conversation with Mr. Eberhardt. She reported that the Dental Co-Op was not willing to be exclusive with Schein and instead was cannibalizing Schein’s business. (Titus, Tr. 5245-46; CX 2211-003). Based on these facts, Ms. Titus recommended to Mr. Upchurch and Mr. Harmon that Schein end its relationship with the Dental Co-Op, but keep the door open for a future relationship. (Titus, Tr. 5244-45).

Response to Proposed Finding No. 613

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014. In March 2014, after

Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which listed “Breakaway, Dental Coop, SmileSource, Steadfast.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

614. Mr. Upchurch agreed with Ms. Titus’s recommendation and informed Mr. Cavaretta that Schein planned to no longer be a part of the Dental Co-Op due to the Dental Co-Op’s newly formed relationships that were competing directly with Schein. (CX 2211-002-03).

Response to Proposed Finding No. 614

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah, per Sullivan’s directives not to do business with buying groups during the conspiracy. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which included “Dental Coop.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein

stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

615. In July 2014, Mr. Cavaretta determined that Schein’s relationship with the Dental Co-Op was no longer beneficial and decided to end the formal arrangement with the Dental Co-Op. (Cavaretta, Tr. 5602-03; CX 2211).

Response to Proposed Finding No. 615

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which listed “Breakaway, Dental Coop, SmileSource, Steadfast.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition,

a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

616. Mr. Sullivan was not involved in Schein’s decision to end its relationship with the Dental Co-Op. (Sullivan, Tr. 4234-35; Cavaretta, Tr. 5603).

Response to Proposed Finding No. 616

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that termination of the Dental Co-Op of Utah was not pursuant to the conspiracy because of Sullivan’s testimony. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014 in accordance with its policy not to do business with buying groups during the conspiracy period. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which listed “Breakaway, Dental Coop, SmileSource, Steadfast.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-Op is the other.” (CCFF ¶ 895). The Dental Co-Op of Utah is just one example of the many buying groups Schein

rejected pursuant to its policy not to do business with buying groups during the conspiracy period. (Complaint Counsel's Post-Trial Brief, at Attachment C). As such, the Proposed Finding is misleading to the extent it implies Sullivan's denial of his involvement disproves the record evidence showing otherwise.

617. On July 18, 2014, Mr. Cavaretta thought it was possible that the Dental Co-Op would form a relationship with either Patterson or Benco and wanted to ensure Schein had a plan to retain the Dental Co-Op members once ties were cut. (Cavaretta, Tr. 5605; CX 2211-001-02).

Response to Proposed Finding No. 617

The Proposed Finding is irrelevant, as Schein's conduct regarding individual members of the Dental Co-Op of Utah has no bearing on its conduct regarding *buying groups* or the Dental Co-Op of Utah.

618. In an attempt to save Schein's business with the Dental Co-Op members, Schein planned to "grandfather current [Dental Co-Op] members on their existing VPA," which would provide these members with an 8%-10% rebate" going forward. (RX 2485-001; RX 2437-001; CX 2720-005 (listing 2011 VPAs including 6-10% rebate for Dental Co-Op members)).

Response to Proposed Finding No. 618

The Proposed Finding is irrelevant, as Schein's conduct regarding individual members of the Dental Co-Op of Utah has no bearing on its conduct regarding *buying groups* or the Dental Co-Op of Utah.

619. Mr. Harmon delivered Schein's decision to Mr. Eberhardt in person, letting him know that although Schein had a long-standing relationship with the Dental Co-Op, the group's decision to add competitive partnerships with companies like P&G and Komet indicated the parties were "going down two different paths." (RX 2437-001-02).

Response to Proposed Finding No. 619

The Proposed Finding is irrelevant, as Schein's conduct regarding individual members of the Dental Co-Op of Utah has no bearing on its conduct regarding *buying groups* or the Dental Co-Op of Utah.

620. Schein's decision included ending Schein's relationship with the Dental Co-Op in the other states in which Schein supported the group, including Nevada, Idaho, and Arizona. (RX 2947 (Cavaretta, Dep. at 71)).

Response to Proposed Finding No. 620

Complaint Counsel has no specific response.

621. On August 28, 2014, Mr. Eberhardt sent a letter to the Dental Co-Op's members informing them that "[a]fter a meaningful sixteen year partnership..." the Dental Co-Op would no longer be participating in a purchasing program with Schein effective September 30, 2014. (RX 2604-002). Mr. Eberhardt said that "much thought, deliberation, strategy and input went into this decision" and it was "in the best interest of Schein and the [Dental] Cooperative to part ways." (RX 2604-002). Mr. Eberhardt acknowledged the risks Schein took over the years to support the Dental Co-Op's efforts and protect independent dentistry, and thanked the local Schein reps that "consistently encouraged dentists to consider the benefits of the [Dental] Cooperative to help strengthen their practices." (RX 2604-002).

Response to Proposed Finding No. 621

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of "hot topics," which listed "Breakaway, Dental Coop, SmileSource, Steadfast." (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition,

a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

622. Shortly thereafter, Schein received positive feedback from its customers supporting Schein even though it was no longer aligned with the Dental Co-Op. (RX 2594-001).

Response to Proposed Finding No. 622

The Proposed Finding is irrelevant, as Schein’s conduct regarding individual members of the Dental Co-Op of Utah has no bearing on its conduct regarding *buying groups* or the Dental Co-Op of Utah.

623. After Schein’s relationship with the Dental Co-Op ended, Schein continued to extend discounts to the members of the Dental Co-Op. (Titus, Tr. 5247).

Response to Proposed Finding No. 623

The Proposed Finding is irrelevant, as Schein’s conduct regarding individual members of the Dental Co-Op of Utah has no bearing on its conduct regarding *buying groups* or the Dental Co-Op of Utah.

624. Schein was able to retain its business with the members of the Dental Co-Op. (RX 2594-001).⁸

⁸ Complaint Counsel cites an email from Mr. Upchurch stating that “[t]he [Dental] Co-Op is turning into a GPO (even if they don’t think they are one now) ... and from Tim S, HSD does not want to enter the GPO world” as evidence that Schein did not want to do business with “buying groups.” (CX2211-002). As Ms. Titus explained, however, that interpretation of the document makes no sense, as Schein was doing business with buying groups. (Titus, Tr. 5248). Instead, Mr. Upchurch was confused about the term “GPO.” (CX8010 (Titus, Dep. at 266-67)). In most cases, Schein personnel used the term “GPO” and “buying group” interchangeably. (Steck, Tr. 3741; Sullivan, Tr. 3901; CX8010 (Titus, Dep. at 248)). But in some cases, Schein personnel used “GPO” to refer to the type of organization common in medical markets that negotiates directly with manufacturers and uses distributors primarily as a fulfillment organization. (CX 8010 (Titus, Dep. at 248, 267)). In dental markets, however, buying groups typically negotiate with distributors, who in turn negotiate with manufacturers. (SF 655-663, 591-94; *see also* RX2405.1 (“We have always contended that Schein is a GPO and negotiates the best prices for our customers ...”). The Dental Co-Op was morphing from a traditional dental buying group to the type of GPO that negotiates directly with manufacturers. (Titus, Tr. 5239). It is that type of group that Schein was particularly uninterested in, as it disintermediates Schein from the manufacturer-customer relationship, and turns the group into a direct competitor of Schein’s. (CX2227-004; CX 0311 (Sullivan, IHT at 118-122)). As Ms. Titus wrote to Colgate’s Mr. Keefe, the Dental Co-Op’s decision to negotiate directly with direct-selling manufacturers “portends the empowerment of the GPO infiltration in the dental space and as this scenario illustrates, the dilution of the influence of Distribution.” (CX2227-004).

Response to Proposed Finding No. 624

The Proposed Finding is irrelevant, as Schein’s conduct regarding individual members of the Dental Co-Op of Utah has no bearing on its conduct regarding *buying groups* or the Dental Co-Op of Utah. Footnote 9, to the extent Schein intended for it to be a part of the Proposed Finding, is misleading and contrary to the weight of the record evidence on multiple fronts. First, its assertion that “Schein was doing business with buying groups” is not supported during the conspiracy period. In fact, the record evidence shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Second, the assertion that Upchurch’s statements in CX2211 were not referring to buying groups relies only upon Titus’ speculation about what Upchurch meant, which lacks foundation and cannot properly support the assertion. Regardless, the assertions regarding Dental Co-Op of Utah becoming a “type of GPO that negotiates directly with manufacturers” is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014 pursuant to that policy. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her

boss, Cavaretta, with a list of “hot topics,” which listed “Breakaway, Dental Coop, SmileSource, Steadfast.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895). Regardless of how Schein now classifies the Dental Co-Op of Utah, the record evidence shows that it terminated this legacy relationship in 2014 during the conspiracy period in accordance with Sullivan’s directives.

625. Schein’s decision to end its relationship with the Dental Co-Op in 2014 was not a result of an alleged agreement with Benco and Patterson.⁹ (Cavaretta, Tr. 5605; Titus, Tr. 5248-49). Complaint Counsel has not identified any interfirm communications between Schein and Patterson or Benco relating to the Dental Co-Op. (CX 6027).

Response to Proposed Finding No. 625

The first sentence of the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts that Schein did not terminate the Dental Co-Op pursuant to a conspiracy because of Cavaretta and Titus’ denials. the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies

⁹ Complaint Counsel cites to internal texts in which Pat Ryan informs Chuck Cohen that Schein had terminated the Dental Co-Op over three months earlier, but this is nothing more than an exchange of typical competitive intelligence and does not reflect any interfirm communications between Schein and Benco. (CXD 0009 (October 2014 texts reporting that “Schein just dumped the last GPO they had . . . [i]n Utah... Indicating [that] they are not interested in state organization GPO.”); Cohen, Tr. 909-10 (noting that his is “simply speculation about Schein’s views about . . . buying groups,” that there were no discussions with Mr. Sullivan about the Dental Co-Op, and denying that there was an agreement “to slowly terminate buying groups over time.”)).

that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which listed “Breakaway, Dental Coop, SmileSource, Steadfast.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

The second sentence of the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not participate in a conspiracy with regards to the Dental Co-Op of Utah because there is no inter-firm communication with Benco identified. Complaint Counsel has identified, and the record evidence is replete with, examples of inter-firm communications between Cohen and Sullivan between 2011 and 2015 that establish Benco orchestrated an agreement with Schein. (CCFF ¶¶ 327-354; *see also* CCFF ¶¶ 284-326). Moreover, the record evidence establishes

that Benco's Cohen informed Sullivan of Benco's position with regard to bidding on buying groups and reached an understanding that Schein would not align itself with buying groups.

(CCFF ¶¶ 661-684). Schein, in turn, ensured compliance by instructing its sales force to reject buying groups. (CCFF ¶¶ 686-954). Benco confronted Schein when it suspected Schein was discounting to buying groups, and Schein and Benco communicated when they were uncertain whether a customer qualified as a buying group. (CCFF ¶¶ 955-1100).

Footnote 9, to the extent Schein intended for it to be a part of the Proposed Finding, is misleading and contrary to the weight of the record evidence for the same reasons. Moreover, Ryan's October 2014 text to Cohen indicates that Benco was concerned about what Schein's actions with respect to buying groups during the conspiracy period, consistent with the record evidence showing communication, confrontation, and assurance regarding buying groups during the conspiracy. (CCFF ¶ 1745).

626. Schein's decision to end its relationship with the Dental Co-Op in 2014 had nothing to do with the Dental Co-Op being a buying group. (Cavaretta, Tr. 5605; Titus, Tr. 5248-49).

Response to Proposed Finding No. 626

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of "hot topics," which listed "Breakaway, Dental Coop, SmileSource, Steadfast." (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies

because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

627. Schein provided discounts to the members of the Dental Co-Op from at least 2007 through 2014. (RX 2947 (Cavaretta, Dep. at 68-69)).

Response to Proposed Finding No. 627

Complaint Counsel has no specific response to the statement that Schein provided discounts to the Dental Co-Op of Utah starting in 2007. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not terminate its pre-existing, legacy relationship with the Dental Co-Op of Utah pursuant to its policy not to do business with buying groups during the conspiracy. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-Op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-Op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta, with a list of “hot topics,” which listed “Breakaway, Dental Coop, SmileSource, Steadfast.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-Op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-

Op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-Op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-Op of Utah in 2014: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895).

628. Complaint Counsel’s expert, Dr. Marshall, did not analyze whether Schein’s relationship with the Dental Co-Op was profitable for Schein. (Marshall, Tr. 2969 [REDACTED] [REDACTED]).

Response to Proposed Finding No. 628

The Proposed Finding is irrelevant and incomplete to the extent that it suggests that Dr. Marshall should have studied Dental Co-Op as a part of his profitability analyses or that the five profitability studies involving Kois and Smile Source is not sufficient to show that Schein was acting against its self interest by having a no buying group policy during the relevant period. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CCFF ¶¶ 1639-1684). [REDACTED]

[REDACTED]. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, consistent with Dr. Marshall’s analyses, it was against Schein’s unilateral self-interest to have a no-buying group policy whereby it instructed its employees to categorically reject all buying groups. (CCFF ¶¶ 661-954; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

This Proposed Finding is incomplete because [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]; *see also* CX8040 (Marshall, Dep. at 212 (explaining that Kojs and Smile Source are “the same in the sense of the definition I offer in paragraph 139.”)).

Additionally, Dr. Marshall explained that for buying groups generally “[a]ll these groups will have different management and they’ll be issues that are different between them. But, again, these fall within what’s identified in paragraph 139 of my report.” (CX8040 (Marshall, Dep. at 212)). Regarding why Smile Source and Kojs Buyers Group were good case studies for his profitability analysis, Dr. Marshall explained that “Smile Source and Kojs had characteristics associated with them that suggested that they were good candidates for investigating the profitability as done in section 5 of my original report.” (CX8040 (Marshall, Dep. at 148)).

Regarding the additional characteristics that made Smile Source and Kojs Buyers Group good case studies, Dr. Marshall elaborated:

Q: Why did you choose to study Kojs and Smile Source?

A: *So these are highly representative of what’s going on in this following sense. It covers a broad geography of the country. It covered a broad time span going from 2012 through 2017. And in addition to that, there were different sizes of the buying groups at the times I looked at them. For Kojs it was at the inception of the buying group. And then in the other studies, we had small size to the buying group, medium size to the buying group, large size to the buying group, so I was able to get a good look at what was going on with buying groups in that diversity.*

Marshall Tr. 2863 (emphasis added); Marshall, Tr. 3244 (“What I had said is the following, that the Kojs and the five studies cover a geography of the United States. And in addition to that, we have buying groups at different stages. We had -- in terms of size. We have -- when they’re at their inception, when they’re small, when they’re medium and when they’re large in size, that this is the nature of the representativeness that I had spoken about with – in my direct testimony.”); *see also* CX8041 (Marshall, Dep. at 382 (“I felt that the data that was

available for Kois and Smile Source spoke to a broad range of the issues in this matter; and therefore, I felt comfortable with the analysis being conducted in Section 5 [of the Marshall Expert Report].”)).

Finally, Dr. Marshall’s profitability analysis is, at bottom, an examination of dentists’ behavior upon joining a buying group. Respondents have not argued that the dentists who joined Kois and Smile Source are unrepresentative of other dentists across the country.

629. Dr. Marshall conceded that he cannot rule out that Schein ended its relationship with the Dental Co-Op because the Dental Co-Op rejected Schein’s proposal to go exclusive. (Marshall, Tr. 2980).

Response to Proposed Finding No. 629

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (*See* February 21, 2019 Order on Post-Trial Briefs). Nonetheless, this Proposed Finding is misleading and inaccurate because the testimony cited does not support the Proposed Finding: in response to a document about

[REDACTED]

[REDACTED]

[REDACTED].

630. Indicating the absence of any common understanding between Schein, on the one hand, and Benco or Patterson, on the other, as to buying groups, Mr. Upchurch, believed that Patterson and Benco “might also jump at the opportunity” to partner with the Dental Co-Op. (CX 0174).

Response to Proposed Finding No. 630

The Proposed Finding is misleading in asserting that an “absence of any common understanding” because Upchurch, who was not personally a party to the conspiracy or directly involved in the communications between Schein and Benco or Schein and Patterson,

was not informed of the conspiracy. That a person who was not directly involved in perpetrating the agreement was not told of the existence of the agreement is irrelevant to whether the agreement existed. Moreover, to the extent that the Proposed Finding relies on a statement written in an email by Upchurch to offer an ultimate opinion on what constitutes a conspiracy, it is misleading and irrelevant. Upchurch is not competent to opine on a legal conclusion. Moreover, the weight of the record evidence shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein's internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195).

631. Schein's relationship with the Dental Co-Op, Schein's desire and efforts to continue a mutually beneficial partnership with the Dental Co-Op, and Complaint Counsel's admission that Schein worked with the Dental Co-Op during the alleged conspiracy period, are all inconsistent with the alleged conspiracy. (Complaint ¶ 1).

Response to Proposed Finding No. 631

The Proposed Finding is not supported by a citation to the Complaint and should be disregarded. Nonetheless, Complaint Counsel addresses the inaccuracies in the Proposed Finding. Complaint Counsel does not admit that Schein worked continuously with the Dental Co-Op of Utah during the conspiracy, as the record shows that Schein shut down a profitable, pre-existing relationship with the Dental Co-Op of Utah in 2014 pursuant to its policy not to do business with buying groups. (*See* Responses to Proposed Finding Nos. 581-630). As such, it is also inaccurate and misleading in its assertion that Schein tried to "continue a mutually beneficial partnership." It did not; it terminated a profitable relationship. (*See* Responses to Proposed Finding Nos. 581-630).

632. The Dental Co-Op eventually formed a relationship with Darby, Schein's business affiliate. (CX 2211-002; RX 2232-001; Sullivan, Tr. 4171-72).

Response to Proposed Finding No. 632

Complaint Counsel has no specific response to the statement that the Dental Co-Op of Utah formed a relationship with Darby. However, the Proposed Finding is misleading to the extent it implies that the Dental Co-Op of Utah's relationship with Darby, which Schein calls its "business affiliate," has any bearing on or should be attributed to Schein. Darby is a separate company from Henry Schein. (Sullivan, Tr. 4348). Schein does not run the day-to-day business of Darby. Sullivan does not run the day-to-day business of Darby. (Sullivan, Tr. 4348). Darby has its own President, and its own executives that are in charge of its sales force. (Sullivan, Tr. 4348).

633. In March 2011, the Dental Co-Op's Arizona chapter reached out to Benco seeking a supply relationship. (CX 1039-01-02). A Benco Regional Manager discussed the opportunity with Pat Ryan, noting that it "would be a great opportunity to win some business from Schein. They certainly do it." (CX 1039-001). However, "per Chuck [Cohen]," Mr. Ryan agreed that Benco could not "pursue groups like this," noting, "No. Never. Ever. Amen." (CX 1039-001; Cohen, Tr. 908 ("Q. And we established that Benco had said no to the Dental Co-Op of Utah while Schein had said yes...? A. Yes.")). Despite learning that Schein certainly does business with these groups, no one from Benco ever discussed the Dental Co-Op with anyone from Schein. (Cohen, Tr. 852-53; Ryan, Tr. 1245).

Response to Proposed Finding No. 633

The last sentence of the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not participate in a conspiracy with regards to the Dental Co-Op of Utah because "no one from Benco ever discussed the Dental Co-Op with anyone from Schein." Complaint Counsel has identified, and the record evidence is replete with, examples of inter-firm communications between Cohen and Sullivan between 2011 and 2015 that establish Benco orchestrated an agreement with Schein. (CCFF ¶¶ 327-354; *see also* CCFF ¶¶ 284-326). Moreover, the record evidence establishes that Benco's Cohen informed Sullivan of Benco's position with regard to bidding on buying groups and reached an understanding that Schein would not align itself with

buying groups. (CCFF ¶¶ 661-684). Schein, in turn, ensured compliance by instructing its sales force to reject buying groups. (CCFF ¶¶ 686-954). Benco confronted Schein when it suspected Schein was discounting to buying groups, and Schein and Benco communicated when they were uncertain whether a customer qualified as a buying group. (CCFF ¶¶ 955-1100). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

M. Dental Gator.

634. While Complaint Counsel asserts Schein “tried to shut down ... Dental Gator” in furtherance of the alleged conspiracy, it nevertheless admits that Dental Gator is a buying group that Schein did business with during the alleged conspiracy period. (RX 3087-004; RX 2956-004).

Response to Proposed Finding No. 634

The Proposed Finding is misleading to the extent that the phrase “did business with during the alleged conspiracy period” asserts that Schein bid on or pursued Dental Gator’s business during the conspiracy period or that the relationship with Dental Gator disproves Schein’s participation in the conspiracy. The record evidence does not support such an assertion.

Dental Gator became a customer of Schein Special Markets when MB2 Solutions (“MB2”), an elite DSO customer of Schein that created Dental Gator, extended the pricing it received from Schein under a 2014 agreement (“2014 MB2 Agreement”) to Dental Gator, initially without Schein’s knowledge. (CCFF ¶¶ 1778, 1783, 1789-1796). The 2014 MB2 Agreement prohibited MB2 from forming a buying group, and Schein inserted these provisions into the agreement to prevent Dental Gator from becoming a “typical GPO.” (CCFF ¶¶ 1791-1793).

When Schein learned that MB2 formed buying group Dental Gator, Schein deemed it a breach of the 2014 MB2 agreement. (CCFF ¶¶ 1796). Schein informed Dental Gator that if “it looks at any time like a GPO [Schein] will disenroll” and imposed advertising guidelines to ensure that Dental Gator did not “represent in their marketing anything that looks like a

GPO.” (CCFF ¶¶1797-1800; *see also* CCFF ¶¶1812-1817). The record also shows that Sullivan approached Muller to discuss shutting down Dental Gator. (CCFF ¶ 1806 (quoting CX0246 at 001)). Muller testified that while he does not recall this discussion with Sullivan, he had no reason to doubt that Sullivan approached him about shutting down Dental Gator. (CX0309 (Muller, IHT at 176)). Sullivan and other executives had sought to end the relationship with Dental Gator, but Schein was worried about losing MB2’s business in doing so, which was a long-term and top 50 customer for Special Markets. (CCFF 1801-1806, 1776-1782). Schein was “accommodating [Dental Gator] for unique reasons” but feared “open[ing] the floodgates on buying groups.” (CCFF ¶¶ 1811 (citing CX0188 at 001), 1802-1810; *see also* CX0309 (Muller, IHT at 102 (“we supported it because we hoped our customer [MB2] would buy those offices. So in that case, yes, but Dental Gator really didn’t go anywhere”))). Indeed, Schein would not have tolerated Dental Gator but for its relationship with MB2, and the record evidence shows that Schein never bid on Dental Gator, did not have a separate contract with Dental Gator, and that Dental Gator became a Schein customer without its knowledge. (CCFF ¶¶ 1790, 1795, 1810). As such, the Proposed Finding is contrary to the weight of the evidence and should be disregarded. Complaint Counsel has no specific response to the statements that Dental Gator is a buying group or that Complaint Counsel asserts “Schein ‘tried to shut down . . . Dental Gator’ in furtherance of the conspiracy.”

635. In 2014, the owners of MB2 Dental Solutions (“MB2”), a large DSO, formed a buying group called Dental Gator. (Puckett, Tr. 2214-16, 2221).

Response to Proposed Finding No. 635

Complaint Counsel has no specific response.

636. Dental Gator was formed as a way for MB2 to identify target offices for potential acquisition. (Puckett, Tr. 2214-16, 2221; Foley, Tr. 4570-71). Through Dental Gator, MB2

hoped to establish relationships with those independent dental practices and eventually acquire them. (CX 8006 (Puckett, Dep. at 40-41); RX 2838). Dental Gator, however, did not have any ownership interest in its members' offices. (CX 8006 (Puckett, Dep. at 69-70)).

Response to Proposed Finding No. 636

Per the Parties' Joint Stipulations and Admissibility of Exhibits submitted on December 19, 2018, "Third party websites will be admitted into evidence for any non-hearsay purpose."

RX2838, a third party website, is admitted into evidence but cannot be used for any non-hearsay purpose. RX2838 cannot be used to support the second sentence of the Proposed Finding. Complaint Counsel has no specific response to the remainder of the Proposed Finding.

637. Dental Gator marketed itself as "a group of independent Dental Office owners" who "combined each of their unique, valuable, and time-tested vendor relationships" to help reduce vendor costs and improve efficiency. (RX 2838).

Response to Proposed Finding No. 637

Per the Parties' Joint Stipulations and Admissibility of Exhibits submitted on December 19, 2018, "Third party websites will be admitted into evidence for any non-hearsay purpose."

RX2838, a third party website, is admitted into evidence but cannot be used for any non-hearsay purpose. Complaint Counsel does not object to the assertion that the statement appears on RX2838. However, the Proposed Finding is improper to the extent it uses hearsay to assert that the statement is true.

638. Dental Gator sought to obtain better discounts on dental supplies for their members than they could otherwise secure on their own. (Puckett, Tr. 2220). Dental Gator also offered its members certain value-added services, such as advertising, information and technology, legal, lab, accounting, and billing, among others. (Puckett, Tr. 2221; CX 8006 (Puckett, Dep. at 46-47)).

Response to Proposed Finding No. 638

Complaint Counsel has no specific response.

639. Dental Gator charged up to \$499/month for members to be a part of its buying group. (Puckett, Tr. 2304).

Response to Proposed Finding No. 639

Complaint Counsel has no specific response.

640. Dental Gator never had more than 27 members. (Puckett, Tr. 2219).

Response to Proposed Finding No. 640

The Proposed Finding is not supported and is misleading because it mischaracterizes the cited evidence. Puckett testified that 27 members “was the highest number I saw” not that Dental Gator “never had more than 27 member.” (Puckett, Tr. 2219).

641. In early 2014, MB2 met with Schein and other distributors to discuss a request for proposal for MB2’s business and also its plans for a buying group. (Puckett, Tr. 2227-28 (“We didn’t call it Dental Gator at the time.”)). During this initial meeting, MB2 informed Schein about its plan to use the newly-formed buying group as a way to procure dental offices for MB2. (Puckett, Tr. 2228; CX 0306 (Foley, IHT at 191)).

Response to Proposed Finding No. 641

Complaint Counsel has no specific response.

642. Because Schein had never heard about Dental Gator prior to this point, Schein asked MB2 “standard due diligence questions” to get a better understanding of the Dental Gator Group, such as what was Dental Gator’s purpose, who was going to run the group, how would it be marketed, who would be eligible, and what the membership rate was. (Puckett, Tr. 2228-29).

Response to Proposed Finding No. 642

Complaint Counsel has no specific response.

643. During the early 2014 negotiations with MB2, Andrea Hight, Strategic Account Manager for Schein Special Markets, expressed some concerns about whether Dental Gator was going to be set up only as a “pure buying group[,]” meaning that it was “formed for the sole purpose of just saving money on supplies,” rather than also offering value-added services. (Puckett, Tr. 2337-38; CX 8006 (Puckett, Dep. at 63-65); CX 8022 (Hight, Dep. at 161 (“the real issue was market[ing] that it was just a purchasing plan without management services”))). But she said that Schein “would work with groups that could offer more in terms of ... value-added services.” (Puckett, Tr. 2275).

Response to Proposed Finding No. 643

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein would have worked with Dental Gator as a buying group.

The record evidence shows the opposite—Schein told MB2 that it did not work with buying groups and that it had a policy not to work with buying groups (CCFF ¶ 1788, 1797-1800).

On April 1, 2014, Hight wrote to Foley regarding a conversation with Dental Gator: “We continue to stress that if it looks at any time like a GPO we will disenroll.” (CX2427 at 001).

Hight also sought assurances from Dental Gator that it would not operate as a GPO. (CCFF ¶ 1788, 1797-1800). The record evidence also shows that Schein told MB2 that an ownership interest was required in Dental Gator offices. Schein asked MB2 whether it would be managing the Dental Gator practices. (CCFF ¶ 1788). Schein asked MB2 whether it was seeking to acquire ownership in the Dental Gator practices. (CCFF ¶ 1788). Schein told MB2 that an ownership interest was required in the Dental Gator members’ practices. (CCFF ¶ 1788). After MB2 formed Dental Gator, Schein continued to ask questions about Dental Gator’s business model. (CCFF ¶ 1788).

644. While Schein was open to working with a buying group like Dental Gator, it needed more information about the group, such as what value-added services Dental Gator provided to its members. (Puckett, Tr. 2237-38; CX 8006 (Puckett, Dep. at 82-83)). MB2 assured Schein that Dental Gator offered more than just discounts by way of its value-added services. (CX 8006 (Puckett, Dep. at 82-83)).

Response to Proposed Finding No. 644

The Proposed Finding is inaccurate and contradictory to the record evidence, and is not supported by the cited evidence, as to the phrase “Schein was open to working with a buying group like Dental Gator.” The cited evidence shows that Schein expressed concerns that Dental Gator was a buying group and does not establish that “Schein was open to working with a buying group like Dental Gator.” (Puckett, Tr. 2237-2238; CX8006 (Puckett, Dep. at

82-82)). The record evidence shows the opposite—Schein told MB2 that it did not work with buying groups and that it had a policy not to work with buying groups (CCFF ¶ 1788).

Complaint Counsel has no specific response as to the remainder of the Proposed Finding.

645. Mr. Puckett, President of MB2 and Dental Gator owner, testified that Schein was satisfied with MB2's response regarding Dental Gator's offering and opened Dental Gator as a buying group. (Puckett, Tr. 2222; CX 8006 (Puckett, Dep. at 83)).

Response to Proposed Finding No. 645

The Proposed Finding is not supported by the cited evidence and inaccurate as to the portion that asserts Schein "opened Dental Gator as a buying group." (CX8006 (Puckett, Dep. at 83)). The record evidence shows Schein entered into an agreement with MB2 in 2014 not with Dental Gator, which did not reference Dental Gator by name and specifically prohibited it from forming a buying group. (CCFF ¶¶ 1789-1794). The evidence also shows that MB2 formed Dental Gator without Schein's permission, which Schein viewed as a breach of the agreement. (CCFF ¶¶ 1795-1796). Furthermore, to the extent the Proposed Finding asserts Schein approved or knowingly "opened" a Dental Gator account, the Proposed Finding is also not supported and contrary to the weight of the evidence. Complaint Counsel has no specific response to the remainder of the Proposed Finding.

646. Schein won the MB2 RFP over both Patterson and Benco because it offered the most "aggressive pricing." (Puckett, Tr. 2263-64, 2309-11). On March 20, 2014, Schein and MB2 entered into a Prime Vendor Agreement ("2014 MB2 Agreement") that obligated MB2 to purchase [REDACTED] of their supplies from Schein, [REDACTED]. (CX 4001-002; Puckett, Tr. 2285-86). Dental Gator, however, made no such volume purchase commitments. (Puckett, Tr. 2287-88; CX 4001-002).

Response to Proposed Finding No. 646

Complaint Counsel has no specific response.

647. Under the 2014 MB2 Agreement, Schein provided a custom formulary and discounts on non-formulary items to the members of MB2's DSO (offices owned by MB2). (CX 4001-003).

Response to Proposed Finding No. 647

Complaint Counsel has no specific response.

648. According to the 2014 MB2 Agreement, “[d]ental practices which are not owned in whole or in part by MB2, must have a formal affiliate agreement in place with MB2.” (CX 4001-002). This clause was included to ensure that DSO pricing would only apply to MB2 and would not be extended to a non-DSO, like Dental Gator. (Foley, Tr. 4574). This provision was important because the pricing that Special Markets negotiated on behalf of DSOs was proprietary with the manufacturer, Schein, and the DSO. (Foley, Tr. 4696-97). The provision did not preclude MB2 from operating a buying group or preclude Schein from offering discounts to that buying group. (CX 8022 (Hight, Dep. at 134; 161-62)). If MB2 wanted to operate a buying group, Schein could offer discounts to that group under a separate sales plan. (CX 8022 (Hight, Dep. at 134, 136, 161-62)).

Response to Proposed Finding No. 648

The statement in the Proposed Finding that “The provision did not preclude MB2 from operating a buying group” is misleading to the extent it asserts that the 2014 MB2 Agreement did not preclude MB2 from using the 2014 MB2 Agreement to form a buying group. As the record evidence shows, the 2014 MB2 Agreement had a specific provision prohibiting MB2 from using the agreement to form a buying group. (CCFF ¶ 1792 (citing CX4001 at 002) (“This agreement may not be used to grow any Group Purchasing Organization (GPO) type relationship.”)). Moreover, the record shows that Schein inserted these provisions into the agreement to prevent Dental Gator from becoming a “typical GPO.” (CCFF ¶¶ 1791-1793).

Complaint Counsel has no specific response to the remainder of the Proposed Finding.

649. Although the 2014 MB2 Agreement did not allow MB2 to extend its pricing to Dental Gator, MB2 extended its Schein pricing to Dental Gator members anyway. (CX 8022 (Hight, Dep. at 134)).

Response to Proposed Finding No. 649

Complaint Counsel has no specific response.

650. As a result, Dental Gator members were provided the same pricing from Schein that Schein gave to MB2. (Puckett, Tr. 2231, 2288-89; Foley, Tr. 4572). Special Markets also provided a rebate to Dental Gator for its member’s purchases. (CX 4027-001).

Response to Proposed Finding No. 650

The first sentence of the Proposed Finding is vague and incomplete as to the time period.

Dental Gator members received the same pricing from Schein that Schein gave to MB2. The record evidence shows that Dental Gator initially offered its members the 2014 MB2 Agreement pricing until 2015, when Schein raised prices by cutting the discounts for new Dental Gator members. (CCFF ¶¶ 1818-1819). To the extent the Proposed Finding asserts that all Dental Gator members received the MB2 pricing at all times, it is misleading based on the record evidence. Complaint Counsel has no specific response to the second sentence of the Proposed Finding.

651. During its negotiations with Schein, Dental Gator agreed not to advertise that it was merely a “pure buying group” that provided deep discounts to its members. (Puckett, Tr. 2237-38). Instead, Dental Gator agreed that it would advertise all of its value-added services that it provided to help dentists. (Puckett, Tr. 2241-42, 2246; CX 8005 (Muller, Dep. at 189)).

Response to Proposed Finding No. 651

The Proposed Finding is inaccurate and is not supported by the cited evidence as to the statement “During its negotiations with Schein.” The evidence does not show that Schein negotiated with Dental Gator. In fact, at the time the 2014 MB2 Agreement was created, it prohibited MB2 from forming a buying group, and Schein inserted these provisions into the agreement to prevent Dental Gator from becoming a “typical GPO.” (CCFF ¶¶ 1791-1793).

The statement is also misleading to the extent it implies that Schein negotiated any advertising restrictions for Dental Gator under the 2014 MB2 Agreement, which did not even name Dental Gator. (SF 646-647; CCFF ¶ 1790).

652. Nevertheless, in June 2014, Schein became aware that Dental Gator advertised that it could save Dental Gator members up to 60% on Schein supplies, which caused Schein concern. (Puckett, Tr. 2248; CX 8005 (Muller, Dep. at 189)). Mr. Puckett testified that such an advertisement (which was put out by a third-party vendor) was a “false statement” and “misleading for sure,” contrary to what Dental Gator had agreed to do with respect to marketing.

(CX 8006 (Puckett, Dep. at 79-80 (“I don’t think anyone ... can save 60 percent – it is probably a false statement.”)); Puckett, Tr. 2278; CX 4067).

Response to Proposed Finding No. 652

Complaint Counsel has no specific response.

653. On June 10, 2014, Ms. Hight had a conversation with Mr. Puckett, regarding both MB2’s failure to comply with the 2014 MB2 Agreement and Dental Gator’s advertising of the discounts provided by Schein. (CX 8022 (Hight, Dep. at 136); Puckett, Tr. 2247-48). Ms. Hight informed Mr. Puckett that the Dental Gator advertising was in “breach” of their contract and it needed to be fixed. (Puckett, Tr. 2247-48; RX 2283). Dental Gator attempted to rectify the advertising issue by taking its advertisement down. (Puckett, Tr. 2253-54). To resolve Schein’s concerns, Dental Gator agreed that, going forward, it “would market itself as a value-added partner of Henry Schein, providing a broad spectrum of services to dentists.” (Puckett, Tr. 2279-80; *see also* CX 4016-001 (updated Dental Gator website noting that “[o]ur members do see significant savings on variable cost, but our main goal is to help doctor’s [*sic*] grow their practice.”)). This satisfied Ms. Hight, who wrote that “[w]e really do look forward to seeing your great success continue and to be true partners with you to help make that happen.” (CX 4067-001).

Response to Proposed Finding No. 653

The Proposed Finding is vague and misleading as to the phrase “their contract,” to the extent it refers to a separate written contract between Schein and Dental Gator because the record evidence shows that there was none. (Puckett, Tr. 2232; CCFF ¶ 1790). Complaint Counsel otherwise has no specific response to the Proposed Finding.

654. Complaint Counsel cites Ms. Hight’s June 10, 2014 email reporting that Dental Gator “assured me [that] they are shutting down the GPO aspect of what happened immediately.” (CX 0247; *see also* CX 2425). At her deposition, Ms. Hight explained that she merely meant that Dental Gator had “to provide management services.” (CX 8022 (Hight, Dep. at 161)). Mr. Puckett similarly testified that Dental Gator only agreed to stop marketing itself as a pure or price-only buying group, not to shut down. (Puckett, Tr. 2237-38). Ms. Hight did not ask Mr. Puckett to “shut down” the Dental Gator buying group. (Puckett, Tr. 2251; CX 8022 (Hight, Dep. at 191-92)). Ms. Hight did not ask Mr. Puckett for proof that MB2 was acquiring ownership in the Dental Gator offices. (Puckett, Tr. 2251). Ms. Hight did not ask Mr. Puckett for assurances that Dental Gator would meet MSO criteria. (Puckett, Tr. 2251-52). Ms. Hight also did not ask Mr. Puckett for assurances that Dental Gator would “stay clear of anything remotely GPO in nature,” nor did Ms. Hight say anything about Schein purportedly shutting down other buying groups. (Puckett, Tr. 2251-52; CX 8022 (Hight, Dep. at 191-92)).

Response to Proposed Finding No. 654

The Proposed Finding is also contrary to the weight of the evidence, which shows that Sullivan, Hight, Cavaretta, and other HSD executives wanted to end the relationship with Dental Gator because it was a buying group. First, following Hight's June 10, 2014 email (CX0247), she drafted a letter to send to MB2 and wrote: "As you know, we discussed how very important Schein's position is in that we do not support nor contract with GPOs. To that end, we also included GPO language in the prime vendor agreement." (CX2431 at 001-002; CX8022 (Hight, Dep. at 175) (testifying that the email was a draft letter to MB2); *see also* CCFF ¶ 1799). In a later email on the chain, Hight wrote to Cavaretta: "[MB2] signed a PVA that very specifically said no GPO relationship. This was a point of some discussion with them on negotiations. We dug our heels in and they agreed." (CX2431 at 001; *see also* CCFF ¶ 1799). In response, Cavaretta replied: "Shut this down. The letter is very well written. In [*sic*] 100% behind you on this." (CX2431 at 001; *see also* CCFF ¶ 1799).

Second, Hight also reported her call June 2014 call to her boss, Cavaretta: "[T]hey will make sure they do not represent in their marketing anything that looks like a GPO and that they will focus on practice management. . . . I did in process of conversation let them know we had identified a couple of GPO models in Texas and were in the process of closing those down." (CX2425 at 001; *see also* CCFF ¶ 1800).

Third, Sullivan and other HSD executives sought to end the relationship between Special Markets and Dental Gator. In a July 1, 2015 email, Sullivan wrote: "The Dec 'offsite' last year I left with a goal to see if we could get Hal to shut it down, but knew that could be a challenge due to the parent company being a EDSO of ours in [Special Markets]." (CX0246 at 001; *see also* CCFF ¶ 1806).

Fourth, in a July 2014 email, Schein sales manager Dean Kyle wrote to Cavaretta: “We really need to shut the Dental Gator down.” (CX0175 at 001; *see also* CCFF ¶ 1806). Cavaretta replied: “I agree...as this is the second big GPO we will be shutting down...Co-op is the other.” (CX0175 at 001; *see also* CCFF ¶ 1806).

Fifth, in an October 2014 email, Cavaretta stated that he was not comfortable promoting Dental Gator. (RX2294 at 003 (“This is going to create major confusion in the field and I’m not comfortable at all promoting this GPO.”); *see also* CCFF ¶ 1806).

The second sentence of the Proposed Finding is inaccurate, not supported by the cited evidence, and mischaracterizes the cited evidence. The cited Hight deposition testimony does not explain what Hight meant by her statement in CX0247 (“assured me they are shutting down the GPO aspect of what happened immediately”) but rather, explains what she meant by her use of the term “saga” in CX2425, a different document. (CX8022 (Hight, Dep. at 161)).

The third sentence of the Proposed Finding is not supported by the cited Puckett testimony. (*See* Puckett, Tr. 2237-2238). Thus, to the extent the second and third sentences assert or imply that Schein did not discuss or attempt to shut down Dental Gator, they are not only misleading but not supported by the cited evidence and contrary to the weight of the record evidence. Complaint Counsel has no specific response to the first sentence of the Proposed Finding.

655. In addition to marketing issues, Dental Gator caused conflicts with Schein’s manufacturer partners. In the summer of 2014, a Patterson sales representative complained to manufacturers that Schein was extending its pricing for MB2 to Dental Gator offices. (CX 0306 (Foley, IHT. at 73-74); CX 2078). As a result, manufacturers asked Schein to stop extending its pricing for the MB2 DSO to Dental Gator. (CX 0306 (Foley, IHT at 74, 77); CX 8003 (Foley, Dep at 247)).

Response to Proposed Finding No. 655

Complaint Counsel has no specific response.

656. Dental Gator also caused internal conflicts at Schein between HSD and Special Markets. (CX 8005 (Muller, Dep. at 195, 217); Sullivan, Tr. 3991, 3997). Special Markets received complaints from HSD FSCs who were concerned that Dental Gator leading its advertisements with deep discounts from Schein, instead of value-added services, would result in reduced commissions. (CX 0306 (Foley, IHT at 193-96); CX 8003 (Foley, Dep. at 293-94, 303-05); CX 8005 (Muller, Dep. at 195)).

Response to Proposed Finding No. 656

Complaint Counsel has no specific response.

657. Despite these issues, HSD never pressured or asked Special Markets to shut down or dissolve Dental Gator. (CX 0306 (Foley, IHT at 198); CX 8003 (Foley, Dep. at 351, 418); CX 8022 (Hight, Dep. at 192)).

Response to Proposed Finding No. 657

The Proposed Finding is also contrary to the weight of the evidence, which shows that Sullivan, Hight, Cavaretta, and other HSD executives wanted to end the relationship with Dental Gator. First, following Hight's June 10, 2014 email (CX0247), she drafted a letter to send to MB2 and wrote: "As you know, we discussed how very important Schein's position is in that we do not support nor contract with GPOs. To that end, we also included GPO language in the prime vendor agreement." (CX2431 at 001-002; CX8022 (Hight, Dep. at 175) (testifying that the email was a draft letter to MB2); *see also* CCFF ¶ 1799). In a later email on the chain, Hight wrote to Cavaretta: "[MB2] signed a PVA that very specifically said no GPO relationship. This was a point of some discussion with them on negotiations. We dug our heels in and they agreed." (CX2431 at 001; *see also* CCFF ¶1799). In response, Cavaretta replied: "Shut this down. The letter is very well written. In [*sic*] 100% behind you on this." (CX2431 at 001; *see also* CCFF ¶1799). Second, Hight also reported her call June 2014 call to her boss, Cavaretta: "[T]hey will make sure they do not represent in their

marketing anything that looks like a GPO and that they will focus on practice management. . . . I did in process of conversation let them know we had identified a couple of GPO models in Texas and were in the process of closing those down.” (CX2425 at 001; *see also* CCFF ¶1800). Third, Sullivan and other HSD executives sought to end the relationship between Special Markets and Dental Gator. In a July 1, 2015 email, Sullivan wrote: “The Dec ‘offsite’ last year I left with a goal to see if we could get Hal to shut it down, but knew that could be a challenge due to the parent company being a EDSO of ours in [Special Markets].” (CX0246 at 001; *see also* CCFF ¶1806). Fourth, in a July 2014 email, Schein sales manager Kyle wrote to Cavaretta: “We really need to shut the Dental Gator down.” (CX0175 at 001; *see also* CCFF ¶ 1806). Cavaretta replied: “I agree...as this is the second big GPO we will be shutting down...Co-op is the other.” (CX0175 at 001; *see also* CCFF ¶1806). Fifth, in an October 2014 email, Cavaretta stated that he was not comfortable promoting Dental Gator. (RX2294 at 003 (“This is going to create major confusion in the field and I’m not comfortable at all promoting this GPO.”); *see also* CCFF ¶ 1806).

658. With respect to Mr. Sullivan’s July 1, 2015 email which stated “[t]he Dec ‘offsite’ last year I left with a goal to see if we could get Hal to shut it down...,” Mr. Sullivan clarified at trial that he was talking specifically about Dental Gator using MB2’s DSO pricing outside the scope of the MB2 contract. (Sullivan, Tr. 4255-56; CX 0246). Mr. Sullivan never had the goal to shut down Special Markets’ relationship with Dental Gator. (Sullivan, Tr. 4255-56).

Response to Proposed Finding No. 658

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts that Sullivan’s testimony disproves the weight of the record evidence, which shows that Sullivan and other HSD executives wanted to shut-down Dental Gator and feared that allowing Dental Gator could “open the floodgates on other GPOs.” (CCFF ¶ 1811 (citing CX0188 at 001), 1799, 1802, 1806). There are multiple contemporaneous documents that indicate Sullivan and Schein’s concerns and attempt to shut down Dental Gator.

- Hight stressed to Dental Gator that it would not work with a GPO multiple times. (CX2431 at 001 (“[MB2] signed a PVA that very specifically said no GPO relationship. This was a point of some discussion with them on negotiations. We dug our heels in and they agreed.”; CX2425 at 001 (“[T]hey will make sure they do not represent in their marketing anything that looks like a GPO and that they will focus on practice management. . . . I did in process of conversation let them know we had identified a couple of GPO models in Texas and were in the process of closing those down.”)).
- Cavaretta agreed with Hight: “Shut this down. The letter is very well written. In [*sic*] 100% behind you on this.” (CX2431 at 001; *see also* CCFF ¶1799).
- Another Schein sales manager, Kyle, wrote to Cavaretta: “We really need to shut the Dental Gator down.” (CX0175 at 001; *see also* CCFF ¶ 1806). Cavaretta replied: “I agree...as this is the second big GPO we will be shutting down...Co-op is the other.” (CX0175 at 001; *see also* CCFF ¶1806).
- Cavaretta stated that he was not comfortable promoting Dental Gator. (RX2294 at 003 (“This is going to create major confusion in the field and I’m not comfortable at all promoting this GPO.”)).
- Muller felt he had to defend Dental Gator to Sullivan, by telling them Dental Gator was not a typical buying group, and that it was part of one of Schein’s largest customers. (CX0309 (Muller, IHT at 181-182)).
- Cavaretta was concerned that allowing Dental Gator would lead to other GPOs. (CCFF ¶ 1802 (citing CX2761 at 001 (“This is a straight up GPO and if we allow, I’m not sure how we say no to other GPOs. . . . Understandably, they want to leave it

alone because they don't want to upset MB2. I don't think that is a consistent strategy with where we want to go per our last meeting with you [Sullivan] and Dave [Steck].”)).

- Sullivan's trial testimony is contradictory to the weight of the record evidence, and contemporaneous documents, which shows that Sullivan and Schein tried to shut down Dental Gator.

659. Moreover, Special Markets had its own concerns about Dental Gator because MB2 was operating outside of the 2014 MB2 Agreement by extending pricing only meant for DSO customers to Dental Gator, which led to the manufacturer complaints. (CX 8005 (Muller, Dep. at 187-88); CX 0306 (Foley, IHT at 74-77)).

Response to Proposed Finding No. 659

Complaint Counsel has no specific response.

660. As discussed above, HSD was in the midst of developing its Mid-Market strategy in 2014 and a formal offering to buying groups. Dental Gator highlighted the need for collaboration between HSD and Special Markets in order to develop a consistent buying group strategy and offering going forward. (SF 269-333).

Response to Proposed Finding No. 660

The Proposed Finding is misleading and contrary to the weight of the record evidence. (*See* Responses to Proposed Finding Nos. 269-333). The record evidence does not show that Schein evaluated buying groups during the conspiracy period or that it created some formal strategy for working with buying groups during the conspiracy period. Indeed, the record evidence clearly shows that Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups regardless of type during the conspiracy period. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). By February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein

executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-954). The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period. (CCFF ¶¶ 661-954; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 1159-1166, 1316-1322). In addition, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Mid-Markets was created to serve buying groups or that it entered into agreements with buying groups during the conspiracy period. The Mid-Market group was formed to serve small DSOs, group practices, and community health centers. (Steck, Tr. 3690). Even as of January 2016, Schein still had to “figure out if the [Mid-Market] is going to be responsible for [buying groups].” (CX2280 at 001; Cavaretta, Tr. 5637-5638).

661. Specifically, Mr. Sullivan wanted Special Markets to modify the pricing it offered to Dental Gator to be more in line with what HSD was developing for its buying group offering, which is “ultimately what happened.” (Sullivan, Tr. 4255; CX 2370).

Response to Proposed Finding No. 661

The Proposed Finding is vague as to the phrase “to be more in line with what HSD was developing for its buying group offering,” which is undefined and not supported. The cited evidence does not address or establish that there was pricing “HSD was developing for its buying group offering.” Complaint Counsel has no specific response as to the remainder of the Proposed Finding.

662. Special Markets and HSD resolved their internal conflicts, and Special Markets continued its relationship with Dental Gator. (Sullivan, Tr. 4096-97; CX 8003 (Foley, Dep. at 418); CX 8022 (Hight, Dep. at 192); CX 2144).

Response to Proposed Finding No. 662

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies that Schein did not try to terminate its relationship with Dental Gator. The record evidence shows that Sullivan and HSD executives wanted to shut down the relationship. (*See Responses to Proposed Findings Nos. 634, 657-658*).

663. In February 2015, due to certain manufacturers refusing to extend chargebacks to Dental Gator members, Special Markets created a new Dental Gator sales plan that was separate from MB2. (CX 0306 (Foley, IHT at 74-77); CX 8005 (Muller, Dep. at 183-84, 187-88); CX 2641; CX 8022 (Hight, Dep. at 192)). Special Markets grandfathered all existing Dental Gator members and maintained their current pricing, which was the same DSO-pricing that MB2 members were receiving. (Foley, Tr. 4697-98; Puckett, Tr. 2289-90). Schein set new Dental Gator members up on formulary pricing with discounts that were “competitive” for independent dentists. (Puckett, Tr. 2294, 2296; Foley, Tr. 4698; CX 4026-001 (the new Schein sales plan “is still competitive for an independent dentist”)).

Response to Proposed Finding No. 663

The first sentence of the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Special Markets created a new Dental Gator sales plan due only to issues with manufacturers. The record evidence shows that Schein would not have done business with Dental Gator but for Schein’s relationship with MB2, and in order to keep MB2’s business, Schein was “accommodating” Dental Gator “for unique reasons” aside from appeasing manufacturers. (CCFF ¶¶ 1810-1811). The third sentence of the Proposed Finding is vague as to the term “competitive” because it does not specify what the increased price is competitive with, as individual dentists get lower prices when they join a buying group than when they do not, nor does it explain what Patrick Gill meant when he used the term “competitive” in CX4015. Furthermore, the third sentence is inaccurate, misleading, and contrary to the weight of the evidence to the extent the term “competitive” implies or asserts that the price increase was beneficial. The record evidence shows that

Schein cut discounts to Dental Gator by 10 to 15 percent, which hurt Dental Gator and affected its growth, and that Dental Gator's growth slowed at the time of the reduced discounts. (CCFF ¶¶ 1819-1820).

664. In the month after the new plan was set up with Dental Gator, Schein's merchandise sales to Dental Gator members increased. (Puckett, Tr. 2293; CX 4011; CX 4021).

Response to Proposed Finding No. 664

Complaint Counsel has no specific response.

665. After Schein created the new sales plan, Dental Gator considered working with another distributor and sought other bids. (Puckett, Tr. 2260, 2265). Despite Complaint Counsel's claims that the new sales plan pricing was an effort by Schein "to terminate Dental Gator" or "stop this GPO", Mr. Puckett maintained that Schein was making no such effort. (Puckett, Tr. 2270 ("Q. [Y]ou never viewed that price change by Schein as an effort to terminate Dental Gator, did you? A. No, ma'am. Q. And you never thought that Schein was trying to shut down or terminate Dental Gator, did you? A. I did not."); CX 2370; *see also* CX 8016 (Meadows Dep. at 226-230)). To the contrary, the pricing Schein offered to Dental Gator was "more aggressive," and Dental Gator decided to continue its relationship with Schein. (CX 2370-001; Puckett, Tr. 2297; Sullivan, Tr. 4098).

Response to Proposed Finding No. 665

The Proposed Finding is misleading, and contrary to the weight of the evidence, to the extent it asserts that Schein never tried to terminate Dental Gator. The record of evidence shows that Sullivan and other HSD executives sought to end the relationship between Special Markets and Dental Gator. (CCFF ¶ 1806). The Proposed Finding is also irrelevant, as whether Dental Gator or MB2 thought Schein was trying to terminate the relationship does not negate Schein's own internal documents showing that it was trying to terminate the relationship. (CCFF ¶ 1806; *see also* Responses to Proposed Findings Nos. 657-658). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

666. In January 2015, prior to Schein's creation of the new Dental Gator sales plan, the owners of MB2 had already decided that it would no longer fund Dental Gator. (Puckett, Tr. 2299 ("we just saw that it wasn't the genius idea that we thought or it wasn't executing properly")). At that time, Dental Gator's growth had slowed and the owners could not justify

injecting personal equity to try to take the group to the next level. (Puckett, Tr. 2299; CX 8006 (Puckett, Dep. at 93-94)).

Response to Proposed Finding No. 666

Complaint Counsel has no specific response to the statements regarding MB2's discussions about funding Dental Gator. However, the Proposed Finding is misleading to the extent it implies or asserts that Schein's price increase was not a factor that slowed Dental Gator's growth solely because MB2 discussed funding before Schein's price increase. The record evidence shows that Schein cut discounts to Dental Gator by 10 to 15 percent, which hurt Dental Gator and affected its growth, and that Dental Gator's growth slowed at the time of the reduced discounts. (CCFF ¶¶ 1819-1820).

667. There were various market factors and issues internal to Dental Gator that slowed Dental Gator's growth, which had nothing to do with Schein. (Puckett, Tr. 2306 (Q. Mr. Puckett, is it fair to say that there are market factors and other issues internal to Dental Gator that slowed Dental Gator's growth and that have absolutely nothing to do with Henry Schein? A. Yes.)), 2298 ("[membership] had started to slow before the Schein price change for new Dental Gator customers.")). For example, the competition from other buying groups, which increased over time, impacted Dental Gator's growth. (Puckett, Tr. 2303-04). Moreover, Dental Gator also received complaints from its members that its membership fee was too high to justify the savings or value to them. (Puckett, Tr. 2304-05).

Response to Proposed Finding No. 667

Complaint Counsel has no specific response to the statements regarding various market factors and internal issues. However, the Proposed Finding is misleading to the extent it implies or asserts Schein's price increase was not a factor that slowed Dental Gator's growth. The record evidence shows that Schein cut discounts to Dental Gator by 10 to 15 percent, which hurt Dental Gator and affected its growth, and that Dental Gator's growth slowed at the time of the reduced discounts. (CCFF ¶¶ 1819-1820).

668. Additionally, the owners of MB2 observed that the level of communication and overall performance by Patrick Gill, the President of Dental Gator, had drastically declined in 2015 as compared to 2014. (Puckett, Tr. 2301; CX 8006 (Puckett, Dep. at 43-44)). With respect

to performance, Mr. Puckett testified that he felt that Mr. Gill had checked out of his responsibilities and “stopped working as hard” at Dental Gator in 2015. (Puckett, Tr. 2301).

Response to Proposed Finding No. 668

Complaint Counsel has no specific response to the statements regarding Gill or his performance. However, the Proposed Finding is misleading to the extent it implies or asserts that Schein’s price increase was not a factor that slowed Dental Gator’s growth. The record evidence shows that Schein cut discounts to Dental Gator by 10 to 15 percent, which hurt Dental Gator and affected its growth, and that Dental Gator’s growth slowed at the time of the reduced discounts. (CCFF ¶¶ 1819-1820).

669. Dental Gator realized, prior to the change in pricing, that it had either built a bad business model or did not have the right people employed, as it was offering Dental Gator to dentists for free, but still could not get people to sign up for the program. (CX 8006 (Puckett, Dep. at 92-93, 157); Puckett, Tr. 2298-302).

Response to Proposed Finding No. 669

Complaint Counsel has no specific response to the statements regarding Dental Gator’s discussions about its growth. However, the Proposed Finding is misleading to the extent it implies or asserts that the Schein’s price increase was not a factor that slowed Dental Gator’s growth solely because Dental Gator’s discussed its growth before the price increase. The record evidence shows that Schein cut discounts to Dental Gator by 10 to 15 percent, which hurt Dental Gator and affected its growth, and that Dental Gator’s growth slowed at the time of the reduced discounts. (CCFF ¶¶ 1819-1820).

670. Mr. Gill eventually left Dental Gator at the end of 2015. (Puckett, Tr. 2302). After Mr. Gill left, Dental Gator did not make any additional efforts to market its buying group program. (Puckett, Tr. 2302).

Response to Proposed Finding No. 670

Complaint Counsel has no specific response.

671. For reasons having nothing to do with Schein, Dental Gator ultimately dissolved in 2018. (Puckett, Tr. 2303-06, 2218-19).

Response to Proposed Finding No. 671

Complaint Counsel has no specific response to the statement that Dental Gator ultimately dissolved in 2018. However, the Proposed Finding is misleading to the extent it asserts that Schein's price increase was not a factor that slowed Dental Gator's growth. The record evidence shows that Schein cut discounts to Dental Gator by 10 to 15 percent, which hurt Dental Gator and affected its growth, and that Dental Gator's growth slowed at the time of the reduced discounts. (CCFF ¶¶ 1819-1820).

672. Schein never told MB2 that it could not operate its Dental Gator buying group. (Foley, Tr. 4698-99).

Response to Proposed Finding No. 672

The Proposed Finding is misleading and contrary to the weight of the evidence, which shows that Schein did tell Dental Gator it could not operate as a buying group. Schein told MB2 that it did not work with buying groups and that it had a policy not to work with buying groups (CCFF ¶¶ 1788, 1797-1800). On April 1, 2014, Hight wrote to Foley regarding a conversation with Dental Gator: "We continue to stress that if it looks at any time like a GPO we will disenroll." (CCFF ¶ 1797 (quoting CX2427 at 001)). Hight also sought assurances from Dental Gator that it would not operate as a GPO. (CCFF ¶¶ 1788, 1797-1800). The record evidence shows that Schein told MB2 that an ownership interest was required in Dental Gator offices. Schein asked MB2 whether it would be managing the Dental Gator practices. (CCFF ¶ 1788). Schein asked MB2 whether it was seeking to acquire ownership in the Dental Gator practices. (CCFF ¶ 1788). Schein told MB2 that an ownership interest was required in the Dental Gator members' practices. (CCFF ¶ 1788). After MB2 formed Dental

Gator, Schein continued to ask questions about Dental Gator’s business model. (CCFF ¶ 1788).

673. Schein provided discounts to the members of Dental Gator during the alleged conspiracy. (Puckett, Tr. 2231, 2288-89; 2293-94; Foley, Tr. 4572).

Response to Proposed Finding No. 673

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that Schein bid on or pursued the business of Dental Gator during the conspiracy period. The record evidence clearly shows that Schein did neither but was “accommodating” Dental Gator “for unique reasons,” such as keeping the business of MB2, an elite DSO and top 50 customer. (CCFF ¶¶ 1810-1811, 1768, 1776-1778). Schein would not have done business with Dental Gator, but for Schein’s relationship with MB2. (CCFF ¶ 1810).

674. Schein did not have any type of discussion with anyone at Benco or Patterson about Dental Gator. (Cohen, Tr. 913; Rogan, Tr. 3657; Ryan, Tr. 1247; CX 8022 (Hight, Dep. at 190-92); CX 8003 (Foley, Dep. at 418)).

Response to Proposed Finding No. 674

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the statement disproves Schein’s participation in a conspiracy. The record evidence shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein’s internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195).

675. Schein’s relationship with Dental Gator and Complaint Counsel’s admission that Schein worked with the Dental Gator during the alleged conspiracy period are inconsistent with the alleged conspiracy. (Complaint ¶ 1).

Response to Proposed Finding No. 675

The Proposed Finding is vague, ambiguous, and unintelligible as to the term “admission,” as the cited evidence does not set forth any admissions by Complaint Counsel. Nonetheless, the

Proposed Finding is contrary to the weight of the record evidence, which shows that Schein accommodated Dental Gator for unique reasons but tried to terminate the relationship. (*See* Responses to Proposed Finding Nos. 634-674). The record evidence also shows that Schein was concerned about maintaining a consistent strategy with respect to buying groups if it accommodated Dental Gator. (CCFF ¶ 1802, 1811). The Proposed Finding is also misleading to the extent it implies or asserts that Schein’s “relationship with Dental Gator” means it bid on or otherwise *intentionally* pursued Dental Gator’s business during the conspiracy period. The record evidence shows it did neither. (CCFF ¶ 1795).

In addition, Schein’s relationship with Dental Gator in 2014 brought Schein new customers from competitors and lead to increased purchasing volume from existing customers. (CX2140 at 001 (Muller informed Sullivan in January 2015: “Before we go too far down the road to cut off Dental Gator ... [t]here are 24 locations, 11 of these are new, not Schein customers...of the 13 others they are up in in aggregate of 54% of sales per month volume...”); CX8005 (Muller, Dep. at 175 (Q. “Is your understanding from this e-mail that existing Schein customers who joined Dental Gator had increased volume with Schein after joining Dental Gator? A. Yes.”)); CX8005 (Muller, Dep. at 173 (Q. The relationship with Dental Gator brought Henry Schein increased purchase volume; is that right? A. Yes. ... Q. As a result of joining Dental Gator, some customers of Schein who previously split their purchases among other distributors were able to consolidate their purchases with Schein; is that right? A. Traditionally, that would be true.”)); CX8005 (Muller, Dep. at 172-173 (Q. “Is it your understanding that some FSCs admitted that they never would have gotten some customer accounts without the Dental Gator relationship? A. Yes.”))). The Proposed Finding is thus misleading to the extent it implies or asserts or that the relationship with

Dental Gator disproves Schein's participation in the conspiracy because the weight of the record evidence, as set forth above, shows the contrary.

N. Dental Partners of Georgia.

676. Dental Partners of Georgia is a group of private dentists that focus on pediatric dentistry through Georgia's Medicaid program. (Foley, Tr. 4610-11).

Response to Proposed Finding No. 676

Complaint Counsel has no specific response.

677. Dental Partners of Georgia describes itself as "an Independent Provider Association which consists of a network of providers, solo and group practitioners, in a region or community who agree to participate in an association that will contract with managed care plans and vendors for the benefit of each of the IPA members." (RX 2880-001).

Response to Proposed Finding No. 677

Per the Parties' Joint Stipulations and Admissibility of Exhibits submitted on December 19, 2018, "Third party websites will be admitted into evidence for any non-hearsay purpose."

RX2880, a third party website, is admitted into evidence but cannot be used for any non-hearsay purpose. Complaint Counsel does not object to the assertion that the statement appears on RX2880. However, the Proposed Finding is improper to the extent it asserts that the statement is true or to the extent it uses the hearsay statement to assert or imply anything about Schein's relationship with Dental Partners of Georgia during the conspiracy period.

678. Schein considers and treats Dental Partners of Georgia as a buying group. (Foley, Tr. 4611; Meadows, Tr. 2482; CX 0306 (Foley, IHT at 220-21); CX 309 (Muller, IHT at 200); CX 2282-001).

Response to Proposed Finding No. 678

The Proposed Finding is misleading in that it focuses on how Schein currently "considers and treats" Dental Partners of Georgia, which is not relevant to the analysis of Schein's conduct with respect to buying groups during the conspiracy period. The cited testimony does not address how Schein categorized Dental Partners of Georgia during the conspiracy period, and

CX2282 is a 2016 email that similarly does not reflect Schein's views during the relevant period. In fact, the record evidence shows that Schein did not consider Dental Partners of Georgia to be a buying group during the conspiracy. The agreement specifically stated that "Dental Partners of Georgia owns and/or manages dental offices under various names," (RX2543 at 001), which would mean it could not be a buying group. (CCFF ¶¶ 72-76 (distinguishing buying groups and DSOs)). Schein's Foley, who signed the agreement, regularly distinguished buying groups from MSOs and DSOs based on common ownership and management during the same time frame and circulated contractual terms requiring ownership and/or management to prevent buying groups. (CX2066 at 001 (March 2012 email in which Foley identified "Terms not to be a buying group" as requiring ownership and/or management); CX2069 (January 30, 2013 email in which Foley sends "Rules to be DSO, not a Buying Group.")). Moreover, even if Schein did consider Dental Partners of Georgia to be a buying group during the conspiracy period, Schein's relationship with Dental Partners of Georgia began no later than 2009. (Foley, Tr. 4603-4604, 4619; SF 680). Schein's pre-existing, legacy buying group relationships do not disprove its participation in a conspiracy, during which it instructed its sales force to reject buying groups that approached it. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

679. Through its Special Markets division, Schein has had a longstanding relationship with the Dental Partners of Georgia buying group since at least 2009. (Foley, Tr. 4603-04, 4619). Dental Partners of Georgia was brought to the attention of Special Markets by HSD in 2009. (Foley, Tr. 4610-12).

Response to Proposed Finding No. 679

Complaint Counsel has no specific response.

680. In May 2012, Schein began to memorialize its relationship with Dental Partners of Georgia in a prime vendor agreement. (RX 2543 (signatures dated May 24, 2012, August 29, 2012, and September 4, 2012); Foley, Tr. 4611-12; *see also* CX 7101-140 (identifying sales to

Dental Partners of Georgia in Schein's sales data from 2012 through 2015)). The terms of the prime vendor agreement executed in 2012 were in effect as early as 2009. (Foley, Tr. 4612).

Response to Proposed Finding No. 680

The Proposed Finding is misleading to the extent it implies that Schein's prime vendor agreement with Dental Partners of Georgia treated Dental Partners of Georgia as a buying group. In fact, the agreement specifically states that "Dental Partners of Georgia owns and/or manages dental offices under various names," (RX2543 at 001), which would mean it could not be a buying group. (CCFF ¶¶ 72-76 (distinguishing buying groups and DSOs). Schein's Foley, who signed the agreement, regularly distinguished buying groups from MSOs and DSOs based on common ownership and management during the same time frame and circulated contractual terms requiring ownership and/or management to prevent buying groups. (CX2066 at 001 (March 2012 email in which Foley identified "Terms not to be a buying group" as requiring ownership and/or management); CX2069 (January 30, 2013 email in which Foley sends "Rules to be DSO, not a Buying Group.")). Moreover, even if Schein did consider Dental Partners of Georgia to be a buying group during the conspiracy period, Schein's relationship with Dental Partners of Georgia began no later than 2009. (Foley, Tr. 4603-4604, 4619). Schein's pre-existing, legacy buying group relationships do not disprove its participation in a conspiracy, during which it instructed its sales force to reject buying groups that approached it. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

Additionally, with respect to [REDACTED], the citation should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (*See* February 21, 2019 Order on Post-Trial Briefs). However, the Proposed Finding is misleading to the extent

that it suggests that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

[REDACTED]. (CX7101 at 138 (Appendix C) and 140-141

(Appendix D)). Moreover, for reasons explained in more detail in Response to Proposed Finding Nos. 1611-1612, this Proposed Finding is also unreliable, inaccurate, and misleading to the extent that it suggests that Schein's purported sales buying groups during the relevant period show lack of parallel conduct or structural break for Schein. As explained in Response to Proposed Finding Nos. 1611-1612, some buying group relationships and sales that occurred during the relevant period are either pre-existing, legacy relationships formed prior the conspiracy or those that were entered into after the conspiracy became difficult to maintain and Schein began competing for buying groups. (CCFF ¶¶ 440-444, 1159-1166, 1398, 1400, 1403, 1717-1719, 1730, 1734-1735). Schein executives did not even know that some of these "legacy" buying groups were customers and referred to some as "inherited messes." (CX2287 at 001; CX2286 at 001).

681. Under the agreement, Schein created a formulary for the Dental Partners of Georgia with "reduced pricing on over 7,500 popular items," and offered discounts of up to 18% on items not on the formulary. (RX 2543-001; Foley, Tr. 4618-19).

Response to Proposed Finding No. 681

The Proposed Finding is misleading to the extent it implies that the discounts provided by Schein's prime vendor agreement with Dental Partners of Georgia meant that Schein viewed Dental Partners of Georgia as a buying group. In fact, the agreement specifically states that "Dental Partners of Georgia owns and/or manages dental offices under various names," (RX2543 at 001), which would mean it could not be a buying group. (CCFF ¶¶ 72-76 (distinguishing buying groups and DSOs). Schein's Foley, who signed the agreement,

regularly distinguished buying groups from MSOs and DSOs based on common ownership and management during the same time frame and circulated contractual terms requiring ownership and/or management to prevent buying groups. (CX2066 at 001 (March 2012 email in which Foley identified “Terms not to be a buying group” as requiring ownership and/or management); CX2069 (January 30, 2013 email in which Foley sends “Rules to be DSO, not a Buying Group.”)). Moreover, even if Schein did consider Dental Partners of Georgia to be a buying group during the conspiracy period, Schein’s relationship with Dental Partners of Georgia began no later than 2009. (Foley, Tr. 4603-4604, 4619). Schein’s pre-existing, legacy buying group relationships do not disprove its participation in a conspiracy, during which it instructed its sales force to reject buying groups that approached it. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

682. The agreement attaches a list of private dentists who are members of Dental Partners of Georgia. (RX 2543-005; Foley, Tr. 1612-13).

Response to Proposed Finding No. 682

The Proposed Finding is not supported by the evidence cited. The Foley testimony does not relate to Dental Partners of Georgia. (*See* Foley, Tr. 1612-1613). RX2543 at 005 is a list of dentists, but it does not make any representation about whether they are “private” dentists rather than those owned or managed by Dental Partners of Georgia. The Proposed Finding is also misleading to the extent it implies that the discounts provided by Schein’s prime vendor agreement with Dental Partners of Georgia meant that Schein viewed Dental Partners of Georgia as a buying group. In fact, the agreement specifically states that “Dental Partners of Georgia owns and/or manages dental offices under various names,” (RX2543 at 001), which would mean it could not be a buying group. (CCFF ¶¶ 72-76 (distinguishing buying groups and DSOs). Schein’s Foley, who signed the agreement, regularly distinguished buying

groups from MSOs and DSOs based on common ownership and management during the same time frame and circulated contractual terms requiring ownership and/or management to prevent buying groups. (CX2066 at 001 (March 2012 email in which Foley identified “Terms not to be a buying group” as requiring ownership and/or management); CX2069 (January 30, 2013 email in which Foley sends “Rules to be DSO, not a Buying Group.”)). Moreover, even if Schein did consider Dental Partners of Georgia to be a buying group during the conspiracy period, Schein’s relationship with Dental Partners of Georgia began no later than 2009. (Foley, Tr. 4603-4604, 4619). Schein’s pre-existing, legacy buying group relationships do not disprove its participation in a conspiracy, during which it instructed its sales force to reject buying groups that approached it. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

683. While the agreement states that “Dental Partners of Georgia owns and/or manages dental offices under various names,” Mr. Foley, who negotiated the agreement with Dental Partners of Georgia, confirmed at trial that they do not own or formally manage their member offices. (RX 2543; Foley, Tr. 4613-14).

Response to Proposed Finding No. 683

The Proposed Finding is misleading to the extent that it implies that Foley’s trial testimony reflected his understanding at the time he signed that agreement with Dental Partners of Georgia in 2012. The only record evidence reflecting Schein’s understanding as of 2012 is RX2543, which affirmatively states that “Dental Partners of Georgia owns and/or manages dental offices under various names.” Foley’s trial testimony, after the fact, that the language in the written agreement, signed by himself and the Chairman of Dental Partners of Georgia, is not true does not make it so, nor does it speak to Schein’s understanding in 2012.

Moreover, the language that was included in RX2543 is consistent with Foley’s approach to other contracts in 2012 where he included language designed to clarify that the group was a

DSO, not a buying group. (CCFF ¶ 864). And the record shows that Foley, who signed the agreement, regularly distinguished buying groups from MSOs and DSOs based on common ownership and management during the same time frame and circulated contractual terms requiring ownership and/or management to prevent buying groups. (CX2066 at 001 (March 2012 email in which Foley identified “Terms not to be a buying group” as requiring ownership and/or management); CX2069 (January 30, 2013 email in which Foley sends “Rules to be DSO, not a Buying Group.”)). Moreover, even if Schein did consider Dental Partners of Georgia to be a buying group during the conspiracy period, Schein’s relationship with Dental Partners of Georgia began no later than 2009. (Foley, Tr. 4603-4604, 4619). Schein’s pre-existing, legacy buying group relationships do not disprove its participation in a conspiracy, during which it instructed its sales force to reject buying groups that approached it. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

684. In addition to negotiating the partnership with Schein on behalf of its members, Dental Partners of Georgia helps negotiate rates with the Georgia Medicaid plan on behalf of its members, vets software application programs for its members, and provides continuing education. (Foley, Tr. 4614).

Response to Proposed Finding No. 684

The Proposed Finding is misleading to the extent it implies that the services Dental Partners of Georgia offers its members mean that Schein considered it a buying group during the conspiracy period. The record shows that Schein did not consider Dental Partners of Georgia to be a buying group during the conspiracy. In fact, Schein’s agreement with Dental Partners of Georgia specifically states that “Dental Partners of Georgia owns and/or manages dental offices under various names,” (RX2543 at 001), which would mean it could not be a buying group. (CCFF ¶¶ 72-76 (distinguishing buying groups and DSOs)). Schein’s Foley, who signed the agreement, regularly distinguished buying groups from MSOs and DSOs based on

common ownership and management during the same time frame and circulated contractual terms requiring ownership and/or management to prevent buying groups. (CX2066 at 001 (March 2012 email in which Foley identified “Terms not to be a buying group” as requiring ownership and/or management); CX2069 (January 30, 2013 email in which Foley sends “Rules to be DSO, not a Buying Group.”)). Moreover, even if Schein did consider Dental Partners of Georgia to be a buying group during the conspiracy period, Schein’s relationship with Dental Partners of Georgia began no later than 2009. (Foley, Tr. 4603-4604, 4619). Schein’s pre-existing, legacy buying group relationships do not disprove its participation in a conspiracy, during which it instructed its sales force to reject buying groups that approached it. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

685. These services were not offered by all of the buying groups Schein encountered and were part of Schein’s consideration in deciding to continue the relationship with Dental Partners of Georgia, as well as the group’s representation that it would promote Schein to its members to drive compliance. (Foley, Tr. 4614-16 (“Q. Did the services provided by Dental Partners of Georgia to their members play any role in your evaluation of whether to do business with the buying group? A. Yes... Well, a relationship is mutually rewarding if the buying group offers sticky – stickiness... also being able to drive compliance ... [and] you know, promote us.”); CX 2543-002).

Response to Proposed Finding No. 685

The Proposed Finding is misleading to the extent it implies that the services Dental Partners of Georgia offers its members mean that Schein considered it a buying group during the conspiracy period. The record shows that Schein did not consider Dental Partners of Georgia to be a buying group during the conspiracy. In fact, Schein’s agreement with Dental Partners of Georgia specifically states that “Dental Partners of Georgia owns and/or manages dental offices under various names,” (RX2543 at 001), which would mean it could not be a buying group. (CCFF ¶¶ 72-76 (distinguishing buying groups and DSOs)). Schein’s Foley, who signed the agreement, regularly distinguished buying groups from MSOs and DSOs based on

common ownership and management during the same time frame and circulated contractual terms requiring ownership and/or management to prevent buying groups. (CX2066 at 001 (March 2012 email in which Foley identified “Terms not to be a buying group” as requiring ownership and/or management); CX2069 (January 30, 2013 email in which Foley sends “Rules to be DSO, not a Buying Group.”)). Moreover, even if Schein did consider Dental Partners of Georgia to be a buying group during the conspiracy period, Schein’s relationship with Dental Partners of Georgia began no later than 2009. (Foley, Tr. 4603-4604, 4619). Schein’s pre-existing, legacy buying group relationships do not disprove its participation in a conspiracy, during which it instructed its sales force to reject buying groups that approached it. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

686. As Mr. Foley explained at trial, “If they could have their members purchase at least 80 percent from Henry Schein and not other vendors, we can then in turn provide these high discounts that we’re offering as well as ... a custom formulary.” (Foley, Tr. 4617; RX 2543 (committing members to purchase “at least 80% of [their] dental merchandise from” Schein)).

Response to Proposed Finding No. 686

The Proposed Finding is misleading to the extent it implies that the discounts Schein offered to Dental Partners of Georgia’s members are evidence that Schein considered it a buying group during the conspiracy period. The record shows that Schein did not consider Dental Partners of Georgia to be a buying group during the conspiracy. In fact, Schein’s agreement with Dental Partners of Georgia specifically states that “Dental Partners of Georgia owns and/or manages dental offices under various names,” (RX2543 at 001), which would mean it could not be a buying group. (CCFF ¶¶ 72-76 (distinguishing buying groups and DSOs)). Schein’s Foley, who signed the agreement, regularly distinguished buying groups from MSOs and DSOs based on common ownership and management during the same time frame and circulated contractual terms requiring ownership and/or management to prevent buying

groups. (CX2066 at 001 (March 2012 email in which Foley identified “Terms not to be a buying group” as requiring ownership and/or management); CX2069 (January 30, 2013 email in which Foley sends “Rules to be DSO, not a Buying Group.”)). Moreover, even if Schein did consider Dental Partners of Georgia to be a buying group during the conspiracy period, Schein’s relationship with Dental Partners of Georgia began no later than 2009. (Foley, Tr. 4603-4604, 4619). Schein’s pre-existing, legacy buying group relationships do not disprove its participation in a conspiracy, during which it instructed its sales force to reject buying groups that approached it. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

687. Schein provided discounts to members of the Dental Partners of Georgia buying group from 2009 until at least 2016. (Foley, Tr. 4619).

Response to Proposed Finding No. 687

The Proposed Finding is misleading to the extent it states that Dental Partners of Georgia is a buying group or implies that the discounts Schein offered to Dental Partners of Georgia’s members are evidence that Schein considered it a buying group during the conspiracy period. The record shows that Schein did not consider Dental Partners of Georgia to be a buying group during the conspiracy. In fact, Schein’s agreement with Dental Partners of Georgia specifically states that “Dental Partners of Georgia owns and/or manages dental offices under various names,” (RX2543 at 001), which would mean it could not be a buying group. (CCFF ¶¶ 72-76 (distinguishing buying groups and DSOs)). Schein’s Foley, who signed the agreement, regularly distinguished buying groups from MSOs and DSOs based on common ownership and management during the same time frame and circulated contractual terms requiring ownership and/or management to prevent buying groups. (CX2066 at 001 (March 2012 email in which Foley identified “Terms not to be a buying group” as requiring

ownership and/or management); CX2069 (January 30, 2013 email in which Foley sends “Rules to be DSO, not a Buying Group.”)). Moreover, even if Schein did consider Dental Partners of Georgia to be a buying group during the conspiracy period, Schein’s relationship with Dental Partners of Georgia began no later than 2009. (Foley, Tr. 4603-4604, 4619). Schein’s pre-existing, legacy buying group relationships do not disprove its participation in a conspiracy, during which it instructed its sales force to reject buying groups that approached it. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

688. As a group of independent dentists receiving discounts based on the group’s collective purchases, the Dental Partners of Georgia meets Complaint Counsel’s definition of buying group. (Complaint ¶ 3).

Response to Proposed Finding No. 688

The Proposed Finding is inaccurate because it mischaracterizes the definition of buying group set forth in the Complaint. The definition does not equate “group of independent dentists receiving a discount on dental supplies” to a buying group. The definition states that “Buying Groups are organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products.” (Complaint ¶ 3). In addition, the Proposed Finding is misleading and contrary to the weight of the evidence in its assertion that Dental Partners of Georgia is a buying group or that Schein considered it to be a buying group. The record shows that Schein did not consider Dental Partners of Georgia to be a buying group during the conspiracy. In fact, Schein’s agreement with Dental Partners of Georgia specifically states that “Dental Partners of Georgia owns and/or manages dental offices under various names,” (RX2543 at 001), which would mean it could not be a buying group. (CCFF ¶¶ 72-76 (distinguishing buying groups and DSOs)). Schein’s Foley, who signed the agreement, regularly distinguished buying groups from MSOs and DSOs based on

common ownership and management during the same time frame and circulated contractual terms requiring ownership and/or management to prevent buying groups. (CX2066 at 001 (March 2012 email in which Foley identified “Terms not to be a buying group” as requiring ownership and/or management); CX2069 (January 30, 2013 email in which Foley sends “Rules to be DSO, not a Buying Group.”)). Moreover, even if Schein did consider Dental Partners of Georgia to be a buying group during the conspiracy period, Schein’s relationship with Dental Partners of Georgia began no later than 2009. (Foley, Tr. 4603-4604, 4619). Schein’s pre-existing, legacy buying group relationships do not disprove its participation in a conspiracy, during which it instructed its sales force to reject buying groups that approached it. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

689. Schein’s partnership with Dental Partners of Georgia is inconsistent with the alleged conspiracy. (Complaint ¶ 1).

Response to Proposed Finding No. 689

The Proposed Finding is not supported by the cited evidence and should be disregarded, as the Complaint does not state that any conduct is inconsistent with a conspiracy. The Proposed Finding is also misleading to the extent it implies that Dental Partners of Georgia is a buying group or that Schein considered it a buying group during the conspiracy period. The record shows that Schein did not consider Dental Partners of Georgia to be a buying group during the conspiracy. In fact, Schein’s agreement with Dental Partners of Georgia specifically states that “Dental Partners of Georgia owns and/or manages dental offices under various names,” (RX2543 at 001), which would mean it could not be a buying group. (CCFF ¶¶ 72-76 (distinguishing buying groups and DSOs)). Schein’s Foley, who signed the agreement, regularly distinguished buying groups from MSOs and DSOs based on common ownership and management during the same time frame and circulated contractual terms

requiring ownership and/or management to prevent buying groups. (CX2066 at 001 (March 2012 email in which Foley identified “Terms not to be a buying group” as requiring ownership and/or management); CX2069 (January 30, 2013 email in which Foley sends “Rules to be DSO, not a Buying Group.”)). Moreover, even if Schein did consider Dental Partners of Georgia to be a buying group during the conspiracy period, Schein’s relationship with Dental Partners of Georgia began no later than 2009. (Foley, Tr. 4603-4604, 4619). Schein’s pre-existing, legacy buying group relationships do not disprove its participation in a conspiracy, during which it instructed its sales force to reject buying groups that approached it. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Moreover, the Proposed Finding is also inaccurate and misleading to the extent it asserts that Complaint Counsel asserts or must show that Schein necessarily must reject all existing buying groups relationships during the conspiracy period. Complaint Counsel’s position is that Schein had a policy not to do business with buying groups that approached it during the conspiracy period, and in fact, the record evidence is replete with such examples. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Thus, the Proposed Finding is misleading and inaccurate to the extent it mischaracterizes Complaint Counsel’s position to assert that Schein did not participate in the conspiracy because it did not reject a legacy buying group relationship.

O. Dentistry Unchained.

690. Complaint Counsel does not dispute that Dentistry Unchained is a buying group. (RX 2956-004).

Response to Proposed Finding No. 690

Complaint Counsel has no specific response.

691. Schein also considered Dentistry Unchained a buying group. (Titus, Tr. 5271-72 (“It’s a buying group.”)).

Response to Proposed Finding No. 691

Complaint Counsel has no specific response.

692. Dentistry Unchained first approached Schein in May 2015 about rolling out a buying group with various vendors, including one for dental supplies. (RX 2115-006; Titus, Tr. 5272).

Response to Proposed Finding No. 692

Complaint Counsel has no specific response. However, the Proposed Finding is irrelevant, as Schein's conduct regarding Dentistry Unchained occurred after the conspiracy became difficult to maintain and has no bearing on Schein's agreement not to do business with buying groups *during* the conspiracy period. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it asserts or implies that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy became difficult to maintain in April 2015, following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161).

693. Rudy Wolf, Schein's Regional Manager in Denver, reported that he asked what Dentistry Unchained was "doing to help [members] be more efficient, productive, and profitabl[e]," though he had "a feeling we will be giving additional discounts to customers already doing business with HSD...." (RX 2115-004).

Response to Proposed Finding No. 693

Complaint Counsel has no specific response. However, the Proposed Finding is irrelevant, as Schein's conduct regarding Dentistry Unchained occurred after the conspiracy became difficult to maintain and has no bearing on Schein's agreement not to do business with buying groups *during* the conspiracy period. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it asserts or implies that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy became difficult to maintain in April 2015, following Benco's settlement

with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161).

694. Still, Mr. Cavaretta's response was to try to "schedule a face to face" with Dentistry Unchained. (RX 2115-003).

Response to Proposed Finding No. 694

Complaint Counsel has no specific response. However, the Proposed Finding is irrelevant, as Schein's conduct regarding Dentistry Unchained occurred after the conspiracy became difficult to maintain and has no bearing on Schein's agreement not to do business with buying groups *during* the conspiracy period. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it asserts or implies that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy became difficult to maintain in April 2015, following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161).

695. Mr. Titus explained that "[t]he key is ... drawing up an agreement that is 100% exclusive." (RX 2115-002).

Response to Proposed Finding No. 695

Complaint Counsel has no specific response. However, the Proposed Finding is irrelevant, as Schein's conduct regarding Dentistry Unchained occurred after the conspiracy became difficult to maintain and has no bearing on Schein's agreement not to do business with buying groups *during* the conspiracy period. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it asserts or implies that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy became difficult to maintain in April 2015, following Benco's settlement

with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161).

696. Dentistry Unchained advised “that we need to see that Henry Schein is intentional about moving forward.” (RX 2115-006).

Response to Proposed Finding No. 696

Complaint Counsel has no specific response. However, the Proposed Finding is irrelevant, as Schein’s conduct regarding Dentistry Unchained occurred after the conspiracy became difficult to maintain and has no bearing on Schein’s agreement not to do business with buying groups *during* the conspiracy period. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it asserts or implies that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy became difficult to maintain in April 2015, following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161).

697. Schein sent Dentistry Unchained a non-binding letter of intent in July 2015, noting it “is pleased to present this non-binding letter of intent to discuss, evaluate and negotiate a potential business transaction” for an exclusive thirty-day negotiation period. (RX 2229-002).

Response to Proposed Finding No. 697

Complaint Counsel has no specific response. However, the Proposed Finding is irrelevant, as Schein’s conduct regarding Dentistry Unchained occurred after the conspiracy became difficult to maintain and has no bearing on Schein’s agreement not to do business with buying groups *during* the conspiracy period. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it asserts or implies that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy became difficult to maintain in April 2015, following Benco’s settlement

with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161).

698. In following conversations with Dentistry Unchained, Schein sought to determine, among other things, “how ... they compare to the endless sea of other ‘buying groups’,” and thought there might be a “fit” for Schein working with the group. (RX 2334-001-02).

Response to Proposed Finding No. 698

Complaint Counsel has no specific response. However, the Proposed Finding is irrelevant, as Schein’s conduct regarding Dentistry Unchained occurred after the conspiracy became difficult to maintain and has no bearing on Schein’s agreement not to do business with buying groups *during* the conspiracy period. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it asserts or implies that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy became difficult to maintain in April 2015, following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161).

699. By September 2015, negotiations were continuing and had progressed enough for Dentistry Unchained to provide Schein with a member list, data, and survey responses to compare to Schein’s own database. (RX 2597-002).

Response to Proposed Finding No. 699

Complaint Counsel has no specific response. However, the Proposed Finding is irrelevant, as Schein’s conduct regarding Dentistry Unchained occurred after the conspiracy became difficult to maintain and has no bearing on Schein’s agreement not to do business with buying groups *during* the conspiracy period. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it asserts or implies that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy became difficult to maintain in April 2015, following Benco’s settlement

with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161).

700. As Schein reviewed the member list, data, and survey responses, Dentistry Unchained wrote it was “very excited to officially be working with ... Henry Schein! ... We are looking forward to a partnership that helps to grow not only our respective businesses, but supports and strengthens the future of independent dental practice.” (RX 2597-001).

Response to Proposed Finding No. 700

Complaint Counsel has no specific response. However, the Proposed Finding is irrelevant, as Schein’s conduct regarding Dentistry Unchained occurred after the conspiracy became difficult to maintain and has no bearing on Schein’s agreement not to do business with buying groups *during* the conspiracy period. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it asserts or implies that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy became difficult to maintain in April 2015, following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161).

701. Schein’s preliminary audit of Dentistry Unchained’s membership data indicated “a lot of opportunity,” but the analysis would take time. (CX 2716-001).

Response to Proposed Finding No. 701

Complaint Counsel has no specific response. However, the Proposed Finding is irrelevant, as Schein’s conduct regarding Dentistry Unchained occurred after the conspiracy became difficult to maintain and has no bearing on Schein’s agreement not to do business with buying groups *during* the conspiracy period. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it asserts or implies that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy became difficult to maintain in April 2015, following Benco’s settlement with the

Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161).

702. While Schein continued to negotiate with Dentistry Unchained (with a focus on the proposed exclusivity term), unbeknownst to Schein, Patterson and Benco were also negotiating a possible partnership with the group. (CX 8037 (Ryan, Dep. at 313); CX 8004 (McFadden, Dep. at 150-51))

Response to Proposed Finding No. 702

Complaint Counsel has no specific response. However, the Proposed Finding is irrelevant, as Schein's conduct regarding Dentistry Unchained occurred after the conspiracy became difficult to maintain and has no bearing on Schein's agreement not to do business with buying groups *during* the conspiracy period. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it asserts or implies that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy became difficult to maintain in April 2015, following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161).

703. Schein continued to negotiate with the group through February 2016, and even went so far as to do a "beta test" to understand whether the partnership would result in more business for Schein if it was the group's "primary dental partner." (RX 3090-001; Cavaretta, Tr. 5611-12).

Response to Proposed Finding No. 703

Complaint Counsel has no specific response. However, the Proposed Finding is irrelevant, as Schein's conduct regarding Dentistry Unchained occurred after the conspiracy became difficult to maintain and has no bearing on Schein's agreement not to do business with buying groups *during* the conspiracy period. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it asserts or implies that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group

after the conspiracy became difficult to maintain in April 2015, following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161).

704. In April 2016, Dentistry Unchained sent to Schein a mockup of the new Dentistry Unchained website, which listed Patterson products and caused Mr. Cavaretta to reevaluate the prospects of a partnership: “I don’t think we are close to launching any longer and I’m actually closer to walking now.” (RX 2457-001).

Response to Proposed Finding No. 704

Complaint Counsel has no specific response. However, the Proposed Finding is irrelevant, as Schein’s conduct regarding Dentistry Unchained occurred after the conspiracy became difficult to maintain and has no bearing on Schein’s agreement not to do business with buying groups *during* the conspiracy period. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it asserts or implies that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy became difficult to maintain in April 2015, following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161).

705. Ms. Titus explained that “As we were learning more about Dentistry Unchained and our negotiations moved along, exclusivity and compliance were a very big part of what the discussions were.... Unfortunately, towards the end of the negotiations, we made a discovery that was extremely disturbing and we felt was a breach of trust. Dentistry Unchained launched a website in which they were featuring, prominently featuring, our competitor” (Titus, Tr. 5272-73; *see also* Cavaretta, Tr. 5611-12).

Response to Proposed Finding No. 705

Complaint Counsel has no specific response. However, the Proposed Finding is irrelevant, as Schein’s conduct regarding Dentistry Unchained occurred after the conspiracy became difficult to maintain and has no bearing on Schein’s agreement not to do business with buying groups *during* the conspiracy period. The Proposed Finding is also misleading and

contrary to the weight of the evidence to the extent it asserts or implies that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy became difficult to maintain in April 2015, following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161).

706. After Dentistry Unchained refused to remove the competitive information from its website, Schein discontinued the negotiations. (Titus, Tr. 5273).

Response to Proposed Finding No. 706

Complaint Counsel has no specific response. However, the Proposed Finding is irrelevant, as Schein's conduct regarding Dentistry Unchained occurred after the conspiracy became difficult to maintain and has no bearing on Schein's agreement not to do business with buying groups *during* the conspiracy period. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it asserts or implies that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy became difficult to maintain in April 2015, following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161).

707. After Schein declined to continue with Dentistry Unchained, Dentistry Unchained informed Schein that they were seeking to sell their business. (CX 2717-001).

Response to Proposed Finding No. 707

Complaint Counsel has no specific response. However, the Proposed Finding is irrelevant, as Schein's conduct regarding Dentistry Unchained occurred after the conspiracy became difficult to maintain and has no bearing on Schein's agreement not to do business with buying groups *during* the conspiracy period. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it asserts or implies that Schein did not

participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy became difficult to maintain in April 2015, following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161).

708. Mr. Cavaretta forwarded Dentistry Unchained's note to Mr. Sullivan and Mr. Steck, reminding them that it was an "opportunity[y] we vetted out for a full year and decided not to work with them.... Looks like we made the right choice. This is just to help you guys understand we do take our time with all of these opportunities." (CX 2717-001).

Response to Proposed Finding No. 708

The Proposed Finding is vague as to the phrase "vetted out for a full year," as it does not specify the relevant time period. However, the record evidence shows that Dentistry Unchained did not approach Schein until after the conspiracy period. As such, the Proposed Finding is irrelevant, as Schein's conduct regarding Dentistry Unchained occurred after the conspiracy became difficult to maintain and has no bearing on Schein's agreement not to do business with buying groups *during* the conspiracy period. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it asserts or implies that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy became difficult to maintain in April 2015, following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161).

709. Schein's year-long efforts with respect to Dentistry Unchained, including its "several visits to their location" is inconsistent with the alleged agreement not to do business with buying groups at all. (Complaint ¶ 1; *see also* Cavaretta, Tr. 5611-12).

Response to Proposed Finding No. 709

The Proposed Finding is vague, irrelevant, and inaccurate. Complaint Counsel does not allege that the agreement was "not to do business with buying groups at all." Rather,

Complaint Counsel alleges and the record evidence shows that Schein had a policy not to work with buying groups during the conspiracy period but that it competed for buying groups when the conspiracy became difficult to maintain. (CCFF ¶¶ 654-661, 1159-1166). In addition, the Proposed Finding is vague as to the phrase “year-long efforts,” as it does not specify the relevant time period. The record evidence shows that Dentistry Unchained did not approach Schein until after the conspiracy period. As such, the Proposed Finding is irrelevant, as Schein’s conduct regarding Dentistry Unchained occurred after the conspiracy became difficult to maintain and has no bearing on Schein’s agreement not to do business with buying groups *during* the conspiracy period. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it asserts or implies that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy became difficult to maintain in April 2015, following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161).

710. Schein’s decision not to pursue a partnership with Dentistry Unchained was made after the alleged conspiracy and is thus inconsistent with Complaint Counsel’s contention that after “April of 2015 ... respondents started dealing with buying groups.” (Kahn, Tr. 19; *see also* Kahn, Tr. 54).

Response to Proposed Finding No. 710

The Proposed Finding mischaracterizes Complaint Counsel’s statements, and it is misleading, inaccurate, and contrary to the weight of the evidence. Complaint Counsel, during its opening statement, stated that the “conspiracy was effectively difficult, if not impossible to maintain [after April of 2015]. And so past that point . . . respondents started dealing with buying groups after that point.” (Kahn, Tr. 10, *see also* Kahn, Tr. 54).

Complaint Counsel did not and does not state that after April 2015, any respondent entered

into every agreement with each and every buying group that approached it. As such, the Proposed Finding is misleading in asserting that Schein’s “decision not to pursue a partnership with Dentistry Unchained” is somehow inconsistent with Complaint Counsel’s statements or position. In fact, Schein’s evaluation of Dentistry Unchained starting in May 2015 is consistent with Complaint Counsel’s statement that Schein began “dealing with buying groups” after April 2015 after it turned down buying groups without such evaluation during the conspiracy period. (*Compare* Complaint Counsel’s Post-Trial Brief, at Attachment C (buying groups turned down by Schein) *with* SF 692-709 (post-conspiracy evaluation of Dentistry Unchained)). Furthermore, the Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence in its assertion that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy became difficult to maintain in April 2015, following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161).

711. Rather, Schein’s approach to Dentistry Unchained is consistent with its approach before and after the alleged conspiracy: careful consideration and evaluation of the opportunity with a focus on compliance and exclusivity. (Titus, Tr. 5199-203, 5274; Meadows, Tr. 2495, 2506, 2544; Sullivan, Tr. 4088, 4098-99; Cavaretta, Tr. 5574-76; Foley, Tr. 4638-39, 4614-15).

Response to Proposed Finding No. 711

The Proposed Finding misleading and contrary to the weight of the record evidence. The record evidence shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications

with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

712. Schein's decision regarding Dentistry Unchained was unilateral. There are no interfirm communications regarding Dentistry Unchained. (Ryan, Tr. 1257; Titus, Tr. 5195).

Response to Proposed Finding No. 712

Complaint Counsel has no specific response. However, to the extent the Proposed Finding implies that Schein did not participate in a conspiracy because there are no inter-firm communication regarding a group that approached it *after* the conspiracy became difficult to maintain, that is misleading and irrelevant. Complaint Counsel has identified, and the record evidence is replete with, examples of inter-firm communications between Cohen and Sullivan between 2011 and 2015 that establish Benco orchestrated an agreement with Schein. (CCFF ¶¶ 327-354; *see also* CCFF ¶¶ 284-326). Moreover, the record evidence establishes that Benco's Cohen informed Sullivan of Benco's position with regard to bidding on buying groups and reached an understanding that Schein would not align itself with buying groups. (CCFF ¶¶ 661-684). Schein, in turn, ensured compliance by instructing its sales force to reject buying groups. (CCFF ¶¶ 686-954). Benco confronted Schein when it suspected Schein was discounting to buying groups, and Schein and Benco communicated when they were uncertain whether a customer qualified as a buying group. (CCFF ¶¶ 955-1100). The record evidence also shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein's internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195).

713. Complaint Counsel cites to CX 0012, a May 2015 internal Benco email in which Pat Ryan writes to Chuck Cohen regarding Dentistry Unchained, "I already KNOW that Patterson and Schein have said NO" as evidence reflecting an agreement among Schein, Patterson, and Benco. (CC Pretrial Br. at 25-27; CX 0012-001).

Response to Proposed Finding No. 713

Complaint Counsel has no specific response.

714. The evidence shows, however, that Mr. Ryan was mistaken. Schein continued negotiations with Dentistry Unchained into 2016, and Dentistry Unchained was featuring Patterson products on its website in 2016. (RX 2457-001; RX 2334-001-002; RX 2115-006; Titus, Tr. 5272-73).

Response to Proposed Finding No. 714

The first sentence of the Proposed Finding is misleading, as Ryan's statement in CX0012, evidence Ryan's understanding of a collective refusal. Whether or not Ryan was mistaken is irrelevant to his state of mind. The second sentence of the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein negotiated with Dentistry Unchained during the conspiracy period. The record evidence, and Schein's own findings, show that all communications and conduct concerning Dentistry Unchained occurred after the conspiracy period and Schein's "year-long efforts" or decision not to pursue Dentistry Unchained are not relevant, as it has no bearing on the agreement not to do business with buying groups *during* the conspiracy period. (*See* SF 692-708, 709). In addition, the statement that "Dentistry Unchained was featuring Patterson products on its website in 2016" is irrelevant, as it is long after the conspiracy and contrary to Patterson's own admissions. Patterson's sworn statement is that it did not have any buying group agreements prior to April 2018. (CX3366 at 004 (Patterson's Response to Complaint Counsel's First Interrogatories ¶1 ("Patterson is not currently aware of any agreements for the purchase or sale of dental products between itself and entities falling under the FTC's definition of "Buying Group" [for the period 2009 to April 16, 2018])))).

715. At trial, Mr. Ryan conceded that he never spoke with anyone at Schein or Patterson about Dentistry Unchained. (Ryan, Tr. 1209).

Response to Proposed Finding No. 715

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Ryan’s denial disproves Schein’s participation in a conspiracy. In fact, the record evidence shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). In addition, the record evidence shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein’s internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195).

716. Mr. Ryan’s email was just speculation “from my experience [that] we usually got approached after, after Schein and Patterson.” (Ryan, Tr. 1209-10). Mr. Ryan was not aware of Schein’s negotiations with Dentistry Unchained, had no idea whether his May 2015 email to Mr. Cohen was true, and was just speculating. (Ryan, Tr. 1254-55).

Response to Proposed Finding No. 716

The Proposed Finding is misleading and contrary to the weight of the record evidence. Ryan’s statement in CX0012, evidences Ryan’s understanding of the Big Three’s collective refusal to discount to buying groups. The record evidence also contradicts Ryan’s testimony that Benco gets approached after Schein and Patterson. Kois, for example, had discussions with Schein and Benco nearly simultaneously. (CCFF ¶ 421; *Compare* CX1240 at 001 (Kois reached out to Benco on October 21, 2014) *with* CX4310 at 010-011 (Kois and Schein communications reflecting discussions on October 23, 2014 and later)). Likewise, Smile Source approached Benco when it was already working with Schein. (CCFF ¶¶ 532, 669

(CX1116: “We currently use Henry Schein for our services, but, want to see what sort of relationship could be established with Benco.”)). In addition, Ryan’s testimony that he had “no idea” whether Schein or Patterson said no to Dentistry Unchained is incomplete and misleading in that the evidence shows that Ryan was aware of some of the underlying conduct supporting the conspiracy. (CCFF ¶ 958 (forwarding email reflecting that Schein worked with buying group Unified Smiles and writing, “For Timmy conversation.”); ¶ 982 (forwarding email suggesting Schein worked with buying group Smile Source and writing, “Better tell your buddy Tim to knock this shit off.”); ¶ 527 (“[A]ll the major dental companies [referring to Benco, Schein, and Patterson] have said, ‘NO’, and that’s the stance we will continue to take.”), ¶ 1103 (“CHUCK—maybe what you should do is make sure you tell Tim [Sullivan of Schein] and Paul [Guggenheim of Patterson] to hold their positions [on buying groups] as we are.”)).

P. Dentists for a Better Huntington.

717. Complaint Counsel concedes Dentists for a Better Huntington is a buying group. (RX 2956-004).

Response to Proposed Finding No. 717

Complaint Counsel has no specific response to the statement that Dentists for a Better Huntington is a buying group.

718. Schein also considers and treats Dentists for a Better Huntington as a buying group. (CX 8020 (Brady, Dep. at 258-59)).

Response to Proposed Finding No. 718

Complaint Counsel has no specific response.

719. Schein has worked with the Dentists for a Better Huntington buying group since at least 2009. (CX 2724-021 (2009 agreement); *see also* CX 6602-003 (“This Agreement terminates that certain Partnership Support Program document, dated 2009.”)).

Response to Proposed Finding No. 719

Complaint Counsel has no specific response.

720. Schein provided both discounts and rebates to the Dentists for a Better Huntington buying group. (CX 2724-021). Schein's 2009 Partnership Support Program for "the Dentists for Better Huntington group" provided "aggregate rebates that will be donated quarterly to the group," and a "10% discount on ALL orders." (CX 2724-021).

Response to Proposed Finding No. 720

Complaint Counsel has no specific response.

721. On November 4, 2011, Chuck Cohen and Pat Ryan became aware that Schein was working with the Dentists for a Better Huntington buying group. (CX 1047-002 (Dentists for a Better Huntington has "an arrangement with Schein to rebate 10% quarterly on merchandise purchases."); Ryan, Tr. 1246). Unlike Schein, Benco declined to work with Dentists for a Better Huntington because it was a "buying club" that "aggregates the combined volume of unaffiliated practices to leverage pricing." (CX 1047-001).

Response to Proposed Finding No. 721

Complaint Counsel has no specific response.

722. Despite being aware that Schein was working with Dentists for a Better Huntington, neither Chuck Cohen or Pat Ryan contacted anyone at Schein regarding Dentists for a Better Huntington. (Ryan, Tr. 1246; Cohen, Tr. 914).

Response to Proposed Finding No. 722

Complaint Counsel has no specific response. However, the Proposed Finding misleading and contrary to the weight of the record evidence to the extent it asserts Schein or Benco did not participate in a conspiracy because Benco's Cohen or Ryan denied talking to anyone at Schein. Complaint Counsel has identified, and the record evidence is replete with, examples of inter-firm communications between Cohen and Sullivan between 2011 and 2015 that establish Benco orchestrated an agreement with Schein. (CCFF ¶¶ 327-354; *see also* CCFF ¶¶ 284-326). Moreover, the record evidence establishes that Benco's Cohen informed Sullivan of Benco's position with regard to bidding on buying groups and reached an understanding that Schein would not align itself with buying groups. (CCFF ¶¶ 661-684).

Schein, in turn, ensured compliance by instructing its sales force to reject buying groups. (CCFF ¶¶ 686-954). Benco confronted Schein when it suspected Schein was discounting to buying groups, and Schein and Benco communicated when they were uncertain whether a customer qualified as a buying group. (CCFF ¶¶ 955-1100). The record evidence also shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein's internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195).

723. Schein executed a new Prime Vendor Agreement with Dentists for a Better Huntington on January 1, 2017. (CX 6602-003).

Response to Proposed Finding No. 723

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it entered into or executed a new agreement with a buying group after the conspiracy became difficult to maintain following Benco's April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161).

724. Schein's 2017 agreement with Dentists for a Better Huntington provides members with a certain discount on all orders. (CX 6602-003).

Response to Proposed Finding No. 724

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it entered into or executed a new agreement with a buying group after the conspiracy became difficult to maintain following Benco's April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161).

725. Schein's relationship with and sales to Dentists for a Better Huntington from at least 2009 to the present are inconsistent with the alleged conspiracy. (Complaint ¶ 1).

Response to Proposed Finding No. 725

The Proposed Finding is not supported by the cited evidence and should be disregarded, as the Complaint does not state that any conduct is inconsistent with a conspiracy. Regardless, Schein's pre-existing, legacy buying group relationships have no bearing on Schein's conduct during the conspiracy, where it instructed its sales force to reject buying groups that approached it. (CCFF ¶¶ 661-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). The Proposed Finding is also inaccurate and misleading to the extent it asserts that Complaint Counsel's "alleged conspiracy" is one where Schein necessarily must reject all existing buying groups relationships during the conspiracy period. Complaint Counsel's position is that Schein had a policy not to do business with buying groups that approached it during the conspiracy period, and in fact, the record evidence is replete with such examples. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). Thus, the Proposed Finding is misleading and inaccurate to the extent it mischaracterizes Complaint Counsel's position to assert that Schein did not participate in the conspiracy because it did not reject a legacy buying group relationship.

Q. Direct Dental Sales.

726. Direct Dental Sales was a GPO start-up that formed around January 2016. Dr. Jim Corcoran established the group and claimed to have access to a network of 98,000 dentists. (RX 0553-001).

Response to Proposed Finding No. 726

Complaint Counsel has no specific response.

727. The Direct Dental Sales model was unique, and the Schein sales team asked Nancy Lanis, Henry Schein's Chief Compliance Counsel, for guidance. (CX 2166-010).

Response to Proposed Finding No. 727

The portion of the Proposed Finding, “The Direct Dental Sales model was unique,” is not supported by the cited evidence. Complaint Counsel has no specific response to the remainder of the Proposed Finding.

728. Schein engaged in discussions with Dr. Corcoran for several months (March-June 2016). (CX 2166-001, -010).

Response to Proposed Finding No. 728

Complaint Counsel has no specific response.

729. Jake Meadows made the final decision to not do business with Direct Dental Sales. (CX 8016 (Meadows, Dep. at 63)).

Response to Proposed Finding No. 729

Complaint Counsel has no specific response.

730. Mr. Meadows said there were two primary reasons for his decision. (CX 8016 (Meadows, Dep. at 64-65)). One was, from a marketing perspective, their name, Direct Dental Sales, is attractive in the dental market space, but counter to Schein’s business model. (CX 8016 (Meadows, Dep. at 64-65)). The second was that Direct Dental Sales planned to start dispatching a sales team to Boston and target the entire dental market, which would in effect compete with Schein and possibly create customer conflicts. (CX 8016 (Meadows, Dep. at 65)).

Response to Proposed Finding No. 730

Complaint Counsel has no specific response.

731. Schein’s careful evaluation of and decision not to do business with Direct Dental Sales after the alleged conspiracy ended supports Schein’s position that it continued to evaluate buying groups case-by-case based on each group’s value proposition and ability to drive compliance, as it had done before and during the alleged conspiracy (Titus, Tr. 5199-202, 5274; Meadows, Tr. 2495, 2506, 2544; Sullivan, Tr. 4088, 4098-99; Cavaretta, Tr. 5574-76; Foley, Tr. 4638-39, 4614-15).

Response to Proposed Finding No. 731

The Proposed Finding is irrelevant, misleading, inaccurate, and contrary to the weight of the evidence to the extent it implies that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group after the conspiracy period. In addition,

the inclusion of the term “continued” is misleading and contrary to the weight of the evidence to the extent the Proposed Finding asserts that Schein’s conduct was consistent before, during, and after the conspiracy. The record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to turning down buying groups during the conspiracy pursuant to a policy not to work with buying groups, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015, when Benco’s settlement with the Texas Attorney General required it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). The Proposed Finding is also inaccurate, misleading, and contrary to the weight of the evidence in its assertion Schein “evaluates buying groups case-by-case based on each group’s value proposition and ability to drive compliance, as it had done [] during the alleged conspiracy.” The record evidence is replete with evidence of Schein turning down buying groups regardless of their characteristics during the conspiracy period. (Complaint Counsel’s Post-Trial Brief, at Attachment C).

R. Intermountain Dental Associates.

732. Intermountain Dental Associates (“IDA”) describes itself as “an association of independent dental practitioners established in 2006.” (RX 2844).

Response to Proposed Finding No. 732

Per the Parties’ Joint Stipulations and Admissibility of Exhibits submitted on December 19, 2018, “Third party websites will be admitted into evidence for any non-hearsay purpose.” RX2844, a third party website, is admitted into evidence but cannot be used for any non-hearsay purpose. Complaint Counsel does not object to the assertion that the statement appears on RX2844. However, the Proposed Finding is improper to the extent it asserts that

the statement is true or to the extent it uses the hearsay statement to assert or imply that IDA is a buying group. The record evidence shows that Schein considered IDA to be a DSO with centralized purchasing. (CCFF ¶ 751). Schein executives stated that they would not work with IDA if it were a buying group/GPO. On January 26, 2012, Cavaretta wrote to Melanie Bingham and Hight regarding IDA: “It is dangerously close but I told him we would not do business with a GPO.” (CCFF ¶ 750). On January 26, 2012, Cavaretta then wrote: “The difference here is that they will force any customer to purchase from Schein which is more along the lines of a corp account.” (CCFF ¶ 751). By “corp account,” Cavaretta meant corporate practice or a DSO. (CCFF ¶ 751).

733. IDA’s website notes that IDA owns or is affiliated with 17 general practices and 2 specialty practices. (RX 2845).

Response to Proposed Finding No. 733

Per the Parties’ Joint Stipulations and Admissibility of Exhibits submitted on December 19, 2018, “Third party websites will be admitted into evidence for any non-hearsay purpose.” RX2845, a third party website, is admitted into evidence but cannot be used for any non-hearsay purpose. Complaint Counsel does not object to the assertion that the statement appears on RX2845. However, the Proposed Finding is improper to the extent it asserts that the statement is true or to the extent it uses the hearsay statement to assert or imply that IDA is a buying group. The record evidence shows that Schein considered IDA to be a DSO with centralized purchasing. (CCFF ¶ 751). Schein executives stated that they would not work with IDA if it were a buying group/GPO. On January 26, 2012, Cavaretta wrote to Melanie Bingham and Hight regarding IDA: “It is dangerously close but I told him we would not do business with a GPO.” (CCFF ¶ 750). On January 26, 2012, Cavaretta then wrote: “The difference here is that they will force any customer to purchase from Schein which is more

along the lines of a corp account.” (CCFF ¶ 751). By “corp account,” Cavaretta meant corporate practice or a DSO. (CCFF ¶ 751).

734. IDA markets member offerings of various business, consulting, and management services to its members. (RX 2844; RX 2845).

Response to Proposed Finding No. 734

Per the Parties’ Joint Stipulations and Admissibility of Exhibits submitted on December 19,

2018, “Third party websites will be admitted into evidence for any non-hearsay purpose.”

RX2844 and RX2845, third party websites, are admitted into evidence but cannot be used for any non-hearsay purpose. Complaint Counsel does not object to the assertion that the website appears to list the terms, “business services, consulting, and management,” on RX2844.

However, the Proposed Finding is improper to the extent it asserts that the statement is true or to the extent it uses the hearsay statement to assert or imply that IDA is a buying group.

The record evidence shows that Schein considered IDA to be a DSO with centralized purchasing. (CCFF ¶ 751). Schein executives stated that they would not work with IDA if it were a buying group/GPO. On January 26, 2012, Cavaretta wrote to Melanie Bingham and Hight regarding IDA: “It is dangerously close but I told him we would not do business with a GPO.” (CCFF ¶ 750). On January 26, 2012, Cavaretta then wrote: “The difference here is that they will force any customer to purchase from Schein which is more along the lines of a corp account.” (CCFF ¶ 751). By “corp account,” Cavaretta meant corporate practice or a DSO. (CCFF ¶ 751).

735. IDA describes its “business services” as providing “access to all supplies and/or services at [...] discounted negotiated rates” from specific suppliers, including Schein. (RX 2846-001).

Response to Proposed Finding No. 735

Per the Parties' Joint Stipulations and Admissibility of Exhibits submitted on December 19, 2018, "Third party websites will be admitted into evidence for any non-hearsay purpose." RX2846, a third party website, is admitted into evidence but cannot be used for any non-hearsay purpose. Complaint Counsel does not object to the assertion that the statement appears on RX2846. However, the Proposed Finding is improper to the extent it asserts that the statement is true or to the extent it uses the hearsay statement to assert or imply that IDA is a buying group. The record evidence shows that Schein considered IDA to be a DSO with centralized purchasing. (CCFF ¶ 751). Schein executives stated that they would not work with IDA if it were a buying group/GPO. On January 26, 2012, Cavaretta wrote to Melanie Bingham and Hight regarding IDA: "It is dangerously close but I told him we would not do business with a GPO." (CCFF ¶ 750). On January 26, 2012, Cavaretta then wrote: "The difference here is that they will force any customer to purchase from Schein which is more along the lines of a corp account." (CCFF ¶ 751). By "corp account," Cavaretta meant corporate practice or a DSO. (CCFF ¶ 751).

736. IDA has a DSO arm and a buying group arm of independent dentists in which IDA "DOES NOT have any ownership." (CX 2153-002-03).

Response to Proposed Finding No. 736

Complaint Counsel has no specific response.

737. Schein Special Markets formed a relationship with the DSO arm of IDA (its owned offices) in as early as 2009. (Foley, Tr. 4642; CX 0306 (Foley, IHT at 100)).

Response to Proposed Finding No. 737

Complaint Counsel has no specific response.

738. Special Markets subsequently formalized its relationship with the DSO arm of the IDA by entering into a dental supply agreement. (RX 2320).

Response to Proposed Finding No. 738

Complaint Counsel has no specific response.

739. IDA then reached out to Schein in 2010 to create a buying group comprised of non-owned “affiliate” offices, and inquired about the possibility of Schein offering discounts to the IDA buying group. (Foley, Tr. 4642-43; CX 2153-003).

Response to Proposed Finding No. 739

Complaint Counsel has no specific response to the attribution of the statement to Foley.

However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein viewed IDA to be a buying group or that it worked with an IDA buying group arm. The record evidence shows that Schein considered IDA to be a DSO with centralized purchasing. (CCFF ¶ 751). Schein executives stated that they would not work with IDA if it were a buying group/GPO. On January 26, 2012, Cavaretta wrote to Melanie Bingham and Hight regarding IDA: “It is dangerously close but I told him we would not do business with a GPO.” (CCFF ¶ 750). On January 26, 2012, Cavaretta then wrote: “The difference here is that they will force any customer to purchase from Schein which is more along the lines of a corp account.” (CCFF ¶ 751). By “corp account,” Cavaretta meant corporate practice or a DSO. (CCFF ¶ 751).

740. Expressly referencing the 2010 Guidance, Mr. Foley instructed his team to investigate whether IDA would have “complete control” over their members’ purchasing decisions. (CX 2153; Foley, Tr. 4642-45).

Response to Proposed Finding No. 740

Complaint Counsel has no specific response to the attribution of the statement to CX2153.

The Proposed Finding is vague as to the reference to “IDA,” as it does not specify whether it refers to the DSO arm or buying group arm of IDA. Regardless, the record evidence shows that Schein considered IDA to be a DSO with centralized purchasing and that any buying group arm of IDA was rejected in January 2012. (CCFF ¶¶ 750-753). Schein executives

stated that they would not work with IDA if it were a buying group/GPO. On January 26, 2012, Cavaretta wrote to Melanie Bingham and Hight regarding IDA: “It is dangerously close but I told him we would not do business with a GPO.” (CCFF ¶ 750). On January 26, 2012, Cavaretta then wrote: “The difference here is that they will force any customer to purchase from Schein which is more along the lines of a corp account.” (CCFF ¶ 751). By “corp account,” Cavaretta meant corporate practice or a DSO. (CCFF ¶ 751).

In addition, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that the rejection of the IDA buying group arm was pursuant to the 2010 Guidance (defined in SF 210 as “if a buying group ‘could drive compliance, then ... they could be a good opportunity for Schein’”), rather than pursuant to Schein’s compliance with the overarching agreement. The record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322).

741. Mr. Foley testified that this evaluation was consistent with the 2010 Guidance, that if a buying group could drive compliance then it “would be a good fit for Schein.” (Foley, Tr. 4646).

Response to Proposed Finding No. 741

Complaint Counsel has no specific response to the attribution of the statement to Foley. The Proposed Finding is vague as to the phrase “this evaluation,” as it does not specify whether it refers to the DSO arm or buying group arm of IDA. Regardless, the record evidence shows that Schein considered IDA to be a DSO and that any buying group arm of IDA was rejected

in January 2012. (CCFF ¶¶ 750-753). Schein executives stated that they would not work with IDA if it were a buying group/GPO. On January 26, 2012, Cavaretta wrote to Melanie Bingham and Hight regarding IDA: “It is dangerously close but I told him we would not do business with a GPO.” (CCFF ¶ 750). On January 26, 2012, Cavaretta then wrote: “The difference here is that they will force any customer to purchase from Schein which is more along the lines of a corp account.” (CCFF ¶ 751). By “corp account,” Cavaretta meant corporate practice or a DSO. (CCFF ¶ 751).

In addition, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that the rejection of the IDA buying group arm was pursuant to the 2010 Guidance, rather than pursuant to Schein’s compliance with the overarching agreement. The record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). Prior to the conspiracy period, by September 2010, Sullivan explained that any risks posed by buying groups were outweighed by the opportunity to increase overall gross profit for Schein. (CCFF ¶¶ 432-438).

742. After confirming that the IDA buying group could drive compliance, Mr. Foley approved offering discounts to IDA’s buying group. (Foley, Tr. 4646).

Response to Proposed Finding No. 742

The Proposed Finding is inaccurate and contrary to the weight of the record evidence. The record evidence shows that IDA’s buying group arm was rejected in January 2012. Schein

executives stated that they would not work with IDA if it were a buying group/GPO. On January 26, 2012, Cavaretta wrote to Melanie Bingham and Hight regarding IDA: “It is dangerously close but I told him we would not do business with a GPO.” (CCFF ¶ 750). On January 26, 2012, Cavaretta then wrote: “The difference here is that they will force any customer to purchase from Schein which is more along the lines of a corp account.” (CCFF ¶ 751). By “corp account,” Cavaretta meant corporate practice or a DSO. (CCFF ¶ 751).

743. As Mr. Cavaretta explained in January 2012 (after the start of the alleged conspiracy), while “[i]t is dangerously close ... [to] a GPO[,]” the “difference here is that they will force any customer to purchase from Schein....” (CX 0168-001). On that basis, Schein continued to do business with IDA.

Response to Proposed Finding No. 743

The second sentence of the Proposed Finding is vague as to the reference to “IDA,” as it does not specify whether it refers to IDA’s DSO arm or buying group arm. The Proposed Finding is inaccurate and contrary to the weight of the record evidence in conflating the two or asserting that Schein did business with IDA’s buying group arm. In fact, the record evidence shows that IDA’s buying group arm was rejected in January 2012. Schein executives stated that they would not work with IDA if it were a buying group/GPO. On January 26, 2012, Cavaretta wrote to Melanie Bingham and Hight regarding IDA: “It is dangerously close but I told him we would not do business with a GPO.” (CCFF ¶ 750). On January 26, 2012, Cavaretta then wrote: “The difference here is that they will force any customer to purchase from Schein which is more along the lines of a corp account.” (CCFF ¶ 751). By “corp account,” Cavaretta meant corporate practice or a DSO. (CCFF ¶ 751).

744. The pricing Special Markets extended to the IDA buying group was the same pricing it provided to the DSO, which included a custom formulary for IDA members, as well as discounts of up to 20% off non-formulary items. (Foley, Tr. 4646; RX 2320).

Response to Proposed Finding No. 744

The Proposed Finding is inaccurate and contrary to the weight of the record evidence. The record evidence shows that IDA's buying group arm was rejected in January 2012. Schein executives stated that they would not work with IDA if it were a buying group/GPO. On January 26, 2012, Cavaretta wrote to Melanie Bingham and Hight regarding IDA: "It is dangerously close but I told him we would not do business with a GPO." (CCFF ¶ 750). On January 26, 2012, Cavaretta then wrote: "The difference here is that they will force any customer to purchase from Schein which is more along the lines of a corp account." (CCFF ¶ 751). By "corp account," Cavaretta meant corporate practice or a DSO. (CCFF ¶ 751). In addition, the cited evidence does not support the assertion and is internally inconsistent. Schein itself asserted that RX2320 is the contract with IDA's DSO arm. (SF 738). It is not a contract between Schein and any buying group component of IDA.

745. Special Markets continued to offer these discounts to the IDA buying group through at least December 2016. (Foley, Tr. 4646-47).

Response to Proposed Finding No. 745

The Proposed Finding is inaccurate and contrary to the weight of the record evidence. The record evidence shows that Schein considered IDA to be a DSO with centralized purchasing and also rejected any buying group component of IDA in January 2012. (CCFF ¶ 750). Schein executives stated that they would not work with IDA if it were a buying group/GPO. On January 26, 2012, Cavaretta wrote to Melanie Bingham and Hight regarding IDA: "It is dangerously close but I told him we would not do business with a GPO." (CCFF ¶ 750). On January 26, 2012, Cavaretta then wrote: "The difference here is that they will force any customer to purchase from Schein which is more along the lines of a corp account." (CCFF ¶ 751). By "corp account," Cavaretta meant corporate practice or a DSO. (CCFF ¶ 751).

746. IDA has no ownership interest in its “affiliate” offices, which are comprised of independent dental practitioners. (RX 2844; Foley, Tr. 4642; Cavaretta, Tr. 5652; CX 0306 (Foley, IHT at 222-23)).

Response to Proposed Finding No. 746

The Proposed Finding is vague as to “IDA,” as it does not specify whether it refers to IDA’s DSO or buying group arm. Moreover, RX2844 cannot be cited to support the assertion. Per the Parties’ Joint Stipulations and Admissibility of Exhibits submitted on December 19, 2018, “Third party websites will be admitted into evidence for any non-hearsay purpose.” To the extent the Proposed Finding asserts or implies that Schein did business with IDA’s buying group arm, that is inaccurate, misleading, and contrary to the weight of the record evidence. The record evidence shows that Schein considered IDA to be a DSO with centralized purchasing. (CCFF ¶ 751). The record evidence also shows that Schein rejected IDA’s buying group arm in January 2012. On January 26, 2012, Cavaretta wrote to Melanie Bingham and Hight regarding IDA: “It is dangerously close but I told him we would not do business with a GPO.” (CCFF ¶¶ 750 (quoting CX0168 at 001); *see also* CCFF ¶¶ 751-753).

747. As a group of independent dentists receiving discounts based on the group’s collective purchases, IDA’s buying group arm meets Complaint Counsel’s definition of a buying group. (Complaint ¶ 3).

Response to Proposed Finding No. 747

The Proposed Finding is inaccurate because it mischaracterizes the definition of buying group set forth in the Complaint. The definition does not equate “group of independent dentists receiving discounts based on the group’s collective purchases” to a buying group. The definition states that “Buying Groups are organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products.”

(Complaint ¶ 3). Moreover, it is misleading because Schein considered IDA to be a DSO with centralized purchasing. (CCFF ¶ 751).

748. Schein’s relationship with the IDA buying group is inconsistent with the alleged conspiracy. (Complaint ¶ 1).

Response to Proposed Finding No. 748

The Proposed Finding is not supported by a citation to the Complaint. Moreover, it is misleading and inaccurate. The record evidence shows that Schein considered IDA to be a DSO with centralized purchasing, and that it rejected IDA’s buying group arm in January 2012. On January 26, 2012, Cavaretta wrote to Melanie Bingham and Hight regarding IDA: “It is dangerously close but I told him we would not do business with a GPO.” (CCFF ¶¶ 750 (quoting CX0168 at 001); *see also* CCFF ¶¶ 751-753). The rejection of IDA’s buying group arm is just one example of a buying group that Schein rejected during the conspiracy pursuant to its policy not to do business with buying groups. (Complaint Counsel’s Post-Trial Brief, at Attachment C).

S. Florida Dental Association.

749. Complaint Counsel admits that the Florida Dental Association (“FDA”) is a buying group. (RX 2956-004).

Response to Proposed Finding No. 749

Complaint Counsel has no specific response.

750. Complaint Counsel contends that Schein refused “to provide discounts to or otherwise compete for the business of [the Florida Dental Association]” as the result of the alleged agreement with Benco and Patterson. (RX 2956-005-06). The evidence, however, indicates that Schein did compete for the business of FDA’s buying group and offered it discounts, but that the FDA chose a different supplier instead. (CX 0310 (Steck, IHT at 133-34); RX 2466-001).

Response to Proposed Finding No. 750

Complaint Counsel has no specific response to the first sentence of the Proposed Finding.

The second sentence of the Proposed Finding is misleading to the extent it asserts or implies that Schein competed for the business of FDA, as the cited evidence shows the Schein extended an “offer,” described as an effort to “pull together some special speaking arrangements or seminars for [FDA]” and offering a pre-existing plan with pricing already available to other individual dentists to individual FDA members that was not an “offer” to or contract for FDA as a buying group. (CX0310 (Steck, IHT at 134)). The second sentence of the Proposed Finding is also contrary to the weight of the evidence. The record evidence shows that Schein turned down the FDA. (CCFF ¶ 747 (quoting CX0201 at 001 (“Have had two internal calls and one external call on partnering with the Florida Dental Association. This is the classic ‘buying group’ approach that we aren’t buying into.”)), 748-749).

751. In June 2012, the FDA approached Schein about partnering with its buying group. (CX 0201-001; RX 2466-001; CX 0310 (Steck, IHT at 131)).

Response to Proposed Finding No. 751

The Proposed Finding is inaccurate as to the date “June 2012.” The cited evidence indicates FDA approached Schein in late 2011. (CX0201 at 001; *see also* CCFF ¶ 747).

752. Schein was interested, and had several discussions with the FDA about their new program. (CX 0201-001; CX 0310 (Steck, IHT at 133 (“[W]e were interested or we wouldn’t have been talking to them.”))).

Response to Proposed Finding No. 752

Complaint Counsel has no specific response to the attribution of the statement to Steck.

However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies that Schein was interested but that FDA turned Schein down. The record evidence shows that Schein turned FDA down. (CCFF ¶ 747 (quoting CX0201 at

001 (“Have had two internal calls and one external call on partnering with the Florida Dental Association. This is the classic ‘buying group’ approach that we aren’t buying into.”)), 748-749).

753. While Schein was interested, it had concerns about the FDA’s inability “to commit volume for their members or give [Schein] any kind of minimum purchase levels,” and was skeptical that FDA members working with other distributors would switch to Schein. (CX 0310 (Steck, IHT at 133); CX 8031 (Steck, Dep. at 57-58 (“we didn’t believe that they would automatically buy more for [*sic*] us just because we made some kind of agreement with them.”))).

Response to Proposed Finding No. 753

Complaint Counsel has no specific response to the attribution of the statement to Steck.

However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies that Schein was interested but that FDA turned Schein down.

The record evidence shows that Schein turned FDA down. (CCFF ¶ 747 (quoting CX0201 at 001 (“Have had two internal calls and one external call on partnering with the Florida Dental Association. This is the classic ‘buying group’ approach that we aren’t buying into.”)), 748-749).

754. Despite these concerns, Schein prepared a “value-added” offer that included seminars for members and increased discounts to members who made purchase commitments. (CX 0310 (Steck, IHT at 133-34 (“we offered that if a customer signed up on a plan we would normally offer a \$25,000 customer that they could get that same plan with a \$15,000 commitment. So we gave them a reduced commitment to get the pricing, but it still required a commitment.”))).

Response to Proposed Finding No. 754

The Proposed Finding is vague, misleading, and contrary to the weight of the evidence. The

Proposed Finding is vague as to “offer,” which is not defined here or in the cited testimony.

The Proposed Finding is also misleading to the extent it asserts or implies that Schein bid on or pursued the business of FDA, as the cited evidence shows the Schein extended an “offer” described as an effort to “pull together some special speaking arrangements or seminars for

[FDA]” and offering pre-existing plan with pricing already available to other individual dentists to individual FDA members. (CX0310 (Steck, IHT at 134)). This was not an “offer” to or contract for FDA as a buying group. (CX0310 (Steck, IHT at 134)). The Proposed Finding is also contrary to the weight of the evidence, which shows that Schein turned down the FDA. (CCFF ¶ 747 (quoting CX0201 at 001 (“Have had two internal calls and one external call on partnering with the Florida Dental Association. This is the classic ‘buying group’ approach that we aren’t buying into.”))), 748-749).

755. However, the FDA declined Schein’s offer and decided to work with Darby as their “supplier partner” instead. (RX 2466-001; CX 0310 (Steck, IHT at 134)).

Response to Proposed Finding No. 755

The Proposed Finding is vague, misleading, and contrary to the weight of the evidence. The record evidence shows that Schein turned FDA down. (CCFF ¶ 747 (quoting CX0201 at 001 (“Have had two internal calls and one external call on partnering with the Florida Dental Association. This is the classic ‘buying group’ approach that we aren’t buying into.”))), 748-749)755. In addition, it is also misleading to the extent it asserts or implies that FDA declined Schein’s bid on its business, as Schein did not bid on FDA. (CX0310 (Steck, IHT at 134)).

756. Schein’s efforts and offer to work with the FDA demonstrate Schein’s willingness to engage with new buying groups, and is inconsistent with Complaint Counsel’s alleged conspiracy. (Complaint ¶ 1).

Response to Proposed Finding No. 756

The Proposed Finding is vague, misleading, and contrary to the weight of the evidence. The record evidence shows that Schein did not make an offer to FDA and that Schein rejected FDA. (CCFF ¶ 747 (quoting CX0201 at 001 (“Have had two internal calls and one external call on partnering with the Florida Dental Association. This is the classic ‘buying group’ approach that we aren’t buying into.”))), 748-749; CX0310 (Steck, IHT at 134)). In addition,

the Proposed Finding is vague and misleading as to the phrase “willingness to engage” to the extent it asserts or implies that Schein bid on or pursued the business of FDA, as the cited evidence shows the Schein offered to “pull together some special speaking arrangements or seminars for [FDA]” for individual FDA members, rather than an offer to FDA as a buying group. (CX0310 (Steck, IHT at 134)). As such, the Proposed Finding is inaccurate and misleading in its assertion that Schein’s conduct regarding FDA was “inconsistent” with a conspiracy. In fact, Schein’s rejection of FDA is yet another example of a buying group it rejected during the conspiracy period. (CCFF ¶¶ 661-954; Complaint Counsel’s Post-Trial Brief, at Attachment C).

T. Floss Dental.

757. Floss Dental is a DSO based in Dallas, Texas that entered into a contract with Schein sometime before January 29, 2015. (Puckett, Tr. 2205; CX 2372-001 (“I already did something with Floss Dental”)).

Response to Proposed Finding No. 757

The Proposed Finding mischaracterizes the cited evidence, and it is misleading. The statement in CX2372, “did something with Floss Dental,” does not state that Schein entered into a contract with Floss Dental at any time. Notably, the only Schein witness who even mentioned Floss Dental in her testimony was not specifically asked whether or when Schein entered into a contract with Floss Dental and did not testify that Schein entered into a contract with Floss Dental. (*See* Titus, Tr. 5212). Thus, Schein cannot provide any witness testimony, or other evidence, supporting the Proposed Finding. Complaint Counsel has no specific response to the statement that Floss Dental is a DSO based in Dallas.

758. In February 2015, Schein discovered that Floss Dental had an “‘affiliation program’ which is their version of [the] Dental Gator [buying group].” (CX 2084).

Response to Proposed Finding No. 758

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it asserts or implies that Floss Dental had a buying group component that Schein entered into an agreement with, as there is no record evidence of any discounting arrangement between Schein and Floss Dental. (*See* Response to Proposed Finding No. 757).

759. That Floss Dental had a Dental Gator-like program was likely due to the fact that Mr. Puckett, “[t]he main guy at Gator/MB2 used to be with Floss.” (CX 2084; Puckett, Tr. 2205 (“I was there I would say roughly 18 months ... [as the] VP of finance and general counsel.”)).

Response to Proposed Finding No. 759

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Floss Dental had a buying group component that Schein entered into an agreement with, as there is no record evidence of any discounting arrangement between Schein and Floss Dental. (*See* Response to Proposed Finding No. 757).

760. Therefore, as of February 2015, “Floss Dental was a small group of fully owned offices, but also they had members that were individual or independent practices that were part of their group. That part of their group was a buying group.” (Titus, Tr. 5212).

Response to Proposed Finding No. 760

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Floss Dental had a buying group component that Schein entered into an agreement with, there is no record evidence of any discounting arrangement between Schein and Floss Dental. (*See* Response to Proposed Finding No. 757).

761. In May 2014 Schein was still trying to address how to respond to Floss Dental’s decision to “mimic MB2” in a manner that “can develop our policy.” (RX 2105; CX 2084).

Response to Proposed Finding No. 761

The Proposed Finding is misleading because it mischaracterizes the cited evidence. RX2105 does not state or show that the policy document mentioned is related to Floss Dental. The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Floss Dental had a buying group component that Schein entered into an agreement with, as there is no record evidence of any discounting arrangement between Schein and Floss Dental. (*See* Response to Proposed Finding No. 757). Moreover, the Proposed Finding cites a 2014 email describing Floss Dental's plans to potentially establish an MSO model, not a buying group. (RX2105 at 001 (referring to Floss Dental wanting to establish an "MSO model"))).

762. By that point in 2014, Ms. Titus and Mr. Cavaretta had been working on a document that could be used to "evaluate more efficiently and create more parity on those relationships with buying groups that made ... good business sense for us." (Titus, Tr. 5213; RX 2105).

Response to Proposed Finding No. 762

Complaint Counsel has no specific response.

763. That guidance helped Schein develop a program with Floss Dental that allowed its buying group members to "have reduced Schein pricing on the G plan," contingent on those practices purchasing 80% of their supplies from Schein. (RX 2105; CX 2084-001).

Response to Proposed Finding No. 763

The Proposed Finding is not supported by the cited evidence and is misleading. Neither RX2105 nor CX2084 state or show that there was any "guidance" or that such "guidance helped Schein develop a program with Floss Dental." As explained above in Response to Proposed Finding No. 757, Schein has put forth no evidence of a contract between Schein and Floss Dental, and the Proposed Finding is misleading to the extent it attempts to use the term "program" to imply otherwise. Moreover, the Proposed Finding cites a 2014 email

describing Floss Dental's plans to potentially establish an MSO model, not a buying group.

(RX2105 at 001 (referring to Floss Dental wanting to establish an "MSO model").

764. Soon after, an "upset" Dental Gator complained to Schein that the "BG of Floss Dental" had been given a more favorable agreement than they had received. (CX 2088-001).

Response to Proposed Finding No. 764

Complaint Counsel has no specific response to the statement in CX2088. However, as explained above in Response to Proposed Finding No. 757, Schein has put forth no evidence of a contract between Schein and Floss Dental, and the Proposed Finding is misleading to the extent it attempts to imply otherwise.

U. Integrity Dental Buyers Group / Georgia Dental Association.

765. Complaint Counsel alleges that "as result of an agreement with Respondents," Schein decided "not to provide discounts to or otherwise compete for" the business of Integrity Dental Buyers Group ("IDBG"). (RX 3087-004).

Response to Proposed Finding No. 765

Complaint Counsel has no specific response.

766. The idea for IDBG was first conceived in 2015, and it was officially launched in December 2016. (CX 8011 (Capaldo, Dep. at 12-13), CX 0320 (Capaldo, IHT at 34)).

Response to Proposed Finding No. 766

Complaint Counsel has no specific response.

767. Between Schein, Patterson, and Benco, only Schein met with IDGB and evaluated IDGB's program. (CX 0320 (Capaldo IHT at 78-80, 94 ("Q. And then did you ever speak with anyone at Patterson regarding that R.F.P.? A. There was -- their rep approached me at the annual meeting in I want to say 2015.... He called me sometime later ... And then I got a call saying that they had changed their mind."), 29 ("Benco ...They didn't try to negotiate. They did not involve themselves at all."))).

Response to Proposed Finding No. 767

Complaint Counsel has no specific response.

768. Schein became aware of the IDGB's program in July 2015, three months after the Complaint Counsel asserts the alleged conspiracy ended. (RX 2143-001, -003; Kahn, Tr. 19; *see*

also Kahn, Tr. 54 (“for all intents and purposes, the conspiracy was impossible to maintain much long past that point” after April 2015)).

Response to Proposed Finding No. 768

The Proposed Finding is inaccurate and misstates the record evidence as to the phrase “alleged conspiracy ended,” as Complaint Counsel has stated that the conspiracy was “impossible to maintain” after April 2015, not that the conspiracy ended on a specific date. Nonetheless, Schein’s conduct regarding IDBG is irrelevant to its conduct during the conspiracy period, as it occurred after the conspiracy became difficult to maintain.

769. Upon learning that IDGB was planning to issue an Request for Proposal (RFP) to distributors, Mr. Jake Meadows, Schein’s Eastern Area Director at the time, emailed Jim Breslawski, the President of Henry Schein Inc., and Tim Sullivan, the President of Henry Schein Dental, that he had no knowledge of IDGB sending an RFP to Schein and the he would “dig in here and reach out and introduce myself to Frank [Capaldo, IDBG’s Executive Director].” (RX 2143-001).

Response to Proposed Finding No. 769

Complaint Counsel has no specific response.

770. No one instructed Mr. Meadows not to compete for IDGB’s business. (RX 2143-001). Rather, Mr. Breslawski replied, “Thanks Jake” and inquired into what sort of discounts IDGB was seeking: “[d]o we know how they define 35% discount? What is the benchmark? 35% off what?” (RX 2143-001).

Response to Proposed Finding No. 770

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy period.

771. Mr. Capaldo, testified that the first person from Schein he spoke to was Michael Porro, Schein’s Zone Manager for the Atlantic Coast, and that Mr. Porro “reached out to him.” (CX 0320 (Capaldo, IHT. at 77-79)).

Response to Proposed Finding No. 771

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy period.

772. Mr. Porro followed his call with an in-person visit to Mr. Capaldo to discuss IDBG. (CX 0320 (Capaldo, IHT. at 80-81)).

Response to Proposed Finding No. 772

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy period.

773. Mr. Capaldo testified that Mr. Porro conveyed that Schein “wanted to work with” IDBG. (CX 0320 (Capaldo, IHT. at 81-82)).

Response to Proposed Finding No. 773

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy period.

774. In September 2015, Schein received a draft of IDGB’s “summary of the key terms and conditions ... of a proposed relationship.” (RX 2433-001, -003).

Response to Proposed Finding No. 774

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy period.

775. Schein noticed several issues with the proposal, such as how IDBG intends to “maintain no less than 300 Purchasing Members,” and concerns about IDGB’s demand restrictions on which dentists Schein could call on in Georgia. (RX 2433-004).

Response to Proposed Finding No. 775

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy period.

776. Unlike other buying groups that Schein was in discussions with at the time, such as CDA/TDSC and Smile Source, IDBG's model was not a "comprehensive program" and contained "[n]o incentives other than the discounts" that Schein would offer. (RX 2150-001; CX 8011 (Capaldo, Dep. at 31)).

Response to Proposed Finding No. 776

The Proposed Finding is vague as to the phrase "at the time," as it not further defined or described. As such, the assertion about discussions with CDA/TDSC and Smile Source are misleading to the extent the Proposed Finding implies that Schein engaged in discussions or contracted with either during the conspiracy period; it did not. (*See* Responses to Proposed Finding Nos. 468-486 (CDA/TDSC) and 1105-118 (Smile Source)). The Proposed Finding is also misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy period.

777. In January 2016, Schein and IDGB discussed the issues with IDGB's model on a conference call, but further negotiations stalled. (CX 0320 (Capaldo, IHT at 82-84); CX 8016 (Meadows, Dep. at 260-62); CX 2037-003).

Response to Proposed Finding No. 777

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy period.

778. In February 2016, Schein informed Mr. Capaldo that it was "not prepared to move into a formal binding partnership," but that they "welcome future updates and discussion down the road...." (CX 2397-001).

Response to Proposed Finding No. 778

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy period.

779. In August 2016, with the creation of Schein's Alternate Purchasing Channel, Ms. Darci Wingard, who was responsible for "prospecting and managing BGs" at the time, contacted Mr. Capaldo for an "exploratory call." (CX 0299-004; *see also* Titus, Tr. 5274-75).

Response to Proposed Finding No. 779

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it contacted Capaldo or because it did not enter into an agreement with a buying group *after* the conspiracy period.

780. Ms. Wingard, after several calls with Mr. Capaldo, continued to have concerns about IDBG because they appeared "very unorganized," "they were going to be working with multiple manufacturer partners or distribution partners," which "completely ... muddies the message of driving any type of compliance through members." (CX 0320 (Capaldo, ITH at 89); CX 8009 (Wingard, Dep. at 222-23)).

Response to Proposed Finding No. 780

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it contacted Frank Capaldo or because it did not enter into an agreement with a buying group *after* the conspiracy period.

781. Ultimately, Ms. Wingard came to the same conclusion that Schein reached earlier in the year, and did not pursue a relationship with IDBG because "after our discussions I did not feel that this was a partnership that made great business sense to me." (CX 8009 (Wingard, Dep. at 224)).

Response to Proposed Finding No. 781

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy period.

782. Schein's efforts with respect to IDBG, including in-person meetings, phone calls, evaluation of the terms of a proposed partnership, and following up with IDGB to see if it fit within Schein's APC offering are inconsistent with the alleged agreement not to do business with or compete for buying groups at all. (Complaint ¶ 1; *see also* RX 2433-001-02, CX 0320 (Capaldo, ITH at 80-82, 89), CX 8009 (Wingard, Dep. at 222-23); CX 0299-004).

Response to Proposed Finding No. 782

The Proposed Finding is irrelevant and misleading, as Schein's conduct after the conspiracy became difficult to maintain does not disprove its participation in a conspiracy. Moreover, Complaint Counsel does not allege that Schein did not compete for buying groups "at all." In fact, the record shows that Schein began competing for buying groups after the conspiracy became difficult to maintain. (CCFF ¶¶ 1159-1166). As such, the Proposed Finding is also inaccurate that its conduct regarding IDBG is "inconsistent with the alleged agreement."

783. Schein's decision not to pursue a partnership with IDBG was made after the alleged conspiracy, and is thus inconsistent with Complaint Counsel's contention that after "April of 2015 ... respondents started dealing with buying groups." (Kahn, Tr. 19, 54).

Response to Proposed Finding No. 783

The Proposed Finding is inaccurate and misleading. Complaint Counsel did not and does not state that after April 2015, Schein must have entered into every agreement with each and every buying group that approached it. As such, the Proposed Finding is misleading in asserting that Schein's "decision not to pursue a partnership with IDBG" is somehow inconsistent with Complaint Counsel's statements or position. In fact, Schein's conduct regarding IDBG is consistent with Complaint Counsel's statement that Schein began "dealing with buying groups" after April 2015 after it turned down buying groups without

such evaluation during the conspiracy period. (*Compare* Complaint Counsel’s Post-Trial Brief, at Attachment C (buying groups turned down by Schein) *with* CCFF ¶¶ 1159-1166 (Big Three begin competing for buying groups). Furthermore, the Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence in its assertion that Schein did not participate in the conspiracy because it did not enter into an agreement with a buying group *after* the conspiracy became difficult to maintain in April 2015, following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161)

784. Rather, Schein’s approach to IDBG is consistent with its approach to buying groups before and after the alleged conspiracy: careful consideration and evaluation of the opportunity with a focus on compliance, exclusivity, and value. (CX 8009 (Wingard, Dep. at 222-23), Titus, Tr. 5199-02, 5274; Meadows, Tr. 2495, 2506, 2544; Sullivan, Tr. 4088, 4098-99; Cavaretta, Tr. 5574-76; Foley, Tr. 4638-39, 4614-15).

Response to Proposed Finding No. 784

The Proposed Finding is misleading and contrary to the weight of the record evidence. In fact, the record evidence shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

785. Schein’s decision regarding IDBG was unilateral. There are no interfirm communications regarding IDBG.

Response to Proposed Finding No. 785

The Proposed Finding does not cite to any record evidence and should be disregarded. Nonetheless, an assertion that there are no inter-firm communications after Benco’s

settlement with the Texas Attorney General requiring it to log all communications with Schein and its competitors is not only irrelevant but does not otherwise disprove Schein's participation in a conspiracy. Indeed, Complaint Counsel has identified, and the record evidence is replete with, examples of inter-firm communications between Cohen and Sullivan between 2011 and 2015 that establish Benco orchestrated an agreement with Schein. (CCFF ¶¶ 327-354; *see also* CCFF ¶¶ 284-326).

V. Khyber Pass.

786. Schein's Brian Brady testified about entering a relationship with a buying group called Khyber Pass sometime between 2009 and 2012, while he was a regional manager in California. (CX 8020 (Brady, Dep. at 68-71, 84, 86)).

Response to Proposed Finding No. 786

The Proposed Finding is inaccurate and is not supported by the cited evidence. The cited Brady testimony does not clearly establish that Khyber Pass was a buying group or that Schein considered Khyber Pass to be a buying group. (CX8020 (Brady, Dep. at 69 ("I don't remember whether he referred to it as a buying group.")). The Proposed Finding is vague and misleading as to the term "relationship" and phrase "sometime between 2009 and 2012," to the extent they assert or imply that Schein had a contractual relationship with Khyber Pass during the relevant time period. (CX8020 (Brady, Dep. at 70 ("I didn't have any formal contracts or anything in place at my disposal, and I didn't even have the chance to speak to upper management about it . . . it wasn't a formal written contract . . . It was that sort of very informal type thing . . we were engaged in just an informal, non-contract sense.))). The Proposed Finding is misleading to the extent it implies Schein had a formal contractual relationship with Khyber Pass or that Khyber Pass was a buying group. Even if Khyber Pass were considered to be a buying group, Schein has stated that the relationship began as early as 2009 or 2010. (CX8020 (Brady, Dep at 80); RX3086 at 013 (Schein's Third Supplemental

Response to IROG ¶1)). As such, the Proposed Finding is misleading to the extent it implies Schein contracted with buying groups during the conspiracy period and disproves its participation in a conspiracy, as Schein's conduct regarding an entity that is not a buying group or is a pre-existing, legacy relationship does not disprove its participation in a conspiracy.

787. The relationship began when a dentist invited Mr. Brady and a group of other dentists to dinner at an Afghan restaurant in San Diego called Khyber Pass. (CX 8020 (Brady, Dep. at 68-71)).

Response to Proposed Finding No. 787

The Proposed Finding is vague and misleading as to the term "relationship" to the extent it asserts or implies that Schein had a contractual relationship with Khyber Pass. (CX8020 (Brady, Dep. at 70 ("I didn't have any formal contracts or anything in place at my disposal, and I didn't even have the chance to speak to upper management about it . . . it wasn't a formal written contract . . . It was that sort of very informal type thing . . we were engaged in just an informal, non-contract sense.))). Schein did not put forth any evidence that Khyber Pass is a buying group as set forth in the Response to Proposed Finding No 786. Even if Khyber Pass were considered to be a buying group, Schein has stated that the relationship began as early as 2009 or 2010. (CX8020 (Brady, Dep at 80); RX3086 at 013 (Schein's Second Supplemental Response to IROG ¶1)). As such, the Proposed Finding is misleading to the extent it implies Schein contracted with buying groups during the conspiracy period and disproves its participation in a conspiracy, as Schein's conduct regarding an entity that is not a buying group or is a pre-existing, legacy relationship does not disprove its participation in a conspiracy.

788. As Mr. Brady described it, at this dinner, "the doctor started chiming his glass, quieted everyone down, and he says, we are forming a buying group." (CX 8020 (Brady, Dep. at 69)).

Response to Proposed Finding No. 788

The Proposed Finding is inaccurate and is not supported by the cited testimony because it is incomplete. The cited Brady testimony goes on to state: “I don’t remember whether he referred to it as a buying group.” (CX8020 (Brady, Dep. at 69)). The cited Brady testimony does not establish that Khyber Pass was a buying group, and the Proposed Finding is also misleading to the extent it implies Khyber Pass was a buying group. Even if Khyber Pass were considered to be a buying group, Schein has stated that the relationship began as early as 2009 or 2010. (CX8020 (Brady, Dep at 80); RX3086 at 013 (Schein’s Second Supplemental Response to IROG ¶1)). As such, the Proposed Finding is misleading to the extent it implies Schein contracted with buying groups during the conspiracy period and disproves its participation in a conspiracy, as Schein’s conduct regarding an entity that is not a buying group or is a pre-existing, legacy relationship does not disprove its participation in a conspiracy.

789. The dentists then asked Mr. Brady for “30 percent off supplies.” (CX 8020 (Brady, Dep. at 69-70, 84-85)).

Response to Proposed Finding No. 789

The Proposed Finding is misleading to the extent it implies Schein had a contractual relationship with Khyber Pass or that Khyber Pass was a buying group, as set forth above in Responses to Proposed Finding Nos. 786-788. Even if Khyber Pass were considered to be a buying group, Schein has stated that the relationship began as early as 2009 or 2010. (CX8020 (Brady, Dep at 80); RX3086 at 013 (Schein’s Second Supplemental Response to IROG ¶1)). As such, the Proposed Finding is misleading to the extent it implies Schein contracted with buying groups during the conspiracy period and disproves its participation in a conspiracy, as Schein’s conduct regarding an entity that is not a buying group or is a pre-

existing, legacy relationship does not disprove its participation in a conspiracy. The Proposed Finding is also improper to the extent it seeks to assert that a hearsay statement is true.

790. Mr. Brady asked if the group would “do anything else aside from trying to leverage better pricing,” and the group members mentioned “study clubs” and education. (CX 8020 (Brady, Dep. at 69-70)).

Response to Proposed Finding No. 790

Complaint Counsel has no specific response to the attribution of the statement to Brady. The Proposed Finding is misleading to the extent it implies Schein had a contractual relationship with Khyber Pass or that Khyber Pass was a buying group as set forth above in Responses to Proposed Finding Nos. 786-788. Even if Khyber Pass were considered to be a buying group, Schein has stated that the relationship began as early as 2009 or 2010. (CX8020 (Brady, Dep at 80); RX3086 at 013 (Schein’s Second Supplemental Response to IROG ¶1)). As such, the Proposed Finding is misleading to the extent it implies Schein contracted with buying groups during the conspiracy period and disproves its participation in a conspiracy, as Schein’s conduct regarding an entity that is not a buying group or is a pre-existing, legacy relationship does not disprove its participation in a conspiracy.

791. Mr. Brady asked if they would “commit all of [their] business,” and the group said yes. (CX 8020 (Brady, Dep. at 69-70)).

Response to Proposed Finding No. 791

Complaint Counsel has no specific response to the attribution of the statement to Brady. The Proposed Finding is misleading to the extent it implies Schein had a contractual relationship with Khyber Pass or that Khyber Pass was a buying group as set forth above in Responses to Proposed Finding Nos. 786-788. Even if Khyber Pass were considered to be a buying group, Schein has stated that the relationship began as early as 2009 or 2010. (CX8020 (Brady, Dep at 80); RX3086 at 013 (Schein’s Second Supplemental Response to IROG ¶1)). As such, the

Proposed Finding is misleading to the extent it implies Schein contracted with buying groups during the conspiracy period and disproves its participation in a conspiracy, as Schein's conduct regarding an entity that is not a buying group or is a pre-existing, legacy relationship does not disprove its participation in a conspiracy.

792. Mr. Brady told the group he would work with them, but 30% was "too high." (CX 8020 (Brady, Dep. at 70-71)).

Response to Proposed Finding No. 792

Complaint Counsel has no specific response to the attribution of the statement to Brady. The Proposed Finding is misleading to the extent it implies Schein had a contractual relationship with Khyber Pass or that Khyber Pass was a buying group as set forth above in Responses to Proposed Finding Nos. 786-788. Even if Khyber Pass were considered to be a buying group, Schein has stated that the relationship began as early as 2009 or 2010. (CX8020 (Brady, Dep at 80); RX3086 at 013 (Schein's Second Supplemental Response to IROG ¶1)). As such, the Proposed Finding is misleading to the extent it implies Schein contracted with buying groups during the conspiracy period and disproves its participation in a conspiracy, as Schein's conduct regarding an entity that is not a buying group or is a pre-existing, legacy relationship does not disprove its participation in a conspiracy.

793. Mr. Brady then entered into a verbal agreement with the group and authorized a 15-18% discount off of catalog price for the group's member dentists. (CX 8020 (Brady, Dep. at 71-72, 84-85)).

Response to Proposed Finding No. 793

The Proposed Finding is misleading to the extent it implies Schein had a contractual relationship with Khyber Pass or that Khyber Pass was a buying group as set forth above in Responses to Proposed Finding Nos. 786-788. Even if Khyber Pass were considered to be a buying group, Schein has stated that the relationship began as early as 2009 or 2010.

(CX8020 (Brady, Dep at 80); RX3086 at 013 (Schein's Second Supplemental Response to IROG ¶1)). As such, the Proposed Finding is misleading to the extent it implies Schein contracted with buying groups during the conspiracy period and disproves its participation in a conspiracy, as Schein's conduct regarding an entity that is not a buying group or is a pre-existing, legacy relationship does not disprove its participation in a conspiracy.

794. The group decided to call themselves Khyber Pass, after the restaurant where Mr. Brady first met with the group. (CX 8020 (Brady, Dep. at 71)).

Response to Proposed Finding No. 794

Complaint Counsel has no specific response to the statement. However, the Proposed Finding is misleading to the extent it implies Schein had a contractual relationship with Khyber Pass or that Khyber Pass was a buying group as set forth above in Responses to Proposed Finding Nos. 786-788. Even if Khyber Pass were considered to be a buying group, Schein has stated that the relationship began as early as 2009 or 2010. (CX8020 (Brady, Dep at 80); RX3086 at 013 (Schein's Second Supplemental Response to IROG ¶1)). As such, the Proposed Finding is misleading to the extent it implies Schein contracted with buying groups during the conspiracy period and disproves its participation in a conspiracy, as Schein's conduct regarding an entity that is not a buying group or is a pre-existing, legacy relationship does not disprove its participation in a conspiracy.

795. Mr. Brady informed his boss at the time, Joe Cavaretta, about Schein's relationship with Khyber Pass and Mr. Cavaretta did not have any issues with the relationship. (CX 8020 (Brady, Dep. at 71, 81)).

Response to Proposed Finding No. 795

Complaint Counsel has no specific response to the attribution of the statement to Brady. However, the Proposed Finding is misleading to the extent it implies Schein had a contractual relationship with Khyber Pass or that Khyber Pass was a buying group as set

forth above in Responses to Proposed Finding Nos. 786-788. Even if Khyber Pass were considered to be a buying group, Schein has stated that the relationship began as early as 2009 or 2010. (CX8020 (Brady, Dep at 80); RX3086 at 013 (Schein's Second Supplemental Response to IROG ¶1)). As such, the Proposed Finding is misleading to the extent it implies Schein contracted with buying groups during the conspiracy period and disproves its participation in a conspiracy, as Schein's conduct regarding an entity that is not a buying group or is a pre-existing, legacy relationship does not disprove its participation in a conspiracy. Furthermore, there is no evidence that Sullivan was aware of Khyber Pass.

796. Mr. Brady monitored compliance with the agreement by tracking what the members spent "every quarter" and on occasion following up with the members about their purchasing commitment. (CX 8020 (Brady, Dep. at 71)).

Response to Proposed Finding No. 796

The Proposed Finding is vague, inaccurate, and misleading as to the term "agreement." As set forth above in Responses to Proposed Finding Nos. 786-788, there is no evidence that Schein had a contractual relationship with Khyber Pass or that Khyber Pass was a buying group. Even if Khyber Pass were considered to be a buying group, Schein has stated that the relationship began as early as 2009 or 2010. (CX8020 (Brady, Dep at 80); RX3086 at 013 (Schein's Second Supplemental Response to IROG ¶1)). As such, the Proposed Finding is misleading to the extent it implies Schein contracted with buying groups during the conspiracy period and disproves its participation in a conspiracy, as Schein's conduct regarding an entity that is not a buying group or is a pre-existing, legacy relationship does not disprove its participation in a conspiracy. Furthermore, there is no evidence that Sullivan was aware of Khyber Pass.

797. All the Khyber Pass members "had separate accounts, so they had separate field sales consultants, and [each FSC was] responsible for the individual accounts." (CX 8020 (Brady, Dep. at 84)).

Response to Proposed Finding No. 797

Complaint Counsel has no specific response to the attribution of the statement to Brady.

However, the Proposed Finding is misleading to the extent it implies Schein had a contractual relationship with Khyber Pass or that Khyber Pass was a buying group as set forth above in Responses to Proposed Finding Nos. 786-788. Even if Khyber Pass were considered to be a buying group, Schein has stated that the relationship began as early as 2009 or 2010. (CX8020 (Brady, Dep at 80); (RX3086 at 013 (Schein's Second Supplemental Response to IROG ¶1)). As such, the Proposed Finding is misleading to the extent it implies Schein contracted with buying groups during the conspiracy period and disproves its participation in a conspiracy, as Schein's conduct regarding an entity that is not a buying group or is a pre-existing, legacy relationship does not disprove its participation in a conspiracy. Furthermore, there is no evidence that Sullivan was aware of Khyber Pass.

798. Khyber Pass leveraged the collective buying power of its member dentists to negotiate a discount, which Schein offered. (CX 8020 (Brady, Dep. at 68-71)).

Response to Proposed Finding No. 798

The Proposed Finding is vague as to "member dentists," as the cited evidence does not establish that the member dentists were separately-owned and separately-managed dental practices, which is relevant to the definition of buying group. The cited evidence does not support the assertion that "Khyber Pass leveraged the collective buying power of its members." It is also misleading to the extent it implies Khyber Pass is a buying group because Schein has put forth no evidence that it is. (*See* Responses to Proposed Findings Nos. 786-797). Even if Khyber Pass were considered to be a buying group, Schein has stated that the relationship began as early as 2009 or 2010. (CX8020 (Brady, Dep at 80); RX3086 at 013 (Schein's Second Supplemental Response to IROG ¶1)). As such, the Proposed Finding

is misleading to the extent it implies Schein contracted with buying groups during the conspiracy period and disproves its participation in a conspiracy, as Schein's conduct regarding an entity that is not a buying group or is a pre-existing, legacy relationship does not disprove its participation in a conspiracy. Furthermore, there is no evidence that Sullivan was aware of Khyber Pass.

799. Therefore, Khyber Pass meets Complaint Counsel's definition of a buying group. (Complaint ¶ 3).

Response to Proposed Finding No. 799

The Proposed Finding is not supported by a citation to the Complaint. The definition of buying group set forth in the Complaint was: "Buying Groups are organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products." (Complaint ¶ 3). The Proposed Finding offers no explanation or evidentiary support to establish how or why Khyber Pass meets the definition. Moreover, the Proposed Finding is inaccurate and misleading as set forth above in Responses to Proposed Finding Nos. 786-798. It is also misleading to the extent it implies Khyber Pass is a buying group because Schein has put forth no evidence that it is. (*See* Responses to Proposed Findings Nos. 786-797). Even if Khyber Pass were considered to be a buying group, Schein has stated that the relationship began as early as 2009 or 2010. (CX8020 (Brady, Dep at 80); RX3086 at 013 (Schein's Second Supplemental Response to IROG ¶1)). As such, the Proposed Finding is misleading to the extent it implies Schein contracted with buying groups during the conspiracy period and disproves its participation in a conspiracy, as Schein's conduct regarding an entity that is not a buying group or is a pre-existing, legacy relationship does not

disprove its participation in a conspiracy. Furthermore, there is no evidence that Sullivan was aware of Khyber Pass.

800. Mr. Brady testified that Schein's relationship with the group continued at least through his tenure as a regional manager, which ended in January 2015. (CX 8020 (Brady, Dep. at 16-17, 68-71, 88)).

Response to Proposed Finding No. 800

Proposed Finding is vague, inaccurate, and misleading as to the term "agreement." As set forth above in Responses to Proposed Finding Nos. 786-788, there is no evidence that Schein had a contractual relationship with Khyber Pass or that Khyber Pass was a buying group. It is also misleading to the extent it implies Khyber Pass is a buying group because Schein has put forth no evidence that it is. (*See* Responses to Proposed Findings Nos. 786-797). Even if Khyber Pass were considered to be a buying group, Schein has stated that the relationship began as early as 2009 or 2010. (CX8020 (Brady, Dep at 80); RX3086 at 013 (Schein's Second Supplemental Response to IROG ¶1)). As such, the Proposed Finding is misleading to the extent it implies Schein contracted with buying groups during the conspiracy period and disproves its participation in a conspiracy, as Schein's conduct regarding an entity that is not a buying group or is a pre-existing, legacy relationship does not disprove its participation in a conspiracy. Furthermore, there is no evidence that Sullivan was aware of Khyber Pass.

801. Schein's discount offer and relationship with the buying group Khyber Pass are inconsistent with the alleged conspiracy. (Complaint ¶ 1).

Response to Proposed Finding No. 801

The Proposed Finding is not supported by a citation to the Complaint. Furthermore, as set forth above in Responses to Proposed Finding Nos. 786-788, there is no evidence that Schein had a contractual relationship with Khyber Pass or that Khyber Pass was a buying group. It is also misleading to the extent it implies Khyber Pass is a buying group because Schein has put

forth no evidence that it is. (*See* Responses to Proposed Findings Nos. 786-797). Even if Khyber Pass were considered to be a buying group, Schein has stated that the relationship began as early as 2009 or 2010. (CX8020 (Brady, Dep at 80); RX3086 at 013 (Schein’s Second Supplemental Response to IROG ¶1)). As such, the Proposed Finding is misleading to the extent it implies Schein contracted with buying groups during the conspiracy period and disproves its participation in a conspiracy, as Schein’s conduct regarding an entity that is not a buying group or is a pre-existing, legacy relationship does not disprove its participation in a conspiracy. Furthermore, there is no evidence that Sullivan was aware of Khyber Pass.

W. Klear Impakt.

802. As Dr. Richard Johnson, one of the founders and owners of Klear Impakt described it, Klear Impakt is “a buying and networking group with the sole purpose to keep private practice dentists strong and independent.” (R. Johnson, Tr. 5478-79). Klear Impakt is a buying group made up of independent dentists. (R. Johnson, Tr. 5479).

Response to Proposed Finding No. 802

Complaint Counsel has no specific response.

803. By design, Klear Impakt offers its members much more than just discounts on supplies. (R. Johnson, Tr. 5482). For example, it offers “a patient experience class, a phone training class, leadership training, financial training, marketing, discounts,” and advice regarding “acquisition, merger, [and] expansion.” (R. Johnson, Tr. 5482-83; *see also* CX 4109-004 (“Klear Impakt Solutions Summary: Business/Practice Efficiency; Front Office Training; Financing; Human Resources; Marketing; Business Management; Education & Professional Development; Member Integration”); R. Johnson, Tr. 5484-88 (describing the Klear Impakt Solutions)).

Response to Proposed Finding No. 803

Complaint Counsel has no specific response.

804. There is no fee or charge to be a member of Klear Impakt. (R. Johnson, Tr. 5488-89).

Response to Proposed Finding No. 804

Complaint Counsel has no specific response.

805. Dr. Johnson and his partners designed Klear Impakt to include services and benefits beyond just discounts to fill the gap left by dental school. (R. Johnson, Tr. 5483-84). Dental school teaches dentists how to treat a patient but not how to run an office. (R. Johnson, Tr. 5483-84).

Response to Proposed Finding No. 805

Complaint Counsel has no specific response.

806. Schein considers Klear Impakt to be a buying group. (Titus, Tr. 5268 (“Klear Impakt is a buying group.”); Sullivan, Tr. 4128).

Response to Proposed Finding No. 806

Complaint Counsel has no specific response.

807. Schein has been Klear Impakt’s distributor partner since August 2015. (R. Johnson, Tr. 5479, 5505; Titus, Tr. 5324-25; Sullivan, Tr. 4128).

Response to Proposed Finding No. 807

Complaint Counsel has no specific response.

808. Complaint Counsel admits that Klear Impakt is a buying group and that it entered into a contract with Schein during the alleged conspiracy period. (RX 2959-004)

Response to Proposed Finding No. 808

The Proposed Finding is incomplete and mischaracterizes the evidence, which states:

“Complaint Counsel denies that Schein entered into contracts with new Buying Groups

during the conspiracy period, with one exception: Klear Impakt. With respect to Klear

Impakt, Schein personnel testified that Tim Sullivan was not aware of Schein’s relationship

with Klear Impakt.” (RX2959 at 004). Complaint Counsel did not admit that Klear Impakt

entered into a contract with Schein during the conspiracy period, and that statement in the

Proposed Finding is misleading and is not supported. In fact, the record evidence shows that

Schein contracted with Klear Impakt in August 2015, or after the conspiracy became difficult

to maintain after Benco’s April 2015 settlement with the Texas Attorney General that

required it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161).

809. Complaint Counsel asserts that Schein’s business with Klear Impakt does not count because “Tim Sullivan was not aware of Schein’s relationship with Klear Impakt.” (RX 2959-004, -006). First, whether or not Tim Sullivan was aware of Schein’s relationship with Klear Impakt has no bearing on whether Schein did business with Klear Impakt, or that fact’s implications for Complaint Counsel’s allegations against Schein. Second, the evidence does not support Complaint Counsel’s contention.

Response to Proposed Finding No. 809

The second and third sentences of the Proposed Finding are not supported by any citation to the record evidence and should be disregarded. Nonetheless, the second sentence is inaccurate, as Sullivan’s knowledge of Schein’s agreement with Klear Impakt is relevant to the central allegation that Sullivan instructed Schein’s executives and sales force to refuse to sell to buying groups during the conspiracy period, and to the evidence of the numerous buying groups that were rejected pursuant to that directive. (CCFF ¶¶ 728-954). The Proposed Finding is also misleading and irrelevant to the extent it asserts or implies that evidence regarding Klear Impakt disproves Schein’s participation in a conspiracy. The record evidence shows that Schein contracted with Klear Impakt after the conspiracy became difficult to maintain and that Sullivan was unaware of Klear Impakt even as of November 2015. As such, Schein’s relationship with Klear Impakt has no bearing on Schein’s instruction to reject buying groups during the conspiracy period and compliance with that instruction.

810. Complaint Counsel relies on CX 2392 for its assertion that Mr. Sullivan did not know about Klear Impakt. On November 3, 2015, Mr. Sullivan emailed Jake Meadows asking “Did we just recently add Klear Impact? Who are they, where, etc.?” (CX 2392-002).

Response to Proposed Finding No. 810

The Proposed Finding is misleading to the extent it implies that CX2392 is the only evidence for the fact that Sullivan was not aware of Schein's work with Klear Impakt as of November 2, 2015. In addition to CX2392, Sullivan testified that he was not aware of Schein's work with Klear Impakt as of November 2, 2015. (CCFF ¶ 849 (citing Sullivan, Tr. 3981-3982)). Complaint Counsel has no specific response otherwise.

811. The context of Mr. Sullivan's email to Mr. Meadows was a budget meeting dealing with the question of how to budget for buying groups. (Sullivan, Tr. 4128-29).

Response to Proposed Finding No. 811

Complaint Counsel has no specific response to the statement that the "context of Mr. Sullivan's email to Mr. Meadows was a budget meeting dealing with the question of how to budget for buying groups." However, the Proposed Finding is misleading to the extent it implies Sullivan was aware of Schein's work with Klear Impakt as of November 2, 2015 because Sullivan admitted he was not. (CCFF ¶ 849 (citing Sullivan, Tr. 3981-3982), 841 (citing CX2392)).

812. Mr. Sullivan had not budgeted for additional buying groups for the year, and Mr. Meadows slid him a note saying Klear Impakt should be included. (Sullivan, Tr. 4128-30).

Response to Proposed Finding No. 812

Complaint Counsel has no specific response to the statement that the "Mr. Sullivan had not budgeted for additional buying groups for the year, and Mr. Meadows slid him a note saying Klear Impakt should be included." However, the Proposed Finding is misleading to the extent it implies Sullivan was aware of Schein's work with Klear Impakt as of November 2, 2015 because Sullivan admitted he was not. (CCFF ¶ 849 (citing Sullivan, Tr. 3981-3982), 841 (citing CX2392)).

813. Mr. Sullivan testified that “[W]hen he slid me the note, I didn’t know what the plans were for Klear Impakt.” (Sullivan, Tr. 3981-82).

Response to Proposed Finding No. 813

Complaint Counsel has no specific response.

814. In responding to Mr. Sullivan’s question, Mr. Meadows copied Mr. Cavaretta, who reminded Mr. Sullivan that “We did discuss this group over the summer and agreed that we were safe using the G Plan,” which was a pricing plan for buying groups. (CX 2392-001; Sullivan, Tr. 4130; *see also* Sullivan, Tr. 4128; CX 2519-001 (Mr. Cavaretta: “A lot going on and I think they forget what we talk about.”)).

Response to Proposed Finding No. 814

Complaint Counsel has no specific response to the statement that Mr. Meadows responded to Mr. Sullivan’s question, or to the content of Mr. Meadows’ response. However, the Proposed Finding is misleading to the extent it implies Sullivan was aware of Schein’s work with Klear Impakt as of November 2, 2015 because Sullivan admitted he was not. (CCFF ¶ 849 (citing Sullivan, Tr. 3981-3982), 841 (citing CX2392)).

815. Schein began discussing a buying group partnership with Klear Impakt “sometime in 2014.” (R. Johnson, Tr. 5479-80, 5490; Titus, Tr. 5269).

Response to Proposed Finding No. 815

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies that discussions with Klear Impakt in 2014 disprove its participation in a conspiracy, as Sullivan did not know about Schein’s work with Klear Impakt even as of November 2015. (CCFF ¶¶ 843-849).

816. Several phone calls later, Dr. Johnson and his partners had an in-person meeting with Kathleen Titus and Nicole Lena from Henry Schein on January 21, 2015. (R. Johnson, Tr. 5492-93; CX 2208-002).

Response to Proposed Finding No. 816

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies that discussions with Klear Impakt in 2014 disprove its participation

in a conspiracy, as the Sullivan did not know about Schein's work with Klear Impakt even as of November 2015. (CCFF ¶¶ 843-849).

817. The January 2015 meeting between Schein and Klear Impakt lasted for three or four hours, and the two sides discussed "who we were each individually and then what we are as a group, as far as Klear Impakt, what our value proposition [is] and what we're offering." (R. Johnson, Tr. 5493-94).

Response to Proposed Finding No. 817

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies that discussions with Klear Impakt in 2014 disprove its participation in a conspiracy, as the Sullivan did not know about Schein's work with Klear Impakt even as of November 2015. (CCFF ¶¶ 843-849).

818. As Ms. Titus described it, her "first order of business was to collect information on who they were, their scope of membership, who those members were, what their vision and their mission [was], whether they were aligned in their values and their integrity that they would serve our brand well and we would serve theirs well, whether they could offer us exclusivity, whether they could promote our business solutions portfolio which included education and nonclinical business services, and whether they could comply, their members would comply, with an agreement with Henry Schein as a prime vendor." (Titus, Tr. 5269).

Response to Proposed Finding No. 818

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies that discussions with Klear Impakt in 2014 disprove its participation in a conspiracy, as the Sullivan did not know about Schein's work with Klear Impakt even as of November 2015. (CCFF ¶¶ 843-849).

819. Klear Impakt made a point to make sure Schein "knew we weren't the same as ... every other buying group, that we weren't just a discount company." (R. Johnson, Tr. 5494).

Response to Proposed Finding No. 819

Complaint Counsel has no specific response.

820. The message apparently got through. As Ms. Titus testified, "I knew that they fit our criteria or strategy for engaging with buying groups that would present a healthy relationship for all the stakeholders and would grow the Henry Schein business." (Titus, Tr. 5270-71).

Response to Proposed Finding No. 820

The first sentence of the Proposed Finding is vague as to the terms “message” and “got through,” and it is not supported by any citation to the record evidence. It should be disregarded. Complaint Counsel has no specific response to the remainder of the Proposed Finding.

821. Ms. Titus informed the Klear Impakt team that she would “move this up the line” and “will be attending a senior management meeting next week.” (CX 2208-002; R. Johnson, Tr. 5495 (“[S]he is going to explain to her superiors and bosses about who and what we are and hopefully promote our company.”)).

Response to Proposed Finding No. 821

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies that discussions with Klear Impakt in 2014 disprove its participation in a conspiracy, as the Sullivan did not know about Schein’s work with Klear Impakt even as of November 2015. (CCFF ¶¶ 843-849).

822. Ms. Titus came away from the meeting with Klear Impakt with a strong desire to work with the group. (CX 2208-002 (“[We] were very impressed by the clear-eyed vision you have for launching Klearimpakt. Working in the Special Markets space for 15 years, I’ve seen many iterations on the Member model. Klearimpakt is a testimony that not all are created equal... oh, and cream just rises to the top!.... It’s an understatement to say I really liked what I heard and feel very encouraged that our Senior leadership will want to continue the discussion.”)).

Response to Proposed Finding No. 822

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies that discussions with Klear Impakt in 2014 disprove its participation in a conspiracy, as the Sullivan did not know about Schein’s work with Klear Impakt even as of November 2015 and Schein did not contract with Klear Impakt until August 2015, or after the conspiracy became difficult to maintain. (CCFF ¶¶ 843-849).

823. On January 22, 2015, Ms. Titus emailed Brian Brady and Joe Cavaretta, both of whom had oversight over the Mid-Market division at the time, about wanting to explore a

relationship with Klear Impakt, which she described as “different” and “impressive.” (CX 2208-001 (“Guys... we need to talk about this one. Most of these are a dime a dozen... consultants that charge the dentists to vomit business 101, then use them to create additional revenue for themselves from the supplier. This one is different [given their facilities, training center, and academic affiliations]. To be clear, I’m not ALL IN, but it passes the first line muster of ‘need to explore.’ BTW, they actually proactively told me the following: (1) Exclusive [to] Schein, (2) Will promote our BS [Business Solutions] portfolio; (3) Members will be expected to comply w/ Prime Vendor [Agreement] (with penalties for non-compliance).”); CX 8020 (Brady, Dep. at 10); Cavaretta, Tr. 5583).

Response to Proposed Finding No. 823

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies that discussions with Klear Impakt in 2014 disprove its participation in a conspiracy, as the Sullivan did not know about Schein’s work with Klear Impakt even as of November 2015 and Schein did not contract with Klear Impakt until August 2015, or after the conspiracy became difficult to maintain. (CCFF ¶¶ 843-849).

824. A few weeks later, Ms. Titus followed up after she reviewed Klear Impakt with Schein senior management. (CX 2208-001; RX 2062-003). She reported that she “gave a very strong recommendation that we move forward with discussions and provided viable scenarios for a partnership with Klearimpakt.... Key components are those I discussed with your team; exclusivity, compliance (within reason), opportunity to work with your members on full Henry Schein portfolio.” (RX 2062-003.)

Response to Proposed Finding No. 824

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies that discussions with Klear Impakt in 2014 disprove its participation in a conspiracy, as the Sullivan did not know about Schein’s work with Klear Impakt even as of November 2015 and Schein did not contract with Klear Impakt until August 2015, or after the conspiracy became difficult to maintain. (CCFF ¶¶ 843-849).

825. Ms. Titus advised Dr. Johnson as to next steps: reviewing the proposal with the executive committee, which was meeting in two weeks. (RX 2062-003).

Response to Proposed Finding No. 825

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies that discussions with Klear Impakt in 2014 disprove its participation in a conspiracy, as the Sullivan did not know about Schein's work with Klear Impakt even as of November 2015 and Schein did not contract with Klear Impakt until August 2015, or after the conspiracy became difficult to maintain. (CCFF ¶¶ 843-849).

826. Dr. Johnson felt "everything still look[ed] very positive as far as creating a partnership," and was comfortable with giving Schein the time it needed to review the proposal because, "we understand that [it] does not take days, that sometimes it will take months, to get things approved." (R. Johnson, Tr. 5496-97).

Response to Proposed Finding No. 826

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies that discussions with Klear Impakt in 2014 disprove its participation in a conspiracy, as the Sullivan did not know about Schein's work with Klear Impakt even as of November 2015 and Schein did not contract with Klear Impakt until August 2015, or after the conspiracy became difficult to maintain. (CCFF ¶¶ 843-849).

827. As part of the approval process, Schein visited Dr. Johnson and the Klear Impakt team again in Reno, Nevada to discuss Klear Impakt's business and services in more detail. (R. Johnson, Tr. 5498-99).

Response to Proposed Finding No. 827

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies that discussions with Klear Impakt in 2014 disprove its participation in a conspiracy, as the Sullivan did not know about Schein's work with Klear Impakt even as of November 2015 and Schein did not contract with Klear Impakt until August 2015, or after the conspiracy became difficult to maintain. (CCFF ¶¶ 843-849).

828. Dr. Johnson also met with Kathleen, Titus, Nicole Lena, and Joe Cavaretta at the California Dental Academy so that the Klear Impakt team could meet Mr. Cavaretta personally. Mr. Cavaretta reacted “very positive[ly].” (R. Johnson, Tr. 5499).

Response to Proposed Finding No. 828

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies that discussions with Klear Impakt in 2014 disprove its participation in a conspiracy, as the Sullivan did not know about Schein’s work with Klear Impakt even as of November 2015 and Schein did not contract with Klear Impakt until August 2015, or after the conspiracy became difficult to maintain. (CCFF ¶¶ 843-849).

829. At no time in Dr. Johnson’s interactions and negotiations with Schein from 2014 and into 2015 was there an indication that Schein had a policy not to do business with buying groups. (R. Johnson, Tr. 5493-99 (“Nothing stuck out to us that they were not going to work with us; otherwise, they would have been wasting their time or our time.”)).

Response to Proposed Finding No. 829

The Proposed Finding lacks foundation. Dr. Johnson, a third-party to Schein, is not a reliable source for information regarding Schein’s policies or whether any existed. The Proposed Finding is also misleading to the extent it implies or asserts that Schein did not have a policy to not to business with buying groups based on testimony from a third party without foundation.

830. Ms. Titus worked with Klear Impact to develop “marketing pieces showcasing HS...working with the partners for several months to carefully craft a program that serves Schein’s best interest.” (CX 2223-001).

Response to Proposed Finding No. 830

The Proposed Finding is irrelevant, as a June 2015 discussion of creating “marketing pieces showcasing HS” has no bearing on whether Schein entered into an agreement with Klear Impakt during the conspiracy period. The record, in fact, shows that it did not contract with Klear Impakt until after the conspiracy became difficult to maintain. (CCFF ¶ 1318).

831. Nor did Ms. Titus receive any internal instruction at Schein not to do business with or end negotiations with Klear Impakt. (Titus, Tr. 5271).

Response to Proposed Finding No. 831

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies that Sullivan did not instruct against Klear Impakt, as the record evidence shows that he not know about Schein's work with Klear Impakt even as of November 2015. (CCFF ¶¶ 843-849).

832. Klear Impakt's negotiations with Schein culminated in an agreement dated August 17, 2015 that provided Klear Impakt members with a formulary price on "over [REDACTED] items most commonly used" plus [REDACTED] off on merchandise not on the formulary. (RX 2162-001; R. Johnson, Tr. 5501-02).

Response to Proposed Finding No. 832

Complaint Counsel has no specific response.

833. Schein also agreed to pay Klear Impakt a [REDACTED] based on its members' collective purchase volume. (RX 2162-002).

Response to Proposed Finding No. 833

Complaint Counsel has no specific response.

834. For their part, Klear Impakt members who sign up for the Schein discounts "agree to purchase a minimum of [REDACTED] of their supplies from Henry Schein." (RX 2162-001; R. Johnson, Tr. 5501-02, 5514-15, 5518).

Response to Proposed Finding No. 834

Complaint Counsel has no specific response.

835. When Klear Impakt members enroll for the Schein discount, they sign a form that indicates, "The above named Member agrees to purchase a minimum of 70 percent of their supplies in a FISCAL Year from Henry Schein Dental." (RX 2222-001; R. Johnson, Tr. 5503-04).

Response to Proposed Finding No. 835

The Proposed Finding is misleading, lacks foundation, and is contrary to the weight of the evidence to the extent it implies or asserts any fact beyond the fact that the quoted statement

appeared in RX2222. RX2222 contains the statement, “The above named Member agrees to purchase a minimum of 70 percent of their supplies in a FISCAL Year from Henry Schein Dental,” however Dr. Johnson testified that he was not aware of whether that provision was monitored or enforced either by Klear Impakt or by Schein. (R. Johnson, Tr. 5504-5505 (“Judge Chappell: Do you know how that was monitored or enforced? The Witness: The 70%? Judge Chappell: Yes. The Witness: So we don’t get in their books. . . Judge Chappell: So the answer is no, you don’t know. The witness: Well, from my side. I don’t know from the Henry Schein side. . . . Judge Chappell: Do you know if it is enforced? The Witness: I don’t know.”)).

836. The members’ 70 percent commitment benefits Schein by “hopefully ... increas[ing] their overall business,” and it benefits Klear Impakt by increasing its administrative fee. (R. Johnson, Tr. 5518).

Response to Proposed Finding No. 836

The Proposed Finding lacks foundation. Dr. Johnson, a third-party to Schein, is not a reliable source for information regarding benefits to Schein’s business. The Proposed Finding is also misleading because it mischaracterizes the evidence by assuming that Klear Impakt members actually purchased 70% of their supplies from Schein, which is a fact that is not in evidence. (See Response to Proposed Finding No. 835).

837. Klear Impakt and Schein renewed their agreement in 2016.¹⁰ (RX 0602-001). [REDACTED]
[REDACTED] (RX 0602-001-02; R. Johnson, Tr. 5520-23).

¹⁰ In late 2015, Schein and Klear Impakt briefly “hit the pause button ... for new enrollees,” but Schein never stopped doing business with or offering discounts to Klear Impakt. (CX 2226-001-02; R. Johnson, Tr. 5505).

Response to Proposed Finding No. 837

The Proposed Finding, and footnote 10 (to the extent Schein intends to include it in the Proposed Finding), is irrelevant, as a 2016 agreement has no relevance to whether Schein entered into a contract with Klear Impakt, or any other buying group, during the conspiracy period. Complaint Counsel has no specific response to the statement that Klear Impakt and Schein renewed their agreement in 2016.

838. Schein's meetings with and positive reaction to Klear Impakt in late 2014, early 2015, and through the present are inconsistent with the alleged conspiracy not to do business with buying groups. (*See* R. Johnson, Tr. 5506; Complaint ¶ 1; *see also* Cohen, Tr. 914 (Benco has never had any discussions with anyone at Schein about Klear Impakt)).

Response to Proposed Finding No. 838

The Proposed Finding is misleading to the extent it asserts or implies that Schein's "meeting with and positive reaction to Klear Impakt" disprove its participation in a conspiracy. The record evidence shows that Schein contracted with Klear Impakt after the conspiracy became difficult to maintain and that Sullivan was unaware of Klear Impakt even as of November 2015. As such, Schein's relationship with Klear Impakt has no bearing on Schein's instruction to reject buying groups during the conspiracy period and compliance with that instruction. As such, the Proposed Finding is also inaccurate. The Proposed Finding is not supported by a citation to Dr. Johnson's testimony. Dr. Johnson, a third-party fact witness, is not a reliable source to evaluate, much less determine, whether Schein's conduct is "inconsistent with the alleged conspiracy." To the extent the Proposed Finding asserts that Schein did not participate in a conspiracy because Dr. Johnson denied there was one, that is misleading and improper. The citation to Cohen's testimony is similarly flawed and misleading to the extent it is used to imply that Schein did not participate in a conspiracy because Benco and Schein did not communicate about a buying group that Schein contracted

with *after* the conspiracy became difficult to maintain. Indeed, Complaint Counsel has identified, and the record evidence is replete with, examples of interfirm communications between Cohen and Sullivan between 2011 and 2015 that establish Benco orchestrated an agreement with Schein. (CCFF ¶¶ 327-354; *see also* CCFF ¶¶ 284-326).

X. Kois Buyers Group.

839. Complaint Counsel claims the Respondents' decisions with respect to the Kois Buyers Group were "in lock step by affirmatively turning down the buying groups or failing to meaningfully respond." (CC Pretrial Br. at 37). The evidence does not support that claim.

Response to Proposed Finding No. 839

The second sentence of the Proposed Finding is not supported by any citation to the record evidence and should be disregarded. Complaint Counsel has no specific response to the first sentence.

840. Mr. Cohen received competitive intelligence that Schein and Patterson were both negotiating with Kois. (CX 1074; Cohen, Tr. 912-913).

Response to Proposed Finding No. 840

Complaint Counsel has no specific response.

841. Mr. Sullivan never spoke with Mr. Cohen or anyone else at Benco about the Kois Buyers Group, nor did he speak with Mr. Guggenheim or anyone at Patterson about the Kois Buyers Group. (Sullivan, Tr. 4230, 4282).

Response to Proposed Finding No. 841

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it suggests that Schein did not turn down the Kois Buyers Group pursuant to its participation in a conspiracy. The record evidence shows the Big Three were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, Schein instructed its sales force to reject buying groups. (CCFF ¶¶ 661-1100, 1178-1198). The record evidence is replete with examples of buying groups that Schein categorically

rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Schein’s rejection of the Kois Buyers Group is just one example. The record evidence shows that by September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with Kois: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Schein rejected the Kois Buyers Group in November 2014, and stated that it would “pass” on working with the buying group. (CCFF ¶ 928). In addition, the Proposed Finding is misleading to the extent it asserts or implies that Sullivan’s testimony disproves Schein’s participation in a conspiracy. In fact, Complaint Counsel has identified, and the record evidence is replete with, examples of interfirm communications between Cohen and Sullivan between 2011 and 2015 that establish Benco orchestrated an agreement with Schein. (CCFF ¶¶ 327-354; *see also* CCFF ¶¶ 284-326).

842. Mr. Cohen confirmed that he never communicated with Mr. Sullivan or anyone at Schein about the Kois Buyers Group. (Cohen, Tr. 715).

Response to Proposed Finding No. 842

The Proposed Finding is misleading to the extent it asserts or implies that Cohen’s testimony disproves Schein’s participation in a conspiracy. In fact, Complaint Counsel has identified, and the record evidence is replete with, examples of interfirm communications between Cohen and Sullivan between 2011 and 2015 that establish Benco orchestrated an agreement with Schein. (CCFF ¶¶ 327-354; *see also* CCFF ¶¶ 284-326). The record evidence shows the Big Three were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, Schein instructed its sales force to reject buying groups. (CCFF ¶¶

661-1100, 1178-1198). The record evidence is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Schein’s rejection of the Kois Buyers Group is just one example. The record evidence shows that by September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein was not interested in working with Kois Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski regarding Kois Buyers Group: “I don’t think we want to be the first in this game.” (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kois Buyers Group had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶ 928).

843. The Kois Buyers Group was an outgrowth of the Kois Center, a curriculum-based, graduate-level “private teaching center for practicing dentists” founded by Dr. John Kois Sr. in 1994 in Seattle, Washington. (Kois Sr., Tr. 163-64). Dr. Kois has been the director of the Kois Center since its inception. (Kois Sr., Tr. 163-64).

Response to Proposed Finding No. 843

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that the Kois Buyers Group is not a buying group. The record

evidence shows that it is a buying group. (CCFF ¶ 163). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

844. Dr. Kois has been practicing dentistry since 1977 and opened his own private practice in Tacoma, Washington in 1985. (Kois Sr., Tr. 161-63, 168-69). Dr. Kois has always utilized Burkhart as his primary and favored supplier. (Kois Sr., Tr. 168-69, 171-73 (“I trust Burkhart. That’s the company I work with.”)).

Response to Proposed Finding No. 844

Complaint Counsel has no specific response.

845. In addition to his private practice, the curriculum at the Kois Center is “completely taught” by Dr. Kois and involves “many fields in dentistry from treatment planning, occlusion, restoration of teeth and implants.” (Kois Sr., Tr. 164). Each course runs from 7:00am to 6:00pm for three-to-five days. (Kois Sr., Tr. 164). A three-day course costs around \$5,000, while a five-day course costs around \$10,000. (Kois Sr., Tr. 233-34).

Response to Proposed Finding No. 845

Complaint Counsel has no specific response.

846. To be eligible to join the Kois Buyers Group, a dentist must first take at least one of the courses at the Kois Center. (Kois Sr., Tr. 235; Kojs Jr., Tr. 317-18).

Response to Proposed Finding No. 846

Complaint Counsel has no specific response.

847. Any dentist who takes a Kois Center course is deemed to be a member of “the tribe.” (Kois Sr., Tr. 165, 234). Since the inception of the Kois Center, approximately 4,000 dentists have taken a course there, with approximately 900 completing the full curriculum. (Kois Sr., Tr. 165).

Response to Proposed Finding No. 847

Complaint Counsel has no specific response.

848. The current CEO of the Kois Center, John Kois Jr., estimated that more students came from Washington than any other state, given that the center was located in Washington. (CX 0321 (Kois Jr., IHT at 27)).

Response to Proposed Finding No. 848

Complaint Counsel has no specific response.

1. *Qadeer Ahmed and Equalizer ProServices.*

849. By August 2014, Dr. Kois Sr. began working with a Canadian-based consultant named Qadeer Ahmed, through Mr. Ahmed's company called Equalizer ProServices (d/b/a ProCare Dental Services), to create a buying group. (Kois Sr., Tr. 188-89; CX 0116-002). Mr. Ahmed had also partnered with a Canadian dentist named Bobby Chagger. (RX 2197-001; Guggenheim, Tr. 1669-70).

Response to Proposed Finding No. 849

Complaint Counsel has no specific response.

850. Dr. Kois had no personal knowledge of Mr. Ahmed's background at the time he began working with him. (Kois Sr., Tr. 216, 219). Dr. Kois did not meet with Mr. Ahmed in person and did not know how many people ProCare employed. (Kois Sr., Tr. 215, 244). To Dr. Kois' knowledge, neither Mr. Ahmed nor ProCare had any experience in the dental industry. (Kois Sr., Tr. 217, 244-45). Mr. Ahmed used a hotmail email address for his business communications, and apparently worked out of his home in Canada. (RX 0377-00001; Reece, Tr. 4495; *see also* RXD 0211). Nonetheless, Dr. Kois agreed to pay Mr. Ahmed 50% of membership fees that were collected for the buying group. (Kois Sr., Tr. 242).

Response to Proposed Finding No. 850

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it suggests that Schein did not turn down the Kois Buyers Group pursuant to its participation in a conspiracy. The record evidence shows the Big Three were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, Schein instructed its sales force to reject buying groups. (CCFF ¶¶ 661-1100, 1178-1198).

The record evidence is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel's Post-Trial Brief, at Attachment

C). Schein's rejection of the Kois Buyers Group is just one example. The record evidence shows that by September 8, 2014, Sullivan communicated to Muller and his boss,

Breslawski, that Schein would not be interested in working with the Kois Buyers Group: "I still believe this is slippery slope and have yet to see a successful one in dental and don't plan

to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, after Kois Buyers Group had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶ 928). Moreover, assertions about Ahmed’s email account, location of his office, his background, number of employees, or other details are irrelevant to the inquiry, as it has no bearing on Schein’s conduct regarding buying groups during the conspiracy period.

851. Complaint Counsel did not call Mr. Ahmed to testify at trial.

Response to Proposed Finding No. 851

Complaint Counsel does not object to the statement that Mr. Ahmed was not called to testify. However, the Proposed Finding is misleading to the extent it implies that whether Mr. Ahmed testified has any bearing on the record evidence regarding the Kois Buyers Group. Indeed, the record evidence shows the Big Three were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, Schein instructed its sales force to reject buying groups. (CCFF ¶¶ 661-1100, 1178-1198). The record evidence is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Schein’s rejection of the Kois Buyers Group is just one example. The record evidence shows that by September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: “I still believe this is slippery slope and

have yet to see a successful one in dental and don't plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, after Kois Buyers Group had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶ 928).

852. Dr. Kois advertised ProCare Dental Services to his students as a company “led by people who get big things done in business.... Their ‘hit list’ includes multi-billion dollar ‘wins’ in retail (Wal-Mart, Home Depot, Loblaws, Metro, Best Buy), media (Sony Music, CanWest), distribution (Ingram, Globelle, OfficeMax) and technology. They are involved right now in a billion-dollar project with the largest financial company in the world.” (RX 2113-003). Dr. Kois never verified that any of this information about ProCare was correct. (Kois Sr., Tr. 216).

Response to Proposed Finding No. 852

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it suggests that Schein did not turn down the Kois Buyers Group pursuant to its participation in a conspiracy. The record evidence shows the Big Three were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, Schein instructed its sales force to reject buying groups. (CCFF ¶¶ 661-1100, 1178-1198).

The record evidence is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Schein’s rejection of the Kois Buyers Group is just one example. The record evidence shows that by September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers

Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, after Kois Buyers Group had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014, and stated that it would “pass” on working with the buying group. (CCFF ¶ 928). Further, whether Dr. Kois verified information about ProCare is irrelevant, as it has no bearing on Schein’s conduct regarding buying groups during the conspiracy period.

853. Dr. Kois told Burkhardt: “I am starting a membership program for the Kois Center, however, it is not managed by me. It is managed by ProCare Services and the person to contact is Mr. Qadeer Ahmed. Please contact him directly.” (CX 4284-001).

Response to Proposed Finding No. 853

Complaint Counsel has no specific response.

854. Mr. Ahmed composed an email for Dr. Kois to send to the “tribe” announcing the launch of the “Kois Tribal Membership Program.” (CX 0290-002; Kois Sr., Tr. 205). Dr. Kois sent the email on October 8, 2014. (CX 0290-002). The email laid out the costs to join the buying group: an initial deposit of between \$398 and \$998 depending on spending levels, and monthly fees between \$199 and \$499 per month (or \$2,388 and \$5,988 per year), also depending on spending levels. (CX 0290-003; Kois Sr., Tr. 239). These membership dues did not include the \$5,000 to \$10,000 in tuition costs at the Kois Center that were required for “tribe” membership and buying group eligibility. (Kois Sr., Tr. 233-34; Kois Jr., Tr. 319). The email invited Tribe members to immediately sign-up and that they would get their discount “code” within about “3 calendar weeks.” (CX 0290-003-04).

Response to Proposed Finding No. 854

Complaint Counsel has no specific response.

855. The October 8, 2014 email then said: “We will pick one distribution partner from between Patterson Dental, Henry Schein and smaller distributors. We have confirmed prices from manufacturers AND distributors IF we can work together.” (CX 0290-003 (emphasis in original)). However, the only distributor at that time to have had any discussions about the

buying group with Mr. Ahmed was Patterson, and no distributor or manufacturer had “confirmed prices.” (CX 0116-002 (On August 17, 2014, Patterson Branch Manager Marc Beaudet wrote to Paul Guggenheim, “I had two phone conversations with [Kois Buyers Group] so far.”)).

Response to Proposed Finding No. 855

The Proposed Finding is misleading and contrary to the weight of the record evidence as to the assertion that “the only distributor at that time to have had any discussions about the buying group with Mr. Ahmed was Patterson.” The record evidence shows Sullivan was not interested in bidding on Kojs before the October 8, 2014 date asserted in the Proposed Finding. In fact, a month before, on September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kojs Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kojs Buyers Group)). On October 23, 2014, after Kojs Buyers Group had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kojs Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kojs Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶ 928-929). Complaint Counsel has no specific response to the first sentence of the Proposed Finding.

856. Indeed, Dr. Kojs recognized that at this time in October 2014, “the buyers[’] club didn’t even exist, so that many companies would not want to take a risk on engaging with something that isn’t going to even turn out to be anything.” (CX 8007 (Kojs Sr., Dep. at 37-38)).

Response to Proposed Finding No. 856

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it suggests that Schein did not turn down the Kojs Buyers Group pursuant to its

participation in a conspiracy. The record evidence shows the Big Three were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, Schein instructed its sales force to reject buying groups. (CCFF ¶¶ 661-1100, 1178-1198). The record evidence is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Schein’s rejection of the Kois Buyers Group is just one example. The record evidence shows that by September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Schein rejected the Kois Buyers Group in November 2014, and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

2. *Mr. Ahmed’s Proposal Was Unrealistic and Contrary to How the Kois Buyers Group Actually Worked.*

857. Mr. Ahmed created a proposal to send to distributors. (*See* RX 0377; RX 2197).

Response to Proposed Finding No. 857

Complaint Counsel has no specific response.

858. Though the buying group was Dr. Kois’ “vision,” he did not have any input on the proposal and did not review it. (Kois Sr., Tr. 255).

Response to Proposed Finding No. 858

Complaint Counsel has no specific response.

859. The Kois proposal noted that the Kois Buyers Group is “not a standard buying group.” “Normal buying groups,” the proposal continued, “ask distributors to lose margin % ... [but] do not allow the distributor to recover the margin % which is lost.” (RX 2197-004).

Response to Proposed Finding No. 859

Complaint Counsel has no specific response to the statement in RX2197. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it suggests that Schein did not turn down the Kois Buyers Group pursuant to its participation in a conspiracy. The record evidence shows the Big Three were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, Schein instructed its sales force to reject buying groups. (CCFF ¶¶ 661-1100, 1178-1198). The record evidence is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). Schein's rejection of the Kois Buyers Group is just one example. The record evidence shows that by September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: "I still believe this is slippery slope and have yet to see a successful one in dental and don't plan to take the lead role. Watching closely." (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski regarding Kois Buyers Group: "I don't think we want to be the first in this game." (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kois had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: "I would never sign us up for straight out GPO model." (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would "pass" on working with the buying group. (CCFF ¶¶ 928-929).

860. The Kois proposal claimed that it was “profoundly different” from other buying groups in that it promised to “compensate the distributor for the margin % sacrificed.” (RX 2197-004). It claimed the ability to do this by promising to transfer members’ patient revenues to the distributor, such as by sharing revenues on “services which the distributor does NOT” provide. (RX 2197-004).

Response to Proposed Finding No. 860

Complaint Counsel has no specific response to the statement in RX2197. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it suggests that Schein did not turn down the Kois Buyers Group pursuant to its participation in a conspiracy. The record evidence shows the Big Three were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, Schein instructed its sales force to reject buying groups. (CCFF ¶¶ 661-1100, 1178-1198). The record evidence is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Schein’s rejection of the Kois Buyers Group is just one example. The record evidence shows that by September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski regarding Kois Buyers Group: “I don’t think we want to be the first in this game.” (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kois had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO

model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

861. Under the Kois proposal, “[t]he distributor DEFERS margin % on products currently sold (dental supplies) to receive greater immediate volume. The distributor RECOVERS margin % from PATIENT ACQUISITION AND VALUE-ADDED PRODUCTS not offered today.” (RX 2197-004 (emphasis in original)).

Response to Proposed Finding No. 861

Complaint Counsel has no specific response to the statement in RX2197. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it suggests that Schein did not turn down the Kois Buyers Group pursuant to its participation in a conspiracy. The record evidence shows the Big Three were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, Schein instructed its sales force to reject buying groups. (CCFF ¶¶ 661-1100, 1178-1198). The record evidence is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Schein’s rejection of the Kois Buyers Group is just one example. The record evidence shows that by September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski regarding Kois Buyers Group: “I don’t think we want to be the first in this game.” (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kois had approached Sullivan with a proposal, Sullivan was still

not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

862. The proposal then calculated “deferral and immediate gains” “[b]ased on a pilot (1,700 dentists).” (RX 2197-004). The proposal thus assumed that every single one of the 1,700 dentists in the “tribe” would immediately join the buying group, with an “additional 1,000 dentists” joining in “Phase 2.” (RX 2197-005, -007).

Response to Proposed Finding No. 862

The second sentence of the Proposed Finding is inaccurate and not supported by the cited evidence, which does not state any assumptions. The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it suggests that Schein did not turn down the Kois Buyers Group pursuant to its participation in a conspiracy. The record evidence shows the Big Three were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, Schein instructed its sales force to reject buying groups. (CCFF ¶¶ 661-1100, 1178-1198). The record evidence is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Schein’s rejection of the Kois Buyers Group is just one example. The record evidence shows that by September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski

regarding Kois Buyers Group: “I don’t think we want to be the first in this game.” (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kois had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

863. Mr. Sullivan’s reaction to these representations in the Kois proposal was that they were “big” numbers, and not realistic. (Sullivan, Tr. 4223).

Response to Proposed Finding No. 863

Complaint Counsel has no specific response to the attribution of the statement to Sullivan. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it suggests that Schein did not turn down the Kois Buyers Group pursuant to its participation in a conspiracy. The record evidence shows the Big Three were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, Schein instructed its sales force to reject buying groups. (CCFF ¶¶ 661-1100, 1178-1198). The record evidence is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Schein’s rejection of the Kois Buyers Group is just one example. The record evidence shows that by September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025

(Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski regarding Kois Buyers Group: “I don’t think we want to be the first in this game.” (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kois had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

864. By contrast, Heartland Dental, the largest DSO in the country, had only 850 offices. (Rogan, Tr. 3646-47).

Response to Proposed Finding No. 864

Complaint Counsel has no specific response to the attribution of the statement to Rogan. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it suggests that Schein did not turn down the Kois Buyers Group pursuant to its participation in a conspiracy. The record evidence shows the Big Three were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, Schein instructed its sales force to reject buying groups. (CCFF ¶¶ 661-1100, 1178-1198). The record evidence is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Schein’s rejection of the Kois Buyers Group is just one example. The record evidence shows that by September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan

to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski regarding Kois Buyers Group: “I don’t think we want to be the first in this game.” (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kois had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

865. One year into its existence, the Kois Buyers Group only had approximately 174 members, barely ten percent of the originally promised 1,700. (Kois Jr., Tr. 317).

Response to Proposed Finding No. 865

The Proposed Finding is not supported by the cited evidence, which does not state or establish that the number of members in 2015 was “barely ten percent of the originally promised 1,700.” Moreover, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it suggests that Schein did not turn down the Kois Buyers Group pursuant to its participation in a conspiracy. The record evidence shows the Big Three were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, Schein instructed its sales force to reject buying groups. (CCFF ¶¶ 661-1100, 1178-1198). The record evidence is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Schein’s rejection of the Kois Buyers Group is just one example. The record evidence shows that by September 8, 2014, Sullivan communicated to Muller and his boss,

Breslawski, that Schein would not be interested in working with the Kojs Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kojs Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski regarding Kojs Buyers Group: “I don’t think we want to be the first in this game.” (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kojs had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kojs Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kojs Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

866. After three years, the Kojs Buyers Group had 515 members, less than one third of the originally promised 1,700. (CX 0321 (Kojs Jr., IHT at 27)).

Response to Proposed Finding No. 866

The Proposed Finding is not supported by the cited evidence, which does not state or establish what was “originally promised.” Moreover, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it suggests that Schein did not turn down the Kojs Buyers Group pursuant to its participation in a conspiracy. The record evidence shows the Big Three were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, Schein instructed its sales force to reject buying groups. (CCFF ¶¶ 661-1100, 1178-1198). The record evidence is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Schein’s rejection of the Kojs

Buyers Group is just one example. The record evidence shows that by September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski regarding Kois Buyers Group: “I don’t think we want to be the first in this game.” (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kois had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

867. The Kois proposal also stated, in bold and red letters, that Kois “will pursue manufacturers on our own.” (RX 2197-008). This was a “red flag” for Schein. (Sullivan, Tr. 4224 (“Not only was it in red ink, but it was also one of those red flags for us. Again, we do not want anyone between us and our customers, nor do we want anyone between us and our manufacturing partners.”)).

Response to Proposed Finding No. 867

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it suggests that Schein did not turn down the Kois Buyers Group pursuant to its participation in a conspiracy. The record evidence shows the Big Three were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, Schein instructed its sales force to reject buying groups. (CCFF ¶¶ 661-1100, 1178-1198). The record evidence is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy

period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Schein’s rejection of the Kois Buyers Group is just one example. The record evidence shows that by September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski regarding Kois Buyers Group: “I don’t think we want to be the first in this game.” (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kois had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

868. In a slide titled “Detailed Economics,” the Kois proposal purported to calculate the “immediate” gains to Schein. (RX 2197-008). The proposal noted that Schein had an approximately 32% market share among the 1,700 “tribe” members, and conceded that, under the proposal, Schein would lose “\$709k per month” as to its existing business. (RX 2197-008). It then theorized that Schein would immediately gain the remaining 68% of the business, giving Schein a 100% market share and a net gain of “\$842k per month.” (RX 2197-008).

Response to Proposed Finding No. 868

The Proposed Finding is misleading, as its characterizations of RX2197 are speculative. For example, RX2197 does not state that Schein had “32% market share among the 1,700 ‘tribe’ members” or what the “Risk v. Reward” calculations were based on. (*See* RX2197 at 008). Moreover, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it suggests that Schein did not turn down the Kois Buyers Group

pursuant to its participation in a conspiracy. The record evidence shows the Big Three were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, Schein instructed its sales force to reject buying groups. (CCFF ¶¶ 661-1100, 1178-1198). The record evidence is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Schein’s rejection of the Kois Buyers Group is just one example. The record evidence shows that by September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski regarding Kois Buyers Group: “I don’t think we want to be the first in this game.” (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kois had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

869. The Kois proposal did not explain how it would ensure 100% purchasing compliance among 1,700 members. To the contrary, both Dr. Kois and Mr. Kois testified that the Kois Buyers Group could not guarantee purchasing compliance. (*See, e.g.*, CX 0321 (Kois Jr., IHT at 97 (“Q. So does Kois Buyers Group guarantee any level of purchases for any particular vendor? A. No.”))). It is a point of “pride” to Dr. Kois that members can purchase from any supplier rather than just “who we have alliances with.” (CX 8007 (Kois Sr., Dep. at 160)). Mr. Kois actually “encourage[s]” members to “find the lowest price anywhere since there’s no exclusivity

as part of the buying group. I tell them – if a member tells me they found a cheaper price somewhere else[,] I tell them they should buy it there.” (CX 8008 (Kois Jr., Dep. at 13)).

Response to Proposed Finding No. 869

Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it suggests that Schein did not turn down the Kois Buyers Group pursuant to its participation in a conspiracy. The record evidence shows the Big Three were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, Schein instructed its sales force to reject buying groups. (CCFF ¶¶ 661-1100, 1178-1198).

The record evidence is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Schein’s rejection of the Kois Buyers Group is just one example. The record evidence shows that by September 8, 2014, Sullivan communicated to Muller and his boss,

Breslawski, that Schein would not be interested in working with the Kois Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Again, the next day,

Sullivan sent an email to Breslawski regarding Kois Buyers Group: “I don’t think we want to be the first in this game.” (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006).

On October 23, 2014, after Kois had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

Furthermore, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶¶ 1685, 1689-1691). Thus, to the extent that the Proposed Finding implies that lack of explanation of how Kois Buyers Group would “ensure 100% purchasing compliance among 1,700 members” was the reason for the rejection of Kois Buyers Group, it is misleading and contrary to the weight of the evidence.

870. Complaint Counsel’s expert, Dr. Marshall, noted that “in four of the five studies where I’m looking at a distributor supplying a buying group, I have seen nothing that would indicate that the distributor picks up 100 percent of the business.” (CX 8040 (Marshall, Dep. at 223)). Dr. Marshall found that, in 2015, only about [REDACTED] of Kois Tribe members joined the buying group. (CX 7100-062, -151 (noting that only [REDACTED] of the “over 2,000 dentists” joined the group)). [REDACTED]. (CX 7100-153 (showing Burkhart’s purchases of only [REDACTED] out of over [REDACTED] among Burkhart-purchasing-Kois members)). Consequently, Burkhart only had a [REDACTED] share of Kois Tribe Members through the buying group. (CX 7100-062, -151, -153).

Response to Proposed Finding No. 870

This Proposed Finding is incomplete and misleading because Dr. Marshall explained that it does not matter that buying group member dentists did not substitute all of their purchases to the buying group distributor:

[REDACTED]

[REDACTED]

[REDACTED].

This Proposed Finding is inaccurate and misleading to the extent that it suggests that buying groups without contractual guarantees do not drive compliance because Dr. Marshall's various profitability analyses as well as other record evidence demonstrated that buying groups drive incremental business to the distributor and are profitable for distributors, even without contractual volume guarantees. (CCFF ¶¶ 1320, 1381, 1385-1387, 1651-1656, 1664-1666, 1672-1673, 1678, 1681, 1686-1687, 1689, 1718, 1723-1724, 1726; *see also* [REDACTED]

[REDACTED]

[REDACTED].

871. Some Kois Buyers Group members do not purchase from Burkhart at all. (CX 8008 (Kois Jr., Dep. at 128 (“We have members that don’t spend with Burkhart and are still members, my assumption is they buy from somewhere other than Burkhart.”))). [REDACTED]

[REDACTED] (Reece, Tr. 4481).

Response to Proposed Finding No. 871

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts or implies that buying groups that do not drive compliance cannot provide incremental sales or new customers. In fact, the record evidence shows the opposite. Buying groups were profitable for distributors even without contractual volume guarantees, and this was also true for Burkhart in the case of Kois Buyers Group. (CCFF ¶¶ 1685, 1689-1691, 1297-1311). Burkhart's sales and profits increased from working with Kois Buyers Group, and it even won customers from Schein by supplying the Kois Buyers Group. (CCFF ¶ 1297-1311). [REDACTED]

[REDACTED]

[REDACTED]

3. *Mr. Ahmed First Reached Out to Patterson But Lied About His Contacts with Manufacturers.*

872. Patterson was the first distributor that Mr. Ahmed approached with his Kojs proposal on September 22, 2014. (RX 0377).

Response to Proposed Finding No. 872

The Proposed Finding is not supported by the cited evidence, which does not state or establish that Patterson was the first distributor approached. The record evidence shows Sullivan was not interested in bidding on Kojs before September 22, 2014. The record evidence shows that by September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kojs Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kojs Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski regarding Kojs Buyers Group: “I don’t think we want to be the first in this game.” (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kojs had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kojs Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kojs Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

873. Patterson was “very suspicious about all the assertions” in Mr. Ahmed’s proposal. (Guggenheim, Tr. 1825).

Response to Proposed Finding No. 873

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it suggests that any of the Big Three did not turn down the Kois Buyers Group pursuant to their participation in a conspiracy. The record evidence shows the Big Three were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, each instructed its sales force to reject buying groups and rejected buying groups during the conspiracy period. (CCFF ¶¶ 398-399, 406-425, 527, 534-563, 661-954; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). The Kois Buyers Group is an example of a buying group that was rejected by each of the Big Three during the conspiracy. (CCFF ¶ 421, 636-640, 809, 928).

874. On September 22, 2014, Mr. Ahmed asked for a meeting “if required” and pushed Patterson to “get something done this week.” (RX 0377-00002).

Response to Proposed Finding No. 874

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts a timeline that Schein did not have an opportunity to bid on Kois Buyers Group in October 2014. The record evidence shows Sullivan was not interested in bidding on Kois Buyers Group by September 8, 2014. On September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski regarding Kois Buyers Group: “I don’t think we want to be the first in this game.” (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kois had approached

Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

875. On October 13, 2014, Mr. Ahmed informed Dr. Kois that “Guggenheim has already declined.” (CX 8007 (Kois Sr., Dep. at 47)).

Response to Proposed Finding No. 875

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not have an opportunity to bid on Kois Buyers Group in October 2014. The record evidence shows Sullivan was not interested in bidding on Kois Buyers Group by September 8, 2014. On September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski regarding Kois Buyers Group: “I don’t think we want to be the first in this game.” (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kois had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

4. *After Patterson Declined, Kojs Engaged with Benco and Burkhart.*

876. At trial, Dr. Kojs testified on direct that the Kojs Buyers Group only reached out to Burkhart after being turned down by Schein, Patterson, and Benco. (Kojs Sr., Tr. 190). However, as discussed below, this is directly contradicted by contemporaneous documents, which Dr. Kojs admitted on cross. (Kojs, Sr., Tr. 250-55; CX 4284; RX 0377; RX 2197).

Response to Proposed Finding No. 876

Complaint Counsel has no specific response to the first sentence of the Proposed Finding. As to the second sentence, the cited evidence does not support the assertion that “Dr. Kojs admitted” any contradiction to his testimony. As such, the second sentence is not only inaccurate but misleading to the extent it asserts that Dr. John C. Kojs Sr.’s testimony was contradicted. Regardless, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Kojs Buyers Group preferred Burkhart to Schein, Benco, or Patterson, or that it chose Burkhart above the Big Three. The record evidence shows that Kojs Buyers Group didn’t look to Burkhart first because Kojs Buyers Group preferred a national full-service distributor, like Schein, Patterson, or Benco, not a regional distributor like Burkhart (Kojs Sr., Tr. 188, 191; *see also* CCFF ¶¶ 1449, 1452-1454). The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not have an opportunity to bid for Kojs Buyers Group in October 2014. The record evidence shows that Sullivan was not interested in bidding on Kojs Buyers Group as early as September 8, 2014. On September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kojs Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kojs Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski

regarding Kois Buyers Group: “I don’t think we want to be the first in this game.” (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kois had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

877. On October 17, 2014, Burkhart’s Dave Anderson emailed Dr. Kois about the Kois Buyers Group after learning about the group from Burkhart customers. (Kois Sr., Tr. 253-54; Reece, Tr. 4432-33; CX4284-001).

Response to Proposed Finding No. 877

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Kois Buyers Group preferred Burkhart to Schein, Benco, or Patterson, or that it chose Burkhart above the Big Three. The record evidence shows that Kois Buyers Group didn’t look to Burkhart first because Kois Buyers Group preferred a national full-service distributor, like Schein, Patterson, or Benco, not a regional distributor like Burkhart (Kois Sr., Tr. 188, 191; *see also* CCFF ¶¶ 1449, 1452-1454). The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not have an opportunity to bid for Kois Buyers Group in October 2014. The record evidence shows that Sullivan was not interested in bidding on Kois Buyers Group as early as September 8, 2014. On September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan,

Dep. at 295) (CX2469 referred to Kois Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski regarding Kois Buyers Group: “I don’t think we want to be the first in this game.” (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kois had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

878. The next day, Dr. Kois told Burkhart to contact Mr. Ahmed. (Kois Sr., Tr. 254; Reece, Tr. 4433).

Response to Proposed Finding No. 878

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Kois Buyers Group preferred Burkhart to Schein, Benco, or Patterson, or that it chose Burkhart above the Big Three. The record evidence shows that Kois Buyers Group didn’t look to Burkhart first because Kois Buyers Group preferred a national full-service distributor, like Schein, Patterson, or Benco, not a regional distributor like Burkhart (Kois Sr., Tr. 188, 191; *see also* CCFF ¶¶ 1449, 1452-1454). The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not have an opportunity to bid for Kois Buyers Group in October 2014. The record evidence shows that Sullivan was not interested in bidding on Kois Buyers Group as early as September 8, 2014. On September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the

lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski regarding Kois Buyers Group: “I don’t think we want to be the first in this game.” (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kois had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

879. Burkhart reached out to Mr. Ahmed by email on October 20, 2014 (CX 4286), and Mr. Anderson talked with Mr. Ahmed by phone on October 21, 2014. (CX 4289).

Response to Proposed Finding No. 879

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Kois Buyers Group preferred Burkhart to Schein, Benco, or Patterson, or that it chose Burkhart above the Big Three. The record evidence shows that Kois Buyers Group didn’t look to Burkhart first because Kois Buyers Group preferred a national full-service distributor, like Schein, Patterson, or Benco, not a regional distributor like Burkhart (Kois Sr., Tr. 188, 191; *see also* CCFF ¶¶ 1449, 1452-1454). The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not have an opportunity to bid for Kois Buyers Group in October 2014. The record evidence shows that Sullivan was not interested in bidding on Kois Buyers Group as early as September 8, 2014. On September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: “I still believe this is slippery slope and have yet to see a successful one

in dental and don't plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski regarding Kois Buyers Group: “I don't think we want to be the first in this game.” (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kois had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

880. Mr. Ahmed provided Burkhart with his Kois proposal on October 21, 2014. (CX 4126; Reece, Tr. 4473).

Response to Proposed Finding No. 880

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Kois Buyers Group preferred Burkhart to Schein, Benco, or Patterson, or that it chose Burkhart above the Big Three. The record evidence shows that Kois Buyers Group didn't look to Burkhart first because Kois Buyers Group preferred a national full-service distributor, like Schein, Patterson, or Benco, not a regional distributor like Burkhart (Kois Sr., Tr. 188, 191; *see also* CCFF ¶¶ 1449, 1452-1454). The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not have an opportunity to bid for Kois Buyers Group in October 2014. The record evidence shows that Sullivan was not interested in bidding on Kois Buyers Group as early as September 8, 2014. On September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski,

that Schein would not be interested in working with the Kois Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski regarding Kois Buyers Group: “I don’t think we want to be the first in this game.” (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kois had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

881. That same day – October 21, 2014 – Dr. Kois emailed Chuck Cohen of Benco, explaining that he “ha[d] been approached by a company to organize our members for group purchase opportunities” and referred to Mr. Cohen to Mr. Ahmed. (RX 1039-001).

Response to Proposed Finding No. 881

Complaint Counsel has no specific response.

882. Mr. Cohen responded to Dr. Kois later that day, telling him that an opportunity that “involve[d] an outside company like Equalizer Pro Services or anyone else” was not appealing because “they’ll just take a cut of the savings.” (RX 1039-001). Mr. Cohen said he was “going to politely give Qadeer our standards answer of: ‘thanks, but we don’t do buying groups.’” (RX 1039-001). Mr. Cohen suggested that Benco and Dr. Kois discuss “buying club options ... in early 2015.” (RX 1039-001).

Response to Proposed Finding No. 882

Complaint Counsel has no specific response. However, the Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the Big Three did not bid for Kois Buyers Group pursuant to their participation in a conspiracy. Benco did not bid for the Kois Buyers Group in 2014 pursuant to its no buying

group policy. (CCFF ¶ 421). As to Schein, the record evidence shows that Sullivan was not interested in bidding on Kois Buyers Group as early as September 8, 2014. On September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski regarding Kois Buyers Group: “I don’t think we want to be the first in this game.” (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kois had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

883. On October 26, 2014, Mr. Cohen informed Mr. Ahmed that Benco would decline to do business with the buying group, noting “our policy is that we don’t support, or work with, buying groups....” (CX 1240-001).

Response to Proposed Finding No. 883

Complaint Counsel has no specific response.

884. Meanwhile, Burkhart met with Mr. Ahmed on October 22, 2014 and informed Dr. Kois that it was “very interested in participation,” intended to submit a proposal, and scheduled a conference call for October 23 to discuss further with Dr. Kois. (CX 4282-001; CX 4292-001).

Response to Proposed Finding No. 884

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Kois Buyers Group preferred Burkhart to Schein, Benco, or Patterson, or that it chose Burkhart

above the Big Three. The record evidence shows that Kois Buyers Group didn't look to Burkhart first because Kois Buyers Group preferred a national full-service distributor, like Schein, Patterson, or Benco, not a regional distributor like Burkhart (Kois Sr., Tr. 188, 191; *see also* CCFF ¶¶ 1449, 1452-1454). The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not have an opportunity to bid for Kois Buyers Group in October 2014. The record evidence shows that Sullivan was not interested in bidding on Kois Buyers Group as early as September 8, 2014. On September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: "I still believe this is slippery slope and have yet to see a successful one in dental and don't plan to take the lead role. Watching closely." (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski regarding Kois Buyers Group: "I don't think we want to be the first in this game." (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kois had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: "I would never sign us up for straight out GPO model." (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would "pass" on working with the buying group. (CCFF ¶¶ 928-929).

885. [REDACTED]
(CX 4288-002).

[REDACTED] (CX 4288-003; Reece, Tr. 4479).

Response to Proposed Finding No. 885

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Kois Buyers Group preferred Burkhart to Schein, Benco, or Patterson, or that it chose Burkhart above the Big Three. The record evidence shows that Kois Buyers Group didn't look to Burkhart first because Kois Buyers Group preferred a national full-service distributor, like Schein, Patterson, or Benco, not a regional distributor like Burkhart (Kois Sr., Tr. 188, 191; *see also* CCFF ¶¶ 1449, 1452-1454). The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not have an opportunity to bid for Kois Buyers Group in October 2014. The record evidence shows that Sullivan was not interested in bidding on Kois Buyers Group as early as September 8, 2014. On September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: "I still believe this is slippery slope and have yet to see a successful one in dental and don't plan to take the lead role. Watching closely." (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski regarding Kois Buyers Group: "I don't think we want to be the first in this game." (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kois had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: "I would never sign us up for straight out GPO model." (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would "pass" on working with the buying group. (CCFF ¶¶ 928-929).

886. Burkhart pursued a relationship with the Kois Buyers Group in part because like Burkhart, the Kois Center was based in Washington. (Reece, Tr. 4451 (“[I]t was logical within our market....”).

Response to Proposed Finding No. 886

Complaint Counsel has no specific response.

887. “[A]t first,” Burkhart was not “very positive to Qadeer,” so Dr. Kois had to “rel[y] more on [his] personal relationship and reputation....” (CX 8007 (Kois Sr., Dep. at 68)). “The reason that [Burkhart] entered into the relationship [with the Kois Buyers Group] was based solely on Dr. John Kois and his reputation with Burkhart” (Reece, Tr. 4495).

Response to Proposed Finding No. 887

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Kois Buyers Group preferred Burkhart to Schein, Benco, or Patterson, or that it chose Burkhart above the Big Three. The record evidence shows that Kois Buyers Group didn’t look to Burkhart first because Kois Buyers Group preferred a national full-service distributor, like Schein, Patterson, or Benco, not a regional distributor like Burkhart (Kois Sr., Tr. 188, 191; *see also* CCFF ¶¶ 1449, 1452-1454). The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not have an opportunity to bid for Kois Buyers Group in October 2014. The record evidence shows that Sullivan was not interested in bidding on Kois Buyers Group as early as September 8, 2014. On September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski regarding Kois Buyers Group: “I don’t think we want to be the first in

this game.” (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kois had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶ 928-929).

888. Though Mr. Ahmed was responsible for reaching out to distributors, Dr. Kois had ultimate authority to sign-off on any agreement. (Kois Sr., Tr. 189).

Response to Proposed Finding No. 888

Complaint Counsel has no specific response.

889. On October 30, 2014, Mr. Ahmed told Burkhart that it had reached an agreement with the Kois Buyers Group as to the path forward. (CX 4251 (“I spoke to John [Kois Sr.] at 5:30 am – we have agreement on the approach we’re going to take together...”). Dr. Kois testified that this was “around the right time” that he made the decision to choose Burkhart. (Kois Sr., Tr. 302-03).

Response to Proposed Finding No. 889

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Kois Buyers Group preferred Burkhart to Schein, Benco, or Patterson, or that it chose Burkhart above the Big Three. The record evidence shows that Kois Buyers Group didn’t look to Burkhart first because Kois Buyers Group preferred a national full-service distributor, like Schein, Patterson, or Benco, not a regional distributor like Burkhart (Kois Sr., Tr. 188, 191; *see also* CCFF ¶¶ 1449, 1452-1454). The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not have an opportunity to bid for Kois Buyers Group in October 2014. The record evidence shows that Sullivan was not interested in bidding on Kois Buyers Group as early as September 8,

2014. On September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski regarding Kois Buyers Group: “I don’t think we want to be the first in this game.” (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kois had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

890. Dr. Kois chose Burkhart because of his longstanding association with the company: “In the end, because of my relationship with the company, which at that point was about thirty years, I really trusted the company, and they actually showed the most interest, so we decided to work with Burkhart.” (Kois Sr., Tr. 191).

Response to Proposed Finding No. 890

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Kois Buyers Group preferred Burkhart to Schein, Benco, or Patterson, or that it chose Burkhart above the Big Three. The record evidence shows that Kois Buyers Group didn’t look to Burkhart first because Kois Buyers Group preferred a national full-service distributor, like Schein, Patterson, or Benco, not a regional distributor like Burkhart (Kois Sr., Tr. 188, 191; *see also* CCFF ¶¶ 1449, 1452-1454). The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not have

an opportunity to bid for Kois Buyers Group in October 2014. The record evidence shows that Sullivan was not interested in bidding on Kois Buyers Group as early as September 8, 2014. On September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski regarding Kois Buyers Group: “I don’t think we want to be the first in this game.” (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kois had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

891. Dr. Kois “was actually very reluctant to move away from doing business with Burkhart,” because he had “dealt with Burkhart for so many years” and “had such a strong personal relationship” with Burkhart. (CX 8007 (Kois Sr., Dep. at 162-163)). Dr. Kois chose Burkhart because of his “long history” with the company and a trust that was based on 30 years of experience with them. (Kois Sr., Tr. 191; CX 8007 (Kois Sr., Dep. at 119)).

Response to Proposed Finding No. 891

The first sentence of the Proposed Finding is misleading because it relies upon only a portion of Dr. Kois’ full answer in his testimony. In fact, the full answer stated: “So I actually was resistant on going to other companies . . . but it was something that we were willing to at least look at as an opportunity for other members in the buyers club because of what maybe a bigger company could offer our members.” (CX8007 (Kois Sr., Dep. at 162-163)). Then, when asked whether that was “because of the full national reach of the bigger distributors

like Henry Schein, or Patterson or Benco,” Dr. Kois responded, “Yes, yes.” (CX8007 (Kois Sr., Dep. at 163)). In fact, the record evidence shows that Kois Buyers Group didn’t look to Burkhart first because Kois Buyers Group preferred a national full-service distributor, like Schein, Patterson, or Benco, not a regional distributor like Burkhart. (Kois Sr., Tr. 188, 191; *see also* CCF ¶¶ 1449, 1452-1454). To the extent the first sentence implies otherwise, it is inaccurate and misleading. Further, the second sentence of the Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Kois Buyers Group chose Burkhart regardless of Schein, Benco, or Patterson’s rejection. The record evidence shows that each of the Big Three rejected Kois Buyers Group during the conspiracy period, and Kois Buyers Group approached Burkhart because it could not partner with its preferred national distributors. (CCFF ¶¶ 421, 636-640, 809, 928).

892. Given his 30-year relationship with Burkhart, it would have been “very difficult” to choose a different supplier for his buying group. (Kois Sr., Tr. 231-32). The idea of starting a buying group that would partner with anyone but Burkhart was “not appealing” to him. (CX 8007 (Kois Sr., Dep. at 163)).

Response to Proposed Finding No. 892

The Proposed Finding is inaccurate and misleading because it relies upon an incomplete quotation from Dr. Kois’ testimony. In fact, Dr. Kois testified: “That would have been a very difficult decision, but I would have looked at other –other companies.” (Kois Sr., Tr. 231). And as in Proposed Finding No. 891, the cherry-picked language from Dr. Kois’ deposition does not quote the full answer, which renders this Proposed Finding misleading and inaccurate. In fact, Dr. Kois’ full answer included: “. . . not appealing to me personally, but it was something that we were willing to at least look at as an opportunity for other members in the buyers club because of what maybe a bigger company could offer our members.” (CX8007 (Kois Sr., Dep. at 163)). When asked whether that was “because of the full national

reach of the bigger distributors like Henry Schein, or Patterson or Benco,” Dr. Kois responded, “Yes, yes.” (CX8007 (Kois Sr., Dep. at 163)). In fact, the record evidence shows that Kois Buyers Group didn’t look to Burkhart first because Kois Buyers Group preferred a national full-service distributor, like Schein, Patterson, or Benco, not a regional distributor like Burkhart. (Kois Sr., Tr. 188, 191; *see also* CCFF ¶¶ 1449, 1452-1454). To the extent the first sentence implies otherwise, it is inaccurate and misleading. Further, the second sentence of the Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Kois Buyers Group chose Burkhart regardless of Schein, Banco, or Patterson’s rejection. The record evidence shows that each of the Big Three rejected Kois Buyers Group during the conspiracy period, and Kois Buyers Group approached Burkhart because it could not partner with its preferred national distributors. (CCFF ¶¶ 421, 636-640, 809, 928).

5. *Schein Negotiated with Mr. Ahmed, but Dr. Kois Chose Burkhart Before Schein Could Make a Decision.*

893. Schein was the last distributor to receive the Kois proposal – on October 22, 2014. (Kois Sr., Tr. 255; RX 2197-001).

Response to Proposed Finding No. 893

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein rejected Kois Buyers Group because of when it received the Kois Proposal. The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. On September 8, 2014, over one month before Kois Buyers Group approached Schein with a proposal on October 22, 2014, Sullivan learned that Kois was considering Schein, Benco, and Patterson for a distribution agreement. (CX2469 at 003-004). On September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: “I still believe

this is slippery slope and have yet to see a successful one in dental and don't plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski regarding Kois Buyers Group: “I don't think we want to be the first in this game.” (CCFF ¶ 1750 (quoting CX2470 at 001); Sullivan, Tr. 4005-4006). On October 23, 2014, after Kois had approached Sullivan with a proposal, Sullivan was still not interested in any engagement if Kois Buyers Group was a buying group. Sullivan told another Schein executive, Cy Elborne: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

894. Complaint Counsel cites to an earlier email in September 2014 in which Mr. Sullivan reacted to Dr. Kois's introductory email to his “tribe.” (CX 2469; Sullivan, Tr. 3938). Mr. Sullivan wrote, “I forwarded to a few internally for discussion also. I still believe this is slippery slope and have yet to see a successful one in dental and don't plan to take the lead role. Watching closely.” (CX 2469-002). This is consistent with Schein's longstanding approach to and view of buying groups. (SF 159-82; *see also* Sullivan, Tr. 3997-98; 4085).

Response to Proposed Finding No. 894

Complaint Counsel has no specific response to the first and second sentences of the Proposed Finding. As to the third sentence of the Proposed Finding, it is misleading and contrary to the weight of the evidence to the extent it asserts or implies that Schein did not reject Kois Buyers Group pursuant to its participation in a conspiracy. The record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to turning down buying groups during the conspiracy, and then to competing for buying groups when the conspiracy became difficult to maintain following Benco's April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint

Counsel's Post-Trial Brief, at Attachment C). The Kois Buyers Group is just one example of a buying group that was rejected by each of the Big Three during the conspiracy. (CCFF ¶¶ 421, 636-640, 809, 928). The third sentence of the Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein planned to bid on Kois Buyers Group. On September 8, 2014, over one month before Kois Buyers Group approached Schein with a proposal on October 22, 2014, Sullivan learned that Kois was considering Schein, Benco, and Patterson for a distribution agreement. (CX2469 at 003-004). The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. On September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: "I still believe this is slippery slope and have yet to see a successful one in dental and don't plan to take the lead role. Watching closely." (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, Sullivan also stated in response to a proposal from Kois Buyers Group: "I would never sign us up for straight out GPO model." (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would "pass" on working with the buying group. (CCFF ¶¶ 928-929; *see also* Responses to Proposed Finding Nos. 159-182).

895. After receiving the Kois proposal on October 22, Mr. Sullivan informed Dr. Chagger that he would find time for them "to speak in the next week or so. I look forward to catching up with you and learning more about your group." (RX 2424-003). Mr. Sullivan's assistant then asked Dr. Chagger about his availability on October 30 or October 31. (RX 2424-002).

Response to Proposed Finding No. 895

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein planned to bid on the Kois Buyers Group. The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. On

September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, Sullivan also stated in response to a proposal from Kois Buyers Group: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

896. Dr. Chagger replied that he “would like to schedule a webex this week as time is of the essence.” (RX 2424-002). Mr. Sullivan accommodated, and spoke with Dr. Chagger and Mr. Ahmed the following day on October 23. (RX 2602-006).

Response to Proposed Finding No. 896

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein planned to bid on the Kois Buyers Group. The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. On September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, Sullivan also stated in response to a proposal from Kois Buyers Group: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

897. After the discussion, Mr. Sullivan followed up, noting “[w]e are very interested in learning more about this initiative as it certainly seems very unique to anything we’ve heard thus

far. I need a little bit of time to do some homework and will follow up next week on thoughts regarding next steps.” (RX 2602-006).

Response to Proposed Finding No. 897

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein planned to bid on the Kois Buyers Group or that Sullivan was interested in working with the Kois Buyers Group. The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. On September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, Sullivan also stated in response to a proposal from Kois Buyers Group: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

898. This response to Kois is inconsistent with Complaint Counsel’s allegation that Schein had a policy or agreement not to do business with buying groups. (Complaint ¶ 1). If Schein had such a policy or agreement, and was following it, it would have simply declined the Kois proposal. Instead, its executives spent the time and resources to discuss the proposal with Mr. Ahmed and evaluate it. (RX 2424; RX 2602).

Response to Proposed Finding No. 898

The first sentence is not supported by the cited evidence, as the Complaint does not state that Schein’s conduct regarding Kois Buyers Group is inconsistent with a policy or agreement. The second sentence is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein planned to or intended to bid on the Kois Buyers Group. The record evidence shows Sullivan was not interested in bidding on Kois by

September 8, 2014. On September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, that Schein would not be interested in working with the Kois Buyers Group: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, Sullivan also stated in response to a proposal from Kois Buyers Group: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929).

899. Schein held an internal meeting on October 27, 2014 to discuss the buying group’s proposition. (RX 2602-005). The same day, Mr. Sullivan emailed Mr. Ahmed asking for time to consider options and to meet in person: “I highly doubt I’ll be able to coordinate such a broader meeting for a deep dive with this same group again in the next 24-48 hours. I am hopeful you can buy us a little more time considering we were invited to this discussion so late in the game ... it feels like ‘right vs. fast’ may be the best approach. I also believe a face to face meeting with you and Dr. Kois would be of great value to everyone.” (RX 2602-005).

Response to Proposed Finding No. 899

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein planned to or intended to bid on the Kois Buyers Group. The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. Sullivan communicated to Muller and his boss, Breslawski, regarding Kois on September 8, 2014: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295)) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, Sullivan also stated in response to proposal from Kois Buyers Group: “I would never sign us up for straight out GPO model.” (CX6617 at 001).

Schein rejected the Kois Buyers Group in November 2014, and stated that it would “pass” on working with the buying group. (CCFF ¶ 928-929).

900. Mr. Sullivan’s desire to take a “right vs. fast” approach and meet Dr. Kois and Mr. Ahmed in person is inconsistent with Complaint Counsel’s allegation that Schein had a policy or agreement not to do business with buying groups. (Complaint ¶ 1).

Response to Proposed Finding No. 900

The first sentence is not supported by the cited evidence, as the Complaint does not state that Schein’s conduct regarding Kois Buyers Group is inconsistent with a policy or agreement.

The second sentence is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein planned to or intended to bid on the Kois Buyers Group. The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. Sullivan communicated to Muller and his boss, Breslawski, regarding Kois on September 8, 2014: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295)) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, Sullivan also stated in response to a proposal from Kois Buyers Group: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014, and stated that it would “pass” on working with the buying group. (CCFF ¶ 928-929).

901. Mr. Sullivan explained at trial that, “I’m basically saying to him we’re not saying no. There are some things that we have been talking about that actually sound like there’s some potentially opportunity here. It’s a large group. If we could figure some things out, it’s potentially a large opportunity, but we need time to analyze this, and I am not going to rush into an agreement with them.” (Sullivan, Tr. 4225-4226).

Response to Proposed Finding No. 901

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein planned to or intended to bid on the Kois Buyers

Group. The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. Sullivan communicated to Muller and his boss, Breslawski, regarding Kois on September 8, 2014: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295)) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, Sullivan also stated in response to a proposal from Kois Buyers Group: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014, and stated that it would “pass” on working with the buying group. (CCFF ¶ 928-929).

902. Mr. Ahmed replied that he was happy to spend “serious time” discussing “extended aspects of the program,” including with Dr. Kois, but only “after we get a basic initial deal done that gives you an ‘out’ if we don’t deliver on the rest in a timely fashion.” (RX 2602-004).

Response to Proposed Finding No. 902

The Proposed Finding is inaccurate and misleading as to the assertion that Ahmed offered a discussion “only” after a basic deal was put into place, as it mischaracterizes RX2602. That document does not establish such a prerequisite. (RX2602 at 004 (“I’m happy to spend serious time perhaps including John [Kois] given his dense teaching schedule, on the extended aspects of the program after we get a basic initial deal done that gives you an ‘out’ if we don’t deliver on the rest in a timely fashion.”)). The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein planned to or intended to bid on the Kois Buyers Group at any point. The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. Sullivan communicated to Muller and his boss, Breslawski, regarding Kois on September 8, 2014: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002);

CX8025 (Sullivan, Dep. at 295)) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, Sullivan also stated in response to a proposal from Kois Buyers Group: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014, and stated that it would “pass” on working with the buying group. (CCFF ¶ 928-929).

903. Still, Mr. Sullivan responded later that day, noting, “The good news is that our interest continues to remain high. The challenge is that this appears to be quite complicated in structure and modeling and have many more questions than we do answers at this time.” (RX 2602-004).

Response to Proposed Finding No. 903

The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein planned to or intended to bid on the Kois Buyers Group at any point. The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. Sullivan communicated to Muller and his boss, Breslawski, regarding Kois on September 8, 2014: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295)) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, Sullivan also stated in response to a proposal from Kois Buyers Group: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014, and stated that it would “pass” on working with the buying group. (CCFF ¶ 928-929).

904. Mr. Sullivan’s representation that Schein’s “interest continues to remain high” is inconsistent with Complaint Counsel’s allegation that Schein had a policy or agreement not to do business with buying groups. (Complaint ¶ 1).

Response to Proposed Finding No. 904

The Proposed Finding is not supported by a citation to the Complaint, which does not state that Schein's conduct regarding Kois Buyers Group is inconsistent with a policy or agreement. The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein planned to or intended to bid on the Kois Buyers Group. The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. Sullivan communicated to Muller and his boss, Breslawski, regarding Kois on September 8, 2014: "I still believe this is slippery slope and have yet to see a successful one in dental and don't plan to take the lead role. Watching closely." (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, Sullivan also stated in response to a proposal from Kois Buyers Group: "I would never sign us up for straight out GPO model." (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014, and stated that it would "pass" on working with the buying group. (CCFF ¶ 928-929).

905. Mr. Sullivan then asked for an outline of the "basic initial deal" that Mr. Ahmed sought and promised to "quickly turn around our thoughts on next steps." (RX 2602-004). This too is inconsistent with Complaint Counsel's allegation that Schein had a policy or agreement not to do business with buying groups.

Response to Proposed Finding No. 905

The second sentence of the Proposed Finding is not supported by any citation and should be disregarded. However, the Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein planned to or intended to bid on the Kois Buyers Group. The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. Sullivan communicated to Muller and his boss, Breslawski, regarding Kois on September 8, 2014: "I still believe this is slippery slope and

have yet to see a successful one in dental and don't plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295)) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, Sullivan also stated in response to a proposal from Kois Buyers Group: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014, and stated that it would “pass” on working with the buying group. (CCFF ¶ 928-929).

906. The following day, October 28, 2014, Mr. Ahmed sent a proposal, which did little more than repeat the points in his original presentation, and asked to “wrap this up in the next few days.” (RX 2602-003). He offered to “spend the time to share our detailed plans with your team, and understand where you want to take your business[,]” only “*after* you give us the supply deal....” (RX 2602-003; Kois Sr., Tr. 263-64; RX 2197).

Response to Proposed Finding No. 906

The Proposed Finding, as to the assertion that the proposal “did little more than repeat the points in his original presentation,” is not supported by the cited evidence. RX2602 does not even compare Ahmed's proposal to any “original presentation.” Moreover, the Proposed Finding is inaccurate and misleading as to the assertion that Ahmed offered a discussion “only” after a basic deal was put into place, as it mischaracterizes RX2602. That document does not establish such a prerequisite. (RX2602 at 004 (“I'm happy to spend serious time perhaps including John [Kois] given his his dense teaching schedule, on the extended aspects of the program after we get a basic initial deal done that gives you an ‘out’ if we don't deliver on the rest in a timely fashion.”)). The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein planned to or intended to bid on the Kois Buyers Group at any point. The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. Sullivan communicated to Muller and his boss, Breslawski, regarding Kois on September 8, 2014: “I still believe this is slippery slope and have yet to see a successful one in dental and don't plan

to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295)) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, Sullivan also stated in response to a proposal from Kois Buyers Group: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014, and stated that it would “pass” on working with the buying group. (CCFF ¶ 928-929).

907. Mr. Ahmed wrote “I can visit you 48 hours after we launch the supply deal,” but did not otherwise agree to Mr. Sullivan’s suggestion of a “face to face meeting.” (RX 2602-003, 005).

Response to Proposed Finding No. 907

The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein planned to or intended to bid on the Kois Buyers Group at any point. The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. Sullivan communicated to Muller and his boss, Breslawski, regarding Kois on September 8, 2014: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295)) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, Sullivan also stated in response to a proposal from Kois Buyers Group: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014, and stated that it would “pass” on working with the buying group. (CCFF ¶ 928-929).

908. To Mr. Sullivan, “That’s not how you enter a contract. That’s not how you enter a partnership.” (Sullivan, Tr. 4227; *see also* Sullivan, Tr. 4228).

Response to Proposed Finding No. 908

The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein planned to or intended to bid on the Kois Buyers Group at any point. The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. Sullivan communicated to Muller and his boss, Breslawski, regarding Kois on September 8, 2014: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295)) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, Sullivan also stated in response to a proposal from Kois Buyers Group: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014, and stated that it would “pass” on working with the buying group. (CCFF ¶ 928-929).

909. Mr. Sullivan responded: “I appreciate the ‘get r done’ approach, but it’s not a style/approach that I am comfortable working in. I can’t get married with a ‘no big deal, we can always divorce later’ mentality. We do not enter partnerships lightly and ONLY commit if we see long term mutual value. I can’t put out a public ‘go to market’ strategy that includes a special pricing program (ie. appearance of Buying Group only) for a targeted group of customers that doesn’t include ‘the rest of the story’. If that means we are out of your consideration then I respect your decision and hope that we can stay connected along the way for future consideration. However, if we can slow down and really understand your model better that you believe is going to change dentistry, then we believe it’s worth rolling up sleeves and getting to know each other better.... This will take some time to put together thoughtfully and diligently.” (RX 2602-002; Kois Sr., Tr. 265).

Response to Proposed Finding No. 909

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein planned to or intended to bid on the Kois Buyers Group at any point. The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. Sullivan communicated to Muller and his boss, Breslawski, regarding Kois on September 8, 2014: “I still believe this is slippery slope and have yet to see

a successful one in dental and don't plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295)) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, Sullivan also stated in response to a proposal from Kois Buyers Group: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014, and stated that it would “pass” on working with the buying group. (CCFF ¶ 928-929).

910. Mr. Sullivan's response in 2014 (in the middle of the alleged conspiracy) – Schein's desire to proceed “thoughtfully and diligently” and to understand the Kois model – is inconsistent with Complaint Counsel's allegation that Schein had a policy or agreement not to do business with buying groups. (Complaint ¶ 1).

Response to Proposed Finding No. 910

The Proposed Finding is not supported by a citation to the Complaint. Nonetheless, the Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein ever planned to or intended to bid on the Kois Buyers Group. The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. Sullivan communicated to Muller and his boss, Breslawski, regarding Kois on September 8, 2014: “I still believe this is slippery slope and have yet to see a successful one in dental and don't plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, Sullivan also stated in response to a proposal from Kois Buyers Group: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014, and stated that it would “pass” on working with the buying group. (CCFF ¶ 928-929).

911. Mr. Ahmed responded that “[i]f we believe the process is moving to an intelligent and rapid conclusion, we'll stay engaged.” (RX 2602-001).

Response to Proposed Finding No. 911

Complaint Counsel has no specific response.

912. Dr. Kojs was copied on these negotiations between Schein and Mr. Ahmed, but he did not pay attention to them. (Kojs Sr., Tr. 261, 266-67). Still, Dr. Kojs understood at the time that Schein's interest in partnering with the buying group was "high." (Kojs Sr., Tr. 261-62; CX 8007 (Kojs Sr., Dep. at 152)).¹¹

Response to Proposed Finding No. 912

The Proposed Finding and footnote 11 (if intended to be part of the Proposed Finding) is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein planned to or intended to bid on the Kojs Buyers Group. The record evidence shows Sullivan was not interested in bidding on Kojs by September 8, 2014. Sullivan communicated to Muller and his boss, Breslawski, regarding Kojs on September 8, 2014: "I still believe this is slippery slope and have yet to see a successful one in dental and don't plan to take the lead role. Watching closely." (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kojs Buyers Group)). On October 23, 2014, Sullivan also stated in response to a proposal from Kojs Buyers Group: "I would never sign us up for straight out GPO model." (CX6617 at 001). Schein rejected the Kojs Buyers Group in November 2014, and stated that it would "pass" on working with the buying group. (CCFF ¶ 928-929). As such, it is also irrelevant what Dr. Kojs understood about Schein's interest at a particular point in time, as it has no any bearing on Schein's conduct regarding Kojs Buyers Group.

913. But just two days later, on October 30, 2014, Mr. Ahmed told Burkhardt that Dr. Kojs had reached an agreement as to the path forward with Burkhardt. (CX 4251-001; Kojs Sr., Tr.

¹¹ Complaint Counsel elicited testimony from Dr. Kojs that he "did not hear anyone was interested other than Burkhardt" without showing Dr. Kojs the email exchange with Schein. Once Dr. Kojs' recollection was refreshed, he agreed that Schein's interest was "high." (*Compare* Kojs Sr., Tr. 267 *with* Kojs Sr., Tr. 261-62).

265-66). Dr. Kois made that decision before he had any understanding of whether Schein would sign a deal with him. (CX 8007 (Kois Sr., Dep. at 167-68)).

Response to Proposed Finding No. 913

The second sentence of the Proposed Finding is inaccurate. The record evidence shows that Dr. Kois understood that it “didn’t look favorable” that the Big Three would partner with the Kois Buyers Group, and so Kois Buyers Group proceeded with Burkhart. (CX8007 (Kois Sr., Dep. at 169); CCFF ¶ 928). The first sentence of the Proposed Finding is misleading to the extent it asserts or implies that Kois Buyers Group preferred Burkhart to Schein, Benco, or Patterson and chose Burkhart instead of Schein, Benco, or Patterson. The record evidence shows that Kois Buyers Group didn’t look to Burkhart first because Kois Buyers Group preferred a national full-service distributor, like Schein, Patterson, or Benco, not a regional distributor like Burkhart (Kois Sr., Tr. 188, 191; *see also* CCFF ¶¶ 1449, 1452-1454). It also shows that Kois Buyers Group partnered with Schein because the Big Three rejected it. (CCFF ¶ 928).

914. Meanwhile, Schein continued to evaluate the Kois proposal internally with “the entire senior management team,” and did not notify Mr. Ahmed of its decision to decline until November 3, 2014, four days *after* Dr. Kois had already agreed to move forward with Burkhart. (CX 4310-001). Schein’s decision was “based largely on not having enough time to do our due diligence and the current dental market conditions.” (CX 4310-001; Sullivan, Tr. 4230 (“[T]here was no way for us to do it in the time frame they were looking for.”)).

Response to Proposed Finding No. 914

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein planned to or intended to bid on the Kois Buyers Group. The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. Sullivan communicated to Muller and his boss, Breslawski, regarding Kois on September 8, 2014: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶

809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, Sullivan also stated in response to a proposal from Kois Buyers Group: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014, and stated that it would “pass” on working with the buying group. (CCFF ¶ 928-929). The Kois Buyers Group is just one example of a buying group that was rejected by each of the Big Three during the conspiracy. (CCFF ¶¶ 421, 636-640, 809, 928). The record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to turning down buying groups during the conspiracy, and then to competing for buying groups when the conspiracy became difficult to maintain following Benco’s April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

915. For Mr. Sullivan, a big concern with the Kois proposal was commitment. “There was no commitment to whoever they chose as their dealer of choice, that they would actually then make their purchases.” (Sullivan, Tr. 4223).

Response to Proposed Finding No. 915

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein planned to or intended to bid on the Kois Buyers Group but did not because of “commitment.” The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. Sullivan communicated to Muller and his boss, Breslawski, regarding Kois on September 8, 2014: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295)) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, Sullivan also stated in

response to a proposal from Kois Buyers Group: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014, and stated that it would “pass” on working with the buying group. (CCFF ¶ 928-929). The Kois Buyers Group is just one example of a buying group that was rejected by each of the Big Three during the conspiracy. (CCFF ¶¶ 421, 636-640, 809, 928). The record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to turning down buying groups during the conspiracy, and then to competing for buying groups when the conspiracy became difficult to maintain following Benco’s April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

916. As he testified at deposition, when Dr. Kois selected Burkhart, he had not yet heard back from Schein “with any certainty.” (CX 8007 (Kois Sr., Dep. at 168)).¹²

Response to Proposed Finding No. 916

The Proposed Finding and footnote 12 (if intended to be part of the Proposed Finding) is misleading to the extent it implies or asserts that Dr. Kois proceeded to partner with Burkhart despite a competing bid from Schein. In fact, the record evidence shows that Dr. Kois understood that it “didn’t look favorable” that the Big Three would partner with the Kois Buyers Group, and that is why Kois Buyers Group proceeded with Burkhart. (CX8007 (Kois Sr., Dep. at 169); CCFF ¶ 928). The Proposed Finding is misleading to the extent it asserts or implies that Kois Buyers Group preferred Burkhart to Schein, Benco, or Patterson and chose

¹² Complaint Counsel elicited contradictory testimony from Dr. Kois that it was not until Mr. Ahmed “was not able to work with any other companies” that “we reached out to Burkhart.” (Kois Sr., Tr. 190). After looking at the chronology of documents, Dr. Kois later corrected this. (Kois Sr., Tr. 190; *compare* Kois Sr., Tr. 250-51 with Kois Sr., Tr. 255).

Burkhart instead of Schein, Benco, or Patterson. The record evidence shows that Kois Buyers Group preferred a national full-service distributor, like Schein, Patterson, or Benco, not a regional distributor like Burkhart (Kois Sr., Tr. 188, 191; *see also* CCFF ¶¶ 1449, 1452-1454). It also shows that Kois Buyers Group partnered with Schein because the Big Three rejected it. (CCFF ¶ 928).

917. Dr. Kois Sr. never met with Mr. Sullivan and never took part in a meeting with Schein about the Kois proposal. (Kois Sr., Tr. 259, 260-61).

Response to Proposed Finding No. 917

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies or asserts that Dr. Kois preferred Burkhart over Schein and proceeded to partner with Burkhart despite a competing bid from Schein. In fact, the record evidence shows that Dr. Kois understood that it “didn’t look favorable” that the Big Three would partner with the Kois Buyers Group, which is why Kois Buyers Group proceeded with Burkhart. (CX8007 (Kois Sr., Dep. at 169); CCFF ¶ 928). In addition, Kois Buyers Group preferred a national full-service distributor, like Schein, Patterson, or Benco, not a regional distributor like Burkhart (Kois Sr., Tr. 188, 191; *see also* CCFF ¶¶ 1449, 1452-1454). Kois Buyers Group partnered with Schein because the Big Three rejected it. (CCFF ¶ 928).

918. This is in contrast to the negotiations with Burkhart, where Dr. Kois did participate personally. (Kois Sr., Tr. 261).

Response to Proposed Finding No. 918

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies or asserts that Dr. Kois preferred Burkhart over Schein and proceeded to partner with Burkhart despite a competing bid from Schein. In fact, the record evidence shows that Dr. Kois understood that it “didn’t look favorable” that the Big Three would partner with the Kois Buyers Group, which is why Kois Buyers Group proceeded with

Burkhart. (CX8007 (Kois Sr., Dep. at 169); CCFF ¶ 928). In addition, Koīs Buyers Group preferred a national full-service distributor, like Schein, Patterson, or Benco, not a regional distributor like Burkhard (Kois Sr., Tr. 188, 191; *see also* CCFF ¶¶ 1449, 1452-1454). Koīs Buyers Group partnered with Schein because the Big Three rejected it. (CCFF ¶ 928).

919. Mr. Ahmed had nothing to do with Burkhard’s decision to partner with Koīs, it “was based solely on Dr. John Koīs....” (Reece, Tr. 4495-96).

Response to Proposed Finding No. 919

Complaint Counsel has no specific response.

6. *Though the Koīs Buyers Group Got Off to a Slow Start Under Mr. Ahmed’s Leadership, Mr. Koīs Jr. Turned It Around and Never Approached Schein Again.*

920. The Koīs Buyers Group signed an agreement with Burkhard on November 14, 2014. (Kois Sr., Tr. 265-66).

Response to Proposed Finding No. 920

Complaint Counsel has no specific response.

921. At that time, Mr. Ahmed ran and managed the Koīs Buyers Group. (Kois Jr., Tr. 311).

Response to Proposed Finding No. 921

Complaint Counsel has no specific response.

922. The Koīs Buyers Group under Mr. Ahmed was not popular. (CX 8007 (Kois Sr., Dep. at 74-75)). It lacked direction, clarity, and structure. (CX 8008 (Kois Jr., Dep. at 119, 121)).

Response to Proposed Finding No. 922

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or suggests that the popularity of the Koīs Buyers Group was the reason Schein did not bid on it. The record evidence shows Sullivan was not interested in bidding on Koīs Buyers Group by September

8, 2014. Sullivan communicated to Muller and his boss, Breslawski, regarding Kois on September 8, 2014: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, Sullivan also stated in response to information about Kois: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014, and stated that it would “pass” on working with the buying group. (CCFF ¶ 928-929). The Kois Buyers Group is just one example of a buying group that was rejected by each of the Big Three during the conspiracy. (CCFF ¶¶ 421, 636-640, 809, 928). The record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to turning down buying groups during the conspiracy, and then to competing for buying groups when the conspiracy became difficult to maintain following Benco’s April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

923. After one year, Kois Buyers Group “was not doing very well” and the “perception of our members was not great.” (Kois Sr., Tr. 223). Adoption of the buying group was “very slow,” leading to a “very small number” of participants. (CX 8007 (Kois Sr., Dep. at 81)).

Response to Proposed Finding No. 923

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or suggests that the number of participants in the Kois Buyers Group was the reason Schein did not bid on it. The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. Sullivan communicated to Muller and his boss, Breslawski, regarding Kois on

September 8, 2014: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, Sullivan also stated in response to information about Kois: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014, and stated that it would “pass” on working with the buying group. (CCFF ¶ 928-929). The Kois Buyers Group is just one example of a buying group that was rejected by each of the Big Three during the conspiracy. (CCFF ¶¶ 421, 636-640, 809, 928). The record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to turning down buying groups during the conspiracy, and then to competing for buying groups when the conspiracy became difficult to maintain following Benco’s April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

924. The membership fees were initially “way too expensive” for members. (Kois Sr., Tr. 239). The Kois Buyers Group charged between \$2,400 and \$6,000 per year (Kois Sr., Tr. 239), on top of the \$5,000-to-\$10,000 in tuition costs that were required to gain eligibility for group membership. (Kois Sr., Tr. 233-34; Kojs Jr., Tr. 319).

Response to Proposed Finding No. 924

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or suggests that the cost of membership fees to join the Kois Buyers Group was the reason Schein did not bid on it. The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. Sullivan communicated to Muller and his boss, Breslawski, regarding

Kois on September 8, 2014: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295)) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, Sullivan also stated in response to information about Kois: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014, and stated that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929). The Kois Buyers Group is just one example of a buying group that was rejected by each of the Big Three during the conspiracy. (CCFF ¶¶ 421, 636-640, 809, 928). The record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to turning down buying groups during the conspiracy, and then to competing for buying groups when the conspiracy became difficult to maintain following Benco’s April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

925. Though Mr. Ahmed’s proposal to Schein and Patterson had assumed that the buying group would immediately gain 1,700 members, only about 170 members (or 10% of the proposal) had signed up as of March 2015. (CX 8007 (Kois Sr., Dep. at 124); Kois Jr., Tr. 317).

Response to Proposed Finding No. 925

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or suggests that estimated or actual membership in the Kois Buyers Group was the reason Schein did not bid on it. The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. Sullivan communicated to Muller and his boss, Breslawski,

regarding Kois on September 8, 2014: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, Sullivan also stated in response to information about Kois: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014, and stated that it would “pass” on working with the buying group. (CCFF ¶ 928-929). The Kois Buyers Group is just one example of a buying group that was rejected by each of the Big Three during the conspiracy. (CCFF ¶¶ 421, 636-640, 809, 928). The record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to turning down buying groups during the conspiracy, and then to competing for buying groups when the conspiracy became difficult to maintain following Benco’s April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

926. John Kois Jr. took over management of the buying group from Mr. Ahmed in October of 2015. (Kois Jr., Tr. 361). Even then, “there was confusion amongst the members of what kind of discounts they would receive. And also there was hesitation to purchase for people that weren’t purchasing from Burkhart....” (Kois Jr., Tr. 363).

Response to Proposed Finding No. 926

Complaint Counsel has no specific response.

927. Though the Kois Buyers Group has advertised a 15% discount, Mr. Kois admitted there were “credibility concerns” with that claim because individual dentists could obtain higher discounts from Burkhart or other suppliers. (Kois Jr., Tr. 360-61).

Response to Proposed Finding No. 927

The Proposed Finding mischaracterizes the cited evidence, which stated that the 15% discount “is the best price that we – that Burkhart is allowing for our members even if they don’t purchase much at all from Burkhart.” It does not state that “individual dentists could obtain higher discounts from Burkhart or other suppliers.” To the extent the Proposed Finding implies that the Kois Buyers Group advertisement was not credible, that is misleading based on the lack of support for that statement.

928. Mr. Kois implemented numerous changes to the buying group’s operations. Among other things, he created a website, handed out fliers to students, sent out newsletters and updated the group’s social media presence. (Kois Jr., Tr. 363-64).

Response to Proposed Finding No. 928

Complaint Counsel has no specific response.

929. Mr. Kois also drastically reduced the cost of membership to \$299 per year. (Kois Jr., Tr. 364-65; Kojs Sr., Tr. 240-41). When the pricing structure was reduced, “all the people that had paid the high fees” were given “membership for how many years that would work out to be when you look at the total number – the amount of dollars they contributed from the beginning. So if they contributed the \$900, they were given a three-year membership.” (Kois Sr., Tr. 239-41). [REDACTED] (CX 4228; Reece, Tr. 4480).

Response to Proposed Finding No. 929

Complaint Counsel has no specific response.

930. Mr. Ahmed had retained 50% of the initial membership fees, but he did not return any of it to the Kois Buyers Group. (Kois Sr., Tr. 242).

Response to Proposed Finding No. 930

Complaint Counsel has no specific response to the attribution of the statement to Dr. Kois.

However, the Proposed Finding is irrelevant, as it has no bearing on Schein’s conduct regarding the Kois Buyers Group.

931. Mr. Kois also began to “add additional vendors that were manufacturers that sold direct to the dental practices.” (Kois Jr., Tr. 363).

Response to Proposed Finding No. 931

Complaint Counsel has no specific response.

932. One of the manufacturers that Mr. Kois reached out to was 3M. (Kois Jr., Tr. 368). But 3M told Mr. Kois that it was not interested, because “members already purchase[d] from 3M” and “any discounts would erode profits.” (Kois Jr., Tr. 368-69).

Response to Proposed Finding No. 932

Complaint Counsel has no specific response. However, the Proposed Finding is irrelevant, as a manufacturer’s response has no bearing on Schein’s conduct regarding the Kois Buyers Group.

933. Another manufacturer, Ultradent, told Mr. Kois that they had a policy of not working with buying groups. (Kois Jr., Tr. 369). Ultradent explained that “they had been a part of a buyers group in the past and they didn’t have favorable results.” (CX 8008 (Kois Jr., Dep. at 56)).

Response to Proposed Finding No. 933

Complaint Counsel has no specific response. However, the Proposed Finding is irrelevant, as a manufacturer’s response has no bearing on Schein’s conduct regarding the Kois Buyers Group.

934. One manufacturer that did accept Mr. Kois’ invitation was Brasseler, which currently provides discounts for Kois Buyers Group members ranging from 40 to 60%. (Kois Jr., Tr. 369-70; CX 8008 (Kois Jr., Dep. at 161-62)). Brasseler is wholly owned by Henry Schein. (Kois Jr., Tr. 370; CX 8008 (Kois Jr., Dep. at 161-62)).

Response to Proposed Finding No. 934

Complaint Counsel has no specific response. However, the Proposed Finding is irrelevant, as Brasseler is a separate company from Schein, and its conduct has no bearing on Schein’s conduct with respect to the Kois Buyers Group. (Sullivan, Tr. 4347). Sullivan has not been involved in running Brasseler’s business, and he has had no involvement in Brasseler’s management, business strategies, or decisions. (Sullivan, Tr. 4347-4348). Brasseler also has

its own president (Sullivan, Tr. 4347). To the extent the Proposed Finding attempts to conflate Brasseler's actions with Schein's, it is misleading.

935. Despite making numerous changes to the buying group, Mr. Kois never sought to change suppliers. He did not reach out to Schein when he negotiated renewed agreements with Burkhart in 2016 and 2018. (Kois Jr., Tr. 340-41, 362-63). Mr. Kois likewise did not reach out to Patterson when the Kois Buyers Group was negotiating renewals with Burkhart. (Kois Jr., Tr. 382-83).

Response to Proposed Finding No. 935

Complaint Counsel has no specific response.

936. Mr. Kois believes the buying group was not impacted at all by the decision not to work with Schein, Benco or Patterson. (Kois Jr., Tr. 366). And Dr. Kois believes that the buying group has been a success and a different supply company would not have made a difference. (Kois Sr., Tr. 226; CX 8007 (Kois Sr., Dep. at 89-90 ("I don't think a different supply company would make any difference."))).

Response to Proposed Finding No. 936

The Proposed Finding mischaracterizes the evidence. Both Mr. Kois and Dr. Kois testified that some members desired a full-service distributor and that a distributor with an east coast presence would have made a difference for some members. (CX8007 (Kois Sr., Dep. at 90); CX0321 (Kois Jr., IHT, at 158)). The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the Kois Buyers Group was not impacted by the Big Three's rejection of their business. Indeed, the record evidence shows that the Kois Buyers Group preferred a national full-service distributor, like Schein, Patterson, or Benco, not a regional distributor like Burkhart (Kois Sr., Tr. 188, 191; *see also* CCFF ¶¶ 1449, 1452-1454). Kois Buyers Group partnered with Schein because the Big Three rejected it. (CCFF ¶ 928).

Y. Long Island Dental Forum.

937. Complaint Counsel's expert, Dr. Marshall lists the Long Island Dental Forum as a buying group under Complaint Counsel's definition. (CX 7101-032-33, 137-40).

Response to Proposed Finding No. 937

This Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (*See* February 21, 2019 Order on Post-Trial Briefs).

938. Schein also considers and treats the Long Island Dental Forum as a buying group. (Cavaretta, Tr. 5577; CX 8033 (Cavaretta, Dep. at 159-60); CX 8020 (Brady, Dep. at 212)).

Response to Proposed Finding No. 938

Complaint Counsel has no specific response.

939. The Long Island Dental Forum is a “study club” created by Dr. Alan Farber and comprised of independent dentists. (RX 2947 (Cavaretta, Dep. at 23-24); *see also* RX 2263-005-06 (listing dentist members for 2015-16)).

Response to Proposed Finding No. 939

The Proposed Finding is vague as to the undefined term “study club,” and Complaint Counsel cannot guess whether Schein asserts or implies that it is different from the term buying group. The record evidence shows that Long Island Dental Forum was a buying club. (SF 938; *see also* CCFF ¶ 441). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

940. Schein entered into a relationship with the Long Island Dental Forum by at least 2006. (Cavaretta, Tr. 5577).

Response to Proposed Finding No. 940

Complaint Counsel has no specific response.

941. Joe Cavaretta, the Schein Regional Manager for Long Island at the time, was responsible for opening the Long Island Dental Forum buying group within Schein. (Cavaretta, Tr. 5576-78). While Mr. Cavaretta was engaging in negotiations with the Long Island Dental Forum, he called Dave Steck about the opportunity and Mr. Steck agreed it was a good opportunity that Schein should pursue. (Cavaretta, Tr. 5577-78 (“When ... I was engaging in conversations with Dr. Farber I did call Dave Steck and let him know about the opportunity, talked it over, and he said, Yeah, let’s do it.”)).

Response to Proposed Finding No. 941

Complaint Counsel has no specific response.

942. A 2006 letter from Mr. Cavaretta to Dr. Alan Farber outlined the “terms of [Schein’s] agreement” with the Long Island Dental Forum. (CX 2724-017; Cavaretta, Tr. 5576-77).

Response to Proposed Finding No. 942

Complaint Counsel has no specific response.

943. Schein’s letter agreement lists benefits for “each new member” of the Long Island Dental Forum, including “5% off of catalog,” membership in the Privileges Program “as long as they commit to do at least 12k in business,” a “fee analysis” for each member who is also a Privileges customer, a “3% cash back” rebate to the Long Island Dental Forum, and other technical support and technology benefits. (CX 2724-017).

Response to Proposed Finding No. 943

Complaint Counsel has no specific response.

944. Schein’s letter agreement to the Long Island Dental Forum also indicated the Long Island Dental Forum will “persuade members to make SSD [Sullivan Schein Dental] their primary source for merchandise and equipment,” and “promot[e] [Schein] as their exclusive supplier.” (CX 2724-018).

Response to Proposed Finding No. 944

Complaint Counsel has no specific response.

945. Dr. Alan Farber signed an additional agreement with Schein on December 9, 2015. (RX 2263-002).

Response to Proposed Finding No. 945

Complaint Counsel has no specific response.

946. Schein continues to do business with the Long Island Dental Forum and provide its member dentists discounts. (Cavaretta, Tr. 5578; *see also* CX 7101-140 (identifying Long Island Dental Forum sales in Schein sales data from 2009 to 2017)).

Response to Proposed Finding No. 946

Complaint Counsel has no specific response.

947. As a group of independent dentists receiving a discount on dental supplies, the Long Island Dental Forum meets Complaint Counsel’s definition of a buying group. (Complaint ¶ 3).

Response to Proposed Finding No. 947

The Proposed Finding is not supported by the cited evidence. However, Complaint Counsel has no specific response to the statement that Long Island Dental Forum is a buying group.

948. Schein did business with the Long Island Dental Forum buying group during the alleged conspiracy. (Cavaretta, Tr. 5578). The fact that Schein's business with Long Island Dental Forum continued uninterrupted from 2006 to the present is also inconsistent with Complaint Counsel's allegation that Schein ended its existing relationships with buying groups as part of the alleged conspiracy.

Response to Proposed Finding No. 948

The second sentence of the Proposed Finding is not supported by any citation to the record evidence and should be disregarded. Nonetheless, the second sentence is also inaccurate because Complaint Counsel does not allege that Schein "ended its existing relationships with buying groups as part of the alleged conspiracy." Buying groups that Schein contracted with prior to the conspiracy period, which continued into the conspiracy period, are irrelevant to its conduct regarding buying groups that approached Schein during the conspiracy period. Thus, the Proposed Finding is not only irrelevant but misleading to the extent it asserts pre-conspiracy buying groups disprove Schein's participation in a conspiracy.

949. Schein's sales and relationship with the Long Island Dental Forum are inconsistent with the alleged conspiracy. (Complaint ¶ 1).

Response to Proposed Finding No. 949

The Proposed Finding is not supported by the cited evidence and should be disregarded. The Proposed Finding is also inaccurate and misleading for the reasons set forth in the Response to Proposed Finding No. 948.

Z. Mastermind Group.

950. The Mastermind Group is a "buying group composed on independent private practice dentists." (RX 2947 (Cavaretta, Dep. at 66-67)).

Response to Proposed Finding No. 950

Complaint Counsel has no specific response.

951. The Mastermind Group also goes by the names “Elite Dental Success Institute, LLC” and “Elite Practice Mastermind Group.” (CX 2718 (“[T]he Dental Success Institute and the Mastermind Group are one of the same. DSI runs the Mastermind group.”)).

Response to Proposed Finding No. 951

Complaint Counsel has no specific response.

952. Darci Wingard was primarily responsible for Schein’s relationship with the Mastermind Group. (RX 2947 (Cavaretta, Dep. at 67)).

Response to Proposed Finding No. 952

Complaint Counsel has no specific response.

953. Ms. Wingard testified that the Mastermind group provides members with “heavy consulting and analytics for practice growth needs.” (CX 8009 (Wingard, Dep. at 207)).

Response to Proposed Finding No. 953

Complaint Counsel has no specific response.

954. These consulting services allow Mastermind to drive sales to Schein: “they look at practice numbers. They look at inventory. There’s a lot of things through the analytics that they look through. They say ‘We’re working with Schein to help with overhead. You should buy within formulary.’” (CX 8009 (Wingard, Dep. at 208)).

Response to Proposed Finding No. 954

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it entered into an agreement with a buying group *after* the conspiracy became difficult to maintain. In fact, this is consistent with the record evidence that shows Schein’s conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of buying groups during the conspiracy, and then to competing for buying groups when the conspiracy became difficult to maintain following Benco’s April 2015 settlement with the

Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see* Complaint Counsel’s Post-Trial Brief, at Attachment C).

955. Joe Cavaretta referred to the group as one of the “five or six” buying groups that “have a model that ... is somewhat sustainable.” (Cavaretta, Tr. 5570).

Response to Proposed Finding No. 955

Complaint Counsel has no specific response to the statement in the Proposed Finding.

However, the Proposed Finding is misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it entered into an agreement with a buying group *after* the conspiracy became difficult to maintain. In fact, this is consistent with the record evidence that shows Schein’s conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of buying groups during the conspiracy, and then to competing for buying groups when the conspiracy became difficult to maintain following Benco’s April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see* Complaint Counsel’s Post-Trial Brief, at Attachment C).

956. Ms. Wingard brought the group to Schein due to the group’s consulting services and “because their vision was aligned directly with ours of helping these independent practices thrive and grow their businesses.” (CX 8009 (Wingard, Dep. at 209)).

Response to Proposed Finding No. 956

Complaint Counsel has no specific response to the statement in the Proposed Finding.

However, the Proposed Finding is misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it entered into an agreement with a buying group *after* the conspiracy became difficult to maintain. In fact, this is consistent with the record evidence that shows Schein’s conduct changed from working with buying groups

before the conspiracy, to indiscriminate rejection of buying groups during the conspiracy, and then to competing for buying groups when the conspiracy became difficult to maintain following Benco's April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see* Complaint Counsel's Post-Trial Brief, at Attachment C).

957. As of June 2018, Mastermind Group had 85 members. (CX 8009 (Wingard, Dep. at 209)).

Response to Proposed Finding No. 957

Complaint Counsel has no specific response.

958. Schein signed a three-year agreement with the Mastermind Group in August 2017. (RX 2695-001).

Response to Proposed Finding No. 958

Complaint Counsel has no specific response to the statement in the Proposed Finding.

However, the Proposed Finding is misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it entered into an agreement with a buying group *after* the conspiracy became difficult to maintain. In fact, this is consistent with the record evidence that shows Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of buying groups during the conspiracy, and then to competing for buying groups when the conspiracy became difficult to maintain following Benco's April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see* Complaint Counsel's Post-Trial Brief, at Attachment C).

959. Schein's business with the Mastermind Group is consistent with its approach towards buying groups before, during, and after the alleged conspiracy period: it assessed buying group opportunities on a case-by-case basis and did business with them where it made sense. (SF 159-82, 317).

Response to Proposed Finding No. 959

The Proposed Finding is factually inaccurate and contrary to the weight of the record evidence, which establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of buying groups during the conspiracy, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). Schein's conduct regarding Mastermind Group, which occurred after April 2015, when the conspiracy became difficult to maintain, cannot establish any "consistent" conduct. Moreover, Schein's conduct regarding Mastermind Group does not disprove its participation in a conspiracy.

960. Schein's agreement with Mastermind allows Mastermind members to purchase through a custom formulary and also buy non-formulary products at discounts between [REDACTED] off of catalog price. (RX 2695-001).

Response to Proposed Finding No. 960

Complaint Counsel has no specific response.

961. As a group of independent dentists seeking discounts on dental supplies, the Mastermind Group is a buying group within the definition of the Complaint. (Complaint ¶ 3).

Response to Proposed Finding No. 961

The Proposed Finding mischaracterizes the definition of buying group set forth in the Complaint, which stated that "Buying Groups are organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products." (Complaint ¶ 3). Complaint Counsel has no specific response to the statement that "Mastermind Group is a buying group."

962. Schein also pays Mastermind an "administrative fee" of [REDACTED] on all purchases above a baseline of [REDACTED]. (RX 2695-001).

Response to Proposed Finding No. 962

Complaint Counsel has no specific response.

AA. Mari's List.

963. Mari's List is a buying group with between 150 and 200 members that was created and operated by Mari Dunn in San Antonio, Texas. (CX 2179-001). The group is non-exclusive and prides itself on partnering with as many vendors as possible. (CX 2179-001). Members pay an initial \$500 to join and then \$1000 per year. (CX 2179-001).

Response to Proposed Finding No. 963

Complaint Counsel has no specific response to the statements in the Proposed Finding.

However, Complaint Counsel notes that Schein's conduct in relation to Mari's List occurred after April 2015, when the conspiracy became difficult to maintain, which does not disprove Schein's participation in a conspiracy.

964. Around July 2016, Darci Wingard had a few calls with Ms. Dunn to understand her model and investigate whether Mari's List might be a potential partner for Schein. (CX 8009 (Wingard, Dep. at 226-27)).

Response to Proposed Finding No. 964

Complaint Counsel has no specific response to the statements in the Proposed Finding.

However, Complaint Counsel notes that Schein's conduct in relation to Mari's List occurred after April 2015, when the conspiracy became difficult to maintain, which does not disprove Schein's participation in a conspiracy.

965. Ms. Dunn asked Schein to put together a promotion for Mari's List members for a sterilizer unit. (CX 8009 (Wingard, Dep. at 228-29)).

Response to Proposed Finding No. 965

Complaint Counsel has no specific response. However, Complaint Counsel notes that

Schein's conduct in relation to Mari's List occurred after April 2015, when the conspiracy became difficult to maintain, which does not disprove Schein's participation in a conspiracy.

966. Ms. Wingard worked with others at Schein to get the promotion program launched for Mari's List. (CX 8009 (Wingard, Dep. at 228)).

Response to Proposed Finding No. 966

Complaint Counsel has no specific response. However, Complaint Counsel notes that Schein's conduct in relation to Mari's List occurred after April 2015, when the conspiracy became difficult to maintain, which does not disprove Schein's participation in a conspiracy.

967. Schein put together a limited-time offering for the requested product, but the offering was not as successful as planned, and Schein has not worked on any subsequent offerings for Mari's List since. (CX 8009 (Wingard, Dep. at 228-29)).

Response to Proposed Finding No. 967

Complaint Counsel has no specific response. However, Complaint Counsel notes that Schein's conduct in relation to Mari's List occurred after April 2015, when the conspiracy became difficult to maintain, which does not disprove Schein's participation in a conspiracy.

968. Schein's experience with respect to Mari's List, including its offering a promotion program, is inconsistent with the alleged agreement not to do business with buying groups at all. It is consistent with Schein's approach towards buying groups before, during, and after the alleged conspiracy period: it assessed buying group opportunities on a case-by-case basis and did business with them where it made sense. (Complaint ¶ 1; *see also* CX 8009 (Wingard, Dep. at 228)).

Response to Proposed Finding No. 968

The Proposed Finding is factually inaccurate and contrary to the weight of the record evidence, which establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of buying groups during the conspiracy, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General that required it to log its communications with Schein, among other competitors. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see* Complaint Counsel's Post-Trial Brief, at Attachment C). Thus, evidence of conduct regarding Mari's List cannot establish that Schein's conduct was

consistent before, during, and after the conspiracy. Moreover, the Proposed Finding is misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it “offer[ed] a promotion program” to a buying group *after* the conspiracy period.

BB. MeritDent.

969. Schein considered and treated MeritDent as a buying group. (Cavaretta, Tr. 5578, 5651; Sullivan, Tr. 4243-44).

Response to Proposed Finding No. 969

Complaint Counsel has no specific response.

970. When MeritDent first approached Schein in late 2011, Schein was skeptical. (Sullivan, Tr. 4242-43; Cavaretta, Tr. 5580-81). As Mr. Cavaretta, the Western Zone Manager for Schein at the time, explained, Schein’s “value proposition” was “helping doctors grow their practice ... organically with [Schein’s] current offerings.” (Cavaretta, Tr. 5578, 5580). Buying groups were not a natural fit in that strategy, as Schein had concerns about whether the buying group could actually “grow [Schein’s] business.” (Cavaretta, Tr. 5580 (explaining that buying groups were not Schein’s “major growth strategy” in late 2011); Sullivan, Tr. 4242; CX 2458-001 (“As you can imagine, they [senior HSD leadership] feel the same as we do that we don’t want to be the first company to open the floodgates to the dangerous world of GPOs.”)).

Response to Proposed Finding No. 970

Complaint Counsel has no specific response.

971. MeritDent did not “fall into the [Special Markets] world” because it could “not guarantee that all of their business will come to Schein....” (CX 2458-001).

Response to Proposed Finding No. 971

Complaint Counsel has no specific response.

972. Still, MeritDent was reviewed and approved by the leadership of Henry Schein Dental. (Cavaretta, Tr. 5579, 5581-82; Sullivan, Tr. 4241-42; CX 2458-001). Joe Cavaretta, Tim Sullivan, Dave Steck, and John Chatham met in December 2011 to discuss the MeritDent opportunity, including what “was going on in Vegas at the time,” where Schein had “60 percent market share” but “the economy [had] really hit ... hard.” (Cavaretta, Tr. 5579, 5581-82; Sullivan, Tr. 4241-42; CX 2458-001).

Response to Proposed Finding No. 972

The Proposed Finding is vague as to the phrase “leadership of Henry Schein Dental,” which does not identify specific individuals who approved MeritDent. Furthermore, the Proposed Finding is inaccurate and misleading to the extent it implies or asserts that Sullivan approved or was involved in approving any offer to or agreement with MeritDent. He did not. In fact, CX2458 shows Sullivan’s instruction to reject MeritDent. (CCFF ¶ 713 (quoting CX2458 at 001 (“I just met with Tim, Dave and John about the Merit Dent group. As you can imagine they feel the same as we do that we don’t want to be the first company to open the floodgates to the dangerous world of GPOs.”))). Furthermore, Sullivan did not testify that he had ever approved of an offer to or an agreement with MeritDent, or that he was involved in the negotiations with MeritDent. (*See* Sullivan, Tr. 4241-4242).

973. On December 22, 2011, the *day after* Complaint Counsel alleges Schein no longer did business with buying groups (CC Pretrial Br. at 18 (citing CX 2062)), Mr. Cavaretta outlined a proposal to do business with MeritDent buying group. (CX 2458-001; Cavaretta, Tr. 5582; Sullivan, Tr. 4243).

Response to Proposed Finding No. 973

The Proposed Finding is inaccurate as to the phrase “the day after Complaint Counsel alleges Schein no longer did business with buying groups” because it mischaracterizes the cited evidence. Complaint Counsel has never taken the position that the conspiracy period started on a specific date. (Complaint Counsel’s Pre-Trial Brief filed on October 2, 2018 (hereinafter “Complaint Counsel’s Pre-Trial Brief”) at 18 (“By December 2011, Schein’s practice of working with buying groups had changed.”)). The Proposed Finding is also vague as to “proposal to do business,” as CX2458 states that Schein would explain “that the one price fits all strategy doesn’t translate well in our world” and does not identify any discounts on supplies. (CX2458 at 001). The Proposed Finding is also inaccurate and misleading to the

extent it implies or asserts that Sullivan approved or was involved in approving any offer to or agreement with MeritDent, as there is no record evidence that he did. In fact, CX2458 shows Sullivan's instruction to reject MeritDent. (CCFF ¶ 713 (quoting CX2458 at 001 ("I just met with Tim, Dave and John about the Merit Dent group. As you can imagine they feel the same as we do that we don't want to be the first company to open the floodgates to the dangerous world of GPOs."))). Furthermore, Sullivan did not testify that he had ever approved of an offer to or an agreement with MeritDent, or that he was involved in the negotiations with MeritDent. (*See* Sullivan, Tr. 4241-4242).

974. After meeting with MeritDent "several times," Schein and MeritDent reached an agreement on a program that was (1) designed to "meet [MeritDent's] needs"; (2) "priced competitively"; and (3) included additional services such as Schein's practice analysis tool and educational pieces. (Cavaretta, Tr. 5581-82; Sullivan, Tr. 4243).

Response to Proposed Finding No. 974

The Proposed Finding is inaccurate and misleading to the extent it implies or asserts that Sullivan approved or was involved in approving any offer to or agreement with MeritDent, as there is no record evidence that he did. In fact, CX2458 shows Sullivan's instruction to reject MeritDent. (CCFF ¶ 713 (quoting CX2458 at 001 ("I just met with Tim, Dave and John about the Merit Dent group. As you can imagine they feel the same as we do that we don't want to be the first company to open the floodgates to the dangerous world of GPOs."))). Furthermore, Sullivan did not testify that he had ever approved of an offer to or an agreement with MeritDent, or that he was involved in the negotiations with MeritDent. (*See* Sullivan, Tr. 4241-4242).

975. Schein and MeritDent entered into a purchasing agreement on February 7, 2012. (RX 2393-005; Cavaretta, Tr. 5582, 5649).

Response to Proposed Finding No. 975

The Proposed Finding is inaccurate and misleading to the extent it implies or asserts that Sullivan approved or was involved in approving any offer to or agreement with MeritDent, as there is no record evidence that he did. Furthermore, the Proposed Finding is inaccurate and misleading to the extent it implies or asserts that Sullivan approved or was involved in approving any offer to or agreement with MeritDent. He did not. In fact, CX2458 shows Sullivan's instruction to reject MeritDent. (CCFF ¶ 713 (quoting CX2458 at 001 ("I just met with Tim, Dave and John about the Merit Dent group. As you can imagine they feel the same as we do that we don't want to be the first company to open the floodgates to the dangerous world of GPOs."))). Furthermore, Sullivan did not testify that he had ever approved of an offer to or an agreement with MeritDent, or that he was involved in the negotiations with MeritDent. (*See* Sullivan, Tr. 4241-4242).

976. The agreement provided a "pricing program" that "will provide a savings of 15-20% off of HSD cat[a]log." (RX 2393-005; *see also* Marshall, Tr. 3006 [REDACTED]).

Response to Proposed Finding No. 976

The Proposed Finding is inaccurate and misleading to the extent it implies or asserts that Sullivan approved or was involved in approving any offer to or agreement with MeritDent, as there is no record evidence that he did. In fact, CX2458 shows Sullivan's instruction to reject MeritDent. (CCFF ¶ 713 (quoting CX2458 at 001 ("I just met with Tim, Dave and John about the Merit Dent group. As you can imagine they feel the same as we do that we don't want to be the first company to open the floodgates to the dangerous world of GPOs."))). Furthermore, Sullivan did not testify that he had ever approved of an offer to or an agreement with MeritDent, or that he was involved in the negotiations with MeritDent. (*See* Sullivan, Tr. 4241-4242). The Proposed Finding is also incomplete. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

977. The agreement also provided for a \$5,000 rebate to MeritDent “for every 100 customers that are purchasing 15k or more from Henry Schein,” as well as free dental practice analysis service that “on average shows more than \$150,000 per year in opportunity for a dental practice”, Schein-sponsored events specifically for MeritDent members, and other benefits to members. (RX 2393-005; Sullivan, Tr. 4244-45).

Response to Proposed Finding No. 977

The Proposed Finding is inaccurate and misleading to the extent it implies or asserts that Sullivan approved or was involved in approving any offer to or agreement with MeritDent, as there is no record evidence that he did. In fact, CX2458 shows Sullivan’s instruction to reject MeritDent. (CCFF ¶ 713 (quoting CX2458 at 001 (“I just met with Tim, Dave and John about the Merit Dent group. As you can imagine they feel the same as we do that we don’t want to be the first company to open the floodgates to the dangerous world of GPOs.”))). Furthermore, Sullivan did not testify that he had ever approved of an offer to or an agreement with MeritDent, or that he was involved in the negotiations with MeritDent. (*See* Sullivan, Tr. 4241-4242).

978. By 2013, MeritDent was unable to deliver additional sales volume for Schein. (RX 2393-004 (By 2014, MeritDent only had “35 accounts over the \$15,000 minimum threshold” and “purchases for the entire group fell in 2013 from the 2012 levels.”))).

Response to Proposed Finding No. 978

The Proposed Finding is inaccurate and misleading to the extent it implies or asserts that Sullivan approved or was involved in approving any offer to or agreement with MeritDent, as there is no record evidence that he did. In fact, CX2458 shows Sullivan’s instruction to reject MeritDent. (CCFF ¶ 713 (quoting CX2458 at 001 (“I just met with Tim, Dave and John about the Merit Dent group. As you can imagine they feel the same as we do that we don’t

want to be the first company to open the floodgates to the dangerous world of GPOs.”))).

Furthermore, Sullivan did not testify that he had ever approved of an offer to or an agreement with MeritDent, or that he was involved in the negotiations with MeritDent. (*See* Sullivan, Tr. 4241-4242).

979. Despite this, Schein continued to work with MeritDent through at least April 2015, with the “hope we can reach a level with membership [that] would benefit both” parties. (Cavaretta, Tr. 5582; RX 2393-001, 004).

Response to Proposed Finding No. 979

The Proposed Finding is inaccurate and misleading to the extent it implies or asserts that Sullivan approved or was involved in approving any offer to or agreement with MeritDent, as there is no record evidence that he did. In fact, CX2458 shows Sullivan’s instruction to reject MeritDent. (CCFF ¶ 713 (quoting CX2458 at 001 (“I just met with Tim, Dave and John about the Merit Dent group. As you can imagine they feel the same as we do that we don’t want to be the first company to open the floodgates to the dangerous world of GPOs.”))). Furthermore, Sullivan did not testify that he had ever approved of an offer to or an agreement with MeritDent, or that he was involved in the negotiations with MeritDent. (*See* Sullivan, Tr. 4241-4242).

980. Complaint Counsel’s expert, Dr. Marshall, concedes that MeritDent is a buying group and that he did not do any analysis of Merit Dent to determine whether “signing up Merit Dent actually delivered any incremental volume to Schein.” (CX 7100-213 (listing MeritDent as a supposedly boycotted buying group); Marshall, Tr. 3002). However, Dr. Marshall failed to cite Schein’s proposal to MeritDent, and he was unaware of the actual agreement that Schein entered into with MeritDent on February 7, 2012. (Marshall, Tr. 2998; SF 973-776). With respect to the discount that Schein offered to MeritDent, Dr. Marshall admitted it was a [REDACTED] and exceeded the discounts available to a majority of Schein’s independent dentists. (Marshall, Tr. 3006; CX 7101-067 (showing that only [REDACTED] of customers receive discounts greater than [REDACTED])).

Response to Proposed Finding No. 980

This Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (*See* February 21, 2019 Order on Post-Trial Briefs).

This Proposed Finding also is inaccurate and misleading to the extent that it suggests that Dr. Marshall should have done a profitability analysis for MeritDent. Rather, Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CCFF ¶¶ 1639-1684). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED]).

To the extent that Schein claims that these profitability analyses are not representative of other buying groups, Dr. Marshall explained that he studied five different relationships with the Kois Buyers Group and Smile Source because, in addition to having gotten off the ground, these buying groups operate in geographies (Seattle and Atlanta) in which Schein, Patterson, and Benco are likely to have their lowest collective share of sales and another distributor was likely to have a high share of sales. (CX7101 at 045-046, 064 (¶¶ 107-112, 165) (Marshall Expert Rebuttal Report)). These facts addressed potential concerns that the relative sizes of Schein and Patterson make it more costly for them to supply buying groups, both because (1) Schein and Patterson are likely to find itself more profitable to discount when they have a lower share of sales and (2) where Burkhart and Atlanta Dental are large, it illuminates whether a full-service distributor found it profitable to supply a buying group so in a geographic area in which its share of sales was relatively large. (CX7101 at 064 (¶ 165))

(Marshall Expert Rebuttal Report)). Differences between the Kois Buyers Group, with its single regional full-service distributor, and Smile Source, with its changing network of distributors over time, provide further reasons to believe that the experiences of distributors with these two groups provides some information about likely outcomes with other potential buying groups that went nowhere as a result of being rejected by Schein, Patterson, and/or Benco. (CX7101 at 064 (¶ 166) (Marshall Expert Rebuttal Report)). Dr. Marshall also explained that a common feature of the buying groups that he studied and other buying groups was that [REDACTED]

[REDACTED]; *see also* CX8040 (Marshall, Dep. at 212) (explaining that Kois and Smile Source are “the same in the sense of the definition I offer in paragraph 139.”)). Dr. Marshall elaborated that for buying groups generally “[a]ll these groups will have different management and they’ll be issues that are different between them. But, again, these fall within what’s identified in paragraph 139 of my report.” (CX8040 (Marshall, Dep. at 212)). Dr. Marshall also explained that for the buying groups in his profitability studies and buying groups generally, he “thinks of all of these in terms of incentives, not in terms of contractual obligations, but what [he] mean[s] by that is that if you’re offering a better pricing, you’re going to get more volume. And that’s the nature of how buying groups work.” (Marshall, Tr. 3016).

981. Schein’s partnership with MeritDent is inconsistent with the alleged conspiracy. (Complaint ¶ 1).

Response to Proposed Finding No. 981

The Proposed Finding is not supported by the cited evidence and should be disregarded. Nonetheless, the Proposed Finding is inaccurate and misleading to the extent it implies or

asserts that Sullivan approved or was involved in approving any offer to or agreement with MeritDent, as there is no record evidence that he did. In fact, CX2458 shows Sullivan's instruction to reject MeritDent. (CCFF ¶ 713 (quoting CX2458 at 001 ("I just met with Tim, Dave and John about the Merit Dent group. As you can imagine they feel the same as we do that we don't want to be the first company to open the floodgates to the dangerous world of GPOs."))). Furthermore, Sullivan did not testify that he had ever approved of an offer to or an agreement with MeritDent, or that he was involved in the negotiations with MeritDent. (*See* Sullivan, Tr. 4241-4242).

CC. Nevada Dental Cooperative.

982. Complaint Counsel concedes that the Nevada Dental Cooperative ("Nevada Cooperative) is a buying group. (RX 2956-004 ("Complaint Counsel is aware of the following Buying Groups that have existed or that attempted to form: ... Dental Cooperative (Nevada & Utah)."); *see also* RX 2947 (Cavaretta, Dep. at 72)).

Response to Proposed Finding No. 982

The Proposed Finding is inaccurate because it misstates the cited evidence. RX2956 identifies a Nevada branch of the Dental Cooperative buying group. (RX2956 at 004 ("Dental Cooperative (Nevada & Utah)"). It does not separately identify a Nevada Dental Cooperate as a separate buying group.

983. The Nevada Cooperative was part of the Utah Dental Co-Op. (RX 2599; CX 0272; Mason, Tr. 2330).

Response to Proposed Finding No. 983

Complaint Counsel has no specific response.

984. In 2011, the Utah Cooperative began soliciting membership in Nevada. (RX 2947 (Cavaretta, Dep. at 71)).

Response to Proposed Finding No. 984

Complaint Counsel has no specific response.

985. At first, in January 2011 (before the start of the alleged conspiracy), Mr. Cavaretta thought Schein should “stay away for now” after Ms. Titus voiced her concern over cannibalization of Schein’s existing business: “We give them special pricing in Utah and they turn around and present themselves to our top, and I mean very large private practice accounts and study clubs, to either reduce our current margins or the business goes to Darby here in Vegas.” (CX 2811-001-02).

Response to Proposed Finding No. 985

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein contracted with the Nevada Dental Cooperative, or the Nevada branch of the Dental Co-Op of Utah, during the conspiracy or that it did not terminate those relationships. The record evidence shows that Schein’s relationship with the Dental Co-Op of Utah, which included the Nevada Branch Schein calls the Nevada Dental Cooperative, began in 2007, well before the conspiracy. (CCFF ¶ 442; *see also* Responses to Proposed Finding Nos. 581-633). Furthermore, record evidence establishes that Schein terminated its pre-existing, legacy relationship with the Dental Co-Op of Utah, including the Nevada branch of the Nevada Dental Cooperative, during the conspiracy pursuant to Schein’s policy not to do business with buying groups. (*See* Responses to Proposed Finding Nos. 581-633). To the extent the Proposed Finding asserts or implies otherwise, it is misleading and contrary to the record evidence.

986. Nevertheless, in September 2011, Mr. Cavaretta negotiated an “exclusive” contract to cover the Cooperative’s expansion in Nevada. (CX 2720-002, -005); RX 2947 (Cavaretta, Dep. at 72 (“I helped it expand into Nevada.”))).

Response to Proposed Finding No. 986

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein contracted with the Nevada Dental Cooperative, or the Nevada branch of the Dental

Co-Op of Utah, during the conspiracy or that it did not terminate those relationships. The record evidence shows that Schein's relationship with the Dental Co-Op of Utah, which included the Nevada Branch Schein calls the Nevada Dental Cooperative, began in 2007, well before the conspiracy. (CCFF ¶ 442; *see also* Responses to Proposed Finding Nos. 581-633). Furthermore, record evidence establishes that Schein terminated its pre-existing, legacy relationship with the Dental Co-Op of Utah, including the Nevada branch of the Nevada Dental Cooperative, during the conspiracy pursuant to Schein's policy not to do business with buying groups. (*See* Responses to Proposed Finding Nos. 581-633). To the extent the Proposed Finding asserts or implies otherwise, it is misleading and contrary to the record evidence.

987. Andrew Eberhardt, Vice President of the Dental Co-Op, thanked Mr. Cavaretta "for your support and patience with our efforts in Las Vegas." (CX 2720-002).

Response to Proposed Finding No. 987

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein contracted with the Nevada Dental Cooperative, or the Nevada branch of the Dental Co-Op of Utah, during the conspiracy or that it did not terminate those relationships. The record evidence shows that Schein's relationship with the Dental Co-Op of Utah, which included the Nevada Branch Schein calls the Nevada Dental Cooperative, began in 2007, well before the conspiracy. (CCFF ¶ 442; *see also* Responses to Proposed Finding Nos. 581-633). Furthermore, record evidence establishes that Schein terminated its pre-existing, legacy relationship with the Dental Co-Op of Utah, including the Nevada branch of the Nevada Dental Cooperative, during the conspiracy pursuant to Schein's policy not to do business with buying groups. (*See* Responses to Proposed Finding Nos. 581-633). To the extent the

Proposed Finding asserts or implies otherwise, it is misleading and contrary to the record evidence.

988. Schein's agreement with the Nevada Cooperative offered qualifying Cooperative members a rebate of 6%, 8%, or 10% based on the member's quarterly supply purchases, a waiver of annual service fees, a 15% discount on equipment purchases and technical service, free practice analysis, additional business solutions workshops at no charge, and other benefits. (CX 2720-005-06).

Response to Proposed Finding No. 988

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein contracted with the Nevada Dental Cooperative, or the Nevada branch of the Dental Co-Op of Utah, during the conspiracy or that it did not terminate those relationships. The record evidence shows that Schein's relationship with the Dental Co-Op of Utah, which included the Nevada Branch Schein calls the Nevada Dental Cooperative, began in 2007, well before the conspiracy. (CCFF ¶ 442; *see also* Responses to Proposed Finding Nos. 581-633). Furthermore, record evidence establishes that Schein terminated its pre-existing, legacy relationship with the Dental Co-Op of Utah, including the Nevada branch of the Nevada Dental Cooperative, during the conspiracy pursuant to Schein's policy not to do business with buying groups. (*See* Responses to Proposed Finding Nos. 581-633). To the extent the Proposed Finding asserts or implies otherwise, it is misleading and contrary to the record evidence.

989. As part of the agreement, the Nevada Cooperative received a 2% quarterly rebate on new volume from group members. (CX 2720-005).

Response to Proposed Finding No. 989

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that

Schein contracted with the Nevada Dental Cooperative, or the Nevada branch of the Dental Co-Op of Utah, during the conspiracy or that it did not terminate those relationships. The record evidence shows that Schein's relationship with the Dental Co-Op of Utah, which included the Nevada Branch Schein calls the Nevada Dental Cooperative, began in 2007, well before the conspiracy. (CCFF ¶ 442; *see also* Responses to Proposed Finding Nos. 581-633). Furthermore, record evidence establishes that Schein terminated its pre-existing, legacy relationship with the Dental Co-Op of Utah, including the Nevada branch of the Nevada Dental Cooperative, during the conspiracy pursuant to Schein's policy not to do business with buying groups. (*See* Responses to Proposed Finding Nos. 581-633). To the extent the Proposed Finding asserts or implies otherwise, it is misleading and contrary to the record evidence.

990. The Nevada Cooperative agreed to "support and endorse this program to all members," and Schein in turn agreed to "support and endorse the Dental Cooperative of Nevada." (CX 2720-006).

Response to Proposed Finding No. 990

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein contracted with the Nevada Dental Cooperative, or the Nevada branch of the Dental Co-Op of Utah, during the conspiracy or that it did not terminate those relationships. The record evidence shows that Schein's relationship with the Dental Co-Op of Utah, which included the Nevada Branch Schein calls the Nevada Dental Cooperative, began in 2007, well before the conspiracy. (CCFF ¶ 442; *see also* Responses to Proposed Finding Nos. 581-633). Furthermore, record evidence establishes that Schein terminated its pre-existing, legacy relationship with the Dental Co-Op of Utah, including the Nevada branch of the Nevada Dental Cooperative, during the conspiracy pursuant to Schein's policy not to do business

with buying groups. (*See* Responses to Proposed Finding Nos. 581-633). To the extent the Proposed Finding asserts or implies otherwise, it is misleading and contrary to the record evidence.

991. Mr. Eberhardt told Schein that he “believe[d] our exclusive agreement with Henry Schein WILL bring incremental growth to your company and help our organization grow with the support of you and your good FSCs.” (CX 2720-002).

Response to Proposed Finding No. 991

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein contracted with the Nevada Dental Cooperative, or the Nevada branch of the Dental Co-Op of Utah, during the conspiracy or that it did not terminate those relationships. The record evidence shows that Schein’s relationship with the Dental Co-Op of Utah, which included the Nevada Branch Schein calls the Nevada Dental Cooperative, began in 2007, well before the conspiracy. (CCFF ¶ 442; *see also* Responses to Proposed Finding Nos. 581-633). Furthermore, record evidence establishes that Schein terminated its pre-existing, legacy relationship with the Dental Co-Op of Utah, including the Nevada branch of the Nevada Dental Cooperative, during the conspiracy pursuant to Schein’s policy not to do business with buying groups. (*See* Responses to Proposed Finding Nos. 581-633). To the extent the Proposed Finding asserts or implies otherwise, it is misleading and contrary to the record evidence.

992. Within a year, however, Mr. Cavaretta observed that the Nevada Cooperative was “not working very well.” (RX 2490-001).

Response to Proposed Finding No. 992

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that

Schein contracted with the Nevada Dental Cooperative, or the Nevada branch of the Dental Co-Op of Utah, during the conspiracy or that it did not terminate those relationships. The record evidence shows that Schein's relationship with the Dental Co-Op of Utah, which included the Nevada Branch Schein calls the Nevada Dental Cooperative, began in 2007, well before the conspiracy. (CCFF ¶ 442; *see also* Responses to Proposed Finding Nos. 581-633). Furthermore, record evidence establishes that Schein terminated its pre-existing, legacy relationship with the Dental Co-Op of Utah, including the Nevada branch of the Nevada Dental Cooperative, during the conspiracy pursuant to Schein's policy not to do business with buying groups. (*See* Responses to Proposed Finding Nos. 581-633). To the extent the Proposed Finding asserts or implies otherwise, it is misleading and contrary to the record evidence.

993. In March 2013, Mr. Cavaretta wrote that the "program has not worked in Vegas because [a] We have a large portion of market share [b] The doctors that we are trying to win over don't think an 8% discount is a big discount [and] [c] The doctors don't see the value in what the Co-op is doing." (CX 2750-001).

Response to Proposed Finding No. 993

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein contracted with the Nevada Dental Cooperative, or the Nevada branch of the Dental Co-Op of Utah, during the conspiracy or that it did not terminate those relationships. The record evidence shows that Schein's relationship with the Dental Co-Op of Utah, which included the Nevada Branch Schein calls the Nevada Dental Cooperative, began in 2007, well before the conspiracy. (CCFF ¶ 442; *see also* Responses to Proposed Finding Nos. 581-633). Furthermore, record evidence establishes that Schein terminated its pre-existing, legacy relationship with the Dental Co-Op of Utah, including the Nevada branch of the Nevada

Dental Cooperative, during the conspiracy pursuant to Schein's policy not to do business with buying groups. (*See* Responses to Proposed Finding Nos. 581-633). To the extent the Proposed Finding asserts or implies otherwise, it is misleading and contrary to the record evidence.

994. In the last two quarters of 2013, the Nevada Cooperative earned a total rebate of \$12.38, an amount too small for Schein to even write a check. (RX 2384 -002 (the "sales growth [was] not as [Schein] expected," and "the rebate for the group is too minimal to process"))).

Response to Proposed Finding No. 994

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein contracted with the Nevada Dental Cooperative, or the Nevada branch of the Dental Co-Op of Utah, during the conspiracy or that it did not terminate those relationships. The record evidence shows that Schein's relationship with the Dental Co-Op of Utah, which included the Nevada Branch Schein calls the Nevada Dental Cooperative, began in 2007, well before the conspiracy. (CCFF ¶ 442; *see also* Responses to Proposed Finding Nos. 581-633). Furthermore, record evidence establishes that Schein terminated its pre-existing, legacy relationship with the Dental Co-Op of Utah, including the Nevada branch of the Nevada Dental Cooperative, during the conspiracy pursuant to Schein's policy not to do business with buying groups. (*See* Responses to Proposed Finding Nos. 581-633). To the extent the Proposed Finding asserts or implies otherwise, it is misleading and contrary to the record evidence.

995. Schein's agreement with the Nevada Cooperative was up for review in 2014, but Schein was not sure if it would "even be updated since it does not seem to have the sales or growth that would enforce the rebate." (RX 2384-003).

Response to Proposed Finding No. 995

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein contracted with the Nevada Dental Cooperative, or the Nevada branch of the Dental Co-Op of Utah, during the conspiracy or that it did not terminate those relationships. The record evidence shows that Schein's relationship with the Dental Co-Op of Utah, which included the Nevada Branch Schein calls the Nevada Dental Cooperative, began in 2007, well before the conspiracy. (CCFF ¶ 442; *see also* Responses to Proposed Finding Nos. 581-633). Furthermore, record evidence establishes that Schein terminated its pre-existing, legacy relationship with the Dental Co-Op of Utah, including the Nevada branch of the Nevada Dental Cooperative, during the conspiracy pursuant to Schein's policy not to do business with buying groups. (*See* Responses to Proposed Finding Nos. 581-633). To the extent the Proposed Finding asserts or implies otherwise, it is misleading and contrary to the record evidence.

996. In June 2014, Mr. Eberhardt wrote to Schein asking why he "did not receive a rebate check from the Nevada region for Q4 2013 [or] Q1 2014." (CX 2646-005).

Response to Proposed Finding No. 996

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein contracted with the Nevada Dental Cooperative, or the Nevada branch of the Dental Co-Op of Utah, during the conspiracy or that it did not terminate those relationships. The record evidence shows that Schein's relationship with the Dental Co-Op of Utah, which included the Nevada Branch Schein calls the Nevada Dental Cooperative, began in 2007, well before the conspiracy. (CCFF ¶ 442; *see also* Responses to Proposed Finding Nos. 581-

633). Furthermore, record evidence establishes that Schein terminated its pre-existing, legacy relationship with the Dental Co-Op of Utah, including the Nevada branch of the Nevada Dental Cooperative, during the conspiracy pursuant to Schein's policy not to do business with buying groups. (*See Responses to Proposed Finding Nos. 581-633*). To the extent the Proposed Finding asserts or implies otherwise, it is misleading and contrary to the record evidence.

997. Karoline Heytens, a Schein Field Program Coordinator, forwarded Mr. Eberhardt's email internally to Mr. Cavaretta and Steve Perkins, noting "Last we all talked, it was decided that this agreement would need to be reviewed since it has not brought sales in. The rebate is based on growth, not just the sales. [T]he rebate, if any, would be very minimal [F]or Q1 ... the rebate would be \$61." (CX 2646-004).

Response to Proposed Finding No. 997

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein contracted with the Nevada Dental Cooperative, or the Nevada branch of the Dental Co-Op of Utah, during the conspiracy or that it did not terminate those relationships. The record evidence shows that Schein's relationship with the Dental Co-Op of Utah, which included the Nevada Branch Schein calls the Nevada Dental Cooperative, began in 2007, well before the conspiracy. (CCFF ¶ 442; *see also Responses to Proposed Finding Nos. 581-633*). Furthermore, record evidence establishes that Schein terminated its pre-existing, legacy relationship with the Dental Co-Op of Utah, including the Nevada branch of the Nevada Dental Cooperative, during the conspiracy pursuant to Schein's policy not to do business with buying groups. (*See Responses to Proposed Finding Nos. 581-633*). To the extent the Proposed Finding asserts or implies otherwise, it is misleading and contrary to the record evidence.

998. In July 2014, Ms. Heytens reported that the Nevada Cooperative only had 11 members, and a few did not even meet the minimum purchase requirement of \$3,750 per quarter. (CX 2646-002).

Response to Proposed Finding No. 998

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein contracted with the Nevada Dental Cooperative, or the Nevada branch of the Dental Co-Op of Utah, during the conspiracy or that it did not terminate those relationships. The record evidence shows that Schein's relationship with the Dental Co-Op of Utah, which included the Nevada Branch Schein calls the Nevada Dental Cooperative, began in 2007, well before the conspiracy. (CCFF ¶ 442; *see also* Responses to Proposed Finding Nos. 581-633). Furthermore, record evidence establishes that Schein terminated its pre-existing, legacy relationship with the Dental Co-Op of Utah, including the Nevada branch of the Nevada Dental Cooperative, during the conspiracy pursuant to Schein's policy not to do business with buying groups. (*See* Responses to Proposed Finding Nos. 581-633). To the extent the Proposed Finding asserts or implies otherwise, it is misleading and contrary to the record evidence.

999. In Q2 2014, the Nevada Cooperative actually showed negative growth. (CX 2646-002).

Response to Proposed Finding No. 999

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein contracted with the Nevada Dental Cooperative, or the Nevada branch of the Dental Co-Op of Utah, during the conspiracy or that it did not terminate those relationships. The record evidence shows that Schein's relationship with the Dental Co-Op of Utah, which

included the Nevada Branch Schein calls the Nevada Dental Cooperative, began in 2007, well before the conspiracy. (CCFF ¶ 442; *see also* Responses to Proposed Finding Nos. 581-633). Furthermore, record evidence establishes that Schein terminated its pre-existing, legacy relationship with the Dental Co-Op of Utah, including the Nevada branch of the Nevada Dental Cooperative, during the conspiracy pursuant to Schein's policy not to do business with buying groups. (*See* Responses to Proposed Finding Nos. 581-633). To the extent the Proposed Finding asserts or implies otherwise, it is misleading and contrary to the record evidence.

1000. Complaint Counsel's expert, Dr. Marshall, did not analyze whether Schein's relationship with the Nevada Dental Cooperative, or the Dental Co-Op generally, was profitable for Schein. (Marshall, Tr. 2969 [REDACTED]).

Response to Proposed Finding No. 1000

This Proposed Finding is inaccurate and misleading to the extent that it suggests that Dr. Marshall should have done a profitability analysis for Nevada Dental Cooperative or the Dental Co-Op generally. Rather, Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CCFF ¶¶ 1639-1684). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED])

[REDACTED]. To the extent that Schein claims that these profitability analyses are not representative of other buying groups, Dr. Marshall explained that he studied five different relationships with the Kois Buyers Group and Smile Source because, in addition to having gotten off the ground, these buying groups operate in geographies (Seattle and Atlanta) in which Schein, Patterson, and Benco are likely to have their lowest collective share of sales and another distributor was likely to have a high share of sales. (CX7101 at 045-046, 064 (¶¶ 107-112, 165) (Marshall Expert Rebuttal Report)).

These facts addressed potential concerns that the relative sizes of Schein and Patterson make it more costly for them to supply buying groups, both because (1) Schein and Patterson are likely to find itself more profitable to discount when they have a lower share of sales and (2) where Burkhardt and Atlanta Dental are large, it illuminates whether a full-service distributor found it profitable to supply a buying group so in a geographic area in which its share of sales was relatively large. (CX7101 at 064 (¶ 165) (Marshall Expert Rebuttal Report)). Differences between the Kois Buyers Group, with its single regional full-service distributor, and Smile Source, with its changing network of distributors over time, provide further reasons to believe that the experiences of distributors with these two groups provides some information about likely outcomes with other potential buying groups that went nowhere as a result of being rejected by Schein, Patterson, and/or Benco. (CX7101 at 064 (¶ 166) (Marshall Expert Rebuttal Report)). [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]; *see also* CX8040 (Marshall, Dep. at 212 (explaining that Kois and Smile Source are “the same in the sense of the definition I offer in paragraph 139.”)). Dr. Marshall elaborated that for buying groups generally “[a]ll these groups will have different management and they’ll be issues that are different between them. But, again, these fall within what’s identified in paragraph 139 of my report.” (CX8040 (Marshall, Dep. at 212)).

Dr. Marshall also explained that for the buying groups in his profitability studies and buying groups generally, [REDACTED]

[REDACTED]

1001. As discussed previously, Schein ultimately discontinued its relationship with the Dental Co-Op, including the Nevada Cooperative. (SF 591-620).

Response to Proposed Finding No. 1001

Complaint Counsel has no specific response. However, the record evidence establishes that Schein terminated its pre-existing, legacy relationship with the Dental Co-Op of Utah, including the Nevada branch of the Nevada Dental Cooperative, during the conspiracy pursuant to Schein's policy not to do business with buying groups. (*See Responses to Proposed Finding Nos. 581-633*). To the extent the Proposed Finding asserts or implies otherwise, it is misleading and contrary to the record evidence.

DD. New Mexico Dental Co-Op.

1002. Complaint Counsel claims that "[a]s a result" of the alleged agreement, "Schein did not enter into" an agreement with the New Mexico Dental Cooperative. (RX 3087-004). The evidence does not support this claim.

Response to Proposed Finding No. 1002

The second sentence of the Proposed Finding is not supported by any citation to the record evidence and should be disregarded. Complaint Counsel has no specific response to the first sentence of the Proposed Finding.

1003. Complaint Counsel identifies communications between Benco and Patterson executives regarding the New Mexico Dental Co-Op, but does not claim that Mr. Sullivan or any other Schein executives ever communicated with anyone at Benco or Patterson regarding the New Mexico Dental Co-Op. (CC Pretrial Br. at 21-23).

Response to Proposed Finding No. 1003

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies that Schein did not participate in a conspiracy because there are no inter-firm communications regarding New

Mexico Dental Co-Op between Schein and Benco or between Schein and Patterson. The record evidence shows the Big Three were part of an overarching conspiracy not to discount to buying groups, that Schein and Benco exchanged assurances that neither would discount to buying groups, that Schein ensured compliance with that agreement, that Schein instructed its sales force to reject buying groups, and that Schein communicated with Benco regarding buying groups. (CCFF ¶¶ 661-1100, 1178-1198). Indeed, the record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period pursuant to its policy not to do business with buying groups. (CCFF ¶¶ 661-1100; Complaint Counsel's Post-Trial Brief, at Attachment C). The New Mexico Dental Co-Op is just one example of a buying group that each of the Big Three turned down. (CCFF ¶¶ 512, 661-1100, 1159-1166, 1316-1322; Complaint Counsel's Post-Trial Brief, at Attachment C).

1004. Mr. Cohen did not have any discussions with Mr. Sullivan about the New Mexico Dental Co-Op, nor did he forward any of the emails he received from Mr. Guggenheim about buying groups or the New Mexico Dental Co-Op to anyone at Schein. (Cohen, Tr. 845, 848).

Response to Proposed Finding No. 1004

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies that Schein did not participate in a conspiracy. The record evidence shows the Big Three were part of an overarching conspiracy not to discount to buying groups, Schein and Benco exchanged assurances that neither would discount to buying groups, Schein ensured compliance with that agreement, Schein instructed its sales force to reject buying groups, and Schein communicated with Benco regarding buying groups. (CCFF ¶¶ 661-1100, 1178-1198). Indeed, the record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period pursuant to its policy not to do business with buying group. (CCFF ¶¶ 661-1110; Complaint Counsel's Post-Trial Brief, at Attachment C). The New Mexico Dental Co-Op is just one example of a buying group that

each of the Big Three turned down. (CCFF ¶¶ 512, 661-1100, 1159-1166, 1316-1322; Complaint Counsel's Post-Trial Brief, at Attachment C).

1005. Similarly, Mr. Guggenheim never communicated with Mr. Sullivan or anyone at Schein about the New Mexico Dental Co-Op. (Guggenheim, Tr. 1855-56).

Response to Proposed Finding No. 1005

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies that Schein did not participate in a conspiracy. The record evidence shows the Big Three were part of an overarching conspiracy not to discount to buying groups, Schein and Benco exchanged assurances that neither would discount to buying groups, Schein ensured compliance with that agreement, Schein instructed its sales force to reject buying groups, and Schein communicated with Benco regarding buying groups. (CCFF ¶¶ 661-1100, 1178-1198). Indeed, the record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period pursuant to its policy not to do business with buying group. (CCFF ¶¶ 661-1100; Complaint Counsel's Post-Trial Brief, at Attachment C). The New Mexico Dental Co-Op is just one example of a buying group that each of the Big Three turned down. (CCFF ¶¶ 512, 661-1100, 1159-1166, 1316-1322; Complaint Counsel's Post-Trial Brief, at Attachment C).

1006. When Dr. Mason, along with two other dentists, first had the idea for a New Mexico Dental Co-Op in early 2013, they reached out to Patterson as their first choice for a distributor partner. (Mason, Tr. 2331, 2333, 2335, 2339).

Response to Proposed Finding No. 1006

The Proposed Finding is inaccurate as to the date "early 2013," as the record evidence establishes that the New Mexico Dental Co-Op was started in late 2012 or early 2013. (CCFF ¶ 455). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1007. Dr. Mason had a relationship with Patterson and primarily purchased from Patterson for his private practice. (Mason, Tr. 2335).

Response to Proposed Finding No. 1007

Complaint Counsel has no specific response.

1008. In a February 4, 2013 email to manufacturers of dental supplies and equipment, Dr. Mason represented that they were “in the process of starting a dental Cooperative” and had “partnered with Patterson Dental...” (CX 0090-004; Mason, Tr. 2338-39, 2340).

Response to Proposed Finding No. 1008

Complaint Counsel has no specific response.

1009. Dr. Mason’s email to manufacturers invited them to a meeting on March 13, 2013 at the Patterson Dental Branch. (CX 0090-004).

Response to Proposed Finding No. 1009

Complaint Counsel has no specific response.

1010. A representative for one manufacturer – Midmark – forwarded Dr. Mason’s email to Schein’s regional manager, Brandon Bergman, who forwarded it to Stewart Hanely at Benco. (CX 1215-001). Complaint Counsel did not call Mr. Bergman or Mr. Hanley as witnesses, and has not claimed that Mr. Bergman’s email was in furtherance of the alleged conspiracy. As noted below, Mr. Bergman was actually part of Schein’s efforts to partner with the New Mexico Dental Co-Op after it joined the Utah Dental Co-Op. (See RX 2462-001).

Response to Proposed Finding No. 1010

The third sentence of the Proposed Finding is misleading to the extent it conflates the New Mexico Dental Co-Op with the Utah Dental Co-Op. The record evidence shows that Schein rejected the New Mexico Dental Co-Op’s request for a supply partnership. (CCFF ¶¶ 507-509). Having no full-service distributor, the New Mexico Dental Co-Op’s attempt to build a buying group was stymied, and it merged with the existing Dental Co-Op of Utah and became a branch of the Dental Co-Op of Utah. (CCFF ¶ 511). Schein already had a relationship with the Utah Dental Co-Op, which dated back to 2007. (CCFF ¶¶ 688, 889). Thus, the third sentence is misleading to the extent it implies or asserts that Schein’s conduct

regarding New Mexico Dental Co-Op is anything other than interaction with a branch of a buying group, which it had partnered with in 2007. Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1011. In February 2013, Dr. Mason believed they “had worked out a deal with Patterson.” (Mason, Tr. 2340-41, 2343-44).

Response to Proposed Finding No. 1011

Complaint Counsel has no specific response.

1012. It was not until February 20, 2013 that Dr. Mason reached out to a Schein representative – Rick Dolk – to discuss the dental cooperative idea. (Mason, Tr. 2393; RX 2400; *see also* Mason, Tr. 2368 (in February 2013, there still was no entity called the New Mexico Dental Cooperative)).

Response to Proposed Finding No. 1012

Complaint Counsel has no specific response.

1013. Dr. Mason explained his idea for a cooperative in an email to Mr. Dolk: “[W]e are effectively looking to see if we can better the manufacture[r] specials.” (RX 2400-001; *see also* Mason, Tr. 2393-95 (it was the “manufacturer level we’re trying to reach”)). The idea was to get the manufacturers to do something with their prices. (Mason, Tr. 2395).

Response to Proposed Finding No. 1013

The Proposed Finding is inaccurate and misleading to the extent it asserts that the New Mexico Dental Co-Op was not seeking to negotiate pricing with distributors for supplies and equipment. The record evidence shows that Dr. Mason, and the other founders of New Mexico Dental Co-Op, were seeking to “look into vendor and see if we could negotiate pricing for our sundries and our equipment” so that “the independent guys” could better compete with DSOs. (Mason, Tr. 2332-2333).

1014. Dr. Mason was clear with Mr. Dolk as to what the cooperative would *not* do. “We are not looking to remove customers from schein, patterson or benco,” and “we are not moving dentist[s] from one distributor to another or trying to set the price of the distributor.” (RX 2400-001; Mason, Tr. 2394-95 (“So what you told Schein was the customers were not going to move from one distributor to another or not move from one distributor to Schein; correct? A. Correct.”)).

Response to Proposed Finding No. 1014

The Proposed Finding is inaccurate and misleading to the extent it asserts that the New Mexico Dental Co-Op was not seeking to negotiate pricing with distributors for supplies and equipment. The record evidence shows that Dr. Mason, and the other founders of New Mexico Dental Co-Op, were seeking to “look into vendor and see if we could negotiate pricing for our sundries and our equipment” so that “the independent guys” could better compete with DSOs. (CCFF ¶¶ 458-459; Mason, Tr. 2332-2333).

1015. Dr. Mason told Mr. Dolk that he had already “spoken with Patterson ... to see what type of information or ideas they would have to assist our efforts[,]” and simply invited Schein to offer its ideas well. (RX 2400; Mason, Tr. 2395-96).

Response to Proposed Finding No. 1015

The Proposed Finding is misleading to the extent it asserts or implies that Dr. Mason was not seeking a supply partnership with Schein. The record evidence shows that the New Mexico Dental Co-Op reached out to full-service distributors Patterson, Schein, and Benco regarding a potential partnership to help lower costs to independent dentist members. (CCFF ¶¶ 459, 461-462). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1016. Dr. Mason did not offer an exclusive relationship with Schein, or even making Schein a preferred vendor for the group. (Mason, Tr. 2396-97).

Response to Proposed Finding No. 1016

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts that Schein only worked with buying groups that had certain characteristics, or to the extent it implies that Schein did not reject buying groups during the conspiracy period pursuant to a policy not to do business with buying groups. The record evidence establishes that Schein’s conduct

changed from working with buying groups before the conspiracy, to turning down all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

1017. Two days after his email to Mr. Dolk, Dr. Mason wrote to his Patterson contacts and informed them that he had selected it as the exclusive distributor for 3M products. (CX 3339 (“[A]ll 3m products will need to be purchased through a single distributor. I have chosen Patterson at this time if that works for patterson.”)).

Response to Proposed Finding No. 1017

Complaint Counsel has no specific response.

1018. Effectively, Dr. Mason's proposal to Mr. Dolk was for Schein to simply pass through lower prices from manufacturers in exchange for no benefit whatsoever in the form of additional customers or business. (RX 2400-001; Mason, Tr. 2394-97).

Response to Proposed Finding No. 1018

The Proposed Finding is misleading to the extent it asserts or implies that Dr. Mason was not seeking a supply partnership with Schein. The record evidence shows that the New Mexico Dental Co-Op reached out to full-service distributors Patterson, Schein, and Benco regarding a potential partnership to help lower costs to independent dentist members. (CCFF ¶¶ 459, 461-462). In addition, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts that Schein only worked with buying groups that had certain characteristics, or to the extent it implies that Schein did not reject buying groups during the conspiracy period pursuant to a policy not to do business with buying groups. The record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to turning down all buying groups during the conspiracy pursuant to a

policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). Indeed, the record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period pursuant to its policy not to do business with buying groups. (CCFF ¶¶ 661-110; Complaint Counsel's Post-Trial Brief, at Attachment C). The New Mexico Dental Co-Op is just one example of a buying group that each of the Big Three turned down. (CCFF ¶¶ 512, 661-1100, 1159-1166, 1316-1322; Complaint Counsel's Post-Trial Brief, at Attachment C).

1019. It was this proposal that Mr. Dolk declined. (Mason, Tr. 2397 (referring to RX 2400-001)).

Response to Proposed Finding No. 1019

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts that Schein only worked with buying groups that had certain characteristics, or to the extent it implies that Schein did not reject buying groups during the conspiracy period pursuant to a policy not to do business with buying groups. The record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to turning down all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). Indeed, the record evidence is replete with examples of buying groups that

Schein rejected during the conspiracy period pursuant to its policy not to do business with buying groups. (CCFF ¶¶ 661-110; Complaint Counsel’s Post-Trial Brief, at Attachment C). The New Mexico Dental Co-Op is just one example of a buying group that each of the Big Three turned down. (CCFF ¶¶ 512, 661-1100, 1159-1166, 1316-1322; Complaint Counsel’s Post-Trial Brief, at Attachment C).

1020. But that wasn’t the end of the relationship between Dr. Mason’s group and Schein. Dr. Mason’s group became a chapter of the Utah Dental Co-Op, and “Schein was part of that process.” (Mason, Tr. 2397, 2399).

Response to Proposed Finding No. 1020

The Proposed Finding is misleading to the extent it implies or asserts that Schein’s conduct regarding New Mexico Dental Co-Op is anything other than interaction with a branch of a buying group, which it had partnered with in 2007. The record evidence shows that Schein rejected the New Mexico Dental Co-Op’s request for a supply partnership. (CCFF ¶¶ 507-509). Having no full-service distributor, the New Mexico Dental Co-Op’s attempt to build a buying group was stymied, and it merged with the existing Dental Co-Op of Utah and became a branch of the Dental Co-Op of Utah. (CCFF ¶ 511). Schein already had a relationship with the Utah Dental Co-Op, which dated back to 2007. (CCFF ¶¶ 688, 889). As such, to the extent the Proposed Finding implies that Schein worked with the New Mexico Dental Co-Op during the conspiracy, that is the result of a pre-existing, legacy relationship with the Utah Dental Co-Op, which Schein ultimately shut down during the conspiracy. (*See* Responses to Proposed Finding Nos. 581-633).

1021. On July 30, 2013, a Schein FSC wrote to Dr. Mason and his partner: “We look forward to hosting your next co-op meeting at our Henry Schein Center... [W]e will share how Henry Schein is best positioned to help your group and at the same time, we will be ‘all ears’ to hear more about what your group’s needs are so that we can understand fully how to help you.... Thank you for opening the door for us to explore how we can become partners with your dental co-op.” (RX 2462-002-03; Mason, Tr. 2401-02; *see also* RX 2463 (noting the meeting would be held at “a new meeting facility” because the space at Schein was not large enough)).

Response to Proposed Finding No. 1021

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein hosted a meeting for the New Mexico Dental Co-Op to discuss a potential partnership. The record evidence shows that no such meeting ever occurred. (Mason, Tr. 2408; RX2463 at 001). In fact, the record evidence shows that Schein rejected the New Mexico Dental Co-Op's request for a supply partnership. (CCFF ¶¶ 507-509).

1022. Henry Schein's regional manager, Brandon Bergman, also wrote to Dr. Mason and his partner, reiterating that "[t]he Henry Schein team looks forward to the possibility of partnering with you and we are interested in learning more about your goals." (RX 2462-001; Mason, Tr. 2403).

Response to Proposed Finding No. 1022

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein hosted a meeting for the New Mexico Dental Co-Op because it "look[ed] forward to the possibility of partnering." The record evidence shows that no such meeting ever occurred. (Mason, Tr. 2408; RX2463 at 001). In fact, the record evidence shows that Schein rejected the New Mexico Dental Co-Op's request for a supply partnership. (CCFF ¶¶ 507-509).

1023. Schein did in fact partner with the New Mexico chapter of the Utah Dental Co-Op through Schein's agreement with the Utah Dental Co-Op. (Mason, Tr. 2402, 2405).

Response to Proposed Finding No. 1023

The Proposed Finding is misleading to the extent it implies or asserts that Schein's conduct regarding New Mexico Dental Co-Op is anything other than interaction with a branch of a buying group, which it had already partnered with in 2007, or prior to the conspiracy. The record evidence shows that Schein rejected the New Mexico Dental Co-Op's request for a supply partnership during the conspiracy period. (CCFF ¶¶ 507-509). Having no full-service

distributor, the New Mexico Dental Co-Op's attempt to build a buying group was stymied, and it merged with the existing Dental Co-Op of Utah and became a branch of the Dental Co-Op of Utah. (CCFF ¶ 511). Schein already had a relationship with the Utah Dental Co-Op, which dated back to 2007. (CCFF ¶¶ 688, 889). As such, to the extent the Proposed Finding implies that Schein worked with the New Mexico Dental Co-Op during the conspiracy, that is the result of a pre-existing, legacy relationship with the Utah Dental Co-Op, which Schein ultimately shut down during the conspiracy. (*See* Responses to Proposed Finding Nos. 581-633).

1024. As Dr. Mason testified, "Schein never said no to the New Mexico chapter of the Utah Dental Co-Op" and "did in fact partner with the New Mexico chapter of the Utah Dental Co-Op." (Mason, Tr. 2404-05). The New Mexico chapter of the Dental Co-Op received supplies from Schein through Schein's master agreement with the Dental Co-Op. (Mason, Tr. 2391, 2399-2400; RX 2462).

Response to Proposed Finding No. 1024

The Proposed Finding is misleading to the extent it implies or asserts that Schein's conduct regarding New Mexico Dental Co-Op is anything other than interaction with a branch of the Utah Dental Co-Op, which is a buying group it had already partnered with in 2007, or prior to the conspiracy period. The record evidence shows that Schein rejected the New Mexico Dental Co-Op's request for a supply partnership. (CCFF ¶¶ 507-509). Having no full-service distributor, the New Mexico Dental Co-Op's attempt to build a buying group was stymied, and it merged with the existing Dental Co-Op of Utah and became a branch of the Dental Co-Op of Utah. (CCFF ¶ 511). Schein already had a relationship with the Utah Dental Co-Op, which dated back to 2007. (CCFF ¶¶ 688, 889). As such, to the extent the Proposed Finding implies that Schein worked with the New Mexico Dental Co-Op during the conspiracy, that is the result of a pre-existing, legacy relationship with the Utah Dental Co-

Op, which Schein ultimately shut down during the conspiracy. (*See* Responses to Proposed Finding Nos. 581-633).

1025. The evidence thus refutes Complaint Counsel's allegation that Schein boycotted the New Mexico Dental Co-Op as part of an alleged agreement with Patterson and Benco. (RX 3087-004).

Response to Proposed Finding No. 1025

The Proposed Finding is not supported by the cited evidence. It is also inaccurate and contrary to the weight of the record evidence. The record evidence shows that Schein rejected the New Mexico Dental Co-Op's request for a supply partnership. (CCFF ¶¶ 507-509). Having no full-service distributor, the New Mexico Dental Co-Op's attempt to build a buying group was stymied, and it merged with the existing Dental Co-Op of Utah and became a branch of the Dental Co-Op of Utah. (CCFF ¶ 511). Schein already had a relationship with the Utah Dental Co-Op, which dated back to 2007. (CCFF ¶¶ 688, 889). Schein did not enter into a new or separate agreement with the New Mexico Dental Co-Op at any point. (Responses to Proposed Findings Nos. 1023-1024). As such, to the extent the Proposed Finding implies that Schein worked with the New Mexico Dental Co-Op during the conspiracy, that is the result of a pre-existing, legacy relationship with the Utah Dental Co-Op, which Schein ultimately shut down during the conspiracy. (*See* Responses to Proposed Finding Nos. 581-633).

EE. OrthoSynetics.

1026. OrthoSynetics is a buying group comprised of individual private practice orthodontists. (Foley, Tr. 4627; CX 0309 (Muller, IHT at 202); CX 8009 (Wingard, Dep. at 92)).

Response to Proposed Finding No. 1026

The Proposed Finding is inaccurate and contrary to the weight of the evidence, which shows that OrthoSynetics is an MSO not a buying group. (CCFF ¶ 1763; RX2276 at 002; CX2710

at 001). Furthermore, the cited evidence does not support the Proposed Finding for three reasons. First, Muller’s contradictory testimony alone is not reliable enough to support the Proposed Finding. (*Compare* CX0309 (Muller, IHT at 202 (stating OrthoSynetics is a buying group)) *with* CX8005 (Muller, Dep. at 259 (stating OrthoSynetics is an MSO)). Second, and similarly, Foley’s contradictory testimony alone is not reliable enough to support the Proposed Finding. (*Compare* [REDACTED] [REDACTED] *with* Foley, Tr. 4530 (describing MSO characteristics)). Third, the cited Wingard testimony does not establish that OrthoSynetics is a buying group. Thus, the remaining evidence—the OrthoSynetics contract and contemporaneous communications about OrthoSynetics (which Schein does not cite)—must be considered. That evidence clearly establishes that OrthoSynetics is an MSO. (RX2276 at 002 (2014 Schein Dental Supply Agreement: “OrthoSynetics is a company that manages, owns or is under contract to provide services to specific dental offices”); CX2710 at 001 (Statement of Foley: “OrthoSynetics is much more than a Buying Group. All merchandise orders go through a procurement software . . . They also handle all staffing needs and also host the doctors’ practice management system on a centralized server . . . This is completely different from Mari’s List [which Schein identified as buying group in SF 963]”); *see also* CCFF ¶¶ 72-76 (explaining difference between buying group and MSO)). Moreover, the Proposed Finding is irrelevant, as Schein’s conduct regarding an MSO has no bearing on an inquiry into its conduct with respect to buying groups.

1027. OrthoSynetics advertises tailor-made service packages for its clients that include “comprehensive consulting, marketing, collections, procurement, and financial analysis” with the main goal of driving practice growth. (RX 2799).

Response to Proposed Finding No. 1027

Per the Parties' Joint Stipulations and Admissibility of Exhibits submitted on December 19, 2018, "Third party websites will be admitted into evidence for any non-hearsay purpose." RX2799, a third party website, is admitted into evidence but cannot be used for any non-hearsay purpose. Complaint Counsel does not object to the assertion that the statement appears on RX2799. However, the Proposed Finding is improper to the extent it asserts that the statement is true or to the extent it uses the hearsay statement to assert or imply that OrthoSynetics is a buying group. The Proposed Finding is misleading to the extent it implies OrthoSynetics is a buying group, as the record evidence establishes that OrthoSynetics is an MSO not a buying group. (CCFF ¶ 1763; RX2276 at 001; CX2710 at 001; *see also* Response to Proposed Finding No. 1026). The Proposed Finding is irrelevant, as Schein's conduct regarding an MSO has no bearing on an inquiry into its conduct with respect to buying groups.

1028. Schein considers OrthoSynetics a buying group. (Foley, Tr. 4622, 4627-28).

Response to Proposed Finding No. 1028

The Proposed Finding is inaccurate and contrary to the weight of the evidence, which shows that OrthoSynetics is an MSO not a buying group. (CCFF ¶ 1763; RX2276 at 001; CX2710 at 001; *see also* Response to Proposed Finding No. 1026). Foley's contradictory testimony alone is not reliable enough to support the Proposed Finding. (*Compare* [REDACTED] [REDACTED] *with* Foley, Tr. 4530 (describing MSO characteristics)). Third, the cited Wingard testimony does not establish that OrthoSynetics is a buying group. Thus, the remaining evidence—the OrthoSynetics contract and contemporaneous communications about OrthoSynetics (which Schein does not cite)—must be considered. That evidence clearly establishes that OrthoSynetics is an MSO. (RX2276 at 002 (2014 Schein Dental Supply Agreement: "OrthoSynetics is a company that

manages, owns or is under contract to provide services to specific dental offices”); CX2710 at 001 (Statement of Foley: “OrthoSynetics is much more than a Buying Group. All merchandise orders go through a procurement software . . . They also handle all staffing needs and also host the doctors’ practice management system on a centralized server . . . This is completely different from Mari’s List [which Schein identified as buying group in SF 963]”); *see also* CCF ¶¶ 72-76 (explaining difference between buying group and MSO)). Moreover, the Proposed Finding is irrelevant, as Schein’s conduct regarding an MSO has no bearing on an inquiry into its conduct with respect to buying groups.

1029. Through its Special Markets division, Schein has offered discounts to and maintained a longstanding relationship with OrthoSynetics since at least 2009. (Foley, Tr. 4620).

Response to Proposed Finding No. 1029

The Proposed Finding is misleading to the extent it implies OrthoSynetics is a buying group, as the record evidence shows that OrthoSynetics is an MSO not a buying group. (CCFF ¶ 1763; RX2276 at 001; CX2710 at 001; *see also* Response to Proposed Finding No. 1026). As such, the Proposed Finding is irrelevant, as Schein’s conduct regarding an MSO at any point in time has no bearing on an inquiry into its conduct with respect to buying groups.

Complaint Counsel has no specific response to the statement that Schein offered discounts to OrthoSynetics.

1030. OrthoSynetics was transferred to Schein’s APC division in 2018. (CX 8009 (Wingard, Dep. at 91)).

Response to Proposed Finding No. 1030

The Proposed Finding is misleading to the extent it implies OrthoSynetics is a buying group, as the record evidence shows that OrthoSynetics is an MSO not a buying group. (CCFF ¶ 1763; RX2276 at 001; CX2710 at 001; *see also* Response to Proposed Finding No. 1026). As such, the Proposed Finding is irrelevant, as Schein’s conduct regarding an MSO at any point

in time has no bearing on an inquiry into its conduct with respect to buying groups.

Complaint Counsel has no specific response to the statement that Schein transferred

OrthoSynetics to Schein's APC division in 2018.

1031. Schein and OrthoSynetics established a formalized relationship through memorialized agreements that cover the span of the relationship. (Foley, Tr. 4625-26).

Response to Proposed Finding No. 1031

The Proposed Finding is misleading to the extent it implies OrthoSynetics is a buying group or that Schein had a "formalized relationship" with OrthoSynetics as a buying group, as the record evidence shows that OrthoSynetics is an MSO not a buying group. (CCFF ¶ 1763; RX2276 at 0001; CX2710 at 001; *see also* Response to Proposed Finding No. 1026). As such, the Proposed Finding is irrelevant, as Schein's conduct regarding an MSO at any point in time has no bearing on an inquiry into its conduct with respect to buying groups.

Complaint Counsel has no specific response to the statement that Schein established a relationship through memorialized agreements.

1032. In 2014, Schein entered into a formal agreement with OrthoSynetics effective January 1, 2014 through December 31, 2016. (RX 2276-002; Foley, Tr. 4625). Under the agreement, Schein created a formulary for OrthoSynetics with discounts of greater than [REDACTED] on approximately [REDACTED] items and also offered discounts of up to [REDACTED] on items not on the formulary, as well as growth rebates. (RX 2276-002; Foley, Tr. 4628). The agreement also provided that OrthoSynetics would contractually commit [REDACTED] of its member's volume to Schein. (RX 2276-002; Foley, Tr. 4628).

Response to Proposed Finding No. 1032

The Proposed Finding is misleading to the extent it implies OrthoSynetics is a buying group or that Schein had a "formal agreement" with OrthoSynetics as a buying group, as the record evidence shows that OrthoSynetics is an MSO not a buying group. (CCFF ¶ 1763; RX2276 at 001; CX2710 at 001 *see also* Response to Proposed Finding No. 1026). As such, the Proposed Finding is irrelevant, as Schein's conduct regarding an MSO at any point in time

has no bearing on an inquiry into its conduct with respect to buying groups. Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1033. Schein offered OrthoSynetics a similar formulary and pricing prior to the 2014 agreement. (Foley, Tr. 4629).

Response to Proposed Finding No. 1033

The Proposed Finding is misleading to the extent it implies OrthoSynetics is a buying group or that Schein “offered a similar formulary and pricing prior to the 2014 agreement” to OrthoSynetics as a buying group, as the record evidence shows that OrthoSynetics is an MSO not a buying group. (CCFF ¶ 1763; RX2276 at 001; CX2710 at 001 *see also* Response to Proposed Finding No. 1026). As such, the Proposed Finding is irrelevant, as Schein’s conduct regarding an MSO at any point in time has no bearing on an inquiry into its conduct with respect to buying groups. Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1034. The agreement states that “OrthoSynetics is a company that manages, owns or is under contract to provide services to specific dental offices,” and Mr. Foley, who negotiated the agreement with OrthoSynetics, confirmed at trial that OrthoSynetics does not own or formally manage its member’s offices. (RX 2276-002; Foley, Tr. 4625, 4627).

Response to Proposed Finding No. 1034

The Proposed Finding is inaccurate and contrary to the weight of the evidence, which shows that OrthoSynetics is an MSO not a buying group. (CCFF ¶ 1763; RX2276 at 001; CX2710 at 001). Furthermore, the cited evidence does not support the Proposed Finding. Foley’s after-the-fact testimony alone, regardless of whether he negotiated the agreement, is contradictory and cannot be relied upon to support the Proposed Finding. (*Compare* [REDACTED] [REDACTED] with Foley, Tr. 4530 (describing OrthoSynetic’s MSO characteristics)). The remaining evidence—the OrthoSynetics contract and contemporaneous communications about OrthoSynetics—must

be considered. That evidence clearly establishes that OrthoSynetics is an MSO and that Schein considered OrthoSynetics to be an MSO. (RX2276 at 002 (2014 Schein Dental Supply Agreement: “OrthoSynetics is a company that manages, owns or is under contract to provide services to specific dental offices”); CX2710 at 001 (Statement of Foley: “OrthoSynetics is much more than a Buying Group. All merchandise orders go through a procurement software . . . They also handle all staffing needs and also host the doctors’ practice management system on a centralized server . . . This is completely different from Mari’s List [which Schein identified as buying group in SF 963]”); *see also* CCFF ¶¶ 72-76 (explaining difference between buying group and MSO)). Moreover, the Proposed Finding is irrelevant, as Schein’s conduct regarding an MSO has no bearing on an inquiry into its conduct with respect to buying groups, and an attempt to imply otherwise is misleading.

1035. OrthoSynetics offers many value added services to its members. (Foley, Tr. 4621). These services were part of Schein’s consideration in deciding to partner with OrthoSynetics, as well as the group’s ability to provide “stickiness” with Schein in order to drive compliance. (Foley, Tr. 4622-23).

Response to Proposed Finding No. 1035

The Proposed Finding is misleading to the extent it implies OrthoSynetics is a buying group, as the record evidence shows that OrthoSynetics is an MSO not a buying group. (CCFF ¶ 1763; RX2276 at 001; CX2710 at 001; *see also* Response to Proposed Finding No. 1026). As such, the Proposed Finding is irrelevant, as Schein’s conduct regarding an MSO at any point in time has no bearing on an inquiry into its conduct with respect to buying groups.

Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1036. As a group of independent dentists receiving discounts based on the group’s collective purchases, OrthoSynetics meets Complaint Counsel’s definition of a buying group. (Complaint ¶ 3).

Response to Proposed Finding No. 1036

The Proposed Finding misstates the cited evidence and is not supported by the cited evidence. The definition of buying group set forth in the Complaint is: “Buying Groups are organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products.” (Complaint ¶ 3). The Proposed Finding offers no explanation or evidentiary support to establish how OrthoSynetics meets the definition as it is actually set forth in the Complaint. Nonetheless, the Proposed Finding is misleading to the extent it asserts or implies that OrthoSynetics is a buying group, as the record evidence shows that OrthoSynetics is an MSO not a buying group. (CCFF ¶ 1763; RX2276 at 001; CX2710 at 001; *see also* Response to Proposed Finding No. 1026). As such, the Proposed Finding is irrelevant, as Schein’s conduct regarding an MSO at any point in time has no bearing on an inquiry into its conduct with respect to buying groups.

1037. Schein’s partnership with OrthoSynetics is inconsistent with the alleged conspiracy. (Complaint ¶ 1).

Response to Proposed Finding No. 1037

The Proposed Finding is not supported by a citation to the Complaint. Moreover, the Proposed Finding is misleading to the extent it implies OrthoSynetics is a buying group and that Schein partnered with OrthoSynetics as a buying group, as the record evidence shows that OrthoSynetics is an MSO not a buying group. (CCFF ¶ 1763; RX2276 at 001; CX2710 at 001). As such, the Proposed Finding is not only irrelevant, as Schein’s conduct regarding an MSO at any point in time has no bearing on an inquiry into its conduct with respect to buying groups, but also misleading in using irrelevant evidence regarding an *MSO* to assert or imply that Schein did not participate in a conspiracy *regarding buying groups*.

FF. Newport News Buying Group.

1038. In November 2013, Dr. Ross Epstein looked into starting a new buying group to be called the Newport News Buying Group. (CX 8000 (Porro, Dep. at 248-49); RX 2157-001).

Response to Proposed Finding No. 1038

The Proposed Finding is misleading to the extent it asserts or implies that Newport News Buying Group was formed, ever existed, or is a buying group. The record evidence only shows that Michael Porro testified that Dr. Epstein “was talking about the scope of this new buying group . . . Then I believe it fell through.” (CX8000 (Porro, Dep. at 249)). Even setting aside the hearsay issue with this testimony, the record evidence does not establish that Newport News Buying Group was ever formed. (CX8000 (Porro, Dep. at 248-49); RX2157 at 001). As such, the Proposed Finding is irrelevant, as Schein’s conduct regarding a hypothetical buying group has no bearing on Schein’s conduct regarding buying groups during the conspiracy period. Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1039. On November 4, 2013, Michael Porro, Schein’s Zone Manager for the Atlantic Zone at the time, emailed Schein Regional Manager Bobby Anderson, about a potential meeting with Dr. Epstein regarding the “newport news buying group.” (RX 2157-001).

Response to Proposed Finding No. 1039

The Proposed Finding is misleading to the extent it asserts or implies that Newport News Buying Group was formed, ever existed, or is a buying group. The record evidence only shows that Porro testified that Dr. Epstein “was talking about the scope of this new buying group . . . Then I believe it fell through.” (CX8000 (Porro, Dep. at 249)). Even setting aside the hearsay issue with this testimony, the record evidence does not establish that Newport News Buying Group was ever formed. (CX8000 (Porro, Dep. at 248-49); RX2157 at 001). As such, the Proposed Finding is irrelevant, as Schein’s conduct regarding a hypothetical

buying group has no bearing on Schein's conduct regarding buying groups during the conspiracy period. Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1040. Mr. Porro wrote "[a]ny chance we can meet with the leader of this group on Nov. 21? ... Would be good if we could." (RX 2157-001).

Response to Proposed Finding No. 1040

The Proposed Finding is misleading to the extent it asserts or implies that Newport News Buying Group was formed, ever existed, or is a buying group. The record evidence only shows that Porro testified that Dr. Epstein "was talking about the scope of this new buying group . . . Then I believe it fell through." (CX8000 (Porro, Dep. at 249)). Even setting aside the hearsay issue with this testimony, the record evidence does not establish that Newport News Buying Group was ever formed. (CX8000 (Porro, Dep. at 248-49); RX2157 at 001). As such, the Proposed Finding is irrelevant, as Schein's conduct regarding a hypothetical buying group has no bearing on Schein's conduct regarding buying groups during the conspiracy period. Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1041. Mr. Porro recalled meeting with Dr. Epstein "once, maybe twice person to person in his office." (CX 8000 (Porro, Dep. at 248)).

Response to Proposed Finding No. 1041

The Proposed Finding is misleading to the extent it asserts or implies that Newport News Buying Group was formed, ever existed, or is a buying group. The record evidence only shows that Porro testified that Dr. Epstein "was talking about the scope of this new buying group . . . Then I believe it fell through." (CX8000 (Porro, Dep. at 249)). Even setting aside the hearsay issue with this testimony, the record evidence does not establish that Newport News Buying Group was ever formed. (CX8000 (Porro, Dep. at 248-49); RX2157 at 001).

The Proposed Finding is also vague and ambiguous as to “met,” as it provides no description of what the meeting was about and why it would be relevant. As such, the Proposed Finding is irrelevant, as Schein’s conduct regarding a hypothetical buying group, or a meeting with Dr. Epstein with no detail about the content of such meeting, has no bearing on Schein’s conduct regarding buying groups during the conspiracy period.

1042. Rather than reject the group outright, Schein “[was] excited about the possibility” of Dr. Epstein’s group and opted to do some diligence. (CX 8000 (Porro, Dep. at 249)).

Response to Proposed Finding No. 1042

The Proposed Finding is misleading to the extent it asserts or implies that Newport News Buying Group was formed, ever existed, or is a buying group. The record evidence only shows that Porro testified that Dr. Epstein “was talking about the scope of this new buying group . . . Then I believe it fell through.” (CX8000 (Porro, Dep. at 249)). Even setting aside the hearsay issue with this testimony, the record evidence does not establish that Newport News Buying Group was ever formed. (CX8000 (Porro, Dep. at 248-49); RX2157 at 001). The Proposed finding is also vague and ambiguous and misleading to the extent the phrase “excited about the possibility” asserts or implies that Schein actually worked with this buying group. Indeed, it could not have, as it was never formed. The Proposed Finding is irrelevant, as Porro’s emotional state regarding a hypothetical buying group, or any hypothetical meeting with it, has no bearing on Schein’s conduct regarding buying groups during the conspiracy period.

1043. Schein continued discussing the possibility of a Newport News group into January 2014. (CX 8000 (Porro, Dep. at 245-46)).

Response to Proposed Finding No. 1043

The Proposed Finding is misleading to the extent it asserts or implies that Newport News Buying Group was formed, ever existed, or is a buying group. The record evidence only

shows that Porro testified that Dr. Epstein “was talking about the scope of this new buying group . . . Then I believe it fell through.” (CX8000 (Porro, Dep. at 249)). Even setting aside the hearsay issue with this testimony, the record evidence does not establish that Newport News Buying Group was ever formed. (CX8000 (Porro, Dep. at 248-49); RX2157 at 001). The Proposed finding is also vague and ambiguous and misleading to the extent it asserts or implies that the phrase “continued discussing the possibility of a Newport News group” indicates anything other than a mention of a hypothetical buying group that never formed. The Proposed Finding is irrelevant, as a hypothetical buying group, or a mention of a hypothetical buying group, has no bearing on Schein’s conduct regarding buying groups during the conspiracy period. Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1044. However, Mr. Porro testified that Dr. Epstein’s group eventually “fell through” after the group “halted the progression . . . and joined in the ADC.” (CX 8000 (Porro, Dep. at 248-49)).

Response to Proposed Finding No. 1044

Complaint Counsel has no specific response.

1045. Schein’s experience with the Newport News Buying Group demonstrates Schein’s willingness to engage with new buying groups and is inconsistent with Complaint Counsel’s alleged conspiracy. (Complaint ¶ 1).

Response to Proposed Finding No. 1045

The Proposed Finding is not supported by the cited evidence and should be disregarded.

Nonetheless, the Proposed Finding is not only inaccurate, but misleading, as to the use of the phrase “new buying groups” to refer to Dr. Epstein’s hypothetical group or idea. The Proposed Finding is misleading to the extent it asserts or implies that Newport News Buying Group was formed, ever existed, or is a buying group. The record evidence only shows that Porro testified that Dr. Epstein “was talking about the scope of this new buying group . . .

Then I believe it fell through.” (CX8000 (Porro, Dep. at 249)). Even setting aside the hearsay issue with this testimony, the record evidence does not establish that Newport News Buying Group was ever formed. (CX8000 (Porro, Dep. at 248-49); RX2157 at 001). The Proposed Finding is not only misleading, but inaccurate, to the extent it asserts that “Schein’s experience” with a hypothetical group is “inconsistent” with a conspiracy. In fact, as set forth above, any “experience” regarding a hypothetical buying group has no bearing on Schein’s conduct regarding buying groups during the conspiracy period.

GG. Pacific Group Management Services.

1046. Complaint Counsel claims Mr. Sullivan “personally directed his colleagues to ‘shut down’ or refuse to bid on” a buying group called Pacific Group Management Services (“PGMS”). (CC Pretrial Br. at 19-20). The evidence does not support this claim.

Response to Proposed Finding No. 1046

The second sentence of the Proposed Finding is not supported by any citation to the record evidence and should be disregarded. In fact, the record evidence shows that Sullivan “shot down” the PGMS agreement and that Titus understood that Sullivan had done so. (CCFF ¶¶ 799-805). When approached by PGMS, Titus informed her boss, Cavaretta, on June 12, 2014 that PGMS was “(yet another) potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees compliance, exclusivity and the opportunity to market Schein business solutions. I sent them some tough questions thinking it would scare them off, but alas, they raised the stakes by moving to Dir of Ops.” (CCFF ¶ 794 (quoting CX2809 at 002)). By July 16, 2014, Titus had learned that Sullivan was not in favor of the PGMS buying group agreement, and she informed her colleagues and Cavaretta that “Tim was not in favor of it.” (CCFF ¶¶ 795 (quoting CX2219 at 001), 796-797). The same day, she informed Cavaretta of her communication to PGMS, where she explained to PGMS that “if there was a time in the future they become an MSO that could demonstrate compliance, [Schein] would be pleased

to revisit.” (CCFF ¶ 798 (quoting CX2219 at 002)). The next day, on July 17, 2014, Titus informed her colleagues that Schein “had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this [prime vendor agreement] and sent to Joe for review. It went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)). Sullivan was asked about Titus’ statements, and he did not dispute them. (Sullivan, Tr. 3984-3985). Titus understood that Sullivan had shot down the PGMS agreement, even though PGMS was willing to be exclusive with Schein, and that the message from above was that GPOs were not good for Schein.” (CCFF ¶¶ 800-805; *see also* CCFF ¶ 808). On July 18, 2014, Kevin Upchurch, Titus’ colleague, sent a similar message to Cavaretta, Titus, and another colleague: “The Co-Op is turning into a GPO . . . from what KT has observed in Texas, NM and from Tim S., HSD does not want to enter the GPO world.” (CCFF ¶ 806; *see also* CCFF ¶ 807).

1047. PGMS, a “consulting group, with a twist,” first approached Schein as a start-up buying group with approximately ten members around June 2014. (Titus, Tr. 5216-5217; CX 2809-003; CX 2250-002-04).

Response to Proposed Finding No. 1047

The Proposed Finding is vague as to “start-up buying group,” which is not defined or explained. To the extent the Proposed Finding implies that PGMS is not a buying group, it is inaccurate and contrary to the record evidence. The record evidence shows that PGMS is a buying group. (CCFF ¶ 793). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1048. PGMS is located in California, where Schein has well over 50-percent market share, which causes a risk of cannibalization. (Cavaretta, Tr. 5608).

Response to Proposed Finding No. 1048

Complaint Counsel has no specific response to the attribution of the statement to Cavaretta. However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that Schein turned down PGMS for concerns of cannibalizations. The record evidence shows that PGMS was rejected because of Sullivan's instruction to do so and Titus' understanding of such instruction. The record evidence shows that Sullivan "shot down" the PGMS agreement and that Titus understood that Sullivan had done so. (CCFF ¶¶ 799-805). When approached by PGMS, Titus informed her boss, Cavaretta, on June 12, 2014 that PGMS was "(yet another) potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees compliance, exclusivity and the opportunity to market Schein business solutions. I sent them some tough questions thinking it would scare them off, but alas, they raised the stakes by moving to Dir of Ops." (CCFF ¶ 794 (quoting CX2809 at 002)). By July 16, 2014, Titus had learned that Sullivan was not in favor of the PGMS buying group agreement, and she informed her colleagues and Cavaretta that "Tim was not in favor of it." (CCFF ¶¶ 795 (quoting CX2219 at 001), 796-797). The same day, she informed Cavaretta of her communication to PGMS, where she explained to PGMS that "if there was a time in the future they become an MSO that could demonstrate compliance, [Schein] would be pleased to revisit." (CCFF ¶ 798 (quoting CX2219 at 002)). The next day, on July 17, 2014, Titus informed her colleagues that Schein "had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this [prime vendor agreement] and sent to Joe for review. It went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO's are not good for Schein." (CCFF ¶ 799 (quoting CX2235 at 001)). Sullivan was asked about Titus' statements, and he did not dispute them. (Sullivan, Tr. 3984-3985). Titus understood that Sullivan had shot down the PGMS agreement, even though PGMS was willing to be

exclusive with Schein, and that the message from above was that GPOs were not good for Schein.” (CCFF ¶¶ 800-805; *see also* CCFF ¶ 808). On July 18, 2014, Kevin Upchurch, Titus’ colleague, sent a similar message to Cavaretta, Titus, and another colleague: “The Co-Op is turning into a GPO . . . from what KT has observed in Texas, NM and from Tim S., HSD does not want to enter the GPO world.” (CCFF ¶ 806; *see also* CCFF ¶ 807).

1049. PGMS was brought to Kathleen Titus’s attention by a Schein equipment sales specialist working with one of the principals of PGMS. (Titus, Tr. 5217).

Response to Proposed Finding No. 1049

Complaint Counsel has no specific response.

1050. One of PGMS’s owners had a full-service dental lab with in-house lava milling and cadcam technology. (CX 2250-004).

Response to Proposed Finding No. 1050

Complaint Counsel has no specific response.

1051. Ms. Titus, in her role as Director of the Western United States for the Mid-Market Division, carefully evaluated PGMS to see if a relationship between the two would be a good fit for both parties. (Titus, Tr. 5217-18).

Response to Proposed Finding No. 1051

Complaint Counsel has no specific response to the attribution of the statement to Titus.

However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies Titus did not reject PGMS in accordance with her understanding of Sullivan’s instruction. The record evidence shows that PGMS was rejected because of Sullivan’s instruction to do so and Titus’ understanding of such instruction. In fact, the record evidence shows that Sullivan “shot down” the PGMS agreement and that Titus understood that Sullivan had done so. (CCFF ¶¶ 799-805). When approached by PGMS, Titus informed her boss, Cavaretta, on June 12, 2014 that PGMS was “(yet another) potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees

compliance, exclusivity and the opportunity to market Schein business solutions. I sent them some tough questions thinking it would scare them off, but alas, they raised the stakes by moving to Dir of Ops.” (CCFF ¶ 794 (quoting CX2809 at 002)). By July 16, 2014, Titus had learned that Sullivan was not in favor of the PGMS buying group agreement, and she informed her colleagues and Cavaretta that “Tim was not in favor of it.” (CCFF ¶¶ 795 (quoting CX2219 at 001), 796-797). The same day, she informed Cavaretta of her communication to PGMS, where she explained to PGMS that “if there was a time in the future they become an MSO that could demonstrate compliance, [Schein] would be pleased to revisit.” (CCFF ¶ 798 (quoting CX2219 at 002)). The next day, on July 17, 2014, Titus informed her colleagues that Schein “had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this [prime vendor agreement] and sent to Joe for review. It went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)). Sullivan was asked about Titus’ statements, and he did not dispute them. (Sullivan, Tr. 3984-3985). Titus understood that Sullivan had shot down the PGMS agreement, even though PGMS was willing to be exclusive with Schein, and that the message from above was that GPOs were not good for Schein.” (CCFF ¶¶ 800-805; *see also* CCFF ¶ 808). On July 18, 2014, Kevin Upchurch, Titus’ colleague, sent a similar message to Cavaretta, Titus, and another colleague: “The Co-Op is turning into a GPO . . . from what KT has observed in Texas, NM and from Tim S., HSD does not want to enter the GPO world.” (CCFF ¶ 806; *see also* CCFF ¶ 807).

1052. At the time PGMS approached Schein, Schein was working on developing its strategy on determining what constituted a healthy buying group relationship. (Titus, Tr. 5220). Ms. Titus used the opportunity to start “to establish some real policies that will guide us well into the future.” (CX 2219; CX 2809 (Mr. Cavaretta concurred that the questions “should be standard” for all buying group evaluations.)).

Response to Proposed Finding No. 1052

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts that Schein used the PGMS “opportunity to start ‘to establish some real policies that will guide us well into the future.’” It is also vague as to the phrase “healthy buying group relationships.” The record evidence does not show that Schein created some formal strategy for working with buying groups during the conspiracy period. It clearly shows that Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups regardless of type during the conspiracy period. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). By February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728- 870). The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period. (CCFF ¶¶ 661-954; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). PGMS is just one example. This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322, 1178-1198).

The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it implies Titus did not reject PGMS in accordance with her understanding of Sullivan’s instruction. The record evidence shows that by the time PGMS approached Schein, Sullivan had instructed his sales force to reject buying groups, that Titus understood

that instruction, and that Titus rejected PGMS based on that instruction. The record evidence shows that Sullivan “shot down” the PGMS agreement and that Titus understood that Sullivan had done so. (CCFF ¶¶ 799-805). When approached by PGMS, Titus informed her boss, Cavaretta, on June 12, 2014 that PGMS was “(yet another) potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees compliance, exclusivity and the opportunity to market Schein business solutions. I sent them some tough questions thinking it would scare them off, but alas, they raised the stakes by moving to Dir of Ops.” (CCFF ¶ 794 (quoting CX2809 at 002)). By July 16, 2014, Titus had learned that Sullivan was not in favor of the PGMS buying group agreement, and she informed her colleagues and Cavaretta that “Tim was not in favor of it.” (CCFF ¶¶ 795 (quoting CX2219 at 001), 796-797). The same day, she informed Cavaretta of her communication to PGMS, where she explained to PGMS that “if there was a time in the future they become an MSO that could demonstrate compliance, [Schein] would be pleased to revisit.” (CCFF ¶ 798 (quoting CX2219 at 002)). The next day, on July 17, 2014, Titus informed her colleagues that Schein “had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this [prime vendor agreement] and sent to Joe for review. It went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)). Sullivan was asked about Titus’ statements, and he did not dispute them. (Sullivan, Tr. 3984-3985). Titus understood that Sullivan had shot down the PGMS agreement, even though PGMS was willing to be exclusive with Schein, and that the message from above was that GPOs were not good for Schein.” (CCFF ¶¶ 800-805; *see also* CCFF ¶ 808). On July 18, 2014, Kevin Upchurch, Titus’ colleague, sent a similar message to Cavaretta, Titus, and another colleague: “The Co-Op is turning into a GPO . . . from what KT has observed in

Texas, NM and from Tim S., HSD does not want to enter the GPO world.” (CCFF ¶ 806; *see also* CCFF ¶ 807).

1053. On June 2, 2014, Ms. Titus sent PGMS “10 critical questions necessary to evaluate a partnership[,]” designed to understand the nature of the group’s business model, and their capacity to drive compliance, deliver incremental volume, and minimize cannibalization. (CX 2809-003-04).

Response to Proposed Finding No. 1053

Complaint Counsel has no specific response.

1054. Ms. Titus’s ten questions served as a starting point to conduct due diligence on PGMS to determine if it was a group that Schein would be open to partnering with. The questions subsequently became a standard inquiry when Schein evaluated a buying group. (Titus, Tr. 5218-20, 5222; CX 2809-001).

Response to Proposed Finding No. 1054

The second sentence of the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that there was a “standard inquiry when Schein evaluated a buying group” during the conspiracy period. The record evidence does not show that Schein created some formal strategy for evaluating or working with buying groups during the conspiracy period. It clearly shows that Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups regardless of type during the conspiracy period. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). By February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period. (CCFF ¶¶ 661-954; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). PGMS is just one example. This is in stark contrast to the record

evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 1159-1166, 1316-1322).

1055. Ms. Titus forwarded her questions and PGMS's answers to Joe Cavaretta who responded that Ms. Titus's questions "should be standard" for all buying group evaluations. (CX 2809-001, -002).

Response to Proposed Finding No. 1055

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that there was a "standard" inquiry for buying groups during the conspiracy period. The record evidence does not show that Schein created some formal strategy for evaluating or working with buying groups during the conspiracy period. It clearly shows that Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups regardless of type during the conspiracy period. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732). By February 2012, Sullivan informed employees that he wanted to "KILL the buying group model," and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period. (CCFF ¶¶ 661-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). PGMS is just one example. This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General

requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 1159-1166, 1316-1322).

1056. Mr. Cavaretta responded that Schein needed to “make sure we have ou[r] systems and offering down cold and the team understanding how to present.” (CX 2809-002).

Response to Proposed Finding No. 1056

The Proposed Finding is not only vague but misleading and contrary to the weight of the evidence to the extent it implies that Schein was creating “systems and offering” regarding evaluation of buying groups during the conspiracy period. The record evidence does not show that Schein created some formal strategy for evaluating or an offering to work with buying groups during the conspiracy period. It clearly shows that Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups regardless of type during the conspiracy period. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). By February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period. (CCFF ¶¶ 661-954; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). PGMS is just one example. This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 1159-1166, 1316-1322).

1057. Mr. Cavaretta wanted to ensure that Schein's offering to buying groups was aligned with Schein's mission and, in the interest of being fair to all buying groups, that any discount and sales plans offered to a buying group was the same across the board. (Titus, Tr. 5221; Cavaretta, Tr. 5606; 5575).

Response to Proposed Finding No. 1057

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that there was an "offering to buying groups" during the conspiracy period, or that "sales plans" were offered to buying groups during the conspiracy period. The record evidence does not show that Schein created some formal strategy for evaluating or working with buying groups during the conspiracy period. It clearly shows that Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups regardless of type during the conspiracy period. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732). By February 2012, Sullivan informed employees that he wanted to "KILL the buying group model," and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728- 870). The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period. (CCFF ¶¶ 432-453, 661-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 1159-1166, 1316-1322).

PGMS is just one example of the numerous buying groups that Schein rejected during the conspiracy. The record evidence shows that by the time PGMS approached Schein, Sullivan had instructed his sales force to reject buying groups, that Titus understood that instruction, and that Titus rejected PGMS based on that instruction. The record evidence shows that Sullivan “shot down” the PGMS agreement and that Titus understood that Sullivan had done so. (CCFF ¶¶ 799-805). When approached by PGMS, Titus informed her boss, Cavaretta, on June 12, 2014 that PGMS was “(yet another) potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees compliance, exclusivity and the opportunity to market Schein business solutions. I sent them some tough questions thinking it would scare them off, but alas, they raised the stakes by moving to Dir of Ops.” (CCFF ¶ 794 (quoting CX2809 at 002)). By July 16, 2014, Titus had learned that Sullivan was not in favor of the PGMS buying group agreement, and she informed her colleagues and Cavaretta that “Tim was not in favor of it.” (CCFF ¶¶ 795 (quoting CX2219 at 001), 796-797). The same day, she informed Cavaretta of her communication to PGMS, where she explained to PGMS that “if there was a time in the future they become an MSO that could demonstrate compliance, [Schein] would be pleased to revisit.” (CCFF ¶ 798 (quoting CX2219 at 002)). The next day, on July 17, 2014, Titus informed her colleagues that Schein “had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this [prime vendor agreement] and sent to Joe for review. It went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)). Sullivan was asked about Titus’ statements, and he did not dispute them. (Sullivan, Tr. at 3984-3985). Titus understood that Sullivan had shot down the PGMS agreement, even though PGMS was willing to be exclusive with Schein, and that the message from above was that GPOs were

not good for Schein.” (CCFF ¶¶ 800-805; *see also* CCFF ¶ 808). On July 18, 2014, Kevin Upchurch, Titus’ colleague, sent a similar message to Cavaretta, Titus, and another colleague: “The Co-Op is turning into a GPO . . . from what KT has observed in Texas, NM and from Tim S., HSD does not want to enter the GPO world.” (CCFF ¶ 806; *see also* CCFF ¶ 807).

1058. On June 12, 2014, Ms. Titus asked Joe Cavaretta if she should set up a call with PGMS. (CX 2809-002). Mr. Cavaretta approved. (Titus, Tr. 5220).

Response to Proposed Finding No. 1058

Complaint Counsel has no specific response.

1059. On June 26, 2014, Ms. Titus and Brian Brady met in-person with PGMS. (CX 2215-001; Titus, Tr. 5222).

Response to Proposed Finding No. 1059

Complaint Counsel has no specific response.

1060. After the meeting, Ms. Titus believed that PGMS presented a potentially solid business opportunity and initially thought that Schein should move forward with a proposal to the group. (CX 2215; CX 2250-005 (“consensus of the team [was] to move forward with a proposal.”); Titus, Tr. 5222). Ms. Titus then developed a proposal that she hoped could “serve as the foundation” for policy on how to do business with these types of entities. (CX 2250-004; CX2251-002 (Offering supplies discount from 20%)).

Response to Proposed Finding No. 1060

Complaint Counsel has no specific response to the first sentence of the Proposed Finding.

The second sentence of the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein was creating a “policy on how to do business with” buying groups during the conspiracy period or that it contracted with buying groups during the conspiracy period. The record evidence does not show that Schein created some formal strategy for evaluating or working with buying groups during the conspiracy period. It clearly shows that Schein ensured internal compliance with the agreement by

instructing its sales force to refuse to sell to all buying groups regardless of type during the conspiracy period. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). By February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period. (CCFF ¶¶ 432-453, 661-954; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 1159-1166, 1316-1322).

PGMS is just one example of the numerous buying groups that Schein rejected during the conspiracy. The record evidence shows that by the time PGMS approached Schein, Sullivan had instructed his sales force to reject buying groups, that Titus understood that instruction, and that Titus rejected PGMS based on that instruction. The record evidence shows that Sullivan “shot down” the PGMS agreement and that Titus understood that Sullivan had done so. (CCFF ¶¶ 799-805). When approached by PGMS, Titus informed her boss, Cavaretta, on June 12, 2014 that PGMS was “(yet another) potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees compliance, exclusivity and the opportunity to market Schein business solutions. I sent them some tough questions thinking it would scare them off, but alas, they raised the stakes by moving to Dir of Ops.” (CCFF ¶ 794 (quoting CX2809 at

002)). By July 16, 2014, Titus had learned that Sullivan was not in favor of the PGMS buying group agreement, and she informed her colleagues and Cavaretta that “Tim was not in favor of it.” (CCFF ¶¶ 795 (quoting CX2219 at 001), 796-797). The same day, she informed Cavaretta of her communication to PGMS, where she explained to PGMS that “if there was a time in the future they become an MSO that could demonstrate compliance, [Schein] would be pleased to revisit.” (CCFF ¶ 798 (quoting CX2219 at 002)). The next day, on July 17, 2014, Titus informed her colleagues that Schein “had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this [prime vendor agreement] and sent to Joe for review. It went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)). Sullivan was asked about Titus’ statements, and he did not dispute them. (Sullivan, Tr. 3984-3985). Titus understood that Sullivan had shot down the PGMS agreement, even though PGMS was willing to be exclusive with Schein, and that the message from above was that GPOs were not good for Schein.” (CCFF ¶¶ 800-805; *see also* CCFF ¶ 808). On July 18, 2014, Kevin Upchurch, Titus’ colleague, sent a similar message to Cavaretta, Titus, and another colleague: “The Co-Op is turning into a GPO . . . from what KT has observed in Texas, NM and from Tim S., HSD does not want to enter the GPO world.” (CCFF ¶ 806; *see also* CCFF ¶ 807).

1061. However, Ms. Titus was concerned about the small number of PGMS members and whether PGMS would be able to drive compliance to Schein. (Titus, Tr. 5222).

Response to Proposed Finding No. 1061

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that PGMS was not rejected by Titus pursuant to her understanding of Sullivan’s directive to do so. The record evidence shows that by the time

PGMS approached Schein, Sullivan had instructed his sales force to reject buying groups, that Titus understood that instruction, and that Titus rejected PGMS based on that instruction. The record evidence shows that Sullivan “shot down” the PGMS agreement and that Titus understood that Sullivan had done so. (CCFF ¶¶ 799-805). When approached by PGMS, Titus informed her boss, Cavaretta, on June 12, 2014 that PGMS was “(yet another) potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees compliance, exclusivity and the opportunity to market Schein business solutions. I sent them some tough questions thinking it would scare them off, but alas, they raised the stakes by moving to Dir of Ops.” (CCFF ¶ 794 (quoting CX2809 at 002)). By July 16, 2014, Titus had learned that Sullivan was not in favor of the PGMS buying group agreement, and she informed her colleagues and Cavaretta that “Tim was not in favor of it.” (CCFF ¶¶ 795 (quoting CX2219 at 001), 796-797). The same day, she informed Cavaretta of her communication to PGMS, where she explained to PGMS that “if there was a time in the future they become an MSO that could demonstrate compliance, [Schein] would be pleased to revisit.” (CCFF ¶ 798 (quoting CX2219 at 002)). The next day, on July 17, 2014, Titus informed her colleagues that Schein “had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this [prime vendor agreement] and sent to Joe for review. It went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)). Sullivan was asked about Titus’ statements, and he did not dispute them. (Sullivan, Tr. 3984-3985). Titus understood that Sullivan had shot down the PGMS agreement, even though PGMS was willing to be exclusive with Schein, and that the message from above was that GPOs were not good for Schein.” (CCFF ¶¶ 800-805; *see also* CCFF ¶ 808). On July 18, 2014, Kevin Upchurch, Titus’ colleague, sent a

similar message to Cavaretta, Titus, and another colleague: “The Co-Op is turning into a GPO . . . from what KT has observed in Texas, NM and from Tim S., HSD does not want to enter the GPO world.” (CCFF ¶ 806; *see also* CCFF ¶ 807).

1062. Mr. Brady and Mr. Cavaretta shared the same concerns, because PGMS told Schein at the meeting that it can “only ‘lead the horses’, but ‘not make them drink.’” (CX 2250-001; Titus, Tr. 5223-5224; Cavaretta, Tr. 5607-08). As Mr. Brady explained, “[I]et’s say, for example, they have 50 [dentists] . . . , and half of those are buying customers from HSD (our Bay Area market share is 55% ...) on VPAs with an average discount of 5-10%. Will all of those doctors[’] respective VPA’s [now go to] 20% off...? My experience in the past is ... [d]octors already buying from us will want [the] more aggressive discount, and doctors who don’t buy from us probably aren’t going to switch if they have relationships elsewhere ... especially when there is NO mandate to buy from Schein....” (CX 2250-003).

Response to Proposed Finding No. 1062

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that Schein turned down PGMS because of PGMS’ statement in CX2250. The record evidence shows that by the time PGMS approached Schein, Sullivan had instructed his sales force to reject buying groups, that Titus understood that instruction, and that Titus rejected PGMS based on that instruction. The record evidence shows that Sullivan “shot down” the PGMS agreement and that Titus understood that Sullivan had done so. (CCFF ¶¶ 799-805). When approached by PGMS, Titus informed her boss, Cavaretta, on June 12, 2014 that PGMS was “(yet another) potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees compliance, exclusivity and the opportunity to market Schein business solutions. I sent them some tough questions thinking it would scare them off, but alas, they raised the stakes by moving to Dir of Ops.” (CCFF ¶ 794 (quoting CX2809 at 002)). By July 16, 2014, Titus had learned that Sullivan was not in favor of the PGMS buying group agreement, and she informed her colleagues and Cavaretta that “Tim was not in favor of it.” (CCFF ¶¶ 795 (quoting CX2219 at 001), 796-797). The same day, she informed Cavaretta of her communication to PGMS, where she explained to PGMS that “if there was a time in the

future they become an MSO that could demonstrate compliance, [Schein] would be pleased to revisit.” (CCFF ¶ 798 (quoting CX2219 at 002)). The next day, on July 17, 2014, Titus informed her colleagues that Schein “had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this [prime vendor agreement] and sent to Joe for review. It went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)). Sullivan was asked about Titus’ statements, and he did not dispute them. (Sullivan, Tr. 3984-3985). Titus understood that Sullivan had shot down the PGMS agreement, even though PGMS was willing to be exclusive with Schein, and that the message from above was that GPOs were not good for Schein.” (CCFF ¶¶ 800-805; *see also* CCFF ¶ 808). On July 18, 2014, Kevin Upchurch, Titus’ colleague, sent a similar message to Cavaretta, Titus, and another colleague: “The Co-Op is turning into a GPO . . . from what KT has observed in Texas, NM and from Tim S., HSD does not want to enter the GPO world.” (CCFF ¶ 806; *see also* CCFF ¶ 807).

1063. PGMS’s inability to guarantee compliance was highlighted by the fact that Dr. Luque, a key leader of PGMS, would not agree to do business with Schein even if Schein agreed to partner with PGMS. (Titus, Tr. 5224-25; Cavaretta, Tr. 5607 (Dr. Luque “was a customer of Patterson and he had just done an equipment deal with Patterson.”); CX 2250-003). As Mr. Brady explained, “[m]y impression of this group was that they want their cake, and they want to eat it too, and they also want to not try the cake if they don’t like the flavor. Even the lead Dr . . . who has not signed any contracts” said he was “inclined to not work exclusively with Schein...” (CX 2250-003; RX 2228-001 (noting concerns about lack of guarantees of “gaining incremental business”); Cavaretta, Tr. 5607-08)).

Response to Proposed Finding No. 1063

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that Schein turned down PGMS because of compliance concerns. The record evidence shows that by the time PGMS approached Schein, Sullivan had instructed his sales force to reject buying groups, that Titus understood that instruction, and that Titus rejected PGMS based on that instruction. The record evidence shows that Sullivan “shot down” the

PGMS agreement and that Titus understood that Sullivan had done so. (CCFF ¶¶ 799-805).

When approached by PGMS, Titus informed her boss, Cavaretta, on June 12, 2014 that PGMS was “(yet another) potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees compliance, exclusivity and the opportunity to market Schein business solutions. I sent them some tough questions thinking it would scare them off, but alas, they raised the stakes by moving to Dir of Ops.” (CCFF ¶ 794 (quoting CX2809 at 002)). By July 16, 2014, Titus had learned that Sullivan was not in favor of the PGMS buying group agreement, and she informed her colleagues and Cavaretta that “Tim was not in favor of it.” (CCFF ¶¶ 795 (quoting CX2219 at 001), 796-797). The same day, she informed Cavaretta of her communication to PGMS, where she explained to PGMS that “if there was a time in the future they become an MSO that could demonstrate compliance, [Schein] would be pleased to revisit.” (CCFF ¶ 798 (quoting CX2219 at 002)). The next day, on July 17, 2014, Titus informed her colleagues that Schein “had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this [prime vendor agreement] and sent to Joe for review. It went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)). Sullivan was asked about Titus’ statements, and he did not dispute them. (Sullivan, Tr. at 3984-3985). Titus understood that Sullivan had shot down the PGMS agreement, even though PGMS was willing to be exclusive with Schein, and that the message from above was that GPOs were not good for Schein.” (CCFF ¶¶ 800-805; *see also* CCFF ¶ 808). On July 18, 2014, Kevin Upchurch, Titus’ colleague, sent a similar message to Cavaretta, Titus, and another colleague: “The Co-Op is turning into a GPO . . . from what KT has observed in Texas, NM and from Tim S., HSD does not want to enter the GPO world.” (CCFF ¶ 806; *see also* CCFF ¶ 807).

Furthermore, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685). Thus, to the extent that the Proposed Finding implies that “inability to guarantee compliance” was the reason for the rejection of PGMS, it is misleading and contrary to the weight of the evidence.

1064. This was a red flag to Schein because “if the leader of the organization was unwilling to vote with his dollars, how could he influence his member group to do the very same.” (Titus, Tr. 5224-25; Cavaretta, Tr. 5607-08).

Response to Proposed Finding No. 1064

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that Schein turned down PGMS because of compliance concerns. The record evidence shows that by the time PGMS approached Schein, Sullivan had instructed his sales force to reject buying groups, that Titus understood that instruction, and that Titus rejected PGMS based on that instruction. The record evidence shows that Sullivan “shot down” the PGMS agreement and that Titus understood that Sullivan had done so. (CCFF ¶¶ 799-805). When approached by PGMS, Titus informed her boss, Cavaretta, on June 12, 2014 that PGMS was “(yet another) potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees compliance, exclusivity and the opportunity to market Schein business solutions. I sent them some tough questions thinking it would scare them off, but alas, they raised the stakes by moving to Dir of Ops.” (CCFF ¶ 794 (quoting CX2809 at 002)). By July 16, 2014, Titus had learned that Sullivan was not in favor of the PGMS buying group agreement, and she informed her colleagues and Cavaretta that “Tim was not in favor of it.” (CCFF ¶¶ 795 (quoting CX2219 at 001), 796-797). The same day, she informed Cavaretta of her communication to PGMS, where she explained to PGMS that “if there was a time in the future they become an MSO that could demonstrate compliance, [Schein] would be pleased to revisit.” (CCFF ¶ 798 (quoting CX2219 at 002)). The next day, on July 17, 2014, Titus

informed her colleagues that Schein “had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this [prime vendor agreement] and sent to Joe for review. It went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)). Sullivan was asked about Titus’ statements, and he did not dispute them. (Sullivan, Tr. 3984-3985). Titus understood that Sullivan had shot down the PGMS agreement, even though PGMS was willing to be exclusive with Schein, and that the message from above was that GPOs were not good for Schein.” (CCFF ¶¶ 800-805; *see also* CCFF ¶ 808). On July 18, 2014, Kevin Upchurch, Titus’ colleague, sent a similar message to Cavaretta, Titus, and another colleague: “The Co-Op is turning into a GPO . . . from what KT has observed in Texas, NM and from Tim S., HSD does not want to enter the GPO world.” (CCFF ¶ 806; *see also* CCFF ¶ 807). Furthermore, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685). Thus, to the extent that the Proposed Finding implies that “inability to guarantee compliance” was the reason for the rejection of PGMS, it is misleading and contrary to the weight of the evidence.

1065. Ultimately, PGMS “[could not] guarantee that its members will purchase from Schein” and therefore were lacking the key element of compliance. (CX 2251-002; CX 8010 (Titus, Dep. at 245-46)).

Response to Proposed Finding No. 1065

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that Schein turned down PGMS because of compliance concerns. The record evidence shows that by the time PGMS approached Schein, Sullivan had instructed his sales force to reject buying groups, that Titus understood that instruction, and that Titus rejected PGMS based on that instruction. The record evidence shows that Sullivan “shot down” the PGMS agreement and that Titus understood that Sullivan had done so. (CCFF ¶¶ 799-805).

When approached by PGMS, Titus informed her boss, Cavaretta, on June 12, 2014 that PGMS was “(yet another) potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees compliance, exclusivity and the opportunity to market Schein business solutions. I sent them some tough questions thinking it would scare them off, but alas, they raised the stakes by moving to Dir of Ops.” (CCFF ¶ 794 (quoting CX2809 at 002)). By July 16, 2014, Titus had learned that Sullivan was not in favor of the PGMS buying group agreement, and she informed her colleagues and Cavaretta that “Tim was not in favor of it.” (CCFF ¶¶ 795 (quoting CX2219 at 001), 796-797). The same day, she informed Cavaretta of her communication to PGMS, where she explained to PGMS that “if there was a time in the future they become an MSO that could demonstrate compliance, [Schein] would be pleased to revisit.” (CCFF ¶ 798 (quoting CX2219 at 002)). The next day, on July 17, 2014, Titus informed her colleagues that Schein “had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this [prime vendor agreement] and sent to Joe for review. It went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)). Sullivan was asked about Titus’ statements, and he did not dispute them. (Sullivan, Tr. 3984-3985). Titus understood that Sullivan had shot down the PGMS agreement, even though PGMS was willing to be exclusive with Schein, and that the message from above was that GPOs were not good for Schein.” (CCFF ¶¶ 800-805; *see also* CCFF ¶ 808). On July 18, 2014, Kevin Upchurch, Titus’ colleague, sent a similar message to Cavaretta, Titus, and another colleague: “The Co-Op is turning into a GPO . . . from what KT has observed in Texas, NM and from Tim S., HSD does not want to enter the GPO world.” (CCFF ¶ 806; *see also* CCFF ¶ 807).

Furthermore, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685). Thus, to the extent that the Proposed Finding implies that “inability to guarantee compliance” was the reason for the rejection of PGMS, it is misleading and contrary to the weight of the evidence.

1066. Moreover, PGMS did not have a value-add proposition and was only looking for aggressive pricing from Schein. (Cavaretta, Tr. 5608).

Response to Proposed Finding No. 1066

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts or implies that Schein turned down PGMS because it did not “have a value-add proposition.” The record evidence shows that by the time PGMS approached Schein, Sullivan had instructed his sales force to reject buying groups, that Titus understood that instruction, and that Titus rejected PGMS based on that instruction. The record evidence shows that Sullivan “shot down” the PGMS agreement and that Titus understood that Sullivan had done so. (CCFF ¶¶ 799-805). When approached by PGMS, Titus informed her boss, Cavaretta, on June 12, 2014 that PGMS was “(yet another) potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees compliance, exclusivity and the opportunity to market Schein business solutions. I sent them some tough questions thinking it would scare them off, but alas, they raised the stakes by moving to Dir of Ops.” (CCFF ¶ 794 (quoting CX2809 at 002)). By July 16, 2014, Titus had learned that Sullivan was not in favor of the PGMS buying group agreement, and she informed her colleagues and Cavaretta that “Tim was not in favor of it.” (CCFF ¶¶ 795 (quoting CX2219 at 001), 796-797). The same day, she informed Cavaretta of her communication to PGMS, where she explained to PGMS that “if there was a time in the future they become an MSO that could demonstrate compliance, [Schein] would be pleased to revisit.” (CCFF ¶ 798 (quoting CX2219 at 002)).

The next day, on July 17, 2014, Titus informed her colleagues that Schein “had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this [prime vendor agreement] and sent to Joe for review. It went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)). Sullivan was asked about Titus’ statements, and he did not dispute them. (Sullivan, Tr. 3984-3985). Titus understood that Sullivan had shot down the PGMS agreement, even though PGMS was willing to be exclusive with Schein, and that the message from above was that GPOs were not good for Schein.” (CCFF ¶¶ 800-805; *see also* CCFF ¶ 808). On July 18, 2014, Kevin Upchurch, Titus’ colleague, sent a similar message to Cavaretta, Titus, and another colleague: “The Co-Op is turning into a GPO . . . from what KT has observed in Texas, NM and from Tim S., HSD does not want to enter the GPO world.” (CCFF ¶ 806; *see also* CCFF ¶ 807). Furthermore, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685). Thus, to the extent that the Proposed Finding implies that “inability to guarantee compliance” was the reason for the rejection of PGMS, it is misleading and contrary to the weight of the evidence.

1067. As a result, Schein ran the risk of pouring resources into PGMS without any guaranteed return on investment in the form of PGMS helping Schein grow its business. (Titus, Tr. 5224; Cavaretta, Tr. 5608).

Response to Proposed Finding No. 1067

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts Schein turned down PGMS because of the concerns Titus or Cavaretta named in February 2018. The record evidence shows that by the time PGMS approached Schein, Sullivan had instructed his sales force to reject buying groups, that Titus understood that instruction, and that Titus rejected PGMS based on that instruction. The

contemporaneous documents in the record show that Sullivan “shot down” the PGMS agreement and that Titus understood that Sullivan had done so. (CCFF ¶¶ 799-805). When approached by PGMS, Titus informed her boss, Cavaretta, on June 12, 2014 that PGMS was “(yet another) potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees compliance, exclusivity and the opportunity to market Schein business solutions. I sent them some tough questions thinking it would scare them off, but alas, they raised the stakes by moving to Dir of Ops.” (CCFF ¶ 794 (quoting CX2809 at 002)). By July 16, 2014, Titus had learned that Sullivan was not in favor of the PGMS buying group agreement, and she informed her colleagues and Cavaretta that “Tim was not in favor of it.” (CCFF ¶¶ 795 (quoting CX2219 at 001), 796-797). The same day, she informed Cavaretta of her communication to PGMS, where she explained to PGMS that “if there was a time in the future they become an MSO that could demonstrate compliance, [Schein] would be pleased to revisit.” (CCFF ¶ 798 (quoting CX2219 at 002)). The next day, on July 17, 2014, Titus informed her colleagues that Schein “had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this [prime vendor agreement] and sent to Joe for review. It went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)). Sullivan was asked about Titus’ statements, and he did not dispute them. (Sullivan, Tr. 3984-3985). Titus understood that Sullivan had shot down the PGMS agreement, even though PGMS was willing to be exclusive with Schein, and that the message from above was that GPOs were not good for Schein.” (CCFF ¶¶ 800-805; *see also* CCFF ¶ 808). On July 18, 2014, Kevin Upchurch, Titus’ colleague, sent a similar message to Cavaretta, Titus, and another colleague: “The Co-

Op is turning into a GPO . . . from what KT has observed in Texas, NM and from Tim S., HSD does not want to enter the GPO world.” (CCFF ¶ 806; *see also* CCFF ¶ 807).

1068. During a discussion of the types of groups in the Mid-Market space Schein was fielding inquiries from, Mr. Cavaretta discussed the PGMS opportunity with Tim Sullivan. (Cavaretta, Tr. 5608-09; Sullivan, Tr. 3983-84).

Response to Proposed Finding No. 1068

Complaint Counsel has no specific response.

1069. Mr. Cavaretta told Mr. Sullivan that he did not think that Schein should partner with PGMS because there was no alignment, PGMS could not enforce compliance, and PGMS did not have a value proposition. (Cavaretta, Tr. 5609).

Response to Proposed Finding No. 1069

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that Sullivan turned down PGMS because of compliance concerns. The record evidence shows that by the time PGMS approached Schein, Sullivan had instructed his sales force to reject buying groups, that Titus understood that instruction, and that Titus rejected PGMS based on that instruction. The record evidence shows that Sullivan “shot down” the PGMS agreement and that Titus understood that Sullivan had done so. (CCFF ¶¶ 799-805).

When approached by PGMS, Titus informed her boss, Cavaretta, on June 12, 2014 that PGMS was “(yet another) potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees compliance, exclusivity and the opportunity to market Schein business solutions. I sent them some tough questions thinking it would scare them off, but alas, they raised the stakes by moving to Dir of Ops.” (CCFF ¶ 794 (quoting CX2809 at 002)). By July 16, 2014, Titus had learned that Sullivan was not in favor of the PGMS buying group agreement, and she informed her colleagues and Cavaretta that “Tim was not in favor of it.” (CCFF ¶¶ 795 (quoting CX2219 at 001), 796-797). The same day, she informed Cavaretta of her communication to PGMS, where she explained to PGMS that “if there was a time in the

future they become an MSO that could demonstrate compliance, [Schein] would be pleased to revisit.” (CCFF ¶ 798 (quoting CX2219 at 002)). The next day, on July 17, 2014, Titus informed her colleagues that Schein “had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this [prime vendor agreement] and sent to Joe for review. It went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)). Sullivan was asked about Titus’ statements, and he did not dispute them. (Sullivan, Tr. 3984-3985). Titus understood that Sullivan had shot down the PGMS agreement, even though PGMS was willing to be exclusive with Schein, and that the message from above was that GPOs were not good for Schein.” (CCFF ¶¶ 800-805; *see also* CCFF ¶ 808). On July 18, 2014, Kevin Upchurch, Titus’ colleague, sent a similar message to Cavaretta, Titus, and another colleague: “The Co-Op is turning into a GPO . . . from what KT has observed in Texas, NM and from Tim S., HSD does not want to enter the GPO world.” (CCFF ¶ 806; *see also* CCFF ¶ 807). Furthermore, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685). Thus, to the extent that the Proposed Finding implies that “inability to guarantee compliance” was the reason for the rejection of PGMS, it is misleading and contrary to the weight of the evidence.

1070. Mr. Cavaretta asked Mr. Sullivan what he thought and Mr. Sullivan told him “whatever you want to do we do.” (Cavaretta, Tr. 5609).

Response to Proposed Finding No. 1070

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts or implies that Sullivan did not reject PGMS and that Titus adhered to that directive. The record evidence shows that by the time PGMS approached Schein, Sullivan had instructed his sales force to reject buying groups, that Titus understood that instruction,

and that Titus rejected PGMS based on that instruction. The record evidence shows that Sullivan “shot down” the PGMS agreement and that Titus understood that Sullivan had done so. (CCFF ¶¶ 799-805). When approached by PGMS, Titus informed her boss, Cavaretta, on June 12, 2014 that PGMS was “(yet another) potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees compliance, exclusivity and the opportunity to market Schein business solutions. I sent them some tough questions thinking it would scare them off, but alas, they raised the stakes by moving to Dir of Ops.” (CCFF ¶ 794 (quoting CX2809 at 002)). By July 16, 2014, Titus had learned that Sullivan was not in favor of the PGMS buying group agreement, and she informed her colleagues and Cavaretta that “Tim was not in favor of it.” (CCFF ¶¶ 795 (quoting CX2219 at 001), 796-797). The same day, she informed Cavaretta of her communication to PGMS, where she explained to PGMS that “if there was a time in the future they become an MSO that could demonstrate compliance, [Schein] would be pleased to revisit.” (CCFF ¶ 798 (quoting CX2219 at 002)). The next day, on July 17, 2014, Titus informed her colleagues that Schein “had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this [prime vendor agreement] and sent to Joe for review. It went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)). Sullivan was asked about Titus’ statements, and he did not dispute them. (Sullivan, Tr. 3984-3985). Titus understood that Sullivan had shot down the PGMS agreement, even though PGMS was willing to be exclusive with Schein, and that the message from above was that GPOs were not good for Schein.” (CCFF ¶¶ 800-805; *see also* CCFF ¶ 808). On July 18, 2014, Kevin Upchurch, Titus’ colleague, sent a similar message to Cavaretta, Titus, and another colleague: “The Co-Op is turning into a GPO . . . from what KT has observed in Texas, NM

and from Tim S., HSD does not want to enter the GPO world.” (CCFF ¶ 806; *see also* CCFF ¶ 807).

Furthermore, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685). Thus, to the extent that the Proposed Finding implies that “inability to guarantee compliance” was the reason for the rejection of PGMS, it is misleading and contrary to the weight of the evidence.

1071. After engaging in negotiations with PGMS, Schein ultimately declined to partner with the group. (Titus, Tr. 5225; Cavaretta, Tr. 5609-5610).

Response to Proposed Finding No. 1071

Complaint Counsel has no specific response.

1072. Mr. Cavaretta, not Mr. Sullivan, ultimately made the decision not to partner with PGMS. (Cavaretta, Tr. 5609-5610).

Response to Proposed Finding No. 1072

The Proposed Finding is misleading and contrary to the weight of the evidence. The record evidence shows that Titus, who communicated the rejection to PGMS, understood that Sullivan had “shot down” PGMS. (CCFF ¶¶ 799-805). The record evidence shows that by the time PGMS approached Schein, Sullivan had instructed his sales force to reject buying groups, that Titus understood that instruction, and that Titus rejected PGMS based on that instruction. The record evidence shows that Sullivan “shot down” the PGMS agreement and that Titus understood that Sullivan had done so. (CCFF ¶¶ 799-805). When approached by PGMS, Titus informed her boss, Cavaretta, on June 12, 2014 that PGMS was “(yet another) potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees compliance, exclusivity and the opportunity to market Schein business solutions. I sent them some tough questions thinking it would scare them off, but alas, they raised the stakes by moving to Dir of Ops.” (CCFF ¶ 794 (quoting CX2809 at 002)). By July 16, 2014, Titus had

learned that Sullivan was not in favor of the PGMS buying group agreement, and she informed her colleagues and Cavaretta that “Tim was not in favor of it.” (CCFF ¶¶ 795 (quoting CX2219 at 001), 796-797). The same day, she informed Cavaretta of her communication to PGMS, where she explained to PGMS that “if there was a time in the future they become an MSO that could demonstrate compliance, [Schein] would be pleased to revisit.” (CCFF ¶ 798 (quoting CX2219 at 002)). The next day, on July 17, 2014, Titus informed her colleagues that Schein “had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this [prime vendor agreement] and sent to Joe for review. It went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)). Sullivan was asked about Titus’ statements, and he did not dispute them. (Sullivan, Tr. 3984-3985). Titus understood that Sullivan had shot down the PGMS agreement, even though PGMS was willing to be exclusive with Schein, and that the message from above was that GPOs were not good for Schein.” (CCFF ¶¶ 800-805; *see also* CCFF ¶ 808). On July 18, 2014, Kevin Upchurch, Titus’ colleague, sent a similar message to Cavaretta, Titus, and another colleague: “The Co-Op is turning into a GPO . . . from what KT has observed in Texas, NM and from Tim S., HSD does not want to enter the GPO world.” (CCFF ¶ 806; *see also* CCFF ¶ 807).

1073. Complaint Counsel points to emails that Ms. Titus later wrote, in which she expressed her belief that the decision not to move forward with PGMS originated with Mr. Sullivan. (CC Pretrial Br. at 19-20 (citing CX 2235-001 (“We had a GPO prospect called PGMS . . . , willing to be exclusive. [Proposal] went to Tim and he shot it down. I think the meta [message] is officially, GPO’s are not good for Schein.”), and CX 2219-001 (“I [spoke with] Joe today about the agreement. Tim was not in favor of it.”))). As Ms. Titus testified, however, she “never spoke to Tim [Sullivan]” personally about PGMS nor was she told that Mr. Sullivan did not want to work with PGMS. (Titus, Tr. 5227-29, 5315-16 (Mr. Sullivan “was not telling us not to proceed but that he had concerns....”)). Ms. Titus also testified that Mr. Cavaretta’s words “[were] more measured,” and that no one ever told her that Schein could not work with buying groups. (Titus, Tr. 5192-93, 5227-28).

Response to Proposed Finding No. 1073

The Proposed Finding is misleading and contrary to the weight of the evidence. The record evidence shows that Titus communicated the rejection to PGMS because, even though she did not speak personally with Sullivan, she understood that Sullivan had “shot down” PGMS. (CCFF ¶¶ 799-805). When approached by PGMS, Titus informed her boss, Cavaretta, on June 12, 2014 that PGMS was “(yet another) potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees compliance, exclusivity and the opportunity to market Schein business solutions. I sent them some tough questions thinking it would scare them off, but alas, they raised the stakes by moving to Dir of Ops.” (CCFF ¶ 794 (quoting CX2809 at 002)). By July 16, 2014, Titus had learned that Sullivan was not in favor of the PGMS buying group agreement, and she informed her colleagues and Cavaretta that “Tim was not in favor of it.” (CCFF ¶¶ 795 (quoting CX2219 at 001), 796-797). The same day, she informed Cavaretta of her communication to PGMS, where she explained to PGMS that “if there was a time in the future they become an MSO that could demonstrate compliance, [Schein] would be pleased to revisit.” (CCFF ¶ 798 (quoting CX2219 at 002)). The next day, on July 17, 2014, Titus informed her colleagues that Schein “had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this [prime vendor agreement] and sent to Joe for review. It went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)). Sullivan was asked about Titus’ statements, and he did not dispute them. (Sullivan, Tr. 3984-3985). Titus understood that Sullivan had shot down the PGMS agreement, even though PGMS was willing to be exclusive with Schein, and that the message from above was that GPOs were not good for Schein.” (CCFF ¶¶ 800-805; *see also* CCFF ¶ 808). On July 18, 2014, Kevin Upchurch, Titus’ colleague, sent a similar message to Cavaretta, Titus, and another

colleague: “The Co-Op is turning into a GPO . . . from what KT has observed in Texas, NM and from Tim S., HSD does not want to enter the GPO world.” (CCFF ¶ 806; *see also* CCFF ¶ 807).

1074. Schein decided not to partner with PGMS because “they weren’t in alignment, they weren’t promising any type of compliance which would help grow the business, there was no value proposition, and it was just pretty much risk for Henry Schein’s business.” (Cavaretta, Tr. 5608).

Response to Proposed Finding No. 1074

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that Schein turned down PGMS because of risks Cavaretta identified in February 2018. The record evidence shows that by the time PGMS approached Schein, Sullivan had instructed his sales force to reject buying groups, that Titus understood that instruction, and that Titus rejected PGMS based on that instruction. The record evidence shows that Sullivan “shot down” the PGMS agreement and that Titus understood that Sullivan had done so. (CCFF ¶¶ 799-805). When approached by PGMS, Titus informed her boss, Cavaretta, on June 12, 2014 that PGMS was “(yet another) potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees compliance, exclusivity and the opportunity to market Schein business solutions. I sent them some tough questions thinking it would scare them off, but alas, they raised the stakes by moving to Dir of Ops.” (CCFF ¶ 794 (quoting CX2809 at 002)). By July 16, 2014, Titus had learned that Sullivan was not in favor of the PGMS buying group agreement, and she informed her colleagues and Cavaretta that “Tim was not in favor of it.” (CCFF ¶¶ 795 (quoting CX2219 at 001), 796-797). The same day, she informed Cavaretta of her communication to PGMS, where she explained to PGMS that “if there was a time in the future they become an MSO that could demonstrate compliance, [Schein] would be pleased to revisit.” (CCFF ¶ 798 (quoting CX2219 at 002)). The next day, on July 17,

2014, Titus informed her colleagues that Schein “had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this [prime vendor agreement] and sent to Joe for review. It went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)). Sullivan was asked about Titus’ statements, and he did not dispute them. (Sullivan, Tr. 3984-3985). Titus understood that Sullivan had shot down the PGMS agreement, even though PGMS was willing to be exclusive with Schein, and that the message from above was that GPOs were not good for Schein.” (CCFF ¶¶ 800-805; *see also* CCFF ¶ 808). On July 18, 2014, Kevin Upchurch, Titus’ colleague, sent a similar message to Cavaretta, Titus, and another colleague: “The Co-Op is turning into a GPO . . . from what KT has observed in Texas, NM and from Tim S., HSD does not want to enter the GPO world.” (CCFF ¶ 806; *see also* CCFF ¶ 807).

Furthermore, the record evidence also shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685). Thus, to the extent that the Proposed Finding implies that “inability to guarantee compliance” was the reason for the rejection of PGMS, it is misleading and contrary to the weight of the evidence

1075. Although PGMS was willing to be “exclusive” with Schein, if PGMS could not deliver sales to Schein, “it was an empty promise and there was no return on investment.” (Titus, Tr. 5226; CX 2215-001; CX 8025 (Sullivan, Dep. at 243-44)).

Response to Proposed Finding No. 1075

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that Schein turned down PGMS because “PGMS could not deliver sales to Schein.” First, the record evidence shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685). Second, the record evidence shows that by the time PGMS approached Schein, Sullivan had instructed his sales force to reject

buying groups, that Titus understood that instruction, and that Titus rejected PGMS based on that instruction. The record evidence shows that Sullivan “shot down” the PGMS agreement and that Titus understood that Sullivan had done so. (CCFF ¶¶ 799-805). When approached by PGMS, Titus informed her boss, Cavaretta, on June 12, 2014 that PGMS was “(yet another) potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees compliance, exclusivity and the opportunity to market Schein business solutions. I sent them some tough questions thinking it would scare them off, but alas, they raised the stakes by moving to Dir of Ops.” (CCFF ¶ 794 (quoting CX2809 at 002)). By July 16, 2014, Titus had learned that Sullivan was not in favor of the PGMS buying group agreement, and she informed her colleagues and Cavaretta that “Tim was not in favor of it.” (CCFF ¶¶ 795 (quoting CX2219 at 001), 796-797). The same day, she informed Cavaretta of her communication to PGMS, where she explained to PGMS that “if there was a time in the future they become an MSO that could demonstrate compliance, [Schein] would be pleased to revisit.” (CCFF ¶ 798 (quoting CX2219 at 002)). The next day, on July 17, 2014, Titus informed her colleagues that Schein “had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this [prime vendor agreement] and sent to Joe for review. It went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)). Sullivan was asked about Titus’ statements, and he did not dispute them. (Sullivan, Tr. 3984-3985). Titus understood that Sullivan had shot down the PGMS agreement, even though PGMS was willing to be exclusive with Schein, and that the message from above was that GPOs were not good for Schein.” (CCFF ¶¶ 800-805; *see also* CCFF ¶ 808). On July 18, 2014, Kevin Upchurch, Titus’ colleague, sent a similar message to Cavaretta, Titus, and another colleague: “The Co-

Op is turning into a GPO . . . from what KT has observed in Texas, NM and from Tim S., HSD does not want to enter the GPO world.” (CCFF ¶ 806; *see also* CCFF ¶ 807).

1076. Schein’s decision not to partner with PGMS had nothing to do with any purported agreement with Benco or Patterson. (Titus, Tr. 5228; Cavaretta, Tr. 5610).

Response to Proposed Finding No. 1076

The Proposed Finding is misleading, as Titus and Cavaretta’s testimony that Schein’s rejection of PGMS had “nothing to do” with an agreement does not disprove no agreement. Moreover, it is inaccurate and misleading to the extent it relies on testimony of fact witnesses to reach a legal conclusion regarding an agreement. The record evidence shows that by the time PGMS approached Schein, Sullivan had instructed his sales force to reject buying groups, that Titus understood that instruction, and that Titus rejected PGMS based on that instruction. The record evidence shows that Sullivan “shot down” the PGMS agreement and that Titus understood that Sullivan had done so. (CCFF ¶¶ 799-805). When approached by PGMS, Titus informed her boss, Cavaretta, on June 12, 2014 that PGMS was “(yet another) potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees compliance, exclusivity and the opportunity to market Schein business solutions. I sent them some tough questions thinking it would scare them off, but alas, they raised the stakes by moving to Dir of Ops.” (CCFF ¶ 794 (quoting CX2809 at 002)). By July 16, 2014, Titus had learned that Sullivan was not in favor of the PGMS buying group agreement, and she informed her colleagues and Cavaretta that “Tim was not in favor of it.” (CCFF ¶¶ 795 (quoting CX2219 at 001), 796-797). The same day, she informed Cavaretta of her communication to PGMS, where she explained to PGMS that “if there was a time in the future they become an MSO that could demonstrate compliance, [Schein] would be pleased to revisit.” (CCFF ¶ 798 (quoting CX2219 at 002)). The next day, on July 17, 2014, Titus

informed her colleagues that Schein “had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this [prime vendor agreement] and sent to Joe for review. It went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)). Sullivan was asked about Titus’ statements, and he did not dispute them. (Sullivan, Tr. 3984-3985). Titus understood that Sullivan had shot down the PGMS agreement, even though PGMS was willing to be exclusive with Schein, and that the message from above was that GPOs were not good for Schein.” (CCFF ¶¶ 800-805; *see also* CCFF ¶ 808). On July 18, 2014, Kevin Upchurch, Titus’ colleague, sent a similar message to Cavaretta, Titus, and another colleague: “The Co-Op is turning into a GPO . . . from what KT has observed in Texas, NM and from Tim S., HSD does not want to enter the GPO world.” (CCFF ¶ 806; *see also* CCFF ¶ 807).

1077. Schein’s decision not to partner with PGMS had nothing to do with PGMS being a buying group. (Cavaretta, Tr. 5610).

Response to Proposed Finding No. 1077

The Proposed Finding is misleading, as Cavaretta’s testimony that Schein’s rejection of PGMS had “nothing to do” with PGMS being a buying group does not disprove Schein’s rejection of PGMS pursuant to a conspiracy. The record evidence shows otherwise. It shows that by the time PGMS approached Schein, Sullivan had instructed his sales force to reject buying groups, that Titus understood that instruction, and that Titus rejected PGMS based on that instruction. The record evidence shows that Sullivan “shot down” the PGMS agreement and that Titus understood that Sullivan had done so. (CCFF ¶¶ 799-805). When approached by PGMS, Titus informed her boss, Cavaretta, on June 12, 2014 that PGMS was “(yet another) potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees compliance, exclusivity and the opportunity to market Schein business solutions. I sent them

some tough questions thinking it would scare them off, but alas, they raised the stakes by moving to Dir of Ops.” (CCFF ¶ 794 (quoting CX2809 at 002)). By July 16, 2014, Titus had learned that Sullivan was not in favor of the PGMS buying group agreement, and she informed her colleagues and Cavaretta that “Tim was not in favor of it.” (CCFF ¶¶ 795 (quoting CX2219 at 001), 796-797). The same day, she informed Cavaretta of her communication to PGMS, where she explained to PGMS that “if there was a time in the future they become an MSO that could demonstrate compliance, [Schein] would be pleased to revisit.” (CCFF ¶ 798 (quoting CX2219 at 002)). The next day, on July 17, 2014, Titus informed her colleagues that Schein “had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this [prime vendor agreement] and sent to Joe for review. It went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)). Sullivan was asked about Titus’ statements, and he did not dispute them. (Sullivan, Tr. 3984-3985). Titus understood that Sullivan had shot down the PGMS agreement, even though PGMS was willing to be exclusive with Schein, and that the message from above was that GPOs were not good for Schein.” (CCFF ¶¶ 800-805; *see also* CCFF ¶ 808). On July 18, 2014, Kevin Upchurch, Titus’ colleague, sent a similar message to Cavaretta, Titus, and another colleague: “The Co-Op is turning into a GPO . . . from what KT has observed in Texas, NM and from Tim S., HSD does not want to enter the GPO world.” (CCFF ¶ 806; *see also* CCFF ¶ 807).

HH. PEARL Network.

1078. In early December 2011, Schein declined to do business with a buying group called the PEARL Network consisting of dentists affiliated with NYU. (*See* CX 2456-001).

Response to Proposed Finding No. 1078

Complaint Counsel has no specific response.

1079. Expressing concerns of cannibalization, Henry Schein Inc.'s Steve Kess, Vice President of Global Professional Relations, explained that, given "[t]he brand and market position of HSD and HSM ... [w]ith almost 40 % market share," contracting with a "national" GPO "could be a disaster to our pricing and [gross profit] structure." (CX 2456-002).

Response to Proposed Finding No. 1079

Complaint Counsel has no specific response to the statement in CX2456. However the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Sullivan rejected PEARL Network's buying group because of cannibalization concerns. The record evidence shows otherwise. PEARL Network at NYU expressed interest to Schein in "creating a dental GPO with Schein as the anchor" in December 2011. (CCFF ¶ 947 (quoting CX2456 at 005)). On December 7, 2011, Steve Kess elevated the issue of working with PEARL Network's potential buying group to Sullivan and Steck. (CCFF ¶ 949 (quoting CX2456 at 001 ("By cc of this email and chain I have shared it with HSD Leadership."))). Sullivan responded to the idea of working with PEARL Network's potential buying group and rejected it expressing concern about the risk of buying groups: "I am still of position that we do NOT want to lead in getting this initiative started in dental. I think that it is a very slippery slope." (CCFF ¶ 950 (quoting CX2456 at 001); Sullivan, Tr. 3943-3944). He did not reject PEARL Network and express concerns about cannibalization. PEARL Network is just one example of the numerous examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

1080. Consistent with Schein's skepticism towards buying groups and the 2010 Guidance, Mr. Sullivan echoed this, noting that he was "still of [the] position that we do NOT want to lead in getting this initiative started in dental," as it is "a very slippery slope," and "[a]t the end of the day, [Schein] provide[s] discount 'deals' to those that *control buying*." (CX 2456-001 (emphasis added)).

Response to Proposed Finding No. 1080

The Proposed Finding is misleading and contrary to the weight of the evidence to that extent it asserts that PEARL Network's buying group was rejected because of the 2010 Guidance (defined in SF 210 as "if a buying group 'could drive compliance, then ... they could be a good opportunity for Schein'"). The record evidence shows that PEARL Network at NYU expressed interest to Schein in "creating a dental GPO with Schein as the anchor" in December 2011. (CCFF ¶ 947 (quoting CX2456 at 005)). On December 7, 2011, Steve Kess elevated the issue of working with PEARL Network's potential buying group to Sullivan and Steck. (CCFF ¶ 949 (quoting CX2456 at 001 ("By cc of this email and chain I have shared it with HSD Leadership."))). Sullivan responded to the idea of working with PEARL Network's potential buying group and rejected it expressing concern about the risk of buying groups: "I am still of position that we do NOT want to lead in getting this initiative started in dental. I think that it is a very slippery slope." (CCFF ¶ 950 (quoting CX2456 at 001); Sullivan, Tr. 3943-3944). PEARL Network is just one example of the numerous examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). As such, the Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it implies or asserts that the 2010 was applied during the conspiracy period or to the PEARL Network. The record evidence shows that Schein did not evaluate certain characteristics of buying groups to decide whether or not to do business with them during the conspiracy period. The record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy

pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322).

1081. "Simply being a 'member,'" as Mr. Sullivan explained, "has historically provided little value or incentive to drive change in purchasing loyalty at the local GP [general practitioner] practice level, yet causes all sorts of issues for those members and local area non-members who expect the same." (CX 2456-001).

Response to Proposed Finding No. 1081

The Proposed Finding is incomplete, misleading, and contrary to the weight of the evidence to that extent it asserts that PEARL Network's buying group was not rejected by Sullivan during the conspiracy period pursuant to Schein's adherence to an agreement not to discount to buying groups. The record evidence shows that PEARL Network at NYU expressed interest to Schein in "creating a dental GPO with Schein as the anchor" in December 2011. (CCFF ¶ 947 (quoting CX2456 at 005)). On December 7, 2011, Steve Kess elevated the issue of working with PEARL Network's potential buying group to Sullivan and Steck. (CCFF ¶ 949 (quoting CX2456 at 001 ("By cc of this email and chain I have shared it with HSD Leadership."))). Sullivan responded to the idea of working with PEARL Network's potential buying group and rejected it expressing concern about the risk of buying groups: "I am still of position that we do NOT want to lead in getting this initiative started in dental. I think that it is a very slippery slope." (CCFF ¶ 950 (quoting CX2456 at 001); Sullivan, Tr. 3943-3944). PEARL Network is just one example of the numerous examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

II. Pugh Dental Alliance.

1082. Shortly after Randy Foley started in Schein's Special Markets division in 2009, he set up a partnership with a buying group called Pugh Dental Alliance. (Foley, Tr. 4522, 4605).

Response to Proposed Finding No. 1082

Complaint Counsel has no specific response.

1083. The Pugh Dental Alliance was a buying group comprised of female dentists in Southeast Florida. (Foley, Tr. 4657, 4662; Steck, Tr. 3766).

Response to Proposed Finding No. 1083

Complaint Counsel has no specific response.

1084. The Pugh Dental Alliance was created by Jody Pugh, the husband of a dentist and had a number of friends who were also female dentists. (Foley, Tr. 4662).

Response to Proposed Finding No. 1084

Complaint Counsel has no specific response.

1085. The members of Pugh Dental Alliance consisted of private practice female dentists. ((Foley, Tr. 4657; CX 2529-004 ("These are private practice offices...."))).

Response to Proposed Finding No. 1085

Complaint Counsel has no specific response.

1086. Schein provided discounts to the group under a formulary plan, as well as "a 'start up' equipment formulary with Midmark." (Foley, Tr. 4666-67; CX 2529-004).

Response to Proposed Finding No. 1086

Complaint Counsel has no specific response.

1087. Shortly after the buying group opened, however, it started causing "friction" with Schein's local FSCs, who thought the buying group relationship would take accounts away from the FSCs and cause their commission to be reduced. (Foley, Tr. 4639, 4661-66; Steck, Tr. 3766-70; CX 2529-004-05).

Response to Proposed Finding No. 1087

Complaint Counsel has no specific response.

1088. The Pugh Dental Alliance did not have much success and Mr. Pugh decided to discontinue adding new members to the buying group. (CX 2529-012).

Response to Proposed Finding No. 1088

Complaint Counsel has no specific response.

1089. However, the relationship between Schein and the Pugh Dental Alliance was not severed. Instead, the current members continued to operate as a buying group. (Foley, Tr. 4666). Instead, Schein agreed to keep the formulary discount plan in place for Pugh Dental Alliance members and it continued to operate as a buying group. (Foley, Tr. 4666; CX 2529-012).

Response to Proposed Finding No. 1089

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it asserts or implies that Schein's pre-existing, legacy relationship with Pugh Dental Alliance disproves its participation in a conspiracy. It is also inaccurate and misleading to the extent it implies that because Schein did not reject all existing buying groups relationships during the conspiracy period that it did not participate in a conspiracy. Complaint Counsel's position is that Schein had a policy not to do business with buying groups that approached it during the conspiracy period, and in fact, the record evidence is replete with such examples. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). Thus, the Proposed Finding is misleading and inaccurate to the extent it mischaracterizes Complaint Counsel's position to assert that Schein did not participate in the conspiracy because it had or did not sever a pre-existing, legacy buying group relationship.

1090. As a group of independent dentists receiving discounts based on the group's collective purchases, Pugh Dental Alliance meets Complaint Counsel's definition of buying group. (Complaint ¶ 3).

Response to Proposed Finding No. 1090

The Proposed Finding mischaracterizes the definition of buying group set forth in the Complaint, which stated that "Buying Groups are organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and

separately-managed dental practices in exchange for lower prices on dental products.”

(Complaint ¶ 3). However, the Proposed Finding is misleading to the extent it asserts or implies that Schein’s pre-existing, legacy relationship with Pugh Dental Alliance disproves its participation in a conspiracy. It is also inaccurate and misleading to the extent it implies that because Schein did not reject all existing buying groups relationships during the conspiracy period that it did not participate in a conspiracy. Complaint Counsel’s position is that Schein had a policy not to do business with buying groups that approached it during the conspiracy period, and in fact, the record evidence is replete with such examples. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Thus, the Proposed Finding is misleading and inaccurate to the extent it mischaracterizes Complaint Counsel’s position to assert that Schein did not participate in the conspiracy because it had or did not sever a pre-existing, legacy buying group relationship.

1091. Complaint Counsel’s expert, Dr. Marshall, analyzed Schein’s sales data and identified sales to the Pugh Dental Alliance from 2010 through 2014. (CX 7101-141).

Response to Proposed Finding No. 1091

This Proposed Finding is misleading to the extent that it [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; *see also* RX2832 at 021 (¶¶ 28-29) (explaining that “Other Buying Groups” were excluded from his Table 1 calculation of Schein sales to “Buying Groups of

Independent Dentists” because these “Other Buying Groups” are “buying groups other than buying groups of independent dentists.”).

1092. Schein’s partnership and discounted sales to the Pugh Dental Alliance is inconsistent with the alleged conspiracy. (Complaint ¶ 1).

Response to Proposed Finding No. 1092

The Proposed Finding is not supported by a citation to the Complaint. However, the Proposed Finding is misleading to the extent it asserts or implies that Schein’s pre-existing, legacy relationship with Pugh Dental Alliance disproves its participation in a conspiracy. Schein’s pre-existing, legacy relationships have no bearing on Schein’s conduct during the conspiracy, where it instructed its sales force to reject buying groups that approached it. Moreover, the Proposed Finding is also inaccurate and misleading to the extent it asserts that Complaint Counsel’s “alleged conspiracy” is one where Schein necessarily must have terminated all pre-existing buying groups relationships during the conspiracy period. Complaint Counsel’s position is that Schein had a policy not to do business with buying groups that approached it during the conspiracy period, and in fact, the record evidence is replete with such examples. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Thus, the Proposed Finding is misleading and inaccurate to the extent it mischaracterizes Complaint Counsel’s position to assert that Schein did not participate in the conspiracy because it did not reject a legacy buying group relationship.

JJ. Schulman Group.

1093. Complaint Counsel concedes that the Schulman Group is a buying group. (RX 2956-004).

Response to Proposed Finding No. 1093

Complaint Counsel has no specific response.

1094. Complaint Counsel's expert, Dr. Marshall, also considers the Schulman Group to be a buying group. (CX 7100-209, 212). Dr. Marshall listed the Schulman Group as a buying group that was allegedly boycotted by Respondents. (CX 7100-209, -212). However, Dr. Marshall does not cite to any Schein related documents to support his theory that Schein boycotted the group. Instead, at trial, Dr. Marshall testified that he did not do a profitability analysis on the Schulman Group and did not know if Schein had done business with the group. (Marshall, Tr. 3007-08).

Response to Proposed Finding No. 1094

This Proposed Finding is misleading and improper to the extent it relies upon Dr. Marshall, Complaint Counsel's expert, to establish factual propositions regarding the Schulman Group, which is a violation of the Court's Order On Post-Trial Briefs. (Order On Post-Trial Briefs at 3 ("Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents."); *see also* Marshall Tr. at 2884-2885 (J. Chappell: "My advice to both parties, experts are not fact witnesses.")). This Proposed Finding is inaccurate and misleading to the extent that it suggests that Dr. Marshall should have done a profitability analysis for the Schulman Group. Rather, Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CCFF ¶¶ 1639-1684). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). To the extent that Schein claims that these profitability analyses are not representative of other buying groups, Dr. Marshall explained that he studied five different relationships with the Kois Buyers Group and Smile Source because, in addition to having gotten off the ground, these buying groups operate in geographies (Seattle and Atlanta) in which Schein, Patterson, and Benco are likely to have their lowest collective share of sales and another distributor was likely to have a high share of sales. (CX7101 at 045-046, 064 (¶¶ 107-112, 165) (Marshall Expert Rebuttal Report)). These facts addressed potential concerns that the relative sizes of Schein and

Patterson make it more costly for them to supply buying groups, both because (1) Schein and Patterson are likely to find itself more profitable to discount when they have a lower share of sales and (2) where Burkhart and Atlanta Dental are large, it illuminates whether a full-service distributor found it profitable to supply a buying group so in a geographic area in which its share of sales was relatively large. (CX7101 at 064 (¶ 165) (Marshall Expert Rebuttal Report)). Differences between the Kois Buyers Group, with its single regional full-service distributor, and Smile Source, with its changing network of distributors over time, provide further reasons to believe that the experiences of distributors with these two groups provides some information about likely outcomes with other potential buying groups that went nowhere as a result of being rejected by Schein, Patterson, and/or Benco. (CX7101 at 064 (¶ 166) (Marshall Expert Rebuttal Report)). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; *see also* CX8040 (Marshall, Dep. at 212 (explaining that Kois and Smile Source are “the same in the sense of the definition I offer in paragraph 139.”)). Dr. Marshall elaborated that for buying groups generally “[a]ll these groups will have different management and they’ll be issues that are different between them. But, again, these fall within what’s identified in paragraph 139 of my report.” (CX8040 (Marshall, Dep. at 212)).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

1095. In April 2013, Schein developed a “Group Partnership Program” for the Schulman Group. (RX 2256-001 (“Henry Schein Dental is excited to present this partnership program to the Schulman Group. This program is designed to offer saving and value in many areas that are important to your practice.”); CX 8000 (Porro, Dep. at 153-54); CX 2047-002).

Response to Proposed Finding No. 1095

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Sullivan was aware that Schulman Group was a buying group or approved an agreement with the Schulman Group. The record evidence shows that Sullivan learned of the Schulman Group from an April 19, 2013 email from Paul Hinsch, who had learned of the Schulman Group through an email from Michael Porro. Hinsch asked Sullivan and Steck about the Schulman Group: “Don’t know anything about this but it seems to take us in a direction we have been reluctant to go in the past. I am sure there is good reason to do it and probably little risk in the sense that we don’t have much business with the target customers. Safe to assume you guys were in the loop? I wasn’t.” (CX2047 at 002). Sullivan replied that same day to Porro and others: “First I’m hearing about this . . . MP, a buying group program without any advance discussion about it? what are the details? Is there a kickback to Schulman Group?” (CX2047 at 001). Porro replied to Sullivan: “Not a buying group.” (CX2047 at 001). Sullivan then replied to Porro: “All sounds good.” (CX2047 at 001). The record evidence shows that when Sullivan learned about the Schulman Group, he was assured that it was “Not a buying group.” (CX2047 at 001).

1096. Schein’s Group Partnership Program with the Schulman Group included a “Special Discount Program . . . on 2,000 of the most common products an Orthodontist purchases” plus a \$500 service coupon, \$1,000 off certain equipment or technology purchases, discounts, and a rebate opportunity. (RX 2256-001; CX 8000 (Porro, Dep. at 151)).

Response to Proposed Finding No. 1096

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Sullivan was aware that Schulman Group was a buying group or approved an agreement with the Schulman Group. The record evidence shows that Sullivan learned of the Schulman Group from an April 19, 2013 email from Paul Hinsch, who had learned of the Schulman Group through an email from Michael Porro. Hinsch asked Sullivan and Steck about the Schulman Group: “Don’t know anything about this but it seems to take us in a direction we have been reluctant to go in the past. I am sure there is good reason to do it and probably little risk in the sense that we don’t have much business with the target customers. Safe to assume you guys were in the loop? I wasn’t.” (CX2047 at 002). Sullivan replied that same day to Porro and others: “First I’m hearing about this . . . MP, a buying group program without any advance discussion about it? what are the details? Is there a kickback to Schulman Group?” (CX2047 at 001). Porro replied to Sullivan: “Not a buying group.” (CX2047 at 001). Sullivan then replied to Porro: “All sounds good.” (CX2047 at 001). The record evidence shows that when Sullivan learned about the Schulman Group, he was assured that it was “Not a buying group.” (CX2047 at 001).

1097. Schulman Group members agreed to a “minimum \$15k” merchandise goal for the year. (RX 2256-001).

Response to Proposed Finding No. 1097

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Sullivan was aware that Schulman Group was a buying group or approved an agreement with the Schulman Group. The record evidence shows that Sullivan learned of the Schulman

Group from an April 19, 2013 email from Paul Hinsch, who had learned of the Schulman Group through an email from Michael Porro. Hinsch asked Sullivan and Steck about the Schulman Group: “Don’t know anything about this but it seems to take us in a direction we have been reluctant to go in the past. I am sure there is good reason to do it and probably little risk in the sense that we don’t have much business with the target customers. Safe to assume you guys were in the loop? I wasn’t.” (CX2047 at 002). Sullivan replied that same day to Porro and others: “First I’m hearing about this . . . MP, a buying group program without any advance discussion about it? what are the details? Is there a kickback to Schulman Group?” (CX2047 at 001). Porro replied to Sullivan: “Not a buying group.” (CX2047 at 001). Sullivan then replied to Porro: “All sounds good.” (CX2047 at 001). The record evidence shows that when Sullivan learned about the Schulman Group, he was assured that it was “Not a buying group.” (CX2047 at 001).

1098. On April 19, 2013, Michael Porro, Schein’s Atlantic Coast Zone General manager at the time, distributed the partnership program documentation to the Schein sales reps that had customers in the Schulman Group. (CX 2047-002-03; CX 8000 (Porro, Dep. at 150)).

Response to Proposed Finding No. 1098

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Sullivan was aware that Schulman Group was a buying group or approved an agreement with the Schulman Group. The record evidence shows that Sullivan learned of the Schulman Group from an April 19, 2013 email from Paul Hinsch, who had learned of the Schulman Group through an email from Michael Porro. Hinsch asked Sullivan and Steck about the Schulman Group: “Don’t know anything about this but it seems to take us in a direction we have been reluctant to go in the past. I am sure there is good reason to do it and probably little risk in the sense that we don’t have much business with the target customers. Safe to

assume you guys were in the loop? I wasn't." (CX2047 at 002). Sullivan replied that same day to Porro and others: "First I'm hearing about this . . . MP, a buying group program without any advance discussion about it? what are the details? Is there a kickback to Schulman Group?" (CX2047 at 001). Porro replied to Sullivan: "Not a buying group." (CX2047 at 001). Sullivan then replied to Porro: "All sounds good." (CX2047 at 001). The record evidence shows that when Sullivan learned about the Schulman Group, he was assured that it was "Not a buying group." (CX2047 at 001).

1099. Mr. Porro described the Schulman Group as a group "of over 175 high level/volume orthodontic practices across the country," noting "[m]ost of the members of the group do very little business with Henry Schein so this can be a nice opportunity." (CX 2047-002).

Response to Proposed Finding No. 1099

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Sullivan was aware that Schulman Group was a buying group or approved an agreement with the Schulman Group. The record evidence shows that Sullivan learned of the Schulman Group from an April 19, 2013 email from Paul Hinsch, who had learned of the Schulman Group through an email from Michael Porro. Hinsch asked Sullivan and Steck about the Schulman Group: "Don't know anything about this but it seems to take us in a direction we have been reluctant to go in the past. I am sure there is good reason to do it and probably little risk in the sense that we don't have much business with the target customers. Safe to assume you guys were in the loop? I wasn't." (CX2047 at 002). Sullivan replied that same day to Porro and others: "First I'm hearing about this . . . MP, a buying group program without any advance discussion about it? what are the details? Is there a kickback to Schulman Group?" (CX2047 at 001). Porro replied to Sullivan: "Not a buying group." (CX2047 at 001). Sullivan then replied to Porro: "All sounds good." (CX2047 at 001). The

record evidence shows that when Sullivan learned about the Schulman Group, he was assured that it was “Not a buying group.” (CX2047 at 001).

1100. Mr. Sullivan was informed about the Schulman group and wanted more details from Mr. Porro about what Schein was offering to the Schulman Group. (CX 2047-001 (“[A] buying group program without any advance discussion about it? [W]hat are the details?”)).

Response to Proposed Finding No. 1100

The Proposed Finding is vague and ambiguous as to the term “was informed,” as it suggests that Sullivan was aware of Schein’s interaction with the Schulman Group. The record evidence shows that Sullivan first heard about the Schulman Group on April 19, 2013, and when he did, he inquired why he had not been consulted about it. (CX2047 at 001 (Statement of Sullivan: “First I’m hearing about this . . . [Michael Porro], a buying group program without any advance discussion about it?”)). Porro replied to Sullivan: “Not a buying group.” (CX2047 at 001). Sullivan then replied to Porro: “All sounds good.” (CX2047 at 001). The record evidence shows that when Sullivan learned about the Schulman Group, he was assured that it was “Not a buying group.” (CX2047 at 001).

1101. Mr. Sullivan testified that he was not necessarily surprised to learn Mr. Porro had entered into a buying group program without discussion with Mr. Sullivan, but it was something HSD management “would like to be aware of.” (Sullivan, Tr. 3999-4000; *see also* CX 8000 (Porro, Dep. at 153-54 (“Mr. Sullivan’s concern is “not knowing the full picture.”))). After becoming aware of the details of Schein’s offer to the Schulman Group, Mr. Sullivan told Mr. Porro that “[a]ll sounds good...” (CX 2047-001).

Response to Proposed Finding No. 1101

The second sentence of the Proposed Finding is inaccurate and misleading to the extent it asserts or implies that Sullivan’s statement in CX2047 that “[a]ll sounds good” means Sullivan approved of any agreement with a buying group, as Sullivan’s statement was a response to Porro’s assurance that Schulman Group was “[n]ot a buying group.” (CX2047 at 001) (emphasis added). The record evidence shows that Sullivan first heard about the

Schulman Group on April 19, 2013, and when he did, he inquired why he had not been consulted about it. (CX2047 at 001 (Statement of Sullivan: “First I’m hearing about this . . . [Michael Porro], a buying group program without any advance discussion about it?”)). Porro replied to Sullivan: “Not a buying group.” (CX2047 at 001). Sullivan then replied to Porro: “All sounds good.” (CX2047 at 001).

1102. In the middle of the alleged conspiracy – August 2014 – Benco became aware that Henry Schein was offering a discount program to the Schulman Group when a Benco FSC reached out to senior Benco leadership “to see if we (Benco) [wanted to] offer a discount for the Schulman Group,” as “Henry Schein does.” (CX 1104-002). Benco did not reach out to anyone at Schein or take “any action to try to stop [Schein] from working with . . . the Schulman Group.” (Ryan, Tr. 1252-53 (Mr. Ryan did not take “any action to stop [Schein] from working with . . . the Schulman Group”); *see also* Cohen, Tr. 913-14).

Response to Proposed Finding No. 1102

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Ryan’s testimony disproves Benco or Schein’s participation in an overarching conspiracy. Indeed, Complaint Counsel has identified, and the record evidence is replete with, examples of interfirm communications between Cohen and Sullivan between 2011 and 2015 that establish Benco orchestrated an agreement with Schein. (CCFF ¶¶ 327-354; *see also* CCFF ¶¶ 284-326). Moreover, the record evidence establishes that Benco’s Cohen informed Sullivan of Benco’s position with regard to bidding on buying groups and reached an understanding that Schein would not align itself with buying groups. (CCFF ¶¶ 661-684). Schein, in turn, ensured compliance by instructing its sales force to reject buying groups. (CCFF ¶¶ 686-954). Benco confronted Schein when it suspected Schein was discounting to buying groups, and Schein and Benco communicated when they were uncertain whether a customer qualified as a buying group. (CCFF ¶¶ 955-1100). The record evidence also shows that the Big Three were part of an overarching conspiracy.

(CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein’s internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195).

1103. Benco’s approach to the Schulman Group was the opposite of Schein’s. (CX 1206-001). Unlike Schein, Benco declined to do business with the Schulman Group because it was a buying group. (CX 1206-001; CX 1104-001). Pat Ryan, Benco’s Director of Sales at the time, rejected the idea, noting that the “Schulman Group is a buying group ... and we don’t participate in that business,” instructing the FSC not to “put anything in front of them.” (CX 1206-001; CX 1104-001).

Response to Proposed Finding No. 1103

Complaint Counsel has no specific response to the third sentence of the Proposed Finding.

The first sentence of the Proposed Finding is vague and ambiguous in its inclusion of the term “opposite,” which is neither defined or explained and forces Complaint Counsel to guess at its meaning. Nonetheless, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein contracted with buying groups during the conspiracy period. The record evidence shows that it did not pursuant to Sullivan’s directives. (CCFF ¶¶ 661-1100). The existence of the Schulman Group does not change the weight of the record evidence, as Sullivan was neither aware of the group and in fact, assured it was not a buying group. (*See Responses to Proposed Finding Nos. 1093-1102*).

1104. This is contrary to Complaint Counsel’s allegation that “Benco began enforcing the agreement against Schein each time they suspected that Schein was cheating by discounting to a buying group.” (Kahn, Tr. 42; *see also* CC Pretrial Br. at 14; Complaint ¶ 8).

Response to Proposed Finding No. 1104

The Proposed Finding is not supported by the cited evidence, which does not assert that anything is contrary to Complaint Counsel’s allegations. Nonetheless, the Proposed Finding is misleading and contrary to the weight of the record evidence. The record evidence shows that in 2012, 2013, and 2014, Cohen understood that Schein was not selling to buying

groups. (CCFF ¶¶ 674-678). Cohen's belief that Schein was not working with buying groups was *contrary* to the market intelligence that he received indicating that Schein did work with buying groups. (CCFF ¶¶ 665-673, 684; *see also* CX1104 at 001, Ryan, Tr. 1252 (testifying that he received an August 2014 email in which Benco territory reps reported to Ryan that Schein was working with Schulman Group)). In addition, there were opportunities for Benco and Schein to discuss Schulman Group in 2014. For example, Cohen and Sullivan spoke for 12 minutes and 21 seconds on September 10, 2014. (CX6027 at 046 (Row 388). Both also attended the ADA meeting in October 2014, the Dental Trade Alliance meeting in November 2014, and the Greater New York Dental meeting in November 2014. (CCFF ¶¶ 374, 367, 371).

The record evidence shows that Cohen knew of Sullivan's policy, regardless of market intelligence regarding Schein working with a buying group. In fact, Cohen testified that he did not believe market intelligence about Schein working with buying groups. (Cohen, Tr. 525). Additionally, it is misleading to assert that Cohen, the individual who formed the agreement through communications, did not confront Schein because *Ryan* did not confront Schein. (*See* CCFF ¶¶ 661-684, 327-354; *see also* CCFF ¶¶ 284-326). Indeed, the record evidence establishes that Cohen informed Sullivan of Benco's position with regard to bidding on buying groups and reached an understanding that Schein would not align itself with buying groups. (CCFF ¶¶ 661-684). Schein, in turn, ensured compliance by instructing its sales force to reject buying groups. (CCFF ¶¶ 686-954). Benco confronted Schein when it suspected Schein was discounting to buying groups, and Schein and Benco communicated when they were uncertain whether a customer qualified as a buying group. (CCFF ¶¶ 955-1100). The record evidence also shows that the Big Three were part of an overarching

conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein's internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195).

KK. Smile Source.

1105. Complaint Counsel claims that the Respondents' conspiracy is evident from their interactions with Smile Source. (Complaint ¶ 35; CC Pretrial Br. at 13-21). Respondents' dealings, however, were consistent with unilateral action, and that such conduct does not itself raise, or contribute to, an inference of a conspiracy.

Response to Proposed Finding No. 1105

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts that Respondents' actions toward Smile Source show Respondents' unilateral actions. Respondents did not work with Smile Source during the conspiracy. (CCFF ¶¶ 410, 641-642, 728). Schein's relationship with Smile Source is consistent with the record evidence establishing Schein's participation in a conspiracy. It was a pre-existing relationship established in 2008 that ended at the beginning of 2012, which made "Tim Sullivan [] happy that we are less one more BG." (CCFF ¶¶ 758, 899). Schein did not work with Smile Source during the conspiracy period, but Schein began working with Smile Source after the conspiracy in 2017. (CCFF ¶¶ 728, 1319).

1. *Smile Source Changed Strategic Direction, Hired a New President, and Fired Schein in Favor of Burkhart.*

1106. In early 2011, Smile Source was small, with just 15 members [REDACTED]. (Goldsmith, Tr. 2088, 2103; CX 0238-001). [REDACTED] (Goldsmith, Tr. 2072-73; CX 2299-001). [REDACTED] (Goldsmith, Tr. 2073).

Response to Proposed Finding No. 1106

The Proposed Finding is factually inaccurate and misleading to the extent it implies that Smile Source had [REDACTED]. The record evidence shows that Smile

Source was a profitable and growing customer for Schein at the time. Schein Special Markets executives Randy Foley and Hal Muller, who handled the account until 2011, testified that Smile Source was a growing and very profitable customer, brought Schein new customers from its competitors, and allowed Schein to grow its customer base. (CCFF ¶¶ 447-452). In September 2010, Sullivan saw Smile Source as an opportunity that he did not want Schein to lose, because it was “\$1 million and growing.” (CCFF ¶¶ 448-449). Smile Source continued to grow after 2011. Dr. Goldsmith, who joined Smile Source in August 2011, grew Smile Source’s membership from 20 to 200 locations under his tenure. (Goldsmith, Tr. 1937).

Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1107. As part of this plan, they hired a new President, Dr. Andrew Goldsmith, in August 2011. (Goldsmith, Tr. 1934; CX 2299-001). Prior to becoming President, Dr. Goldsmith was practicing dentistry full-time, had no leadership position in Smile Source, and no experience running a franchisor, buying group, or a DSO. (Goldsmith, Tr. 2040-41). Dr. Goldsmith was in that position for approximately one year, after which he was demoted to Vice President and Chief Dental Officer. (Goldsmith, Tr. 2041-43; Maurer, Tr. 4938). Dr. Goldsmith parted ways with Smile Source at the end of 2014, a little over two years after first joining Smile Source, [REDACTED] (Maurer, Tr. 4956-58; Goldsmith, Tr. 2041-43; RX 0290-00017).

Response to Proposed Finding No. 1107

The Proposed Finding is misleading, contrary to the weight of the evidence, and irrelevant to the extent it asserts that Dr. Goldsmith was “demoted” [REDACTED]

Dr. Goldsmith testified that he was President of Smile Source for 18 months beginning in August 2011 and that he then transitioned to Chief Dental Officer and Vice President of Vendor Relations in 2013. (CCFF ¶¶ 1858-1861; Goldsmith, Tr. 1934, 2041-2042). When Dr. Goldsmith transitioned to Chief Dental Officer and Vice President of Vendor Relations, he was considered an “equal” to Jim Greenwood, Smile Source’s then-CEO. (Goldsmith, Tr. 1938). Both as President and as Chief Dental Officer, Dr. Goldsmith continued reporting to Smile Source’s CEO. (Goldsmith, Tr. 1937-1938). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Dr. Goldsmith testified that he “absolutely” contributed to Smile Source’s growth and success and that he grew Smile Source’s membership from 20 to 200 locations under his tenure. (Goldsmith, Tr. [REDACTED], 1937).

1108. Smile Source decided to switch distributors from Schein to Burkhart for a variety of reasons, none of which give rise to an inference that Schein was acting in furtherance of any alleged conspiracy to not do business with, or offer discounts to, buying groups. (RX 2090-001-02; RX 2619-001; Goldsmith, Tr. 2082, 2093-95, 2104-05; Sullivan, Tr. 4144-45).

Response to Proposed Finding No. 1108

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts or implies that Smile Source ended the relationship because it preferred to work with Burkhart. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
 [REDACTED]
 [REDACTED] (CCFF ¶ 915). Burkhart was a regional distributor and did not have a national footprint. (CCFF ¶ 1453). [REDACTED]
 [REDACTED]
 [REDACTED] (CCFF ¶ 913). [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED].

Regardless of who terminated whom, the record evidence shows that Schein did not work with Smile Source during the conspiracy and that Sullivan was pleased when the relationship ended at the beginning of 2012. (CCFF ¶¶ 914-924). Finally, evidence regarding Schein's conduct in relation to the pre-existing Smile Source relationship does not disprove Schein's participation in a conspiracy. The record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

1109. Shortly after joining Smile Source, Dr. Goldsmith started to reach out to other distributors in an effort to replace Schein as Smile Source's primary distributor. (Goldsmith, Tr. 2083-84; CX 1116-002). In an email dated September 26, 2011, Dr. Goldsmith wrote to a Benco corporate email address (institutions@Benco.com), to "see what sort of relationship could be

established with Benco.” (CX 1116-002; *see also* CX 1138-003 (Sept. 30, 2011 Goldsmith email to Benco’s Pat Ryan stating that “[w]e need a new distribut[or] that ... we can grow with and build a long term relationship with.”)).

Response to Proposed Finding No. 1109

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts or implies that Dr. Goldsmith wanted to replace Schein as a distributor in 2011 after joining Smile Source. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CCFF ¶ 915). Burkhart was a regional

distributor and did not have a national footprint. (CCFF ¶ 1453). [REDACTED]

[REDACTED]

[REDACTED] (CCFF ¶ 913; *see also*

Complaint Counsel’s Response to Proposed Finding No. 1108). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

1110. Benco declined Dr. Goldsmith’s overtures. (CX 1138-001 (“Benco does not participate in group purchasing organizations.”); Cohen, Tr. 863; Ryan, Tr. 1131).

Response to Proposed Finding No. 1110

Complaint Counsel has no specific response.

1111. Dr. Goldsmith also reached out to Burkhart, and in January 2012, decided to switch from Schein to Burkhart. (Goldsmith, Tr. 1947-48, 2082).

Response to Proposed Finding No. 1111

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts or implies that Smile Source ended the relationship because it preferred to work with Burkhart. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CCFF ¶ 915). Burkhart was a regional distributor and did not have a national footprint. (CCFF ¶ 1453). [REDACTED]

[REDACTED]

[REDACTED] (CCFF ¶ 913).

1112. [REDACTED] (Goldsmith, Tr. 2082, 2093-95, 2104-05; RX 2090-001-02).

[REDACTED] (Goldsmith, Tr. 1990-91; 2094-95

also CX 8039 (Goldsmith, Dep. at 90) (same); RX 2083-001

[REDACTED].

Response to Proposed Finding No. 1112

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts or implies that Smile Source ended the relationship because it preferred to work with Burkhart. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] (CCFF ¶ 915). Burkhart was a regional distributor and did not have a national footprint. (CCFF ¶ 1453). [REDACTED]
[REDACTED]

[REDACTED] (CCFF ¶ 913).

Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1113. [REDACTED]

[REDACTED] (Goldsmith, Tr. 1990-91). [REDACTED]

[REDACTED] (Goldsmith, Tr. 2003-04). Accordingly, while Smile Source may have preferred a nationwide distributor, it was not an important enough factor to prevent Smile Source from terminating its relationship with Schein. (*See* Goldsmith, Tr. 2005-06, 2082).

Response to Proposed Finding No. 1113

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts or implies that Smile Source ended the relationship because it preferred to work with Burkhart. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] (CCFF ¶ 915). Burkhart was a regional distributor and did not have a national footprint. (CCFF ¶ 1453). [REDACTED]
[REDACTED]

[REDACTED] (CCFF ¶ 913).

The Proposed Finding is also misleading to the extent it asserts that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1114. Despite this, Dr. Marshall testified that it was Schein who “terminate[d] its relationship with Smile Source” claiming Schein had substantially increased prices to Smile Source at the end of the relationship. (Marshall, Tr. 2936-37, 3125). But, the evidence does not support Dr. Marshall, and shows the opposite – that Smile Source “fire[d]” Schein. (CX 0199-003). As Dr. Goldsmith testified, [REDACTED] (Goldsmith, Tr. 2037).

Response to Proposed Finding No. 1114

This Proposed Finding should be disregarded to the extent that Schein is attempting to use expert testimony to establish facts in relation to the end of Schein’s relationship with Smile Source in violation of the Court’s Order On Post-Trial Briefs. (Order On Post-Trial Briefs at 3 (“Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.”); *see also* Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses.”)). To the extent that this Proposed Finding suggests that Schein did not act against its self-interest based on facts related to the end of Schein’s relationship with Smile Source in 2012, it is inaccurate and misleading because Dr. Marshall explained that his five natural experiments (profitability studies) show that buying groups drive purchasing volume and are profitable for full-service distributors to serve, and that “Even if Carlton’s assessment of the facts were correct, that would not affect the conclusions I draw below from these profitability studies...[t]hese facts are in the data of the studies, and they follow regardless of whether Schein terminated its discussions with

Smile Source and Kois or visa versa.” (CX7101 at 049 (¶ 119) (Marshall Expert Rebuttal Report)).

The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it asserts or implies that (1) Complaint Counsel has not introduced evidence to support Dr. Goldsmith’s testimony about the end of the Smile Source relationship and/or (2) Complaint Counsel alleges that Schein terminated Smile Source. (*See* Complaint Counsel’s Response to Proposed Finding No. 1121.) [REDACTED]

[REDACTED] (CCFF ¶ 913; *see* Complaint Counsel’s Response to Proposed Finding No. 1129).

1115. Following Smile Source’s decision to terminate Schein, [REDACTED]

(RX 2090-002-03).

(Goldsmith, Tr. 2101).

Response to Proposed Finding No. 1115

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that Smile Source ended the relationship because it preferred to work with Burkhart. [REDACTED]

[REDACTED] (CCFF ¶ 915). Burkhart was a regional distributor and did not have a national footprint. (CCFF ¶ 1453; Goldsmith, Tr. 1946). [REDACTED]

[REDACTED]

[REDACTED] (CCFF ¶ 913). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1116. Upon receiving Dr. Abram's email (after it had been forwarded to Schein's Tim Sullivan), Dr. Goldsmith and Smile Source's Director of Business Development Todd Nickerson [REDACTED] (RX 2090-001-02; RX 2619-001).

Response to Proposed Finding No. 1116

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that Smile Source ended the relationship because it preferred to work with Burkhart. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CCFF ¶ 915). Burkhart was a regional distributor and did not have a national footprint. (CCFF ¶ 1453; Goldsmith, Tr. 1946). [REDACTED]

[REDACTED]

[REDACTED] (CCFF ¶ 913). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1117. Dr. Goldsmith wrote [REDACTED]

[REDACTED]

[REDACTED] (RX 2090-001-02).

Response to Proposed Finding No. 1117

Complaint Counsel has no specific response to the attribution of the statements to Dr. Goldsmith in RX2090. However, the Proposed Finding is misleading and contrary to the

weight of the evidence to the extent it implies that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CCFF ¶ 915). Burkhart was a regional distributor and did not have a national footprint. (CCFF ¶ 1453; Goldsmith, Tr. 1946). [REDACTED]

[REDACTED]

[REDACTED] (CCFF ¶ 913).

1118. Dr. Goldsmith further noted that [REDACTED]

[REDACTED]

[REDACTED]

(RX 2090-002). At trial, while Dr. Goldsmith

(Goldsmith, Tr. 2102-05).

Response to Proposed Finding No. 1118

Complaint Counsel has no specific response to the attribution of the statements to Dr.

Goldsmith. However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. The Proposed Finding is misleading and contrary to the weight of the evidence to

the extent it implies that Smile Source ended the relationship because it preferred to work with Burkhart. [REDACTED]

[REDACTED] (CCFF ¶ 915). Burkhart was a regional distributor and did not have a national footprint. (CCFF ¶ 1453; Goldsmith, Tr. 1946). [REDACTED]

[REDACTED] (CCFF ¶ 913).

1119. Dr. Goldsmith finished by writing [REDACTED]

(RX 2090-002).

Response to Proposed Finding No. 1119

Complaint Counsel has no specific response to the attribution of the statements to Dr.

Goldsmith. However, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that Smile Source ended the relationship because it preferred to work with Burkhart. [REDACTED]

[REDACTED]. The

Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that Smile Source ended the relationship because it preferred to work with Burkhart.

(CCFF ¶ 915). Burkhart was a regional distributor and did not have a national footprint.

(CCFF ¶ 1453; Goldsmith, Tr. 1946). [REDACTED]

[REDACTED]

[REDACTED] (CCFF ¶ 913).

1120. Mr. Nickerson similarly [REDACTED] (Goldsmith, Tr. 2018; RX 2619-001 (explaining that “our relationship with [Mr. Sullivan] made this even a harder decision than it already was,” that he was “appreciative of everything that Henry [Schein] has done,” and that the decision to go with Burkhart was because it was “a better fit for us at this time due to our size.”)). [REDACTED]

[REDACTED] (Goldsmith, Tr. 2105-06).

Response to Proposed Finding No. 1120

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that Smile Source ended the relationship because it preferred to work with

Burkhart. [REDACTED]

[REDACTED]

[REDACTED]. The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that Smile Source ended the relationship because it preferred to work with Burkhart. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CCFF

¶ 915). Burkhart was a regional distributor and did not have a national footprint. (CCFF ¶ 1453; Goldsmith, Tr. 1946). [REDACTED]

[REDACTED]

[REDACTED] (CCFF ¶ 913).

1121. Complaint Counsel nonetheless asserts that Schein induced Smile Source to terminate its relationship with Schein as part of the alleged conspiracy with Benco. (CC Pretrial Br. at 13-21). Complaint Counsel, however, cites no communications between Schein and Benco or between Schein and Patterson concerning Smile Source during this time frame, let alone any internal Schein documents in which such an elaborate ruse was concocted. Complaint Counsel also cites to no evidence that Schein was somehow prevented from terminating its relationship with Smile Source if that is the course of action it wanted to take. (*See, e.g.*, RX2547-05 (“Either party shall have the right to cancel this agreement at any time.”)).

Response to Proposed Finding No. 1121

The Proposed Finding is misleading to the extent it asserts that Complaint Counsel is alleging “that Schein induced Smile Source to terminate its relationship with Schein as part of the alleged conspiracy with Benco” and to the extent it cites Complaint Counsel’s Pre-Trial Brief for this proposition. Regardless of who terminated whom, the record evidence shows that Schein did not work with Smile Source during the conspiracy and that Sullivan was pleased when the relationship ended at the beginning of 2012. (CCFF ¶¶ 914-924). Finally, evidence regarding Schein’s conduct in relation to the pre-existing Smile Source relationship does not disprove Schein’s participation in a conspiracy. The record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

2. *The Evidence Does Not Support Complaint Counsel’s Contention that Schein Induced Smile Source to Terminate Schein in January 2012.*

a. *Dr. Goldsmith’s Testimony is Not Credible.*

1122. Complaint Counsel relies on the testimony of Dr. Goldsmith for their contention that Schein induced Smile Source to Terminate Schein in January 2012. (CC Pretrial Br. at 17, 20).

Dr. Goldsmith, however, is not a credible witness on that point, and the credible evidence is to the contrary.

Response to Proposed Finding No. 1122

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts that Dr. Goldsmith is not a “credible witness” regarding the end of the Schein-Smile Source relationship in 2012. Contemporaneous documents confirm Dr. Goldsmith’s testimony about the sequence of events that lead to the end of the relationship. For instance, contemporaneous documents confirm the accuracy of Dr. Goldsmith’s testimony that [REDACTED]

[REDACTED]. (CCFF ¶¶ 901-912, 916-917). The Proposed Finding is also misleading to the extent it asserts that Complaint Counsel alleges that Schein induced Smile Source’s termination. (*See* Complaint Counsel’s Response to Proposed Finding No. 1121).

1123. Dr. Goldsmith’s emails with Benco raise credibility concerns. The email communications between Dr. Goldsmith and Benco contain a number of misstatements or embellishments by Dr. Goldsmith that detract from his credibility as a witness. For example, Dr. Goldsmith wrote that Smile Source “currently [had] 40 practices.” (CX 1116-002; CX 1138-003 (repeating same representation)). In fact, Smile Source had 28 members. (*See* Goldsmith, Tr. 2088 [REDACTED]; CX 4232-007 (identifying 28 members)).

Response to Proposed Finding No. 1123

The Proposed Finding is misleading and contrary to the weight of the evidence, to the extent it asserts that Dr. Goldsmith’s emails with Benco raise any “credibility concerns.” Schein has not established that Dr. Goldsmith’s email to Benco about the number of Smile Source practices in 2011 was untruthful or misleading or relevant. In addition, it strains credulity to assert that a statement that Smile Source had [REDACTED], bears on Dr. Goldsmith’s credibility as a testifying witness. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. In other words, Dr. Goldsmith did not testify that his statement was intentionally misleading or inaccurate but that it was based on his belief at the time. Moreover, the Proposed Finding is irrelevant because Dr. Goldsmith's statement in a 2011 email to Benco (with whom Smile Source has never had any relationship) has no bearing on Dr. Goldsmith's credibility as a testifying witness.

1124. In his response to follow-up questions from Benco's Mr. Ryan about whether "Smile Source [can] control and direct ... who the offices purchase from," Mr. Goldsmith states that Smile Source "direct[s] the formulary and the products ... and dictate[s] what vendors to use." (CX 1138-001-02; *see also* Goldsmith 1968-69 [REDACTED])

[REDACTED]. That was false. In fact, Smile Source [REDACTED] (Goldsmith, Tr. 2054-55, 2092 [REDACTED]; RX 0290-0024 ("We do not have specifications you must follow or designated suppliers or approved suppliers you must use for goods, services or real estate."))).

Response to Proposed Finding No. 1124

The Proposed Finding is not supported by the cited evidence, is misleading, and is contrary to the weight of the evidence, to the extent it asserts that Dr. Goldsmith's emails with Benco raise any "credibility concerns," or to the extent it asserts that Dr. Goldsmith's testimony about Smile Source's compliance rates were false. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CCFF ¶ 1727). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Moreover, the

Proposed Finding is irrelevant because Dr. Goldsmith's statement in a 2011 email to Benco (with whom Smile Source has never had any relationship) has no bearing on Dr. Goldsmith's credibility as a testifying witness.

1125. At the time of Dr. Goldsmith's September 26, 2011 email to Benco, [REDACTED] (Goldsmith, Tr. 2079). [REDACTED] (Goldsmith, Tr. 2079). At his deposition, Dr. Goldsmith stated that the meeting was an introductory meeting, and that "[n]othing of substance" was discussed. (CX 8039 (Goldsmith, Dep. at 16)). [REDACTED] (Goldsmith, Tr. 2079).

Response to Proposed Finding No. 1125

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts that Dr. Goldsmith changed his testimony at trial. Dr. Goldsmith's testimony at deposition and at trial was consistent, and the Proposed Finding does not establish otherwise. Dr. Goldsmith testified at his deposition that nothing of substance was discussed with Schein's John Chatham at a meeting in 2011. (CX8039 (Goldsmith, Dep. at 16)). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Contemporaneous

documents confirm Dr. Goldsmith's testimony about the sequence of events that lead to the end of the relationship. For instance, contemporaneous documents confirm the accuracy of Dr. Goldsmith's testimony that [REDACTED]

[REDACTED]

(CCFF ¶¶ 901-912, 916-917).

1126. There is no evidence, such as contemporaneous documents, corroborating Dr. Goldsmith's new account of the meeting with Mr. Chatham. Because supplier discounts are an important aspect of Smile Source's business model, it would be reasonable to expect extended internal communications at both companies and between the two if Schein had announced a change in discount structures.

Response to Proposed Finding No. 1126

The Proposed Finding is not supported by any citation to the record evidence and should be disregarded. Regardless, the Proposed Finding is misleading, and contrary to the weight of the evidence, to the extent it asserts that Dr. Goldsmith changed his testimony at trial. (*See* Complaint Counsel's Response to Proposed Finding No. 1125). Contemporaneous documents also confirm Dr. Goldsmith's testimony about the sequence of events that lead to the end of the relationship. For instance, contemporaneous documents confirm the accuracy of Dr. Goldsmith's testimony that [REDACTED]

[REDACTED]

[REDACTED]. (CCFF ¶¶ 901-912, 916-917).

1127. Even if the Court was inclined to give some credence to Dr. Goldsmith's testimony about his meeting with Mr. Chatham, it has no impact on the Court's findings as to Smile Source's decision to change suppliers.

Response to Proposed Finding No. 1127

The Proposed Finding is not supported by any citation to the record evidence and should be disregarded. Regardless, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts that Dr. Goldsmith changed his testimony at trial. The record evidence shows that his testimony was consistent. (*See* Complaint Counsel's Response to Proposed Finding No. 1125).

1128. [REDACTED]

(Goldsmith, Tr. 1947-48, 2082).

(Goldsmith, Tr. 2037

).

Response to Proposed Finding No. 1128

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that Smile Source ended the relationship because it preferred to work with

Burkhart. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (CCFF ¶ 915). Burkhart was a regional distributor and did not have a national footprint. (CCFF ¶ 1453; Goldsmith, Tr. 1946). [REDACTED]

[REDACTED]

[REDACTED] (CCFF ¶ 913; *see also* Complaint Counsel's Responses Proposed Finding Nos. 1108-1109).

b. The Evidence Does Not Support Complaint Counsel's Contention of "Price Creep"

1129. Dr. Goldsmith testified that Smile Source chose to terminate Schein for two reasons: [REDACTED]. (Goldsmith, Tr. 1982-83). Complaint Counsel has not introduced evidence to show that Schein increased prices, reduced discounts, or reduced services to Smile Source members, let alone that it did so in an effort to induce Smile Source to terminate its relationship with Schein.

Response to Proposed Finding No. 1129

The second sentence is not supported by any citation to the record evidence and should be disregarded. Nonetheless, the Proposed Finding is misleading and contrary to the weight of the evidence in its assertions that Complaint Counsel has not introduced evidence to show Smile Source's reasons for switching to Burkhart. The record evidence establishes that after Smile Source was transferred from Special Markets to HSD in 2011, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CCFF ¶¶ 904-913).

Contemporaneous documents confirm the accuracy of Dr. Goldsmith's testimony that [REDACTED]

[REDACTED]

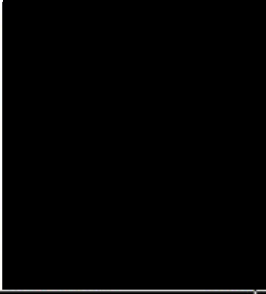
[REDACTED]. (CCFF ¶¶ 901-912, 916-917). On

November 7, 2011, Nickerson of Smile Source wrote to Brady and Chatham of Schein: "We did a spot check on one of our newest additions to the Smile Source. Dr. Jonathon Okabe and

compared his pricing to our Special Market pricing from Dr. James Choy and found out that he is not receiving our negotiated pricing.” (CCFF ¶ 910 (quoting CX2571 at 002)). On February 8, 2012, Dr. Richard Abrams, a dentist and Smile Source administrator in Colorado, wrote of Schein: “Not everyone was getting the same deal and some people were being charged more. And [Schein] just plain didn’t care.” (CX2573 at 002-003, [REDACTED] [REDACTED]). Schein’s own contemporaneous documents also corroborate Dr. Goldsmith’s testimony. (CCFF ¶¶ 916-917 (quoting CX0238 at 001 (“HSD did not give Smile Source the love that SM provided, so they recently dumped Schein.”))). Regardless of who terminated whom, the record evidence shows that Schein did not work with Smile Source during the conspiracy and that Sullivan was pleased when the relationship ended at the beginning of 2012. (CCFF ¶¶ 914-924). Finally, evidence regarding Schein’s conduct in relation to the pre-existing Smile Source relationship does not disprove Schein’s participation in a conspiracy. The record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

1130. To the contrary, the evidence shows that Schein maintained a consistent discount for Smile Source members from 2010 until Smile Source terminated the relationship in January 2012.

Table 3
Schein Discount on Smile Source Purchases
2010 – 1Q2012

Quarter	Total Smile Source Purchases	Discount
2010 Q1		
2010 Q2		
2010 Q3		
2010 Q4		
2011 Q1		
2011 Q2		
2011 Q3		
2011 Q4		
2012 Q1		

Source: Marshall Report backup data production.

Notes: Products include consumables only. Analysis includes only purchases from active Smile Source members.

(Carlton, Tr. 5380-81; RX 2832-058 (Table 3)).

Response to Proposed Finding No. 1130

The Proposed Finding is inaccurate and misleading to the extent it suggests that Schein did not act against its self-interest based on facts related to the end of Schein’s relationship with Smile Source in 2012. Dr. Marshall has explained that his five natural experiments (profitability studies) show that buying groups drive purchasing volume and are profitable for full-service distributors to serve, and that “Even if Carlton’s assessment of the facts were correct, that would not affect the conclusions I draw below from these profitability studies...[t]hese facts are in the data of the studies, and they follow regardless of whether Schein terminated its discussions with Smile Source and Kois or visa versa.” (CX7101 at 049 (¶ 119) (Marshall Expert Rebuttal Report)).

1131. 

(Marshall, Tr. 3142-43; CX 7100-182).

[REDACTED] (Marshall, Tr. 3144-45; CX 7100-168).

Response to Proposed Finding No. 1131

This Proposed Finding is incomplete and misleading in suggesting that Dr. Marshall only relied on his Fischer price index in his assessment of the end of Schein's partnership with Smile Source in 2012. Dr. Marshall also testified that he [REDACTED]

[REDACTED]. The Proposed Finding is also inaccurate and misleading to the extent it suggests that Schein did not act against its self-interest based on facts related to the end of Schein's relationship with Smile Source in 2012. Dr. Marshall has explained that his five natural experiments (profitability studies) show that buying groups drive purchasing volume and are profitable for full-service distributors to serve. Dr. Marshall also explained that "Even if Carlton's assessment of the facts were correct, that would not affect the conclusions I draw below from these profitability studies...[t]hese facts are in the data of the studies, and they follow regardless of whether Schein terminated its discussions with Smile Source and Kois or visa versa." (CX7101 at 049 (¶ 119) (Marshall Expert Rebuttal Report)). Moreover, this Proposed Finding is irrelevant because Dr. Marshall's findings and opinions on structural breaks are sound for the reasons explained in Responses to Proposed Finding Nos. 1636-1656 below. [REDACTED]

[REDACTED]. Additionally, this Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence to the extent that it suggests no structural breaks exist because ample evidence in the record support findings of structural breaks or changes in Respondents conduct during the relevant period. (CCFF ¶¶ 1316-1387). Finally, this Proposed Finding is

inaccurate, incomplete, and misleading for reasons explained in Responses to Proposed Finding Nos. 1129-1137.

1132. While Dr. Goldsmith testified that [REDACTED] neither Dr. Goldsmith nor Complaint Counsel introduced these analyses into evidence. (Goldsmith, Tr. 2110, 2114-17). Nor did they produce any documents to corroborate Dr. Goldsmith's testimony [REDACTED] (Goldsmith, Tr. 2116-17). To the extent such analyses were performed, there is no evidence explaining how these analyses were constructed, describing the quality or comprehensiveness of the data used in conducting the analyses, or showing the magnitude or the alleged price creep. (Goldsmith, Tr. 2116-17). As such, testimony concerning Dr. Goldsmith's [REDACTED] and his testimony concerning [REDACTED] was introduced over Schein's objection and only for the limited purpose of showing how Dr. Goldsmith became aware of the issue and not for the truth of the matter asserted (i.e., whether Schein's prices actually increased). (Goldsmith, Tr. 1979-81). Even if evidence of Dr. Goldsmith's invoice analysis were admissible for the purpose of showing Smile Source's motivation in terminating Schein, there is no evidence that the analysis occurred before Dr. Goldsmith started looking for a replacement distributors. (Goldsmith, 1947-48, 2082). Dr. Goldsmith testified he could not recall any [REDACTED] (Goldsmith, Tr. 2114-15 (confirming accuracy of deposition admission, CX 8039 (Goldsmith, Dep. at 60))).

Response to Proposed Finding No. 1132

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts that (1) Complaint Counsel has not introduced evidence to support to Dr.

Goldsmith's testimony about the end of the Smile Source relationship or (2) Complaint Counsel alleges that Schein terminated Smile Source. (*See* Complaint Counsel's Response to Proposed Finding No. 1121). [REDACTED]

[REDACTED] (CCFF ¶ 913; *see also* Complaint Counsel's Response to Proposed Finding No. 1129). The assertion regarding hearsay is also inaccurate and misleading, as the testimony concerning Dr. Goldsmith's invoice analyses was admitted for non-hearsay purposes and is relevant to show his state of mind and Smile Source's motivation in terminating Schein. Finally, the Proposed Finding is inaccurate and misleading

in asserting that Complaint Counsel must also produce documents to corroborate Dr.

Goldsmith's testimony. Complaint Counsel need not produce documentary evidence beyond the record evidence already discussed.

1133. [REDACTED]

[REDACTED] (Goldsmith, Tr. 2109-10). That transition, however, occurred in January 2011, approximately eight months before Dr. Goldsmith was hired. (Sullivan, Tr. 3925; Goldsmith, Tr. 1934; CX 2299-001). [REDACTED]

[REDACTED] (Goldsmith, Tr. 2110). As noted above, the evidence does not support the conclusion that Schein changed Smile Source's discounts when the account transitioned to HSD or thereafter.

Response to Proposed Finding No. 1133

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts that Complaint Counsel has not introduced evidence to support to Dr. Goldsmith's testimony about the end of the Smile Source relationship, or to the extent it asserts that Complaint Counsel alleges that Schein terminated Smile Source. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CCFF ¶¶ 901-912, 916-917; *see also* Complaint Counsel's Response to Proposed Finding No. 1129).

1134. [REDACTED]

[REDACTED] (Goldsmith, Tr. 1987-89). Dr. Goldsmith's trial testimony, however, was inconsistent with his deposition testimony. [REDACTED]

[REDACTED] (Goldsmith, Tr. 2115-16 (confirming accuracy of deposition admission, CX 8039 (Goldsmith, Dep. at 170))).

Response to Proposed Finding No. 1134

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent (1) it asserts that Complaint Counsel has not introduced evidence to support to Dr.

Goldsmith's testimony about the end of the Smile Source relationship, and (2) it asserts that Complaint Counsel alleges that Schein terminated Smile Source. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CCFF ¶¶ 901-912, 916-917). *See* Complaint Counsel's Response to Proposed Finding No. 1129.

1135. The documentary evidence also does not support the allegation that Smile Source raised systematic pricing concerns with Schein. In fact, Complaint Counsel introduced only one document reflecting a single dispute with one new Smile Source member in Hawaii that had not been properly set up in Schein's pricing systems. (CX 2571-002). [REDACTED]

(Goldsmith, Tr. 2118; CX 2571-001-02).

Response to Proposed Finding No. 1135

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent (1) it asserts that Complaint Counsel has not introduced evidence to support to Dr.

Goldsmith's testimony about the end of the Smile Source relationship, and (2) it asserts that Complaint Counsel alleges that Schein terminated Smile Source. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CCFF ¶¶ 901-912, 916-917). *See* Complaint Counsel's Response to Proposed Finding No. 1129. Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1136. [REDACTED] (Goldsmith, Tr. 2118; *see also* Goldsmith, Tr. 2122 [REDACTED])

2122 [REDACTED]

[REDACTED] CX 8039 (Goldsmith, Dep. at 173).

Response to Proposed Finding No. 1136

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent

(1) it asserts that Complaint Counsel has not introduced evidence to support to Dr.

Goldsmith's testimony about the end of the Smile Source relationship, and (2) it asserts that

Complaint Counsel alleges that Schein terminated Smile Source. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CCFF ¶¶ 901-912, 916-917). *See* Complaint

Counsel's Response to Proposed Finding No. 1129.

1137. Regardless of Complaint Counsel's unsupported allegation that Schein reduced the level of discounts to Smile Source in 2011, it is undisputed that Schein continued to give discounts to Smile Source members pursuant to the terms of the agreement up through the date Smile Source terminated Schein. (Goldsmith, Tr. 2117; Carlton, Tr. 5379-80; RX 2832-058 (Carlton analysis showing steady average discounts off of catalog prices)). As such, Schein's conduct is inconsistent with the allegations that Schein agreed with Benco at this time to refuse to give discounts to buying groups, or induced Smile Source to terminate it by reducing the discounts offered.

Response to Proposed Finding No. 1137

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent

(1) it asserts that Complaint Counsel has not introduced evidence to support to Dr.

Goldsmith's testimony about the end of the Smile Source relationship, and (2) it asserts that

Complaint Counsel alleges that Schein terminated Smile Source. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CCFF ¶¶ 901-912, 916-917). *See* Complaint

Counsel's Response to Proposed Finding No. 1129. The Proposed Finding is also contrary to

the weight of the evidence in stating that Schein's conduct was inconsistent with Complaint Counsel's allegations.

Regardless of who terminated whom, the record evidence shows that Schein did not work with Smile Source during the conspiracy and that Sullivan was pleased when the relationship ended at the beginning of 2012. (CCFF ¶¶ 914-924). Finally, evidence regarding Schein's conduct in relation to the pre-existing Smile Source relationship does not disprove Schein's participation in a conspiracy. The record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

c. The Evidence Does Not Support Complaint Counsel's Contention that Schein Reduced Service Levels to Smile Source.

1138. The evidence also does not support the allegation that Schein reduced service levels or FSC support to Smile Source, either because of any alleged agreement with Patterson or Benco or otherwise. [REDACTED]

[REDACTED] (Goldsmith, Tr. 2123).

Response to Proposed Finding No. 1138

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts that Complaint Counsel has not introduced evidence to support to Dr. Goldsmith's testimony about the end of the Smile Source relationship, or to the extent that it asserts Complaint Counsel alleges that Schein terminated Smile Source. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] (CCFF ¶¶ 901-912, 916-917; *see also* Complaint Counsel's Response to Schein's Proposed Finding No. 1129).

1139. [REDACTED]
[REDACTED]
[REDACTED] (Goldsmith, Tr. 2129). FSCs are paid based on gross margins. (Meadows, Tr. 2521). Because larger discounts mean lower gross margins, larger discounts also mean reduced FSC commissions. (Goldsmith, Tr. 2129 [REDACTED]
[REDACTED] Meadows, Tr. 2549).

Response to Proposed Finding No. 1139

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts that Complaint Counsel has not introduced evidence to support to Dr. Goldsmith's testimony about the end of the Smile Source relationship, or to the extent that it asserts Complaint Counsel alleges that Schein terminated Smile Source. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (CCFF ¶¶ 901-912, 916-917; *see also* Complaint Counsel's Response to Schein's Proposed Finding No. 1129).

1140. [REDACTED] (Goldsmith, Tr. 2123 [REDACTED]; *see also* Goldsmith, Tr. 2128-29; RX 2004-002 ("I think the main problem is [that] the [Burkhart] sales rep is treating the Smile Source accounts as a loss to her.")). [REDACTED]
[REDACTED] (Goldsmith, Tr. 2129).

Response to Proposed Finding No. 1140

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts that Complaint Counsel has not introduced evidence to support to Dr. Goldsmith's

testimony about the end of the Smile Source relationship, or to the extent that it asserts Complaint Counsel alleges that Schein terminated Smile Source. [REDACTED]

[REDACTED] (CCFF ¶¶ 901-912, 916-917; *see also* Complaint Counsel's Response to Schein's Proposed Finding No. 1129).

d. After-the-Fact Emails Do Not Support Complaint Counsel's Contention that Schein Induced Smile Source to Terminate the Relationship.

1141. Complaint Counsel asserts that an inference can be drawn from a February 2, 2012 email in which Mr. Sullivan directs his team to continue seeking business from Smile Source members following the termination. (CX 0199-001; *see also* Kahn, Tr. 40 (citing CX 0199 to show that "Schein changed its conduct," and asserting that "at that time Schein had instituted what the government calls a no-buying group policy.")). In that email, Mr. Sullivan expresses concerns that the team had taken so long to compile the list of Smile Source members, given that Smile Source had "fire[d]" Schein three weeks earlier. (CX 0199-003).

Response to Proposed Finding No. 1141

The Proposed Finding is incomplete, misleading, and contrary to the weight of the evidence.

CX0199, and the record evidence, show that Sullivan enforced a policy against buying groups during the conspiracy. (CCFF ¶¶ 717-732). In full, CX0911 shows that in February 2012, Sullivan wrote to other Schein executives and employees: "Let's really take this serious and get after it. I'm really less concerned about the actual revenues, although very important too, rather more about what we can do to KILL the buying group model!!" (CCFF ¶ 720 (quoting CX0199 at 001 (emphasis in original))); Sullivan, Tr. 3936-3937). Sullivan's statement shows that he was against working with buying groups during the alleged conspiracy. The record evidence also shows that Sullivan was pleased when the Smile Source relationship ended at the beginning of 2012. (CCFF ¶¶ 728-732, 914-924). On February 20,

2012, Foley wrote regarding the end of the Schein's relationship with Smile Source: "Tim Sullivan is happy that we are less one more BG." (CCFF ¶ 758 (quoting CX0238 at 001))).

1142. After receiving an email discussing difficulties in compiling the data, Mr. Sullivan wrote that he is "really interested to see how and what we can do to retain these customers and judge how effective their buying group model is. Let's really take this serious[ly] and get after it. I'm really less concerned about actual revenues, although very important too, rather more about what we can do to KILL their buying group model[.]" (CX 0199-001 (emphasis in original)).

Response to Proposed Finding No. 1142

Complaint Counsel has no specific response.

1143. Nothing in this email suggests any agreement between Schein and Benco. Instead, it reflects the legitimate desire to compete for business that may be at risk as a result of Smile Source's decision to contract with Burkhart. (Sullivan, Tr. 3932-33, 3935-37, 4144-46). Mr. Sullivan testified that, "when Smile Source terminated us ... I definitely wanted to kill – you know, go after ... Smile Source's model, and the customers that they were now attempting to switch to someone else." (Sullivan, Tr. 3932-33, 3935-37, 4144-46 ("We wanted to keep the business.")). Smile Source did not have any control over its members' purchasing – a fact they tout in their franchise agreement – so the loss of the Smile Source contract meant nothing in terms of Schein's ability to separately compete for the dentist, the "ultimate customer." (Sullivan, Tr. 3935; Goldsmith, Tr. 2054-55, 2092; RX 0290). There is no reason to doubt Mr. Sullivan's testimony, as it comports with the text of the email and Schein's actions.

Response to Proposed Finding No. 1143

The Proposed Finding is contrary to the weight of the evidence and misleading to the extent it asserts or implies that Sullivan's conduct was inconsistent with an agreement. The record evidence shows that Sullivan was against working with buying groups during the alleged conspiracy, and that Sullivan was pleased when Smile Source relationship ended at the beginning of 2012. (CCFF ¶¶ 728-732, 914-924). Contemporaneous documents also show that Sullivan was pleased when the Smile Source relationship ended. On February 20, 2012, Foley wrote regarding the end of the Schein's relationship with Smile Source: "Tim Sullivan is happy that we are less one more BG." (CCFF ¶ 758 (quoting (CX0238 at 001))). The Proposed Finding is also contrary to the weight of the record evidence, which shows that

although Smile Source did not *contractually* commit volume on behalf of its members, Dr.

Goldsmith testified that [REDACTED]

[REDACTED] (CCFF ¶ 1727). [REDACTED]

[REDACTED]. The record evidence also shows that Smile Source was a profitable customer for Schein prior to the end of the relationship. (CCFF ¶¶ 447-452; *see also* Complaint Counsel’s Response to Proposed Finding No. 1106).

1144. Contrary to Complaint Counsel’s assertion, Mr. Sullivan’s email reflects an executive trying to motivate his team to compete to retain business that was at risk due to Smile Source’s decision to switch to Burkhardt. (Sullivan, Tr. 3932-33, 3935-37, 4144-46). It does not reflect any special animus towards buying groups generally, does not reflect any “change in Schein’s buying group posture,” and does not support an inference of a conspiracy to boycott buying groups. (CX 2113-001; CX 0199; Kahn, Tr. 40; Sullivan, Tr. 3832-33).

Response to Proposed Finding No. 1144

The Proposed Finding is contrary to the weight of the evidence and misleading to the extent it asserts or implies that Schein or Sullivan was trying to retain or compete for Smile Source’s business in early 2012. Sullivan testified at trial that he wanted his team to pursue the revenues of the individual Smile Source customers, not Smile Source. (Sullivan, Tr. 3932-33, 3935-3937). Sullivan stated: “Let’s really take this serious and get after it. I’m really less concerned about the actual revenues, although very important too, rather more about what we can do to KILL the buying group model!!” (CCFF ¶¶ 729-732 (quoting CX0199 at 001 (emphasis in original))); Sullivan, Tr. 3936-3937). Sullivan also testified that if Schein had lost a customer and was trying to win them back, he would not otherwise instruct his team that he wanted to “KILL” a customer’s business model. (CCFF ¶ 732; Sullivan, Tr. 3933-3935). Sullivan also testified that if Schein was trying to win back a

customer: “We would go work our tail off to show them our value, price being a component of value, to earn their business back, the customer, meaning the dentist.” (CCFF ¶ 732; Sullivan, Tr. 3934). The record evidence establishes that Sullivan was against working with buying groups during the alleged conspiracy and that Sullivan was pleased when Smile Source relationship ended at the beginning of 2012. (CCFF ¶¶ 728-732, 914-924).

Contemporaneous documents also show that Sullivan was pleased when the Smile Source relationship ended. On February 20, 2012, Foley wrote regarding the end of the Schein’s relationship with Smile Source: “Tim Sullivan is happy that we are less one more BG.” (CCFF ¶ 758 (quoting (CX0238 at 001))).

1145. Complaint Counsel cites to after-the-fact documents by individuals who lack personal knowledge of the Smile Source relationship. (CX 0238; CX 2349; CX 2107). For example, in CX 0238 Mr. Foley speculated that Smile Source “dumped Schein” because HSD did “not give Smile Source the love that [Special Markets] provided.” (CX 0238-001). Mr. Foley testified, however, that he had no involvement with Smile Source at the time. (Foley, Tr. 4590 (“after Smile Source was out of Special Markets and in HSD, it was no longer of my concern.”), 4672 (“so did you work with Smile Source as of the date of this email, November 2, 2011? A. No.”), 4706 (“My responsibility with Smile Source ended in 2010.”)). Likewise, CX 2349 is just an email from Mr. Meadows speculating about whose “choice” the termination was. Mr. Meadows testified that he had no personal knowledge of Smile Source at the time. (Meadows, Tr. 2453). These emails were not authored by a person with personal knowledge of the Smile Source relationship at the time of the termination and are not entitled to any weight. (Foley, Tr. 4727-28; Sullivan, Tr. 4144-45).

Response to Proposed Finding No. 1145

The Proposed Finding is also factually inaccurate to the extent it asserts that Foley had no personal knowledge of the Smile Source relationship. Foley’s statement in CX0238 at 001 that HSD did “not give Smile Source the love that [Special Markets] provided” corroborates Dr. Goldsmith’s testimony about the end of the Smile Source relationship. (CCFF ¶ 916).

Regardless of whether Foley was responsible for Smile Source at the time of the statement quoted in CX0238 at 001, Foley testified that he had responsibility for the Smile Source account before it was transferred from Special Markets to HSD in 2011 and that he had

personal knowledge about Schein's relationship with Smile Source. (Foley, Tr. 4523-4524).

Moreover, Foley testified that statements in CX0238 at 001 were based on discussions he had with Sullivan about buying groups. (Foley, Tr. 4554-4556). Indeed, the documents cited support Dr. Goldsmith's testimony that Schein did not give Smile Source "the love that SM provided" and confirm that Sullivan was happy the Smile Source relationship ended. The Proposed Finding misleading to the extent it implies that Complaint Counsel alleges that Schein terminated Smile Source. Regardless of who terminated whom, the record evidence shows that Schein did not work with Smile Source during the conspiracy and that Sullivan was pleased when the relationship ended at the beginning of 2012. (CCFF ¶¶ 914-924).

Finally, evidence regarding Schein's conduct in relation to the pre-existing Smile Source relationship does not disprove Schein's participation in a conspiracy. The record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

e. The Respondents' Conduct Towards Smile Source Was Non-Parallel and Does Not Support an Inference of a Conspiracy.

1146. [REDACTED]

[REDACTED] (Goldsmith, Tr. 2009-14, 2134-39). The evidence shows that Respondents' conduct in dealing with Smile Source during this time was inconsistent with a conspiracy among the Respondents.

Response to Proposed Finding No. 1146

The second sentence of the Proposed Finding is not supported by a citation and should be disregarded. Nonetheless, the Proposed Finding is misleading and contrary to the weight of

the evidence to the extent it asserts that Respondents' conduct in dealing with Smile Source was inconsistent with a conspiracy. The record evidence establishes that Schein did not work with Smile Source during the conspiracy and that Sullivan was pleased when the relationship ended at the beginning of 2012. (CCFF ¶¶ 914-924). This is consistent with the weight of the record evidence, which establishes that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

i. Patterson Said No.

1147. On September 30, 2013, Dr. Goldsmith sent an email to Patterson to explore "possibilities for a partnership" since it was "growing rapidly" and Burkhart did "not have a national footprint." (CX 3277-001-02). Following that inquiry, Dr. Goldsmith met with Patterson's head of Special Markets Neal McFadden at an ADA meeting on October 9, 2013, and again with Mr. McFadden and Patterson's Vice President of Sales, Dave Misiak at Patterson's headquarters in November 2013. (CX 3278-001; McFadden, Tr. 2717; Misiak, Tr. 1401-02).

Response to Proposed Finding No. 1147

Complaint Counsel has no specific response. However, the Proposed Finding is contrary to the weight of the record evidence to the extent it asserts or implies that Respondents' conduct in dealing with Smile Source was inconsistent with a conspiracy. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to "KILL the buying group model," and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence also shows that Schein worked with

buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

1148. On November 20, 2013, Mr. Misiak informed Smile Source that it was "not interested" in pursuing a relationship with Smile Source. (CX 0147-001; Misiak, Tr. 1402).

Response to Proposed Finding No. 1148

Complaint Counsel has no specific response.

ii. Benco Said No.

1149. The record evidence conflicts as to whether Smile Source reached out to Benco in the fall of 2013, but it clearly did so in early 2014. (Ryan, Tr. 1188-89; Cohen, Tr. 784-85, 787-88; RX 1022-002). Regardless of whether there was one or two approaches by Benco in this time frame, the evidence does not support an inference of an agreement between among the Respondents.

Response to Proposed Finding No. 1149

The second sentence is not supported by any citation to the record evidence and should be disregarded. The first sentence of the Proposed Finding is not supported by the cited evidence and is inaccurate. Benco did not bid for Smile Source when it approached Benco in 2011 and 2012. (CCFF ¶ 410; Cohen, Tr. 517; CX1138 at 001 (Statement of Ryan to Smile Source in 2011: "Unfortunately, I don't think we would be able to help you. Your structure meets our definition of GPO, and Benco does not participate in group purchasing organizations"); CX1219 at 002 (Statement of Ryan to Smile Source in 2012: "Benco doesn't recognize GPOs as a single customer)). Regardless, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts that the evidence does

not support finding a conspiracy. Complaint Counsel has identified, and the record evidence is replete with, examples of interfirm communications between Cohen and Sullivan between 2011 and 2015 that establish Benco orchestrated an agreement with Schein. (CCFF ¶¶ 327-354; *see also* CCFF ¶¶ 284-326). Moreover, the record evidence establishes that Benco's Cohen informed Sullivan of Benco's position with regard to bidding on buying groups and reached an understanding that Schein would not align itself with buying groups. (CCFF ¶¶ 661-684). Schein, in turn, ensured compliance by instructing its sales force to reject buying groups. (CCFF ¶¶ 686-954). Benco confronted Schein when it suspected Schein was discounting to buying groups, and Schein and Benco communicated when they were uncertain whether a customer qualified as a buying group. (CCFF ¶¶ 955-1100). The record evidence also shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein's internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195).

1150. While the record does not contain any communication between Smile Source and Benco in 2013, Dr. Goldsmith testified that he [REDACTED] (Goldsmith, Tr. 2009). In fact, Dr. Goldsmith had reached out to Benco a "second time" on July 25, 2012. (CX 1220-001; Ryan, Tr. 1183-84). Any communication in the fall of 2013 would have been a third time.

Response to Proposed Finding No. 1150

The Proposed Finding is misleading to the extent it [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CCFF ¶ 410; [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Contemporaneous documents corroborate Dr. Goldsmith's testimony that Smile

Source reached out to Benco for the third time in 2013. (CX1162 at 001). The Proposed Finding is also contrary to the weight of the evidence to the extent it asserts that Respondents' conduct in dealing with Smile Source was inconsistent with a conspiracy. Complaint Counsel has identified, and the record evidence is replete with, examples of interfirm communications between Cohen and Sullivan between 2011 and 2015 that establish Benco orchestrated an agreement with Schein. (CCFF ¶¶ 327-354; *see also* CCFF ¶¶ 284-326). This includes an 18 minute call from Benco's Ryan to Schein's Foley informing Schein that Benco would not bid on Smile Source, during which Foley "got the impression that they're anti buying group." (CCFF ¶¶ 1009-1013). Moreover, the record evidence establishes that Benco's Cohen informed Sullivan of Benco's position with regard to bidding on buying groups and reached an understanding that Schein would not align itself with buying groups. (CCFF ¶¶ 661-684). Schein, in turn, ensured compliance by instructing its sales force to reject buying groups. (CCFF ¶¶ 686-954). Benco confronted Schein when it suspected Schein was discounting to buying groups, and Schein and Benco communicated when they were uncertain whether a customer qualified as a buying group. (CCFF ¶¶ 955-1100). The record evidence also shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein's internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195).

1151. Nonetheless, while Mr. Ryan testified that the third contact occurred in February 2014, documents suggest that there may have been an earlier communication. (Ryan, Tr. 1118-19). A January 27, 2014 internal Benco email from Mr. Ryan to Mr. Cohen notes that Mr. Ryan had already "[t]alked to [Smile Source] three times." (CX 1162-001 (January 27, 2014 email from Ryan noting that he has already "blown these guys off three times.")).

Response to Proposed Finding No. 1151

The Proposed Finding is misleading to the extent it implies that Dr. Goldsmith's testimony about discussions between Smile Source and Benco are inaccurate. The record evidence and

Dr. Goldsmith's testimony confirms that Smile Source reached out to Benco in 2013 for the third time. (CCFF ¶ 410; [REDACTED]

[REDACTED]. Contemporaneous documents corroborate Dr. Goldsmith's testimony that Smile Source reached out to Benco for the third time in 2013. (CX1162 at 001). The Proposed Finding is also contrary to the weight of the evidence to the extent it asserts that Respondents' conduct in dealing with Smile Source was inconsistent with a conspiracy. Complaint Counsel has identified, and the record evidence is replete with, examples of interfirm communications between Cohen and Sullivan between 2011 and 2015 that establish Benco orchestrated an agreement with Schein. (CCFF ¶¶ 327-354; *see also* CCFF ¶¶ 284-326). This includes an 18 minute call from Benco's Ryan to Schein's Foley informing Schein that Benco would not bid on Smile Source, during which Foley "got the impression that they're anti buying group." (CCFF ¶¶ 1009-1013). Moreover, the record evidence establishes that Benco's Cohen informed Sullivan of Benco's position with regard to bidding on buying groups and reached an understanding that Schein would not align itself with buying groups. (CCFF ¶¶ 661-684). Schein, in turn, ensured compliance by instructing its sales force to reject buying groups. (CCFF ¶¶ 686-954). Benco confronted Schein when it suspected Schein was discounting to buying groups, and Schein and Benco communicated when they were uncertain whether a customer qualified as a buying group. (CCFF ¶¶ 955-1100). The record evidence also shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein's internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195).

1152. In late January 2014, Smile Source again attempted to secure a deal with Benco. Specifically, on January 26, 2014, at Smile Source's request, Mike O'Neil, a former executive at Dentsply (a large dental manufacturer) sent emails to Chuck Cohen and other Benco employees to facilitate discussions about a possible distribution agreement. (CX 1163-001-02; CX 1162-001-02).

Response to Proposed Finding No. 1152

Complaint Counsel has no specific response. However, the Proposed Finding is also contrary to the weight of the evidence to the extent it asserts that Respondents' conduct in dealing with Smile Source was inconsistent with a conspiracy. Complaint Counsel has identified, and the record evidence is replete with, examples of interfirm communications between Cohen and Sullivan between 2011 and 2015 that establish Benco orchestrated an agreement with Schein. (CCFF ¶¶ 327-354; *see also* CCFF ¶¶ 284-326). This includes an 18 minute call from Benco's Ryan to Schein's Foley informing Schein that Benco would not bid on Smile Source, during which Foley "got the impression that they're anti buying group." (CCFF ¶¶ 1009-1013). Moreover, the record evidence establishes that Benco's Cohen informed Sullivan of Benco's position with regard to bidding on buying groups and reached an understanding that Schein would not align itself with buying groups. (CCFF ¶¶ 661-684). Schein, in turn, ensured compliance by instructing its sales force to reject buying groups. (CCFF ¶¶ 686-954). Benco confronted Schein when it suspected Schein was discounting to buying groups, and Schein and Benco communicated when they were uncertain whether a customer qualified as a buying group. (CCFF ¶¶ 955-1100). The record evidence also shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein's internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195).

1153. Mr. Cohen responded the same day that, while he would meet with Smile Source, "they should know going in that we do NOT work with, or recognize, buying groups." (CX 1163-002).

Response to Proposed Finding No. 1153

Complaint Counsel has no specific response. However, the Proposed Finding is also contrary to the weight of the evidence to the extent it asserts that Respondents' conduct in dealing with Smile Source was inconsistent with a conspiracy. Complaint Counsel has identified, and the record evidence is replete with, examples of interfirm communications between Cohen and Sullivan between 2011 and 2015 that establish Benco orchestrated an agreement with Schein. (CCFF ¶¶ 327-354; *see also* CCFF ¶¶ 284-326). This includes an 18 minute call from Benco's Ryan to Schein's Foley informing Schein that Benco would not bid on Smile Source, during which Foley "got the impression that they're anti buying group." (CCFF ¶¶ 1009-1013). Moreover, the record evidence establishes that Benco's Cohen informed Sullivan of Benco's position with regard to bidding on buying groups and reached an understanding that Schein would not align itself with buying groups. (CCFF ¶¶ 661-684). Schein, in turn, ensured compliance by instructing its sales force to reject buying groups. (CCFF ¶¶ 686-954). Benco confronted Schein when it suspected Schein was discounting to buying groups, and Schein and Benco communicated when they were uncertain whether a customer qualified as a buying group. (CCFF ¶¶ 955-1100). The record evidence also shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198).

Furthermore, Benco, Patterson, and Schein's internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195).

1154. At Mr. O'Neil's urging, Mr. Cohen and Mr. Ryan met with Smile Source's President Trevor Maurer at the ADA Chicago Mid-Winter meeting in February 2014 and delivered the same message. (CX 1163-001; RX 1022-001-02; Ryan, Tr. 1188-89; Cohen, Tr. 784-85, 787-88).

Response to Proposed Finding No. 1154

Complaint Counsel has no specific response. However, the Proposed Finding is also contrary to the weight of the evidence to the extent it asserts that Respondents' conduct in dealing with Smile Source was inconsistent with a conspiracy. Complaint Counsel has identified, and the record evidence is replete with, examples of interfirm communications between Cohen and Sullivan between 2011 and 2015 that establish Benco orchestrated an agreement with Schein. (CCFF ¶¶ 327-354; *see also* CCFF ¶¶ 284-326). This includes an 18 minute call from Benco's Ryan to Schein's Foley informing Schein that Benco would not bid on Smile Source, during which Foley "got the impression that they're anti buying group." (CCFF ¶¶ 1009-1013). Moreover, the record evidence establishes that Benco's Cohen informed Sullivan of Benco's position with regard to bidding on buying groups and reached an understanding that Schein would not align itself with buying groups. (CCFF ¶¶ 661-684). Schein, in turn, ensured compliance by instructing its sales force to reject buying groups. (CCFF ¶¶ 686-954). Benco confronted Schein when it suspected Schein was discounting to buying groups, and Schein and Benco communicated when they were uncertain whether a customer qualified as a buying group. (CCFF ¶¶ 955-1100). The record evidence also shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198).

Furthermore, Benco, Patterson, and Schein's internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195).

1155. There is no evidence of any communications between Schein and Benco concerning Smile Source in January or February of 2014. (Cohen, Tr. 779; Ryan, Tr. 1252). Rather, the evidence shows that Benco made a unilateral decision to not enter into a distribution agreement with Smile Source based on its own company policy, consistent with the approach it previously and consistently communicated to Smile Source since 2011. (Cohen, Tr. 780-81, 783-84).

Response to Proposed Finding No. 1155

The Proposed Finding is contrary to the weight of the evidence to the extent it asserts that Benco made a unilateral decision not to deal with Smile Source. The record evidence shows that Benco and Schein communicated about Smile Source at least once, and that Benco understood that Schein and Patterson also were not dealing with buying groups or Smile Source. (CCFF ¶¶ 674-679). Benco reached out to Schein to discuss buying groups on no fewer than six occasions during the period from 2011 through 2014 and understood that Schein had a policy against recognizing buying groups. (CCFF ¶¶ 679-681). Record evidence shows that Schein and Benco communicated about Smile Source a few months prior. In October 2013, Benco's Ryan called Schein's Foley about Smile Source when Smile Source approached both companies regarding potentially working together, and Ryan told Foley that Benco would not bid on Smile Source. (CCFF ¶¶ 1006-1019). The phone call lasted 18 minutes. (CCFF ¶ 1010). Benco declined to work with Smile Source in 2013 and 2014. (CCFF ¶ 1020). Other record evidence shows that Cohen reached out to Sullivan when he believed that Sullivan might be selling to buying groups, such as Smile Source. (CCFF ¶¶ 978-993).

iii. Schein Said Yes.

1156. At the same time that Smile Source was reaching out to Patterson and Benco, Smile Source also reached out to Schein. Schein's response to Smile Source was markedly different from Patterson's and Benco's, and is inconsistent with the alleged conspiracy. (Goldsmith, Tr. 2139; *compare* RX 2328-001 with CX 0147-001 and CX 1163-002).

Response to Proposed Finding No. 1156

The Proposed Finding is contrary to the weight of the evidence to the extent it asserts or implies that Schein contracted with buying groups during the conspiracy or that Schein's actions were inconsistent with an agreement. Complaint Counsel contends that Schein's 2014

proposal to Smile Source was an attempt at cheating on the agreement. (Kahn, Tr. 61). The record evidence shows that Schein's interactions with Smile Source in 2014 was an attempt at cheating—Schein knew Benco and Patterson would not be bidding, offered Smile Source a low, non-competitive bid, instructed its team not to do business with buying groups at the time it was allegedly working on that bid, and Sullivan continued instructing against buying groups after the bid. First, the record evidence shows that by 2014, the Big Three already knew that they would not discount to buying groups. (CCFF ¶¶ 674-676, 700, 1178-1198). Second, the record evidence also shows that the proposed discount in 2014 was non-competitive at 7%, a discount that was significantly lower than what Schein gave to Smile Source in the pre-conspiracy relationship. (CCFF ¶¶ 1829-1837). [REDACTED]

[REDACTED]
[REDACTED]
(CCFF ¶ 1835, 1843-1847). Schein's 2014 partnership proposal to do business with Smile Source members offered [REDACTED]

[REDACTED]
[REDACTED]. Both Dr. Goldsmith and Maurer expected [REDACTED]
[REDACTED]

[REDACTED] (CCFF ¶¶ 1835-1836). Third, just several months after the proposal, Sullivan told other Schein executives internally that he was "Not interested" in the arrangement that Smile Source had been seeking and continued instructing against buying groups like Kois. (CCFF ¶¶ 1849, 809). Sullivan stated: "I still believe this is a slippery slope . . . don't plan to take the lead role." (CCFF ¶ 809). Fourth, even at the same time Schein was allegedly working on a bid for Smile Source, it was instructing its team not to do business with buying groups: "Just for clarity, we are NOT participating in any GPOs

regardless of what they promise to bring us.” (CCFF ¶ 816 (quoting CX2354 at 001) (emphasis in original)). Finally, the record evidence shows that Schein’s meeting with Smile Source was private, took place on Schein’s premises, and only involved the heads of Schein and Smile Source. (CCFF ¶ 1826; Maurer, Tr. 4941). [REDACTED]

[REDACTED]. There is also no evidence that Benco or Patterson ever learned of Schein’s meeting with Smile Source in 2014.

Indeed, evidence of the 2014 proposal is consistent with the weight of the record evidence. Schein had a policy to turn down buying groups during the conspiracy and did so, and it also attempted to cheat on that agreement in offering a low, non-competitive bid to Smile Source in 2014. (CCFF ¶¶ 661-954, 1824-1851; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

1157. On October 28, 2013, Dr. Goldsmith sent an email to Mr. Sullivan seeking to set up a meeting at an upcoming trade show to “discuss some possibilities for ... renewing our partnership.” (CX 2580-001). Mr. Sullivan agreed to meet, and he and Schein’s Mr. Chatham met Dr. Goldsmith at the ADA meeting the following week. (CX 2580-001; RX 2328-001-02; Goldsmith, Tr. 2014, 2137; Sullivan, Tr. 4165-66).

Response to Proposed Finding No. 1157

The Proposed Finding is contrary to the weight of the evidence to the extent it asserts or implies that Schein contracted with buying groups during the conspiracy or that Schein’s actions were inconsistent with an agreement. Patterson and Benco also agreed to meet with Smile Source in the 2013-2014 period, as Schein concedes in its prior Proposed Findings, but neither bid on Smile Source in that time period. (CCFF ¶¶ 641-642; SF 1213, 1153, 1147, 1154). As set forth in Response to Proposed Finding No. 1156, Complaint Counsel contends that Schein’s 2014 Proposal to Smile Source was an attempt at cheating on the agreement.

(Kahn, Tr. 61). The record evidence shows that Schein's interactions with Smile Source in 2014 was an attempt at cheating on the agreement. (*See* Complaint Counsel's Response to Proposed Finding No. 1156).

1158. Dr. Goldsmith described the meeting as [REDACTED]

[REDACTED] (Goldsmith, Tr. 2014).

[REDACTED] (Goldsmith, Tr. 2138).

Response to Proposed Finding No. 1158

The Proposed Finding is contrary to the weight of the evidence to the extent it asserts or implies that Schein contracted with buying groups during the conspiracy or that Schein's actions were inconsistent with an agreement. Patterson and Benco also agreed to meet with Smile Source in the 2013-2014 period, as Schein concedes in its prior Proposed Findings, but neither bid on Smile Source in that time period. (CCFF ¶¶ 641-642; SF 1213, 1153, 1147, 1154). As set forth in Response to Proposed Finding No. 1156, Complaint Counsel contends that Schein's 2014 Proposal to Smile Source was an attempt at cheating on the agreement. (Kahn, Tr. 61). The record evidence shows that Schein's interactions with Smile Source in 2014 was an attempt at cheating on the agreement. (*See* Complaint Counsel's Response to Proposed Finding No. 1156).

1159. A month later, on November 20, 2013, Dr. Goldsmith followed up with Mr. Sullivan asking whether Mr. Sullivan could "foresee any possibility of doing business together," and again suggested a brief meeting at another trade show. (RX 2328-002).

Response to Proposed Finding No. 1159

The Proposed Finding is contrary to the weight of the evidence to the extent it asserts or implies that Schein contracted with buying groups during the conspiracy or that Schein's actions were inconsistent with an agreement. Patterson and Benco also agreed to meet with

Smile Source in the 2013-2014 period, as Schein concedes in its prior Proposed Findings, but neither bid on Smile Source in that time period. (CCFF ¶¶ 641-642; SF 1213, 1153; 1147, 1154). As set forth in Response to Proposed Finding No. 1156, Complaint Counsel contends that Schein's 2014 Proposal to Smile Source was an attempt at cheating on the agreement. (Kahn, Tr. 61). The record evidence shows that Schein's interactions with Smile Source in 2014 was an attempt at cheating on the agreement. (*See* Complaint Counsel's Response to Proposed Finding No. 1156).

1160. Mr. Sullivan immediately responded, saying that "Yes, absolutely would like to discuss further. However, I think we need more than a few minutes together on a convention floor. I think we could use a couple of hours discussing details.... I am confident that there is something here for us to partner on together." (RX 2328-001; Goldsmith, Tr. 2014-18; Sullivan, Tr. 4167-68).

Response to Proposed Finding No. 1160

The Proposed Finding is contrary to the weight of the evidence to the extent it asserts or implies that Schein contracted with buying groups during the conspiracy or that Schein's actions were inconsistent with an agreement. Patterson and Benco also agreed to meet with Smile Source in the 2013-2014 period, as Schein concedes in its prior Proposed Findings, but neither bid on Smile Source in that time period. (CCFF ¶¶ 641-642; SF 1213, 1153; *see* SF 1147, 1154). As set forth in Response to Proposed Finding No. 1156, Complaint Counsel contends that Schein's 2014 Proposal to Smile Source was an attempt at cheating on the agreement. (Kahn, Tr. 61). The record evidence shows that Schein's interactions with Smile Source in 2014 was an attempt at cheating on the agreement. (*See* Complaint Counsel's Response to Proposed Finding No. 1156).

1161. [REDACTED] (Goldsmith, Tr. 2139).

Indeed, the very same day that Mr. Sullivan said "Yes, absolutely would like to discuss further," Patterson said it was "not interested." (*Compare* RX 2328-001 *with* CX 0147-001). This is

another instance of non-parallel conduct among the Respondents, and conduct by Schein that is inconsistent with the alleged conspiracy.

Response to Proposed Finding No. 1161

The Proposed Finding is contrary to the weight of the evidence to the extent it asserts or implies that Schein contracted with buying groups during the conspiracy or that Schein's actions were inconsistent with an agreement. Patterson and Benco also agreed to meet with Smile Source in the 2013-2014 period, as Schein concedes in its prior Proposed Findings, but neither bid on Smile Source in that time period. (CCFF ¶¶ 641-642; SF 1213, 1153; *see* SF 1147, 1154). As set forth in Response to Proposed Finding No. 1156, Complaint Counsel contends that Schein's 2014 Proposal to Smile Source was an attempt at cheating on the agreement. (Kahn, Tr. 61). The record evidence shows that Schein's interactions with Smile Source in 2014 was an attempt at cheating on the agreement. (*See* Complaint Counsel's Response to Proposed Finding No. 1156).

1162. On January 22, 2014, Mr. Sullivan and Mr. Chatham met with Smile Source's then and current President Trevor Maurer; its Chief Dental Officer Dr. Goldsmith, and VP of Vendor Relations Dr. John McCall to discuss the possibility of working together. (CX 2587-001; Sullivan, Tr. 4167-68; Maurer, Tr. 4940-41). Mr. Sullivan described the meeting as a "very positive." (Sullivan, Tr. 4168).

Response to Proposed Finding No. 1162

The Proposed Finding is contrary to the weight of the evidence to the extent it asserts or implies that Schein contracted with buying groups during the conspiracy or that Schein's actions were inconsistent with an agreement. Patterson and Benco also agreed to meet with Smile Source in the 2013-2014 period, as Schein concedes in its prior Proposed Findings, but neither bid on Smile Source in that time period. (CCFF ¶¶ 641-642; SF 1213, 1153; *see* SF 1147, 1154). As set forth in Response to Proposed Finding No. 1156, Complaint Counsel contends that Schein's 2014 Proposal to Smile Source was an attempt at cheating on the

agreement. (Kahn, Tr. 61). The record evidence shows that Schein's interactions with Smile Source in 2014 was an attempt at cheating on the agreement. (*See* Complaint Counsel's Response to Proposed Finding No. 1156).

1163. On February 19, 2014, Dave Steck circulated a draft of Schein's Smile Source proposal to HSD and Special Markets for input. (CX 2462-001). A month later, Mr. Steck circulated a revised version of what Schein planned to offer Smile Source. (RX 2419-001). Mr. Steck recognized that Smile Source would want a "higher discount," but believed that this was a "good negotiating place for us to begin." (RX 2419-001; Sullivan, Tr. 4170). Shortly thereafter, Schein presented an initial "Partnership Proposal" to Smile Source. (CX 4105-001-11; Sullivan, Tr. 4170). The proposal was "competitive" expressly designed to form a "win-win" partnership by offering a "clear economic benefit to Smile Source Members ... beyond what they could individually realize." (CX 4105-002; Maurer, Tr. 4942). Schein offered to assign a "trained and certified" FSC to each member. (CX 4105-003). And it offered "a discount on all products and services purchased from Henry Schein Dental," including a 7% discount on branded supplies, a 14% discount on private label supplies; a 10% discount on equipment, 10% discount on technical service, and a 5% discount on business solutions, practice management software licenses, and CAD-CAM supplies or fees. (CX 4105-009). Schein also offered an additional 2% rebate if certain volume and other conditions were met. (CX 4105-009).

Response to Proposed Finding No. 1163

The Proposed Finding is contrary to the weight of the evidence to the extent it asserts or implies that Schein contracted with buying groups during the conspiracy or that Schein's actions were inconsistent with an agreement. As set forth in Response to Proposed Finding No. 1156, Complaint Counsel contends that Schein's 2014 proposal to Smile Source was an attempt at cheating on the agreement. (Kahn, Tr. 61). The record evidence shows that Schein's interactions with Smile Source in 2014 was an attempt at cheating on the agreement. (*See* Complaint Counsel's Response to Proposed Finding No. 1156). The Proposed Finding is also contrary to the weight of the evidence, which shows that the 2014 proposal to Smile Source was not competitive. Schein's partnership proposal to Smile Source in early 2014 offered a 7% discount off of catalog for private label brand merchandise. (CCFF ¶ 1829). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CCFF ¶ 1835). Schein's 2014 partnership proposal to do business with Smile Source members offered [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CCFF ¶¶ 1833,

1838). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1164. Smile Source rejected Schein's offer in favor of continuing its partnership with Burkhart and entering into a new contract with Darby, Schein's business affiliate. (Steck, Tr. 3794; Sullivan, Tr. 4171-73 ("Q. So they decided to go with – probably to go with a company that you own 45 percent of. A. Correct."); Goldsmith, Tr. 2156-57; CX 2591-002; Maurer, Tr. 4942-43, 4945).

Response to Proposed Finding No. 1164

The Proposed Finding is contrary to the weight of the evidence to the extent it asserts or implies that Smile Source rejected Schein's proposal in order to work with Darby. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. The record evidence shows that [REDACTED]

[REDACTED]

(CCFF ¶¶ 1829-1838; *see also* Complaint Counsel’s Response to Proposed Finding No.

1163). Further, Smile Source preferred to work with [REDACTED]

[REDACTED]

[REDACTED] (CCFF ¶ 915). Darby was not a full-service distributor. (CCFF ¶ 1493). Burkhart was a regional distributor and did not have a national footprint. (CCFF ¶ 1453, Goldsmith, Tr. 1946).

The Proposed Finding is also misleading to the extent it implies that Smile Source’s relationship with Darby, which Schein calls its “business affiliate,” has any bearing on or should be attributed to Schein. Darby is a separate company from Henry Schein. (Sullivan, Tr. 4348). Schein nor Sullivan run the day-to-day business of Darby. (Sullivan, Tr. 4348). Darby has its own President, and its own executives that are in charge of its sales force. (Sullivan, Tr. 4348). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1165. John Chatham, HSD Vice President, reported: “Guys, [I] just spoke with Andrew Goldsmith. They as a group have decided to probably go with Darby [Schein’s business affiliate] for their supply business. I truly believe he wanted us and was voted down by the group. We chatted for 20 minutes and I brought up some things he hadn’t thought of.... I believe he is going to make one more run with the business leaders.” (CX 2591-002).

Response to Proposed Finding No. 1165

The Proposed Finding is contrary to the weight of the evidence to the extent it asserts or implies that Schein contracted with buying groups during the conspiracy or that Schein’s actions were inconsistent with an agreement. (*See* Complaint Counsel’s Response to Proposed Finding No. 1156). The Proposed Finding is also contrary to the weight of the evidence, which shows that the 2014 proposal to Smile Source was not competitive. (*See*

Complaint Counsel's Response to Proposed Finding No. 1163). The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it asserts or implies that Smile Source rejected Schein's proposal in order to work with Darby. (*See* Complaint Counsel's Response to Proposed Finding No. 1164).

1166. Instead of giving up, Schein attempted to "sweeten the pot" by increasing its proposed discounts by 2% on branded products and 4% on private label products. (Steck, Tr. 3795; CX 2591-001-02 ("I think (as you and I discussed) we should increase the discount to 9/18 as our best and final offer.")). This increased Schein's originally proposed discount from 7/14 to 9/18. (Steck, Tr. 3795; CX 2591-001-02). Schein's new offer to Smile Source was superior to Schein's top VPA which is typically reserved for customers with at least \$75,000 in volume. (Steck, Tr. 3795-97; CX 2828-001).

Response to Proposed Finding No. 1166

The Proposed Finding is not supported by the cited evidence and is contrary to the weight of the evidence to the extent it asserts or implies that Schein ever increased the offer to Smile Source in its 2014 proposal or provided a "new offer." [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Schein did not elicit testimony from any witness with personal knowledge of an increased offer by Schein to Smile Source. A citation to Steck's testimony does not support the assertion, as Steck has no foundation to testify about the call between Chatham and Dr. Goldsmith. (CCFF ¶¶ 1842-1843). Steck testified that he has no personal knowledge of that call between Chatham and Dr. Goldsmith in 2014, and he testified that he was not on the alleged call. (Steck, Tr. 3796-3797, 3847).

The Proposed Finding is contrary to the weight of the evidence to the extent it asserts or implies that Schein contracted with buying groups during the conspiracy or that Schein's actions were inconsistent with an agreement. (*See* Complaint Counsel's Response to Proposed Finding No. 1156). The Proposed Finding is also contrary to the weight of the

evidence, which shows that the 2014 proposal to Smile Source was not competitive. (*See* Complaint Counsel's Response to Proposed Finding No. 1163). The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it asserts or implies that Smile Source rejected Schein's proposal in order to work with Darby. (*See* Complaint Counsel's Response to Proposed Finding No. 1164).

1167. Despite this, Smile Source turned down the offer. (Steck, Tr. 3795-96; CX 2828-001). [REDACTED] (RX 3079-001).

Response to Proposed Finding No. 1167

The Proposed Finding is contrary to the weight of the evidence to the extent it asserts or implies that Schein ever increased the offer to Smile Source in its 2014 proposal. The record shows that it did not. (*See* Complaint Counsel's Response to Proposed Finding No. 1166).

The Proposed Finding is also contrary to the weight of the evidence to the extent it asserts or implies that Smile Source rejected Schein's proposal in order to work Burkhardt or Darby.

The record evidence shows that [REDACTED]

[REDACTED] and neither Burkhardt nor Darby are full-service national distributors.

(*See* Complaint Counsel's Response to Proposed Finding No. 1164). The Proposed Finding is also contrary to the weight of the evidence to the extent it asserts or implies that Schein contracted with buying groups during the conspiracy or that Schein's actions were inconsistent with an agreement. (*See* Complaint Counsel's Response to Proposed Finding No. 1156). The Proposed Finding is also contrary to the weight of the evidence, which shows that the 2014 proposal to Smile Source was not competitive. (*See* Complaint Counsel's Response to Proposed Finding No. 1163).

1168. Demonstrating a complete lack of common understanding with Benco and Patterson, Schein's internal notes on the Smile Source proposal indicate that Schein believed it might be competing against Benco and Patterson for the Smile Source business in 2014. (CX 2536-011).

Response to Proposed Finding No. 1168

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts or implies that Schein believed it was competing against Benco or Patterson for Smile Source in 2014. The citation to CX2536-011 does not support the Proposed Finding, as it does not show that Schein believed it was competing against Benco or Patterson for Smile Source in 2014. (CX2536 at 011). The statements in CX2536, which the Proposed Finding refers to as “internal notes” regarding the 2014 proposal to Smile Source, are general statements about Schein’s offerings to customers. (CX2536 at 011). There is no record evidence that Schein believed it was competing against Benco or Patterson for Smile Source in 2014, or that the internal notes referenced in CX2536 were specific to the 2014 proposal. In fact, the record evidence shows that Benco informed Schein a few months before the 2014 proposal that it would not be bidding for Smile Source. (CCFF ¶¶ 1005-1019; *see also* Complaint Counsel’s Response to Proposed Finding No. 1155).

1169. Schein’s proposal to Smile Source is inconsistent with the alleged agreement to “refuse to offer discounted prices or otherwise negotiate with buying groups.” (Complaint ¶ 1).

Response to Proposed Finding No. 1169

The Proposed Finding is not supported by a citation to the Complaint, which does not state that any conduct is inconsistent with an agreement. Nonetheless, the Proposed Finding is contrary to the weight of the evidence and misleading to the extent it asserts or implies that Schein contracted with buying groups during the conspiracy or that Schein’s actions were inconsistent with the alleged agreement. Complaint Counsel contends that Schein’s 2014 proposal to Smile Source was an attempt at cheating on the agreement. (Kahn, Tr. 61). The record evidence shows that Schein’s interactions with Smile Source in 2014 was an attempt

at cheating, and such, Schein's proposal 2014 is not inconsistent with an agreement. (*See* Complaint Counsel's Response to Proposed Finding No. 1156).

1170. Complaint Counsel's expert, Dr. Marshall, agrees that Schein's 2014 bid for Smile Source was an example of non-parallel conduct between Schein, Patterson, and Benco. (Marshall, Tr. 2954-55, 2958). Complaint Counsel acknowledges this inconsistency and attempts to explain Schein's 2014 proposal to Smile Source as an instance of cheating on the agreement. (Kahn, Tr. 61 ("Schein will also claim that they submitted a bid to Smile Source in 2014; ... [w]ell, as with all price-fixing conspiracies, there's an incentive to cheat"); RXD 0017).

Response to Proposed Finding No. 1170

This Proposed Finding is inaccurate, incomplete, and misleading because Dr. Marshall did not agree that Schein's 2014 bid for Smile Source was an example of non-parallel conduct between Schein, Patterson, and Benco. Instead, in responding to Schein's counsel's incomplete hypothetical questions, Dr. Marshall explained that within the context of a conspiracy, this episode would be an example of cheating if it was a sincere effort to get the business. (Marshall, Tr. 2958). This Proposed Finding is misleading and inaccurate because the testimony cited does not support Schein's assertion that "Complaint Counsel acknowledges this inconsistency," and, thus this should be disregarded.

The Proposed Finding is also contrary to the weight of the evidence and misleading to the extent it asserts or implies that Schein contracted with buying groups during the conspiracy or that Schein's actions were inconsistent with the alleged agreement. Complaint Counsel contends that Schein's 2014 proposal to Smile Source was an attempt at cheating on the agreement. (Kahn, Tr. 61). The record evidence shows that Schein's interactions with Smile Source in 2014 was an attempt at cheating, and as such, Schein's proposal 2014 is not inconsistent with an agreement. (*See* Complaint Counsel's Response to Proposed Finding No. 1156). .

1171. As noted, Complaint Counsel’s assertion that Schein’s conduct constitutes “cheating” improperly presupposes the existence of a conspiracy. Moreover, Complaint Counsel has not presented evidence that would tend to suggest Schein’s 2014 bid constituted cheating. Specifically, there is no evidence that Patterson or Benco sought to enforce the alleged agreement or punish Schein’s alleged “cheating.” (SF 1156-71). In any event, regardless of how the conduct is characterized, it is clearly different from the other Respondents and inconsistent with the alleged conspiracy.

Response to Proposed Finding No. 1171

The first sentence of the Proposed Finding, that Complaint Counsel “presupposes” the existence of a conspiracy, is not supported by any citation to the record evidence and should be disregarded. The second sentence of the Proposed Finding is inaccurate and contrary to the weight of the evidence. Complaint Counsel has presented evidence, which shows that Schein’s interactions with Smile Source in 2014 was an attempt at cheating. (*See* Complaint Counsel’s Response to Proposed Finding No. 1156). The third sentence of the Proposed Finding is misleading to the extent it asserts that Patterson or Benco never punished Schein for its attempted cheating. There is no evidence, and the Proposed Finding cites none, that Benco or Patterson ever learned of Schein’s attempted cheating. Finally, the last sentence of the Proposed Finding is not supported by any citation to the record evidence and should be disregarded. Nonetheless, it is also misleading and contrary to the weight of the record evidence. The record evidence shows that Benco and Patterson refused to provide a discount to Smile Source because it was a buying group. (CCFF ¶¶ 410, 1021, 641-642, 652). Schein’s attempt at cheating on the conspiracy by negotiating with Smile Source is not inconsistent with a conspiracy nor does it disprove Schein’s participation in a conspiracy. Indeed, at the same time Schein was allegedly working on a bid for Smile Source, it was instructing its team not to do business with buying groups: “Just for clarity, we are NOT participating in any GPOs regardless of what they promise to bring us.” (CCFF ¶ 816 (quoting CX2354 at 001) (emphasis in original)).

1172. Complaint Counsel also elicited testimony from Dr. Goldsmith and its expert, Dr. Marshall, suggesting that Schein's bid was not a serious or meaningful offer. (Marshall, Tr. 2954-55 ("They submitted a nonserious bid."); Goldsmith, Tr. 2020 (characterizing the offer as a [REDACTED])).

Response to Proposed Finding No. 1172

The Proposed Finding is misleading and irrelevant. Complaint Counsel contends that Schein's 2014 proposal to Smile Source was an attempt at cheating on the agreement. (Kahn, Tr. 61). The record evidence shows that Schein's interactions with Smile Source in 2014 was an attempt at cheating, and as such, Schein's proposal 2014 is not inconsistent with an agreement. (See Complaint Counsel's Response to Proposed Finding No. 1156). The record evidence shows that Schein did not work with Smile Source during the conspiracy and that Sullivan was pleased when the relationship ended at the beginning of 2012. (CCFF ¶¶ 914-924). The record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). In addition, the citation to Dr. Marshall's testimony, Complaint Counsel's expert, for a factual proposition is improper and should be disregarded because it violates this Court's Order On Post-Trial Briefs. (Order On Post-Trial Briefs at 3 ("Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents."); *see also* Marshall Tr. at 2884-2885 (J. Chappell: "My advice to both parties, experts are not fact witnesses.")). Even so, Dr. Marshall's statement or characterization of the bid is irrelevant, as it has no bearing on the record evidence shows Schein's attempt at cheating on

the agreement in 2014. Moreover, to the extent the Proposed Finding asserts that Dr. Marshall's testimony is inconsistent with Complaint Counsel's position that Schein's 2014 bid on Smile Source was an attempt at cheating, that is misleading and contrary to the weight of the record evidence as set forth above. (*See* Complaint Counsel's Response to Proposed Finding No. 1156).

1173. The evidence does not support that conclusion that Schein's offer was not serious or meaningful. (Maurer, Tr. 4942-43). Mr. Foley, who had previously worked with Smile Source in Special Markets, testified at trial that Dave Steck reached out to him for help on pricing to make sure the proposal was "aggressive enough" to win the Smile Source bid. (Foley, Tr. 4654-55 (noting that HSD's 2014 proposal to Smile Source looked "like a winnable proposition" and that it "was even more aggressive than what [Special Markets] once had offered in 2010). Nor does the evidence suggest that Schein engaged (or had any motive to engage) in an elaborate ruse of submitting a bid it did not want to win in order to avoid simply turning Smile Source down as the other Respondents had. Complaint Counsel further fails to explain why Schein would devote so many resources to creating and negotiating a "fake bid."

Response to Proposed Finding No. 1173

The Proposed Finding is misleading and contrary to the weight of the record evidence.

Complaint Counsel contends that Schein's 2014 proposal to Smile Source was an attempt at cheating on the agreement. (Kahn, Tr. 61). The record evidence shows that Schein's interactions with Smile Source in 2014 was an attempt at cheating, and as such, Schein's proposal 2014 is not inconsistent with an agreement. (*See* Complaint Counsel's Response to Proposed Finding No. 1156). The record evidence shows that Schein did not work with Smile Source during the conspiracy and that Sullivan was pleased when the relationship ended at the beginning of 2012. (CCFF ¶¶ 914-924). As such, the Proposed Finding is also irrelevant as to its assertions about a "fake bid," which is not Complaint Counsel's position.

1174. Dr. Goldsmith's testimony that he was [REDACTED] by Schein's offer is contradicted by the evidence. (Goldsmith, Tr. 2029). First, he testified that he [REDACTED]

[REDACTED] (Goldsmith, Tr. 2158, 2160). Second, he said that [REDACTED]

[REDACTED] (Goldsmith, Tr. 2160).

Response to Proposed Finding No. 1174

The Proposed Finding is contrary to the weight of the evidence and misleading to the extent it asserts that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Dr. Goldsmith's testimony and the record evidence shows that Schein's 2014 proposal to Smile Source was not competitive. (*See* Complaint Counsel's Response to Proposed Finding No. 1163).

1175. Instead, Schein's bid to Smile Source was submitted in good faith. Schein believed that its offer to Smile Source was "compelling," "aggressive" and a "good effort" and was disappointed that it didn't win the business. (CX 2130-001 (Tim Sullivan "felt it was a very compelling offer" and so did one of Smile Source's "key guys."); CX 2508 (describing proposal as a "good effort;" and suggesting that it be "use[d] as a template with changes for GPOs going forward"); CX 2683-001 (Mr. Sullivan noting that "[w]e made a very aggressive and inclusive proposal to them that many of their execs liked...."); CX 2591-002; Sullivan, Tr. 4173-74; Steck, Tr. 3783-94; RX 2338-003 ("even though [Smile Source] didn't ultimately sign with us ... yet")).

Response to Proposed Finding No. 1175

The Proposed Finding is misleading and contrary to the weight of the record evidence.

Complaint Counsel contends that Schein's 2014 proposal to Smile Source was an attempt at cheating on the agreement. (Kahn, Tr. 61). The record evidence shows that Schein's

interactions with Smile Source in 2014 was an attempt at cheating, and as such, Schein's proposal 2014 is not inconsistent with an agreement. (*See* Complaint Counsel's Response to Proposed Finding No. 1156). In fact, just several months after the proposal, Sullivan told other Schein executives internally that he was "Not interested" in the arrangement that Smile Source had been seeking and Schein continued to instruct against buying group. (CCFF ¶ 1849 (quoting CX2470 at 002), 816 (quoting CX2354 at 001)). Following the proposal, Sullivan wrote: "they want [REDACTED] discount for members that we just can't do." (CCFF ¶ 1850 (quoting CX2683 at 001)). Indeed, the record evidence shows that Schein did not work with Smile Source during the conspiracy and that Sullivan was pleased when the relationship ended at the beginning of 2012. (CCFF ¶¶ 914-924).

1176. The evidence shows that Schein's proposal offered discounts greater than those typically available to independent dentists who did not make volume commitments. (Steck, Tr. 3782-90). Schein's Vice President David Steck, who prepared the Smile Source proposal, explained that the merchandise discounts of 7% on branded products, and 14% on private label products was typically only available to independent dentists who purchased at least \$35,000 of products from Schein and an improvement over Schein's second-highest Standard VPA. (Steck, Tr. 3791-93, 3849-50; CX 2508-011; CX 2828). In addition, Schein's proposal included discounts of equipment and other products and services, as well as an additional 2% rebate for purchasing at least \$35,000 in supplies and meeting other qualifying conditions. (Steck, Tr. 3782-87, 3793-94).

Response to Proposed Finding No. 1176

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts or implies that Schein's 2014 proposal to Smile Source is inconsistent with the alleged agreement or Complaint Counsel's allegations. Complaint Counsel contends that Schein's 2014 proposal to Smile Source was an attempt at cheating on the agreement. (Kahn, Tr. 61). The record evidence shows that Schein's interactions with Smile Source in 2014 was an attempt at cheating, and as such, Schein's proposal 2014 is not inconsistent with an agreement. (*See* Complaint Counsel's Response to Proposed Finding No. 1156). The

Proposed Finding is also contrary to the weight of the evidence, which shows that the 2014 proposal to Smile Source was not competitive. (*See* Complaint Counsel’s Response to Proposed Finding No. 1163). In fact, just several months after the proposal, Sullivan told other Schein executives internally that he was “Not interested” in the arrangement that Smile Source had been seeking and Schein continued to instruct against buying group. (CCFF ¶¶ 1849 (quoting CX2470 at 002), 816 (quoting CX2354 at 001)). Following the proposal, Sullivan wrote: “they want [REDACTED] discount for members that we just can’t do.” (CCFF ¶¶ 1850 (quoting CX2683 at 001)). Indeed, the record evidence shows that Schein did not work with Smile Source during the conspiracy and that Sullivan was pleased when the relationship ended at the beginning of 2012. (CCFF ¶¶ 914-924).

1177. [REDACTED]

(CX 7101-066-67 (Table 7)).

Response to Proposed Finding No. 1177

The Proposed Finding is misleading and irrelevant. Complaint Counsel contends that Schein’s 2014 proposal to Smile Source was an attempt at cheating on the agreement. (Kahn, Tr. 61). The record evidence shows that Schein’s interactions with Smile Source in 2014 was an attempt at cheating, and as such, Schein’s proposal 2014 is not inconsistent with an agreement. (*See* Complaint Counsel’s Response to Proposed Finding No. 1156).

This Proposed Finding is inaccurate and misleading to the extent that it suggests that the 7% discount that Schein offered to Smile Source was not below average discounts to independent dentists. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1178. Smile Source’s President, Trevor Maurer, also testified that Schein’s offer was comparable or “similar” to the pricing it was receiving from Burkhart. (Maurer, Tr. 4942-43 (“Q. And did you consider this to be a competitive proposal by Henry Schein? A. Yes. It was similar to the deal we had in place with Burkhart.”)). Indeed, Schein’s offer is objectively similar to Burkhart’s deal with Smile Source, and Complaint Counsel failed to show otherwise. (CX 4105 (Schein: supplies: 7-14%, plus 2% volume rebate; equipment, 10% plus 2% volume rebate); RX 2043 [REDACTED]). Mr. Maurer testified that the reason that Smile Source did not switch to Schein was “just loyalty [to] Burkhart.” (Maurer, Tr. 4945).

Response to Proposed Finding No. 1178

The Proposed Finding is inaccurate and contrary to the weight of the evidence to the extent it asserts or implies that Smile Source 2014 proposal was competitive to Burkhart or that Complaint Counsel has “failed to show otherwise.” First, Maurer’s testimony that the 2014 proposal was “objectively similar” to the Burkhart discount is not supported by the record evidence. [REDACTED]

[REDACTED] which is not similar to the 7% discount Schein offered in 2014. (*Compare* CCFF ¶ 181 *with* Maurer, Tr. 4945). Second, the record establishes that Dr. Goldsmith’s testimony is more reliable than Maurer’s testimony, and that more reliable testimony and the record evidence establishes that Schein’s 2014 proposal for a 7% discount was not competitive. As Schein concedes, and as Schein witnesses testified, Schein’s partnership proposal to Smile Source in early 2014 offered a 7% discount off of catalog for private label brand

merchandise. (See SF 1163, 1176; CCFF ¶ 1829; CX2508 at 011; CX2536 at 014;

[REDACTED]; Steck, Tr. 3790). Maurer's testimony about the 2014 proposal is contradicted by the contemporaneous documents and witness testimony. Dr. Goldsmith's testimony about the 2014 proposal discounts, by contrast, is consistent with Schein's contemporaneous documents and witness testimony. Maurer testified that he believed the 2014 Smile Source proposal offered a [REDACTED] off of a catalog discount, which is factually inaccurate and contradicted by the record evidence. (Maurer, Tr. 5004-5005).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1179. Neither Dr. Marshall, nor Dr. Goldsmith compared the pricing that Schein offered to the pricing that Burkhart offered. (Goldsmith, Tr. 2153-54; CX 8039 (Goldsmith, Dep. at 142, 243); CX 8040 (Marshall, Dep. at 240-41)). In fact, Dr. Goldsmith conceded that he did not [REDACTED] and [REDACTED] (Goldsmith, Tr. 2153-54).

Response to Proposed Finding No. 1179

The Proposed Finding is misleading, contrary to the weight of the record evidence, and irrelevant to the extent it asserts or implies that the asserted price comparison is required or otherwise disproves the fact that Schein's 2014 proposal was lower than what it offered Smile Source before and after the conspiracy period. The record evidence clearly shows that Schein's 2014 proposal was much lower than what it previously and later offered Smile

Source, after the conspiracy became difficult to maintain, and that it was an attempt on cheating on the agreement. (*See* Complaint Counsel’s Responses to Proposed Finding Nos. 1156, 1178).

1180. Schein considered using its Smile Source offer “as a template ... for GPOs going forward.” (CX 2508-001).

Response to Proposed Finding No. 1180

The Proposed Finding is misleading and irrelevant. Complaint Counsel contends that Schein’s 2014 proposal to Smile Source was an attempt at cheating on the agreement. (Kahn, Tr. 61). The record evidence shows that Schein’s interactions with Smile Source in 2014 was an attempt at cheating, and as such, Schein’s proposal 2014 is not inconsistent with an agreement. (*See* Complaint Counsel’s Response to Proposed Finding No. 1156). There is also no record evidence to show that Schein ever used the Smile Source proposal template to bid on any other buying groups during the alleged conspiracy, and Schein cites none.

1181. Even after its 2014 bid was rejected, Schein never wavered in its interest in Smile Source. On August 17, 2015, Mr. Maurer reached out to Tim Sullivan asking him if he was interested in catching up soon and Mr. Sullivan replied that he would “love to connect again.” (RX 2444-001-02; Sullivan, Tr. 4173). Two months later, Mr. Sullivan and Joe Cavaretta went to meet with Mr. Maurer at Smile Source’s headquarters. (CX 2606-001; CX 2605). At the meeting, Mr. Maurer explained that Smile Source had grown its membership to “360 members” and “claim[ed] to have over 85% compliance” from its members on purchasing supplies. (CX 2606-001-02).

Response to Proposed Finding No. 1181

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not participate in the conspiracy because of conduct that occurred after the conspiracy became difficult to maintain following Benco’s April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161). In fact, the record evidence shows that Schein had a policy to turn down buying groups during the conspiracy and did so,

but that it then competed for buying groups when the conspiracy became difficult to maintain. (CCFF ¶¶ 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

1182. After the meeting, Mr. Sullivan believed that Smile Source had “reached [a] tipping point and will gain momentum” in the future, and he was interested in working out a deal with Smile Source. (CX 2606-003; Sullivan, Tr. 4177). In late November, Mr. Sullivan met with Mr. Maurer again, this time at the Greater New York dental meeting. (RX 2116-002; Sullivan, Tr. 4176-77). At this point, Schein began working on a proposal to Smile Source based on the “new formulary pricing” program that had just been developed for the “Buying Group pricing model.” (CX 2606-004; RX 2116-001-02).

Response to Proposed Finding No. 1182

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not participate in the conspiracy because of conduct that occurred after the conspiracy became difficult to maintain following Benco’s April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161). Similarly, it is also misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it entered into an agreement with a buying group after the conspiracy became difficult. In fact, the record evidence shows that Schein had a policy to turn down buying groups during the conspiracy and did so, but that it then competed for buying groups when the conspiracy became difficult to maintain. (CCFF ¶¶ 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

1183. [REDACTED]

[REDACTED] (RX 2092-001).

Response to Proposed Finding No. 1183

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not participate in the conspiracy because of

conduct that occurred after the conspiracy became difficult to maintain following Benco's April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161). Similarly, it is also misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it entered into an agreement with a buying group after the conspiracy became difficult. In fact, the record evidence shows that Schein had a policy to turn down buying groups during the conspiracy and did so, but that it then competed for buying groups when the conspiracy became difficult to maintain. (CCFF ¶¶ 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

1184. [REDACTED]

[REDACTED] (RX 2092-001).

Response to Proposed Finding No. 1184

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not participate in the conspiracy because of conduct that occurred after the conspiracy became difficult to maintain following Benco's April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161). Similarly, it is also misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it entered into an agreement with a buying group after the conspiracy became difficult. In fact, the record evidence shows that Schein had a policy to turn down buying groups during the conspiracy and did so, but that it then competed for buying groups when the conspiracy became difficult to maintain. (CCFF ¶¶ 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

1185. Mr. Sullivan [REDACTED] was confident Mr. Maurer would like Schein's offer, but agreed that [REDACTED] Schein would be "ready when you are." (RX 2092-001; RX 2152-001 (noting that Schein expected to connect with Smile Source in April)). On August 30, 2016, Schein met with Smile Source at Smile Source's corporate headquarters. (RX 2160).

Response to Proposed Finding No. 1185

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not participate in the conspiracy because of conduct that occurred after the conspiracy became difficult to maintain following Benco's April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161). Similarly, it is also misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it entered into an agreement with a buying group after the conspiracy became difficult. In fact, the record evidence shows that Schein had a policy to turn down buying groups during the conspiracy and did so, but that it then competed for buying groups when the conspiracy became difficult to maintain. (CCFF ¶¶ 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

1186. [REDACTED]
[REDACTED] (CX 4099-001).

Response to Proposed Finding No. 1186

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not participate in the conspiracy because of conduct that occurred after the conspiracy became difficult to maintain following Benco's April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 1159-1161). Similarly, it is also misleading

to the extent it implies or asserts that Schein did not participate in the conspiracy because it entered into an agreement with a buying group after the conspiracy became difficult. In fact, the record evidence shows that Schein had a policy to turn down buying groups during the conspiracy and did so, but that it then competed for buying groups when the conspiracy became difficult to maintain. (CCFF ¶¶ 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

LL. Stark County Dental Society.

1187. The Stark County Dental Society ("Stark County") is a state dental society with close to 300-350 member dentists. (Baytosh, Tr. 1885).

Response to Proposed Finding No. 1187

Complaint Counsel has no specific response.

1188. Stark County does not have ownership in its member's practices. (RX 2947 (Cavaretta, Dep. at 79-80); *see also* RX 2253-002-04 (listing dentist members)).

Response to Proposed Finding No. 1188

Complaint Counsel has no specific response.

1189. Schein has been working with Stark County since at least 2004. (CX 2724-024).

Response to Proposed Finding No. 1189

Complaint Counsel has no specific response.

1190. Complaint Counsel's expert, Dr. Marshall, identified sales Schein made to Stark County members in Schein's sales data from 2009 through the present. (CX 7101-141).

Response to Proposed Finding No. 1190

The Proposed Finding is misleading to the extent it asserts Stark County is a buying group based on a citation to Dr. Marshall's report. It is also improper because that factual proposition must be established by fact witnesses or documents, not through expert testimony. (*See* February 21, 2019 Order on Post-Trial Briefs). Moreover, this Proposed

Finding is misleading to the extent that it suggests that Dr. Marshall considered Stark County Dental in his analysis of buying groups that Schein did business with during the relevant period – in fact, [REDACTED] Dr. Carlton identified Stark County Dental as an “Other Buying Group” that should not be considered in the calculus of Schein sales to buying group related to this case. [REDACTED]

[REDACTED]; *see also* RX2832 at 021 (¶¶ 28-29) (explaining that “Other Buying Groups” were excluded from his Table 1 calculation of Schein sales to “Buying Groups of Independent Dentists” because these “Other Buying Groups” are “buying groups other than buying groups of independent dentists.”)).

1191. Schein signed a formal agreement with Stark County on February 17, 2015. (RX 2253-001 (noting “since 2004”)).

Response to Proposed Finding No. 1191

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies Stark County is a buying group. The record evidence establishes that Stark County is not a buying group. In fact, it is a dental society similar to Corydon Palmer, which is also not a buying group.

(Baytosh, Tr. 1883; *see* Response to Proposed Finding No. 512). The record evidence shows that Schein provided only rebates, not discounts, to Stark County; that Schein received free exhibit space as part of the rebate agreement; that the rebates went directly to Stark County, not member dentists; and that Schein provided no pricing discounts to member dentists. (RX2253 at 001). As such, Schein’s agreement with a dental society is irrelevant to Schein’s conduct regarding buying groups and does not disprove its participation in a conspiracy.

1192. An unsigned agreement titled “2013-2014 Terms of Agreement Stark County Dental Society and Henry Schein Dental” lists terms nearly identical to those found in the 2015-2017 contract. (*Compare* RX 2253-001 *with* RX 2517-001).

Response to Proposed Finding No. 1192

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies Stark County is a buying group. The record evidence establishes that Stark County is not a buying group; that Schein provided only rebates, not discounts, to Stark County; that Schein received free exhibit space as part of the rebate agreement; that the rebates went directly to Stark County, not member dentists; and that Schein provided no pricing discounts to member dentists.

(RX2253 at 001). As such, Schein’s agreement with a dental society is irrelevant to Schein’s conduct regarding buying groups and does not disprove its participation in a conspiracy.

1193. Both the unsigned 2013-2014 agreement and the signed 2015-2017 agreement between Schein and Stark County provide for a rebate calculated as a percentage of members’ “total merchandise purchases.” (RX 2253-001; RX 2517-001). The more the members of Stark County purchase from Schein, the greater the rebate. (RX 2253-001; RX 2517-001).

Response to Proposed Finding No. 1193

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies Stark County is a buying group. The record evidence establishes that Stark County is not a buying group; that Schein provided only rebates, not discounts, to Stark County; that Schein received free exhibit space as part of the rebate agreement; that the rebates went directly to Stark County, not member dentists; and that Schein provided no pricing discounts to member dentists.

(RX2253 at 001). As such, Schein’s agreement with a dental society is irrelevant to Schein’s conduct regarding buying groups and does not disprove its participation in a conspiracy.

1194. Schein used its agreement with the Stark County Dental Society as a model for its agreement with Corydon Palmer. (Baytosh, Tr. 1885).

Response to Proposed Finding No. 1194

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies Corydon Palmer or Stark County is a buying group. The record evidence establishes that Stark County is not a buying group; that Schein provided only rebates, not discounts, to Stark County; that Schein received free exhibit space as part of the rebate agreement; that the rebates went directly to Stark County, not member dentists; and that Schein provided no pricing discounts to member dentists. (RX2253 at 001). The record also establishes that Corydon Palmer was not a buying group. (CCFF ¶ 1764; *see also* Responses to Proposed Finding Nos. 512-547). As such, Schein's agreement with any dental society is irrelevant to Schein's conduct regarding buying groups and does not disprove its participation in a conspiracy.

1195. Stark County is not restricted with what it can do with the rebates from Schein under either agreement. (RX 2253-001; RX 2517-001).

Response to Proposed Finding No. 1195

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies Stark County is a buying group. The record evidence establishes that Stark County is not a buying group; that Schein provided only rebates, not discounts, to Stark County; that Schein received free exhibit space as part of the rebate agreement; that the rebates went directly to Stark County, not member dentists; and that Schein provided no pricing discounts to member dentists. (RX2253 at 001). As such, Schein's agreement with a dental society is irrelevant to Schein's conduct regarding buying groups and does not disprove its participation in a conspiracy.

1196. To the extent Complaint Counsel argues that Stark County Dental Society does not qualify as a buying group under its definition because Stark County did not negotiate direct discounts on supplies for its members, such theory is flawed as Schein pays the Stark County Dental Society a rebate and therefore is offering its products and services at a lower price to the

group based on the independent dentists' collective purchases. (*See* RX 2253-001; RX 2517-001)

Response to Proposed Finding No. 1196

The Proposed Finding is misleading because it ignores the fact that Schein received free exhibit space as part of the rebate agreement. (RX2253 at 001). Schein admits in the Proposed Finding that it provided no pricing discounts to Stark County's member dentists. Instead, in exchange for the rebates provided directly to Stark County, Schein received free exhibit space at all continuing education seminars. (RX2253 at 001). Even from Schein's perspective, this rebate arrangement was at least in part one in which Schein bought exhibit space using rebates instead of an up-front payment, not one where Schein sold dental supplies at a lower price. Regardless, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies Stark County is a buying group. The record evidence establishes that Stark County is not a buying group; that Schein provided only rebates, not discounts, to Stark County; that Schein received free exhibit space as part of the rebate agreement; that the rebates went directly to Stark County, not member dentists; and that Schein provided no pricing discounts to member dentists. (RX2253 at 001). As such, Schein's agreement with a dental society is irrelevant to its conduct regarding buying groups and does not disprove its participation in a conspiracy.

1197. Schein considers and treats Stark County as a buying group. (CX 2724-002 (including Stark County among "4 buying group rebates that are processed each quarter"); *see also* RX 2947 (Cavaretta, Dep. at 79 ("I would classify them as ... an [Alternative Purchasing Channel] ... more towards a buying group.")); CX 8020 (Brady, Dep at 212)).

Response to Proposed Finding No. 1197

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that a 2016 email referring to Stark County as a buying group is relevant to how Schein viewed Stark County during the conspiracy period. Moreover, the record

evidence shows that Stark County is not a buying group; that Schein provided only rebates, not discounts, to Stark County; that Schein received free exhibit space as part of the rebate agreement; that the rebates went directly to Stark County, not member dentists; and that Schein provided no pricing discounts to member dentists. (RX2253 at 001). As such, Schein's agreement with a dental society is irrelevant to Schein's conduct regarding buying groups and does not disprove its participation in a conspiracy.

1198. Henry Schein's conduct with respect to Stark County is inconsistent with Complaint Counsel's alleged conspiracy. (Complaint ¶ 1).

Response to Proposed Finding No. 1198

The Proposed Finding is not supported by a citation to the Complaint, as the Complaint does not state that any conduct is inconsistent with a conspiracy. The Proposed Finding is also misleading to the extent that it implies that Stark County is a buying group. The definition of buying group provided in the Complaint states that "Buying Groups are organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products." (Complaint ¶ 3). The record evidence shows that Stark County is not a buying group; that Schein provided only rebates, not discounts, to Stark County; that Schein received free exhibit space as part of the rebate agreement; that the rebates went directly to Stark County, not member dentists; and that Schein provided no pricing discounts to member dentists. (RX2253 at 001).

MM. Steadfast.

1199. Steadfast Medical ("Steadfast") is a buying group of independent dentists specializing in oral surgery that markets its ability "to deliver anything an oral surgery practice might need efficiently and LESS EXPENSIVELY." (RX 2885-001; Foley, Tr. 4676).

Response to Proposed Finding No. 1199

Complaint Counsel has no specific response to the statement that Steadfast is a buying group. However, per the Parties' Joint Stipulations and Admissibility of Exhibits submitted on December 19, 2018, "Third party websites will be admitted into evidence for any non-hearsay purpose." RX2885, a third party website, is admitted into evidence but cannot be used for any non-hearsay purpose. Complaint Counsel does not object to the assertion that the statement appears on RX2885. However, the Proposed Finding is improper to the extent it asserts that the statement is true or to the extent it uses the hearsay statement for the truth of the matter asserted.

1200. Complaint Counsel admits that Steadfast is a buying group and that Schein did business with Steadfast during the alleged conspiracy period. (RX 2937-006; RX 3087-004).

Response to Proposed Finding No. 1200

Complaint Counsel does not object to the assertion that Steadfast is a buying group. However, the remainder of the Proposed Finding is misleading because it mischaracterizes the cited evidence. RX3087 stated: "Further as a result of Schein executives instructing sales managers and sales personnel not to provide discounts to or compete for the business of Buying Groups, Schein in 2014 terminated *agreements it had formed with Buying Groups before the alleged agreement with Benco and Patterson*, including the Dental Cooperative (Nevada & Utah) and Steadfast Medical." (RX3087 at 004) (emphasis added). The cited evidence also asserts that Schein terminated the agreement with Steadfast during the conspiracy. Complaint Counsel does not assert and need not show that Schein terminated its pre-existing, legacy buying groups relationships during the conspiracy, however, Steadfast is one example of such conduct. The evidence shows that Schein had a relationship and sold to Steadfast in 2010, or prior to the conspiracy. (CX2667 (lines 174-177, 5238-5244 showing sales to Steadfast in

2010); *see also* CX0306 (Foley, IHT at 91 (“[Steadfast] first came to special markets in 2009 or ‘10’))). The evidence also shows that Schein shut down Steadfast in June 2014 during the conspiracy period. (CCFF ¶¶ 871-885).

On March 25, 2014, Titus sent an email to her boss Cavaretta with the subject “Buying Group STEADFAST DENTAL, do we shut this down?” and wrote: “We need to discuss this. . . I’m still in discovery on their DNA (we think it’s a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened.” (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of “hot topics,” which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus then sought permission from her superiors to “shut down” Steadfast, and on June 10, 2014, she did so by writing to the CEO of Steadfast, Jon Staples: “After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model,” which had been in place for the entirety of Schein’s relationship with Steadfast, was “counter to [Schein’s] business practices.” (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus’ boss, Cavaretta praised her for “shut[ting] down” a GPO; on June 10, 2014, Cavaretta wrote:

“GPO’s are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers.” (CCFF ¶ 885 (quoting CX2216 at 001)).

1201. However, Complaint Counsel argues that Schein terminated Steadfast in 2014 as a result of an alleged agreement with Benco and Patterson, and that the decision to do so was against Schein’s unilateral self-interest. (RX 3087-004; CC Pretrial Br. at 20, 45). The evidence does not support Complaint Counsel’s argument.

Response to Proposed Finding No. 1201

The second sentence of the Proposed Finding is not supported by any citation to the record evidence and should be disregarded. Complaint Counsel has no specific response to the first sentence of the Proposed Finding.

1202. By 2011, Special Markets – under the direction of Mr. Foley – had entered into a relationship with Steadfast. (Foley, Tr. 4676, 4681; CX 0306 (Foley, IHT at 91)).

Response to Proposed Finding No. 1202

The Proposed Finding is vague and ambiguous as to the phrase “By 2011.” In fact, the evidence shows that Schein had a relationship and sold to Steadfast in 2010, or prior to the conspiracy. (CX2667 (showing sales to Steadfast in 2010 in rows 174-177, 5238-5244); *see also* CX0306 (Foley, IHT at 91 (“[Steadfast] first came to special markets in 2009 or ‘10’))). The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies that Schein entered into a relationship with Steadfast *during* the conspiracy period.

1203. At that time, Special Markets created a sales plan for Steadfast that included discounts to Steadfast’s members. (Foley, Tr. 4681; CX 0306 (Foley, IHT at 91)).

Response to Proposed Finding No. 1203

The Proposed Finding is vague and ambiguous as to the phrase “At that time.” The evidence shows that Schein had a relationship and sold to Steadfast in 2010 or prior to the conspiracy. (CX2667 (showing sales to Steadfast in 2010 in rows 174-177, 5238-5244); *see also* CX0306

(Foley, IHT at 91 (“[Steadfast] first came to special markets in 2009 or ‘10’))). The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that a “sales plan” was created in at some nondescript time in 2011 or otherwise during the conspiracy period. Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1204. Special Markets opened up Steadfast as a buying group partner because the group indicated it could drive compliance to Schein and also offered value-added services, like helping its members open new offices. (Foley, Tr. 4677-78; CX 8003 (Foley, Dep. at 145-146)).

Response to Proposed Finding No. 1204

The Proposed Finding is vague and ambiguous as to the phrase “open up Steadfast,” as it does not specify a date. The evidence shows that Schein had a relationship and sold to Steadfast in 2010 or prior to the conspiracy. (CX2667 (lines 174-177, 5238-5244 showing sales to Steadfast in 2010); *see also* CX0306 (Foley, IHT at 91 (“[Steadfast] first came to special markets in 2009 or ‘10’))). The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that it “opened up Steadfast as a buying group” at some nondescript time in 2011 or otherwise during the conspiracy period. Furthermore, assertions regarding reasons for “opening up Steadfast as a buying group” that occurred prior to the conspiracy are irrelevant, as it has no bearing on its conduct during the conspiracy period.

1205. After opening Steadfast, however, Special Markets did not pay close attention to the group because it was a smaller than other Special Markets accounts. (CX 0306 (Foley, IHT at 141)).

Response to Proposed Finding No. 1205

The Proposed Finding is vague and ambiguous as to the phrase “opening up Steadfast,” as it does not specify a date. The evidence shows that Schein had a relationship and sold to Steadfast in 2010 or prior to the conspiracy. (CX2667 (lines 174-177, 5238-5244 showing

sales to Steadfast in 2010); *see also* CX0306 (Foley, IHT at 91 (“[Steadfast] first came to special markets in 2009 or ‘10”). The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that it “opened up Steadfast as a buying group” at some nondescript time in 2011 or otherwise during the conspiracy period. Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1206. Schein continued to offer discounts to Steadfast’s members through 2014. (Foley, Tr. 4681).

Response to Proposed Finding No. 1206

The Proposed Finding is misleading as to the phrase “cotinine to offer discounts . . . through 2014,” because the record evidence shows that Schein shut down Steadfast in June 2014 during the conspiracy period. (CCFF ¶¶ 871-885). On March 25, 2014, Titus sent an email to her boss Cavaretta with the subject “Buying Group STEADFAST DENTAL, do we shut this down?” and wrote: “We need to discuss this. . . I’m still in discovery on their DNA (we think it’s a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened.” (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of “hot topics,” which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus then sought permission from her superiors to “shut down” Steadfast, and on June 10, 2014, she did so by writing to the CEO of Steadfast, Jon Staples: “After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders.” (CCFF ¶¶ 877-878). Titus sought

to cease doing business with Steadfast because Steadfast's "GPO business model," which had been in place for the entirety of Schein's relationship with Steadfast, was "counter to [Schein's] business practices." (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus' boss, Cavaretta praised her for "shut[ting] down" a GPO; on June 10, 2014, Cavaretta wrote: "GPO's are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers." (CCFF ¶ 885 (quoting CX2216 at 001)).

1207. In early 2014, Schein transferred Steadfast from Special Markets to Mid-Market. (Titus, Tr. 5249; Cavaretta, Tr. 5595; CX 8010 (Titus, Dep. at 83)).

Response to Proposed Finding No. 1207

Complaint Counsel has no specific response.

1208. With the transfer to Mid-Market, Steadfast fell under Kathleen Titus's responsibility. (CX 8010 (Titus, Dep. at 83)). Ms. Titus became responsible for "making sure that [Schein was] serving [Steadfast] appropriately." (CX 8010 (Titus, Dep. at 76, 83)).

Response to Proposed Finding No. 1208

Complaint Counsel has no specific response.

1209. In March 2014, as Special Markets was undergoing "some [reorganizational] changes", a Schein telesales rep in Reno, Nevada discovered in March of 2014 that no FSCs had been assigned to Steadfast members and forwarded this information on to Ms. Titus. (CX 0171-001-02). Ms. Titus did some fact-finding on Steadfast to learn more about the group so that Schein could help grow its business. (Titus, Tr. 5249-50 (Q: Did anyone at Schein specifically instruct you to look into the Steadfast Medical buying group relationship? A. Absolutely not.); CX 8010 (Titus, Dep. at 94)).

Response to Proposed Finding No. 1209

The Proposed Finding is misleading as to the assertion that in March 2014, Titus "did some fact-finding on Steadfast . . . so that Schein could help grow its business." The record evidence shows that Schein shut down Steadfast in June 2014 during the conspiracy period.

(CCFF ¶¶ 871-885). CX0171 is a March 25, 2014 email Titus sent an email to her boss Cavaretta with the subject “Buying Group STEADFAST DENTAL, do we shut this down?” and wrote: “We need to discuss this. . . I’m still in discovery on their DNA (we think it’s a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened.” (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of “hot topics,” which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus then sought permission from her superiors to “shut down” Steadfast, and on June 10, 2014, she did so by writing to the CEO of Steadfast, Jon Staples: “After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model,” which had been in place for the entirety of Schein’s relationship with Steadfast, was “counter to [Schein’s] business practices.” (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus’ boss, Cavaretta praised her for “shut[ting] down” a GPO; on June 10, 2014, Cavaretta wrote: “GPO’s are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers.” (CCFF ¶ 885 (quoting CX2216 at 001)).

1210. No one at Schein specifically instructed Ms. Titus to evaluate Steadfast. (Titus, Tr. 5249-50; Foley, Tr. 4681; Cavaretta, Tr. 5532-34).

Response to Proposed Finding No. 1210

The Proposed Finding is misleading and contrary to the weight of the record evidence. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). By February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period. (CCFF ¶¶ 661-954; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

Steadfast is just one example of one of those buying groups. The record evidence shows that Titus shut down Steadfast in June 2014 with the approval of her superiors, one of whom praised her for her actions. (CCFF ¶¶ 871-885).

The record evidence shows that on March 25, 2014, Titus sent an email to her boss Cavaretta with the subject “Buying Group STEADFAST DENTAL, do we shut this down?” and wrote: “We need to discuss this. . . I’m still in discovery on their DNA (we think it’s a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened.” (CCFF ¶¶ 875, 871-872).

On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of “hot topics,” which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus then sought permission from her superiors to “shut down” Steadfast, and on June 10, 2014, she did so by writing to the CEO of Steadfast, Jon Staples: “After examination of your GPO business model we have concluded that continuation of our

current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model,” which had been in place for the entirety of Schein’s relationship with Steadfast, was “counter to [Schein’s] business practices.” (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus’ boss, Cavaretta praised her for “shut[ting] down” a GPO; on June 10, 2014, Cavaretta wrote: “GPO’s are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers.” (CCFF ¶ 885 (quoting CX2216 at 001)).

1211. As part of the discovery process, Ms. Titus exchanged phone calls and emails with Steadfast staff to learn more about the group. (CX 8010 (Titus, Dep. at 72, 75)).

Response to Proposed Finding No. 1211

The Proposed Finding is vague and ambiguous as to the term “discovery process,” which is neither explained nor given the context of a time period. To the extent the Proposed Finding implies that Titus engaged in a “discovery process” that led to anything other than shutting down Steadfast, it is misleading. The record evidence shows that from an initial inquiry into Steadfast in late March 2014, it was only a little over 2 months until the Steadfast relationship was terminated on June 10, 2014 during the conspiracy period. (CCFF ¶¶ 871-885). On March 25, 2014, Titus sent an email to her boss Cavaretta with the subject “Buying Group STEADFAST DENTAL, do we shut this down?” and wrote: “We need to discuss this. . . I’m still in discovery on their DNA (we think it’s a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to

deal with it, but nothing ever happened.” (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of “hot topics,” which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus then sought permission from her superiors to “shut down” Steadfast, and on June 10, 2014, she did so by writing to the CEO of Steadfast, Jon Staples: “After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model,” which had been in place for the entirety of Schein’s relationship with Steadfast, was “counter to [Schein’s] business practices.” (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus’ boss, Cavaretta praised her for “shut[ting] down” a GPO; on June 10, 2014, Cavaretta wrote: “GPO’s are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers.” (CCFF ¶ 885 (quoting CX2216 at 001)).

1212. Ms. Titus discovered that Steadfast was acting as a “procurement” agent by redirecting Schein orders to its competitors. (CX 8010 (Titus, Dep. at 67, 72); Cavaretta, Tr. 5595, Foley, Tr. 4676-77).

Response to Proposed Finding No. 1212

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the relationship with Steadfast was not terminated pursuant to Schein’s policy not to do business with buying groups during the conspiracy period. The

record evidence shows Schein shut down Steadfast during the conspiracy period in June 2014 in compliance with a conspiracy.

On March 25, 2014, Titus sent an email to her boss Cavaretta with the subject “Buying Group STEADFAST DENTAL, do we shut this down?” and wrote: “We need to discuss this. . . I’m still in discovery on their DNA (we think it’s a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened.” (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of “hot topics,” which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus then sought permission from her superiors to “shut down” Steadfast, and on June 10, 2014, she did so by writing to the CEO of Steadfast, Jon Staples: “After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model,” which had been in place for the entirety of Schein’s relationship with Steadfast, was “counter to [Schein’s] business practices.” (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus’ boss, Cavaretta praised her for “shut[ting] down” a GPO; on June 10, 2014, Cavaretta wrote: “GPO’s are popping up like crazy so it is nice when we can shut one down

and still keep the business from the individual customers.” (CCFF ¶ 885 (quoting CX2216 at 001)).

1213. Ms. Titus learned the group would take Schein orders and “break up the order and send items that were cheaper with company A or company B” to those distributors, leaving Schein with the remainder. (CX 2207-001; CX 8010 (Titus, Dep. at 73-74); Titus, Tr. 5298-99).

Response to Proposed Finding No. 1213

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the relationship with Steadfast was not terminated pursuant to Schein’s policy not to do business with buying groups during the conspiracy period. The record evidence shows Schein shut down Steadfast during the conspiracy period in June 2014 in compliance with a conspiracy.

On March 25, 2014, Titus sent an email to her boss Cavaretta with the subject “Buying Group STEADFAST DENTAL, do we shut this down?” and wrote: “We need to discuss this. . . I’m still in discovery on their DNA (we think it’s a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened.” (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of “hot topics,” which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus then sought permission from her superiors to “shut down” Steadfast, and on June 10, 2014, she did so by writing to the CEO of Steadfast, Jon Staples: “After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because

Steadfast's "GPO business model," which had been in place for the entirety of Schein's relationship with Steadfast, was "counter to [Schein's] business practices." (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus' boss, Cavaretta praised her for "shut[ting] down" a GPO; on June 10, 2014, Cavaretta wrote: "GPO's are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers." (CCFF ¶ 885 (quoting CX2216 at 001)).

1214. Steadfast thus sought to "circumvent [Schein's] interaction with the client, and attempt[ed] to prevent [Schein] from selling directly....." (CX 2207-001).

Response to Proposed Finding No. 1214

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the relationship with Steadfast was not terminated pursuant to Schein's policy not to do business with buying groups during the conspiracy period. The record evidence shows Schein shut down Steadfast during the conspiracy period in June 2014 in compliance with a conspiracy.

On March 25, 2014, Titus sent an email to her boss Cavaretta with the subject "Buying Group STEADFAST DENTAL, do we shut this down?" and wrote: "We need to discuss this. . . I'm still in discovery on their DNA (we think it's a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened." (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of "hot topics," which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus

then sought permission from her superiors to “shut down” Steadfast, and on June 10, 2014, she did so by writing to the CEO of Steadfast, Jon Staples: “After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model,” which had been in place for the entirety of Schein’s relationship with Steadfast, was “counter to [Schein’s] business practices.” (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus’ boss, Cavaretta praised her for “shut[ting] down” a GPO; on June 10, 2014, Cavaretta wrote: “GPO’s are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers.” (CCFF ¶ 885 (quoting CX2216 at 001)).

1215. Steadfast’s diversion of Schein orders to competitors was a “big issue” for Schein. (Cavaretta, Tr. 5595).

Response to Proposed Finding No. 1215

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the relationship with Steadfast was not terminated pursuant to Schein’s policy not to do business with buying groups during the conspiracy period. The record evidence shows Schein shut down Steadfast during the conspiracy period in June 2014 in compliance with a conspiracy.

On March 25, 2014, Titus sent an email to her boss Cavaretta with the subject “Buying Group STEADFAST DENTAL, do we shut this down?” and wrote: “We need to discuss

this. . . I'm still in discovery on their DNA (we think it's a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened.” (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of “hot topics,” which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus then sought permission from her superiors to “shut down” Steadfast, and on June 10, 2014, she did so by writing to the CEO of Steadfast, Jon Staples: “After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model,” which had been in place for the entirety of Schein’s relationship with Steadfast, was “counter to [Schein’s] business practices.” (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus’ boss, Cavaretta praised her for “shut[ting] down” a GPO; on June 10, 2014, Cavaretta wrote: “GPO’s are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers.” (CCFF ¶ 885 (quoting CX2216 at 001)).

1216. Steadfast redirected sales that could have gone to Schein and interfered with Schein’s full-service distribution model by discouraging Schein from assigning FSCs to Steadfast accounts. (Titus, Tr. 5252-53; CX 8010 (Titus, Dep. at 74, 90-91); CX 2207-001).

Response to Proposed Finding No. 1216

The Proposed Finding, as to the portion that asserts Steadfast was “discouraging Schein from assigning FSCs to Steadfast accounts,” is not supported by the cited evidence. The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the relationship with Steadfast was not terminated pursuant to Schein’s policy not to do business with buying groups during the conspiracy period. The record evidence shows Schein shut down Steadfast during the conspiracy period in June 2014 in compliance with a conspiracy.

On March 25, 2014, Titus sent an email to her boss Cavaretta with the subject “Buying Group STEADFAST DENTAL, do we shut this down?” and wrote: “We need to discuss this. . . I’m still in discovery on their DNA (we think it’s a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened.” (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of “hot topics,” which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus then sought permission from her superiors to “shut down” Steadfast, and on June 10, 2014, she did so by writing to the CEO of Steadfast, Jon Staples: “After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model,” which had been in place for the entirety of Schein’s

relationship with Steadfast, was “counter to [Schein’s] business practices.” (CCFF ¶ 879).

Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus’ boss, Cavaretta praised her for “shut[ting] down” a GPO; on June 10, 2014, Cavaretta wrote: “GPO’s are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers.” (CCFF ¶ 885 (quoting CX2216 at 001)).

1217. The way Steadfast was operating was not in line with Schein’s core practice care model. (Titus, Tr. 5252-53).

Response to Proposed Finding No. 1217

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the relationship with Steadfast was not terminated pursuant to Schein’s policy not to do business with buying groups during the conspiracy period. The record evidence shows Schein shut down Steadfast during the conspiracy period in June 2014 in compliance with a conspiracy.

On March 25, 2014, Titus sent an email to her boss Cavaretta with the subject “Buying Group STEADFAST DENTAL, do we shut this down?” and wrote: “We need to discuss this. . . I’m still in discovery on their DNA (we think it’s a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened.” (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of “hot topics,” which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus then sought permission from her superiors to “shut down” Steadfast, and on June 10, 2014,

she did so by writing to the CEO of Steadfast, Jon Staples: “After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model,” which had been in place for the entirety of Schein’s relationship with Steadfast, was “counter to [Schein’s] business practices.” (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus’ boss, Cavaretta praised her for “shut[ting] down” a GPO; on June 10, 2014, Cavaretta wrote: “GPO’s are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers.” (CCFF ¶ 885 (quoting CX2216 at 001)).

1218. Although Schein had done approximately \$150,000 in sales with Steadfast in 2013, Ms. Titus uncovered that the actual percentage of business that Schein was doing with individual Steadfast customers had declined by about 50% from the prior year. (CX 0171-001; Titus, Tr. 5250-51 (Schein’s sales to Steadfast had dropped by “nearly half”)).

Response to Proposed Finding No. 1218

Complaint Counsel has no specific response to the statement that “Schein had done approximately \$150,000 in sales with Steadfast in 2013.” However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the relationship with Steadfast was not terminated pursuant to Schein’s policy not to do business with buying groups during the conspiracy period. The record evidence shows Schein shut down Steadfast during the conspiracy period in June 2014 in compliance with a conspiracy.

On March 25, 2014, Titus sent an email to her boss Cavaretta with the subject “Buying Group STEADFAST DENTAL, do we shut this down?” and wrote: “We need to discuss this. . . I’m still in discovery on their DNA (we think it’s a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened.” (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of “hot topics,” which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus then sought permission from her superiors to “shut down” Steadfast, and on June 10, 2014, she did so by writing to the CEO of Steadfast, Jon Staples: “After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model,” which had been in place for the entirety of Schein’s relationship with Steadfast, was “counter to [Schein’s] business practices.” (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus’ boss, Cavaretta praised her for “shut[ting] down” a GPO; on June 10, 2014, Cavaretta wrote: “GPO’s are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers.” (CCFF ¶ 885 (quoting CX2216 at 001)).

1219. Ms. Titus looked at the sales Schein had made to a group of existing Schein customers prior to them joining Steadfast and compared it to the amount of sales Schein had

made once they had joined and determined that Schein's business was down almost 50% with these customers. (Titus, Tr. 5251-52). As Ms. Titus reported: "[Steadfast is] taking perfectly functional HS accounts, opening them under their SM parent called Steadfast, then taking orders from the customer and dividing it up amongst several distributors (our competitors). So business that we once had, is being reallocated to our competition like Benco, McKesson, Smart Practice, Etc. If you visit their site you will note that they are a PROCUREMENT service. You might be looking at number[s] that are up, but when you look at the accounts prior to them being opened as Steadfast, we are down 45%." (CX 0255-001; Titus, Tr. 5252-54, 57).

Response to Proposed Finding No. 1219

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the relationship with Steadfast was not terminated pursuant to Schein's policy not to do business with buying groups during the conspiracy period. The record evidence shows Schein shut down Steadfast during the conspiracy period in June 2014 in compliance with a conspiracy.

On March 25, 2014, Titus sent an email to her boss Cavaretta with the subject "Buying Group STEADFAST DENTAL, do we shut this down?" and wrote: "We need to discuss this. . . I'm still in discovery on their DNA (we think it's a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened." (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of "hot topics," which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus then sought permission from her superiors to "shut down" Steadfast, and on June 10, 2014, she did so by writing to the CEO of Steadfast, Jon Staples: "After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply

orders.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model,” which had been in place for the entirety of Schein’s relationship with Steadfast, was “counter to [Schein’s] business practices.” (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus’ boss, Cavaretta praised her for “shut[ting] down” a GPO; on June 10, 2014, Cavaretta wrote: “GPO’s are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers.” (CCFF ¶ 885 (quoting CX2216 at 001)).

1220. Despite this decline in business, Ms. Titus wanted to start a dialogue with Steadfast’s executive to see if they could come to “an agreement of a win-win for both stakeholders.” (Titus, Tr. 5254-56 (because “all our customers are precious to us, ... I took on the mantle that every relationship can be corrected with proper negotiation, so that was my plan, was to seek out ... a win-win for both stakeholders.”))).

Response to Proposed Finding No. 1220

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the relationship with Steadfast was not terminated pursuant to Schein’s policy not to do business with buying groups during the conspiracy period. The record evidence shows Schein shut down Steadfast during the conspiracy period in June 2014 in compliance with a conspiracy.

On March 25, 2014, Titus sent an email to her boss Cavaretta with the subject “Buying Group STEADFAST DENTAL, do we shut this down?” and wrote: “We need to discuss this. . . I’m still in discovery on their DNA (we think it’s a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened.” (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of “hot topics,” which included Steadfast and

three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus then sought permission from her superiors to “shut down” Steadfast, and on June 10, 2014, she did so by writing to the CEO of Steadfast, Jon Staples: “After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model,” which had been in place for the entirety of Schein’s relationship with Steadfast, was “counter to [Schein’s] business practices.” (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus’ boss, Cavaretta praised her for “shut[ting] down” a GPO; on June 10, 2014, Cavaretta wrote: “GPO’s are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers.” (CCFF ¶ 885 (quoting CX2216 at 001)).

1221. On April 22, 2014, Ms. Titus reached out to Jon Staples, the CEO of Steadfast, regarding setting up an in-person meeting with Schein to see “if there [was] a way to create a better collaboration that provide[d] prosperity to all the stakeholders.” (RX 2201-003; Titus, Tr. 5255-56).

Response to Proposed Finding No. 1221

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or suggests that Titus did not terminate the relationship with Steadfast. The record evidence shows Schein shut down Steadfast during the conspiracy period in June 2014 in compliance with a conspiracy.

On March 25, 2014, Titus sent an email to her boss Cavaretta with the subject “Buying Group STEADFAST DENTAL, do we shut this down?” and wrote: “We need to discuss this. . . I’m still in discovery on their DNA (we think it’s a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened.” (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of “hot topics,” which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus then sought permission from her superiors to “shut down” Steadfast, and on June 10, 2014, she did so by writing to the CEO of Steadfast, Jon Staples: “After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model,” which had been in place for the entirety of Schein’s relationship with Steadfast, was “counter to [Schein’s] business practices.” (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus’ boss, Cavaretta praised her for “shut[ting] down” a GPO; on June 10, 2014, Cavaretta wrote: “GPO’s are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers.” (CCFF ¶ 885 (quoting CX2216 at 001)).

1222. Despite learning that Steadfast was “reallocating [Schein’s] business to other suppliers[,]” Ms. Titus was open to continuing the relationship with Steadfast and attempted to

salvage the relationship with the group by finding “common ground” that “makes financial/business sense for all stake holders.” (Titus, Tr. 5258-59; RX 2201-001-02).

Response to Proposed Finding No. 1222

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or suggests that Titus did not terminate the relationship with Steadfast. The record evidence shows Schein shut down Steadfast during the conspiracy period in June 2014 in compliance with a conspiracy.

On March 25, 2014, Titus sent an email to her boss Cavaretta with the subject “Buying Group STEADFAST DENTAL, do we shut this down?” and wrote: “We need to discuss this. . . I’m still in discovery on their DNA (we think it’s a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened.” (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of “hot topics,” which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus then sought permission from her superiors to “shut down” Steadfast, and on June 10, 2014, she did so by writing to the CEO of Steadfast, Jon Staples: “After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model,” which had been in place for the entirety of Schein’s relationship with Steadfast, was “counter to [Schein’s] business practices.” (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the

relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus' boss, Cavaretta praised her for "shut[ting] down" a GPO; on June 10, 2014, Cavaretta wrote: "GPO's are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers." (CCFF ¶ 885 (quoting CX2216 at 001)).

1223. Ms. Titus told Mr. Staples:

"As you know, virtually all of your members were set up as Henry Schein customers prior to them signing on for your procurement services. Unfortunately, our reporting shows that under Steadfast ..., business for that same group of customers is trending down.... My guess is that Steadfast is reallocating that business to other suppliers. Certainly, you have every right to pursue your business model, however, it appears to be at our expense. To be clear, we are not against having GPO partnerships. Quite the contrary, we have a number of them in which all parties are in a position to win. I would like to think that is possible with Steadfast as well.... [B]ut in order to continue, we need to find common ground that makes financial/business sense for all stake holders. I have been impressed with you and your team. We do not want to pull the plug on this fledg[ling] relationship until both parties agree that our goals are counter to each other."

(RX 2201-002).

Response to Proposed Finding No. 1223

Complaint Counsel has no specific response to the attribution of the statement to Titus.

However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or suggests that Titus did not terminate the relationship with Steadfast. The record evidence shows Schein shut down Steadfast during the conspiracy period in June 2014 in compliance with a conspiracy.

On March 25, 2014, Titus sent an email to her boss Cavaretta with the subject "Buying Group STEADFAST DENTAL, do we shut this down?" and wrote: "We need to discuss this. . . I'm still in discovery on their DNA (we think it's a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened." (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus

wrote to Cavaretta again, this time about a list of “hot topics,” which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus then sought permission from her superiors to “shut down” Steadfast, and on June 10, 2014, she did so by writing to the CEO of Steadfast, Jon Staples: “After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model,” which had been in place for the entirety of Schein’s relationship with Steadfast, was “counter to [Schein’s] business practices.” (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus’ boss, Cavaretta praised her for “shut[ting] down” a GPO; on June 10, 2014, Cavaretta wrote: “GPO’s are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers.” (CCFF ¶ 885 (quoting CX2216 at 001)).

1224. Despite repeated attempts, however, Ms. Titus was unable to arrange a meeting with Steadfast, and eventually Jon Staples stopped responding. (Titus, Tr. 5259; CX 8010 (Titus, Dep. at 75); Foley, Tr. 4679-80; CX 0255 (reporting that Jon Staples has gone “radio silent”). For this reason, a meeting between Steadfast and Schein never occurred. (Titus, Tr. 5259).

Response to Proposed Finding No. 1224

Complaint Counsel has no specific response. The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or suggests that Titus terminated the relationship with Steadfast because of Staples’ lack of response. The record

evidence shows Schein shut down Steadfast during the conspiracy period in June 2014 in compliance with a conspiracy.

On March 25, 2014, Titus sent an email to her boss Cavaretta with the subject “Buying Group STEADFAST DENTAL, do we shut this down?” and wrote: “We need to discuss this. . . I’m still in discovery on their DNA (we think it’s a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened.” (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of “hot topics,” which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus then sought permission from her superiors to “shut down” Steadfast, and on June 10, 2014, she did so by writing to the CEO of Steadfast, Jon Staples: “After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model,” which had been in place for the entirety of Schein’s relationship with Steadfast, was “counter to [Schein’s] business practices.” (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus’ boss, Cavaretta praised her for “shut[ting] down” a GPO; on June 10, 2014, Cavaretta wrote: “GPO’s are popping up like crazy so it is nice when we can shut one down

and still keep the business from the individual customers.” (CCFF ¶ 885 (quoting CX2216 at 001)).

1225. When it became clear Steadfast was not going to engage in negotiations with Schein, Ms. Titus recommended that Schein cease doing business with Steadfast due to the fact that Steadfast was: (1) redirecting business to competitors; (2) not offering any value added services; (3) not allowing Schein to engage with Steadfast customers; and (4) not willing to compromise or negotiate with Schein to find a win-win solution. (Titus, Tr. 5252-53, 5259).

Response to Proposed Finding No. 1225

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or suggests that Titus terminated the relationships with Steadfast for other reasons. The record evidence shows Schein shut down Steadfast during the conspiracy period in June 2014 in compliance with a conspiracy.

On March 25, 2014, Titus sent an email to her boss Cavaretta with the subject “Buying Group STEADFAST DENTAL, do we shut this down?” and wrote: “We need to discuss this. . . I’m still in discovery on their DNA (we think it’s a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened.” (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of “hot topics,” which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus then sought permission from her superiors to “shut down” Steadfast, and on June 10, 2014, she did so by writing to the CEO of Steadfast, Jon Staples: “After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because

Steadfast's "GPO business model," which had been in place for the entirety of Schein's relationship with Steadfast, was "counter to [Schein's] business practices." (CCFF ¶ 879).

Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus' boss, Cavaretta praised her for "shut[ting] down" a GPO; on June 10, 2014, Cavaretta wrote: "GPO's are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers." (CCFF ¶ 885 (quoting CX2216 at 001)).

1226. Ms. Titus's recommendation had nothing to do with Benco or Patterson. (Titus, Tr. 5194).

Response to Proposed Finding No. 1226

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies that Schein did not participate in a conspiracy because Titus testified that her termination of the Steadfast relationship "had nothing to do with Benco or Patterson." The record evidence shows that Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups regardless of type during the conspiracy period. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732). By February 2012, Sullivan informed employees that he wanted to "KILL the buying group model," and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence shows that Schein shut down Steadfast during the conspiracy period in June 2014 in compliance with the overarching conspiracy.

On March 25, 2014, Titus sent an email to her boss Cavaretta with the subject “Buying Group STEADFAST DENTAL, do we shut this down?” and wrote: “We need to discuss this. . . I’m still in discovery on their DNA (we think it’s a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened.” (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of “hot topics,” which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus then sought permission from her superiors to “shut down” Steadfast, and on June 10, 2014, she did so by writing to the CEO of Steadfast, Jon Staples: “After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model,” which had been in place for the entirety of Schein’s relationship with Steadfast, was “counter to [Schein’s] business practices.” (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus’ boss, Cavaretta praised her for “shut[ting] down” a GPO; on June 10, 2014, Cavaretta wrote: “GPO’s are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers.” (CCFF ¶ 885 (quoting CX2216 at 001)).

1227. Ms. Titus relayed her findings on Steadfast to Mr. Foley and sought his approval to stop doing business with the group. (CX 0255; Foley, Tr. 4679-4680).

Response to Proposed Finding No. 1227

Complaint Counsel has no specific response.

1228. Ms. Titus needed Mr. Foley's approval because even though Steadfast was being transferred to Mid-Market, Mr. Foley retained "budgetary control" during the transition. (Foley, Tr. 4680).

Response to Proposed Finding No. 1228

Complaint Counsel has no specific response.

1229. Mr. Foley recognized that the original relationship with Steadfast had "gone south," as Steadfast was no longer following Schein's basic guideline of driving compliance, Steadfast was refusing to meet with Schein after "repeated attempts," and Ms. Titus demonstrated that Schein was "losing revenue" on Steadfast. (Foley, Tr. 4677-78).

Response to Proposed Finding No. 1229

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the relationship with Steadfast was not terminated pursuant to Schein's policy not to do business with buying groups during the conspiracy period. The record evidence shows Schein shut down Steadfast during the conspiracy period in June 2014 in compliance with a conspiracy.

On March 25, 2014, Titus sent an email to her boss Cavaretta with the subject "Buying Group STEADFAST DENTAL, do we shut this down?" and wrote: "We need to discuss this. . . I'm still in discovery on their DNA (we think it's a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened." (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of "hot topics," which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus then sought permission from her superiors to "shut down" Steadfast, and on June 10, 2014,

she did so by writing to the CEO of Steadfast, Jon Staples: “After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model,” which had been in place for the entirety of Schein’s relationship with Steadfast, was “counter to [Schein’s] business practices.” (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus’ boss, Cavaretta praised her for “shut[ting] down” a GPO; on June 10, 2014, Cavaretta wrote: “GPO’s are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers.” (CCFF ¶ 885 (quoting CX2216 at 001)).

1230. As a result, on behalf of Special Markets, Mr. Foley ultimately gave Ms. Titus the green light to end Schein’s relationship with Steadfast. (Foley, Tr. 4680).

Response to Proposed Finding No. 1230

Complaint Counsel has no specific response.

1231. Mr. Cavaretta also approved the decision to terminate Steadfast on behalf of Mid-Market. (Cavaretta, Tr. 5595-5596).

Response to Proposed Finding No. 1231

Complaint Counsel has no specific response.

1232. Tim Sullivan did not have any input in the decision to terminate Steadfast. (Cavaretta, Tr. 5596).

Response to Proposed Finding No. 1232

The Proposed Finding is inaccurate, misleading, and contrary to the weight of the record evidence. The record evidence shows that Schein, which had historically worked with buying groups, adopted a policy not to work with buying groups after Sullivan's communications with Benco's Cohen. (CCFF ¶¶ 661-727). The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732). Sullivan informed employees he wanted to "KILL the buying group model" and following Sullivan's guidance, Schein executives directed the salesforce to refuse to sell to buying groups. (CCFF ¶¶ 728-885). The termination of the relationship with Steadfast is just one example of compliance with that policy and agreement.

On March 25, 2014, Titus sent an email to her boss Cavaretta with the subject "Buying Group STEADFAST DENTAL, do we shut this down?" and wrote: "We need to discuss this. . . I'm still in discovery on their DNA (we think it's a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened." (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of "hot topics," which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus then sought permission from her superiors to "shut down" Steadfast, and on June 10, 2014, she did so by writing to the CEO of Steadfast, Jon Staples: "After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday;

06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model,” which had been in place for the entirety of Schein’s relationship with Steadfast, was “counter to [Schein’s] business practices.” (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus’ boss, Cavaretta praised her for “shut[ting] down” a GPO; on June 10, 2014, Cavaretta wrote: “GPO’s are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers.” (CCFF ¶ 885 (quoting CX2216 at 001)).

1233. On June 10, 2014, Ms. Titus emailed Mr. Staples that Schein would no longer “support the fulfillment of Steadfast Medical supply orders.” (CX 2216-002).

Response to Proposed Finding No. 1233

Complaint Counsel has no specific response.

1234. Ms. Titus wrote that Schein’s business practices were intended to grow business and to work collaboratively, but Steadfast’s model, which guaranteed neither exclusivity nor compliance, ran counter to that goal. (Titus, Tr. 5260-5261).

Response to Proposed Finding No.1234

Complaint Counsel has no specific response to the attribution of the statement to Titus.

However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the relationship with Steadfast was not terminated pursuant to Schein’s policy not to do business with buying groups during the conspiracy period. The record evidence shows Schein shut down Steadfast during the conspiracy period in June 2014 in compliance with a conspiracy.

On March 25, 2014, Titus sent an email to her boss Cavaretta with the subject “Buying Group STEADFAST DENTAL, do we shut this down?” and wrote: “We need to discuss this. . . I’m still in discovery on their DNA (we think it’s a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened.” (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of “hot topics,” which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus then sought permission from her superiors to “shut down” Steadfast, and on June 10, 2014, she did so by writing to the CEO of Steadfast, Jon Staples: “After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model,” which had been in place for the entirety of Schein’s relationship with Steadfast, was “counter to [Schein’s] business practices.” (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus’ boss, Cavaretta praised her for “shut[ting] down” a GPO; on June 10, 2014, Cavaretta wrote: “GPO’s are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers.” (CCFF ¶ 885 (quoting CX2216 at 001)).

1235. Ms. Titus was disappointed, but remained hopeful that Schein and Steadfast could revisit a mutually beneficial relationship at a later date. (Titus, Tr. 5261-62; CX 2216-002 (“If at

some future date you are interested in exploring an exclusive relationship with Henry Schein, we would welcome revisiting a mutually beneficial partnership.”)).

Response to Proposed Finding No. 1235

Complaint Counsel has no specific response.

1236. Mr. Staples never followed-up about a new partnership. (Titus, Tr. 5262).

Response to Proposed Finding No. 1236

Complaint Counsel has no specific response.

1237. Steadfast was diverting business away from Schein, and refused to renegotiate. Therefore, Schein’s decision to cease business with Steadfast was in its unilateral self-interest. (*See* Sullivan, Tr. 4087; Cavaretta, Tr. 5572-74; Titus, Tr. 5202-04).

Response to Proposed Finding No. 1237

The second sentence of the Proposed Finding is misleading and contrary to the weight of the record evidence, as the record evidence shows that Schein shut down a profitable relationship with Steadfast. The record evidence shows that Schein sold \$150,000 worth of supplies to Steadfast members in 2013, which Titus considered to be a large client for Schein. (CCFF ¶¶ 880-881).

The first sentence of the Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the relationship with Steadfast was not terminated pursuant to Schein’s policy not to do business with buying groups during the conspiracy period. The record evidence shows Schein shut down Steadfast during the conspiracy period in June 2014 in compliance with a conspiracy.

On March 25, 2014, Titus sent an email to her boss Cavaretta with the subject “Buying Group STEADFAST DENTAL, do we shut this down?” and wrote: “We need to discuss this. . . I’m still in discovery on their DNA (we think it’s a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to

deal with it, but nothing ever happened.” (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of “hot topics,” which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus then sought permission from her superiors to “shut down” Steadfast, and on June 10, 2014, she did so by writing to the CEO of Steadfast, Jon Staples: “After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model,” which had been in place for the entirety of Schein’s relationship with Steadfast, was “counter to [Schein’s] business practices.” (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus’ boss, Cavaretta praised her for “shut[ting] down” a GPO; on June 10, 2014, Cavaretta wrote: “GPO’s are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers.” (CCFF ¶ 885 (quoting CX2216 at 001)).

1238. Moreover, Schein’s decision to end its relationship with Steadfast had “absolutely” nothing to do with a purported agreement with Benco and Patterson. As Ms. Titus testified, her “job was to work on behalf of Henry Schein and do what was good for our company and our constituency.” (Titus, Tr. 5194-95; Foley, Tr. 4680-81; Cavaretta, Tr. 5595-96).

Response to Proposed Finding No. 1238

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies that Schein did not participate in a conspiracy because Titus testified that her

termination of the Steadfast relationship “had ‘absolutely’ nothing to do with a purported agreement with Benco and Patterson.” The record evidence shows that Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups regardless of type during the conspiracy period. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). By February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728- 870). The record evidence shows that Schein shut down Steadfast during the conspiracy period in June 2014 in compliance with the overarching conspiracy. On March 25, 2014, Titus sent an email to her boss Cavaretta with the subject “Buying Group STEADFAST DENTAL, do we shut this down?” and wrote: “We need to discuss this. . . I’m still in discovery on their DNA (we think it’s a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened.” (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of “hot topics,” which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component (CCFF ¶ 873). Titus then sought permission from her superiors to “shut down” Steadfast, and on June 10, 2014, she did so by writing to the CEO of Steadfast, Jon Staples: “After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the

fulfillment of Steadfast Medical supply orders.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model,” which had been in place for the entirety of Schein’s relationship with Steadfast, was “counter to [Schein’s] business practices.” (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus’ boss, Cavaretta praised her for “shut[ting] down” a GPO; on June 10, 2014, Cavaretta wrote: “GPO’s are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers.” (CCFF ¶ 885 (quoting CX2216 at 001)).

In addition, the second sentence of the Proposed Finding is misleading and contrary to the weight of the record evidence, as Schein shut down a profitable relationship. The record evidence shows that Schein sold \$150,000 worth of supplies to Steadfast members in 2013, which Titus considered to be a large client for Schein. (CCFF ¶¶ 880-881).

1239. Complaint Counsel did not present any evidence that Schein’s decision with respect to Steadfast was anything other than unilateral or in Schein’s self-interest. Complaint Counsel’s expert, Dr. Marshall, did not render the opinion that Schein terminated its relationship with Steadfast because of the alleged conspiracy. (Marshall, Tr. 2978). Complaint Counsel does not identify any communications between Schein and Benco or Patterson concerning Steadfast. (CX 6027; *see also* Cohen Tr. 914; Ryan, Tr. 1258). Dr. Marshall did not do an empirical analysis of Steadfast at all. (Marshall, Tr. 2971).

Response to Proposed Finding No. 1239

The first sentence of the Proposed Finding is inaccurate, misleading, and contrary to the weight of the record evidence. Schein shut down a profitable relationship. The record evidence shows that Schein sold \$150,000 worth of supplies to Steadfast members in 2013, which Titus considered to be a large client for Schein. (CCFF ¶¶ 880-881). It also shows that Schein shut down Steadfast during the conspiracy period in June 2014 in compliance with the overarching conspiracy. On March 25, 2014, Titus sent an email to her boss Cavaretta with

the subject “Buying Group STEADFAST DENTAL, do we shut this down?” and wrote: “We need to discuss this. . . I’m still in discovery on their DNA (we think it’s a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened.” (CCFF ¶¶ 875, 871-872).

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The third sentence of the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies that Schein did not participate in a conspiracy

because there are no inter-firm communications regarding Steadfast. Complaint Counsel has identified, and the record evidence is replete with, examples of interfirm communications between Cohen and Sullivan between 2011 and 2015 that establish Benco orchestrated an agreement with Schein. (CCFF ¶¶ 327-354; *see also* CCFF ¶¶ 284-326). Moreover, the record evidence establishes that Benco's Cohen informed Sullivan of Benco's position with regard to bidding on buying groups and reached an understanding that Schein would not align itself with buying groups. (CCFF ¶¶ 661-684). Schein, in turn, ensured compliance by instructing its sales force to reject buying groups. (CCFF ¶¶ 686-954). Benco confronted Schein when it suspected Schein was discounting to buying groups, and Schein and Benco communicated when they were uncertain whether a customer qualified as a buying group. (CCFF ¶¶ 955-1100). The record evidence also shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein's internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195).

The second sentence of the Proposed Finding is misleading and improper to the extent it asserts that Schein did not terminate Steadfast pursuant to the conspiracy because Dr. Marshall did not render that opinion. As set forth above, the record evidence establishing Steadfast's termination in accordance with a conspiracy is clear. Dr. Marshall, Complaint Counsel's expert, need not and cannot be relied on for that factual proposition. That would be a violation of this Court's Order, which prohibits citing to "expert testimony to support factual propositions that should be established by fact witnesses or documents." (February 21, 2019 Order on Post-Trial Briefs, at 3). This Proposed Finding is inaccurate and misleading to the extent that it suggests that Dr. Marshall should have done a profitability analysis for Steadfast. Dr. Marshall conducted five profitability analyses to determine

whether a buying group can be incrementally profitable for the contracted distributor. (CCFF ¶¶ 1639-1684). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). To the extent that Schein claims that these profitability analyses are not representative of other buying groups, Dr. Marshall explained that he studied five different relationships with the Kois Buyers Group and Smile Source because, in addition to having gotten off the ground, these buying groups operate in geographies (Seattle and Atlanta) in which Schein, Patterson, and Benco are likely to have their lowest collective share of sales and another distributor was likely to have a high share of sales. (CX7101 at 045-046, 064 (¶¶ 107-112, 165) (Marshall Expert Rebuttal Report)). These facts addressed potential concerns that the relative sizes of Schein and Patterson make it more costly for them to supply buying groups, both because (1) Schein and Patterson are likely to find itself more profitable to discount when they have a lower share of sales and (2) where Burkhart and Atlanta Dental are large, it illuminates whether a full-service distributor found it profitable to supply a buying group so in a geographic area in which its share of sales was relatively large. (CX7101 at 64 (¶ 165) (Marshall Expert Rebuttal Report)). Differences between the Kois Buyers Group, with its single regional full-service distributor, and Smile Source, with its changing network of distributors over time, provide further reasons to believe that the experiences of distributors with these two groups provides some information about likely outcomes with other potential buying groups that went nowhere as a result of being rejected by Schein, Patterson, and/or Benco. (CX7101 at 64 (¶ 166) (Marshall Expert Rebuttal Report)). [REDACTED] [REDACTED]

[REDACTED]; *see also* CX8040

(Marshall, Dep. at 212 (explaining that Kois and Smile Source are “the same in the sense of the definition I offer in paragraph 139.”)). Dr. Marshall elaborated that for buying groups generally “[a]ll these groups will have different management and they’ll be issues that are different between them. But, again, these fall within what’s identified in paragraph 139 of my report.” (CX8040 (Marshall, Dep. at 212)).

[REDACTED]

1240. In fact, the evidence indicates that Schein’s business improved after terminating its partnership with Steadfast. After Schein terminated its relationship with Steadfast, Schein undertook efforts to retain the business of Steadfast’s members. (Titus, Tr. 5262-63; CX 2241-002).

Response to Proposed Finding No. 1240

The first sentence of the Proposed Finding is not supported by the cited evidence and is vague and ambiguous as to the phrase “Schein’s business improved,” which fails to specify what improved, how it improved, or when it improved. The second sentence of the Proposed Response is irrelevant, as any assertion of “efforts to retain the business” of *individual members of Steadfast* has no bearing on Schein’s conduct regarding *buying groups* or its termination of Steadfast.

1241. Schein did not lose the business it was doing with the members of Steadfast and instead was able to grow the business. (Cavaretta, Tr. 5597-98).

Response to Proposed Finding No. 1241

The Proposed Finding is irrelevant, as any assertion of “business” Schein was doing with *individual members of Steadfast* has no bearing on Schein’s conduct regarding *buying groups* or its termination of Steadfast.

1242. Schein’s relationship with Steadfast, its desire and efforts to find a mutually beneficial partnership with Steadfast, and Complaint Counsel’s admission that Schein worked with Steadfast during the alleged conspiracy period, are inconsistent with the alleged conspiracy. (Complaint ¶ 1).

Response to Proposed Finding No. 1242

The Proposed Finding is not supported by a citation to the Complaint and should be disregarded. Nonetheless, the Proposed Finding is inaccurate, misleading and contrary to the weight of the record evidence. As set forth above in Responses to Proposed Finding Nos. 1199 to 1241, Steadfast was a pre-existing, legacy buying group relationship, which Schein shut-down during the conspiracy period. While Complaint Counsel does not assert and need not show that Schein terminated all of its pre-existing, legacy buying groups relationships during the conspiracy, Steadfast is an example of such conduct, which is consistent with the record evidence showing Schein’s participation in a conspiracy.

NN. Sunrise Dental

1243. Sunrise Dental was a buying group consisting of 49 “independently owned” offices. (CX 2955-002).

Response to Proposed Finding No. 1243

The Proposed Finding is misleading and contrary to the weight of the record evidence. The record evidence shows that Schein told Sunrise it did not work with buying groups and that Sunrise needed to be structured as a DSO with ownership. (CCFF ¶ 771). In June 2012, Schein Regional Account Manager Andrea Hight informed her bosses of her discussions with Sunrise Dental: “I explained that we do not accommodate GPOs” and “I have not budged of

course on how a customer needs to be structured and very adamant about no GPO type situation.” (CCFF ¶ 771). In August 2013, Foley confirmed that Schein would not work with Sunrise Dental if it was a buying group: “No on sunrise as they r [sic] more of a buying group. Andrea has been working with as they have been talking more about ownership.” (CX2072 at 001). Furthermore, Schein does not assert that it entered into an agreement with Sunrise Dental at any point, and the evidence does not show that Schein did so. (CX2956 at 005, 002 (no agreement with Sunrise Dental as of January 6, 2016)).

1244. In March 2012, HSD Zone Manager Jake Meadows entered into negotiations with Sunrise Dental for a “package of a Formulary with decent pricing, a service deal, [and] a discount for items not on the Formulary.” (CX 2955-002).

Response to Proposed Finding No. 1244

The Proposed Finding is inaccurate because it relies upon a mischaracterization of the cited evidence. CX2955 states: “I think if we make a package of a Formulary with decent pricing . . . we might be able to get them in the fold.” (CX2955 at 002). It does not state that Meadows entered into negotiations with Sunrise for the described package. Schein does not assert that it entered into an agreement with Sunrise Dental at any point, and the evidence does not show that Schein did so. (CX2956 at 005, 002 (no agreement with Sunrise Dental as of January 6, 2016)). The record evidence also shows that Schein told Sunrise it did not work with buying groups and that Sunrise needed to be structured as a DSO with ownership. (CCFF ¶ 771). In June 2012, Schein Regional Account Manager Andrea Hight informed her bosses of her discussions with Sunrise Dental: “I explained that we do not accommodate GPOs” and “I have not budged of course on how a customer needs to be structured and very adamant about no GPO type situation.” (CCFF ¶ 771). In August 2013, Foley confirmed that Schein would not work with Sunrise Dental if it was a buying group: “No on sunrise as they r

[sic] more of a buying group. Andrea has been working with as they have been talking more about ownership.” (CX2072 at 001).

1245. Mr. Meadows noted that most of the members were buying from Patterson or Burkhart Dental, so there was an opportunity for incremental sales. (CX 2955-001).

Response to Proposed Finding No. 1245

Complaint Counsel has no specific response. However, the Proposed Finding is misleading to the extent it asserts or implies that Schein worked with Sunrise Dental. The record evidence shows that Schein told Sunrise it did not work with buying groups and that Sunrise needed to be structured as a DSO with ownership. (CCFF ¶ 771). In June 2012, Schein Regional Account Manager Andrea Hight informed her bosses of her discussions with Sunrise Dental: “I explained that we do not accommodate GPOs” and “I have not budged of course on how a customer needs to be structured and very adamant about no GPO type situation.” (CCFF ¶ 771). In August 2013, Foley confirmed that Schein would not work with Sunrise Dental if it was a buying group: “No on sunrise as they r [sic] more of a buying group. Andrea has been working with as they have been talking more about ownership.” (CX2072 at 001).

Furthermore, Schein does not assert that it entered into an agreement with Sunrise Dental at any point, and the evidence does not show that Schein did so. (CX2956 at 005, 002 (no agreement with Sunrise Dental as of January 6, 2016)).

1246. Mr. Meadows sought approval to form a relationship with Sunrise Dental from HSD’s Vice President Dave Steck. (Meadows, Tr. 2501-02; CX 2955-001).

Response to Proposed Finding No. 1246

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein worked with Sunrise Dental. The record evidence shows that Schein told Sunrise it did not work with buying groups and that Sunrise needed to be structured as a DSO with ownership. (CCFF ¶ 771). In June 2012, Schein Regional

Account Manager Andrea Hight informed her bosses of her discussions with Sunrise Dental: “I explained that we do not accommodate GPOs” and “I have not budged of course on how a customer needs to be structured and very adamant about no GPO type situation.” (CCFF ¶ 771). In August 2013, Foley confirmed that Schein would not work with Sunrise Dental if it was a buying group: “No on sunrise as they r [sic] more of a buying group. Andrea has been working with as they have been talking more about ownership.” (CX2072 at 001). Furthermore, Schein does not assert that it entered into an agreement with Sunrise Dental at any point, and the evidence does not show that Schein did so. (CX2956 at 005, 002 (no agreement with Sunrise Dental as of January 6, 2016)).

1247. Mr. Steck’s approval was necessary to manage the conflict between Special Markets and HSD, since, at the time, only Special Markets had contract writing authority to create specialized formularies. (CX 2955-001; Meadows, Tr. 2472-75; Steck, Tr. 3722-34 (Based on its experience in the DSO space, Special Markets was “better suited to enter into prime vendor agreements with entities that had a single purchasing or single negotiating point.”)).

Response to Proposed Finding No. 1247

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts that Special Market’s approval was necessary for HSD to contract with buying groups. The record evidence shows that both HSD and Special Markets had responsibility for buying groups. (Foley, Tr. 4523; *see also* Responses to Proposed Finding Nos. 104-106). In addition, it shows that buying group opportunities during the conspiracy were directed to HSD. (CX0309 (Muller, IHT at 94-95 (“Q. . . . Prior to 2014, when a buying group was interested in working with Henry Schein, which division would that buying group be directed toward? A. If it was for the private practitioner, it would go to Henry Schein dental. If it was for a special markets world type of customer, it would go to me.”)); CX2060 at 001 (Special Markets executive Foley stated in 2011: “If it turns out to be a DSO, all ours. If it turns out to be more of a local buying group, HSD (if they even want

it.”); CX0165 at 002 (In 2011, Special Markets Manager Kathleen Titus declined a buying group, sent it to HSD, and stated: “The participants are Private Practices which rules SM out.”)). Buying groups were better served by HSD. (CX2504 at 003 (In 2011, Special Markets Manager Kathleen Titus stated that GPOs are “a better fit for HSD than SM.”)). The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein worked with Sunrise Dental. The record evidence shows that Schein told Sunrise it did not work with buying groups and that Sunrise needed to be structured as a DSO with ownership. (CCFF ¶ 771). In June 2012, Schein Regional Account Manager Andrea Hight informed her bosses of her discussions with Sunrise Dental: “I explained that we do not accommodate GPOs” and “I have not budged of course on how a customer needs to be structured and very adamant about no GPO type situation.” (CCFF ¶ 771). In August 2013, Foley confirmed that Schein would not work with Sunrise Dental if it was a buying group: “No on sunrise as they r [sic] more of a buying group. Andrea has been working with as they have been talking more about ownership.” (CX2072 at 001). Furthermore, Schein does not assert that it entered into an agreement with Sunrise Dental at any point, and the evidence does not show that Schein did so. (CX2956 at 005, 002 (no agreement with Sunrise Dental as of January 6, 2016)).

1248. Mr. Steck responded to Mr. Meadows saying “No problem ... we will work this out.” (CX 2955-001).

Response to Proposed Finding No. 1248

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts that Special Market’s approval was necessary for HSD to contract with buying groups. The record evidence shows that both HSD and Special Markets had responsibility for buying groups. (Foley, Tr. 4523; *see also* Responses to Proposed Finding

Nos. 104-106). In addition, it shows that buying group opportunities during the conspiracy were directed to HSD. (CX0309 (Muller, IHT at 94-95 (“Q. . . . Prior to 2014, when a buying group was interested in working with Henry Schein, which division would that buying group be directed toward? A. If it was for the private practitioner, it would go to Henry Schein dental. If it was for a special markets world type of customer, it would go to me.”)); CX2060 at 001 (Special Markets executive Foley stated in 2011: “If it turns out to be a DSO, all ours. If it turns out to be more of a local buying group, HSD (if they even want it.”); CX0165 at 002 (In 2011, Special Markets Manager Kathleen Titus declined a buying group, sent it to HSD, and stated: “The participants are Private Practices which rules SM out.”)). Buying groups were better served by HSD. (CX2504 at 003 (In 2011, Special Markets Manager Kathleen Titus stated that GPOs are “a better fit for HSD than SM.”)).

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Furthermore, Schein does not assert that it entered into an agreement with Sunrise Dental at

any point, and the evidence does not show that Schein did so. (CX2956 at 005, 002 (no agreement with Sunrise Dental as of January 6, 2016)).

1249. Mr. Steck gave his approval and “told [Mr. Meadows] to pursue [Sunrise Dental] because, honestly, it’s an area of the country where we have low market share, and I felt there was a good upside there.” (Steck, Tr. 3773-74).

Response to Proposed Finding No. 1249

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts that Special Market’s approval was necessary for HSD to contract with buying groups. The record evidence shows that both HSD and Special Markets had responsibility for buying groups. (Foley, Tr. 4523; *see also* Responses to Proposed Finding Nos. 104-106). In addition, it shows that buying group opportunities during the conspiracy were directed to HSD. (CX0309 (Muller, IHT at 94-95 (“Q. . . . Prior to 2014, when a buying group was interested in working with Henry Schein, which division would that buying group be directed toward? A. If it was for the private practitioner, it would go to Henry Schein dental. If it was for a special markets world type of customer, it would go to me.”)); CX2060 at 001 (Special Markets executive Foley stated in 2011: “If it turns out to be a DSO, all ours. If it turns out to be more of a local buying group, HSD (if they even want it.”)); CX0165 at 002 (In 2011, Special Markets Manager Kathleen Titus declined a buying group, sent it to HSD, and stated: “The participants are Private Practices which rules SM out.”)). Buying groups were better served by HSD. (CX2504 at 003 (In 2011, Special Markets Manager Kathleen Titus stated that GPOs are “a better fit for HSD than SM.”)).

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Account Manager Andrea Hight informed her bosses of her discussions with Sunrise Dental: “I explained that we do not accommodate GPOs” and “I have not budged of course on how a customer needs to be structured and very adamant about no GPO type situation.” (CCFF ¶ 771). In August 2013, Foley confirmed that Schein would not work with Sunrise Dental if it was a buying group: “No on sunrise as they r [sic] more of a buying group. Andrea has been working with as they have been talking more about ownership.” (CX2072 at 001). Furthermore, Schein does not assert that it entered into an agreement with Sunrise Dental at any point, and the evidence does not show that Schein did so. (CX2956 at 005, 002 (no agreement with Sunrise Dental as of January 6, 2016)).

OO. Teeth Tomorrow.

1250. Teeth Tomorrow is a “franchise model” group of private practice dentists. (CX 8009 (Wingard, Dep. at 203-04)).

Response to Proposed Finding No. 1250

Complaint Counsel has no specific response.

1251. Teeth Tomorrow has “a buying group component.” (CX 8009 (Wingard, Dep. at 204)).

Response to Proposed Finding No. 1251

Complaint Counsel has no specific response.

1252. Members of Teeth Tomorrow’s buying group are primarily independent dentists. (RX 2947 (Cavaretta, Dep. at 84)).

Response to Proposed Finding No. 1252

Complaint Counsel has no specific response.

1253. Teeth Tomorrow describes its network as “independently owned dental practices operated by individually licensed dentists that offer Teeth Tomorrow® branded products.” (RX 2886-001).

Response to Proposed Finding No. 1253

Per the Parties' Joint Stipulations and Admissibility of Exhibits submitted on December 19, 2018, "Third party websites will be admitted into evidence for any non-hearsay purpose."

RX2886, a third party website, is admitted into evidence but cannot be used for any non-hearsay purpose. Complaint Counsel does not object to the assertion that the statement appears on RX2886. However, the Proposed Finding is improper to the extent it asserts that the statement is true.

1254. Teeth Tomorrow offers value-added services to its membership through its "educational arm that teaches best practices on certain clinical needs through full mouth restoration." (CX 8009 (Wingard, Dep. at 204)).

Response to Proposed Finding No. 1254

Complaint Counsel has no specific response.

1255. When Schein evaluated Teeth Tomorrow, Schein's Jake Meadows "did preliminary meetings with ... the two executives that represented Teeth Tomorrow and got into a lot of detail." (CX 8016 (Meadows, Dep. at 281)).

Response to Proposed Finding No. 1255

Complaint Counsel has no specific response.

1256. Schein and Teeth Tomorrow entered into a three year agreement on May 15, 2017. (RX 2684-001, -003-04).

Response to Proposed Finding No. 1256

Complaint Counsel has no specific response.

1257. Under that agreement, Schein offers a formulary "custom-priced" for Teeth Tomorrow members and additional discounts on non-formulary products, including a [REDACTED] discount off of catalog price for dental merchandise, [REDACTED] off of catalog for "films, amalgams, anesthetic and alloy," [REDACTED] off of catalog for "small equipment and hand pieces," and [REDACTED] off of catalog price for office supplies. (RX 2684-001).

Response to Proposed Finding No. 1257

Complaint Counsel has no specific response.

1258. The agreement also gives Teeth Tomorrow members “[REDACTED] off local repair and large equipment rental rates,” an [REDACTED] extended labor warranty for all capital equipment purchased through HSI,” and other Schein services. (RX 2684-002).

Response to Proposed Finding No. 1258

Complaint Counsel has no specific response.

1259. Schein’s agreement with Teeth Tomorrow also requires Schein to provide “a dedicated field team to visit and assist the Group’s practices and to meet and schedule business review meetings.” (RX 2684-001).

Response to Proposed Finding No. 1259

Complaint Counsel has no specific response.

1260. Ms. Wingard testified Teeth Tomorrow was able to “drive compliance” and influence their members to purchase from Schein. (CX 8009 (Wingard, Dep. at 205)).

Response to Proposed Finding No. 1260

Complaint Counsel has no specific response.

1261. As a group of independent dentists seeking discounts on dental supplies, Teeth Tomorrow is a buying group within the definition of the Complaint. (Complaint ¶ 3).

Response to Proposed Finding No. 1261

The Proposed Finding is inaccurate because it mischaracterizes the definition of buying group set forth in the Complaint. The definition does not equate “group of independent dentists seeking discounts on dental supplies” to a buying group. The definition states that “Buying Groups are organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products.” (Complaint ¶ 3). However, Complaint Counsel has no specific response to the statement that Teeth Tomorrow is a buying group.

1262. Schein’s relationship with Teeth Tomorrow is consistent with Schein’s approach to buying groups before and during the alleged conspiracy period: looking for groups that could drive compliance and add value. (Foley, Tr. 4614-16, 4621-23; Titus, Tr. 5201-02; Cavaretta,

Tr. 5574-76; *see also* Sullivan, Tr. 4088; RX 2062-003). Accordingly, Schein's relationship with Teeth Tomorrow is inconsistent with Complaint Counsel's alleged conspiracy. (Complaint, ¶ 1)

Response to Proposed Finding No. 1262

The second sentence of the Proposed Finding is not supported by the citation to the Complaint, which does not state that anything is inconsistent with the conspiracy alleged, and it should be disregarded. The first sentence of the Proposed Finding is misleading, factually inaccurate, and contrary to the weight of the record evidence. The record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of buying groups during the conspiracy, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see* Complaint Counsel's Post-Trial Brief, at Attachment C). Indeed, the record evidence is replete with examples of buying groups rejected during the conspiracy without regard for any specific characteristics. (CCFF ¶¶ 661-110; Complaint Counsel's Post-Trial Brief, at Attachment C). As such, Schein's conduct regarding Teeth Tomorrow, which occurred after April 2015 when the conspiracy became difficult to maintain, is not consistent with Schein's conduct regarding buying groups during the conspiracy period.

PP. Tralongo.

1263. Tralongo is a buying group based out of Atlanta, Georgia comprised of private practice dentists. (CX 0306 (Foley, IHT at 225); Foley, Tr. 4568, 4712-13; Meadows, Tr. 2484).

Response to Proposed Finding No. 1263

Complaint Counsel has no specific response.

1264. Tralongo provides its members lower cost supplies by leveraging "buying power for lease and major purchase negotiations." (RX 2917-001).

Response to Proposed Finding No. 1264

The Proposed Finding is not supported by the cited evidence. Per the Parties' Joint Stipulations and Admissibility of Exhibits submitted on December 19, 2018, "Third party websites will be admitted into evidence for any non-hearsay purpose." RX2917, a third party website, is admitted into evidence but cannot be used for any non-hearsay purpose.

Complaint Counsel does not object to the assertion that the statement appears on RX2917.

However, the Proposed Finding is improper to the extent it asserts that the statement is true or to the extent it uses the hearsay statement to assert or imply the truth of the statement.

1265. Tralongo also advises its independently-owned members on how to acquire dental offices and provides other services to its members such as "financial management, marketing, human resource management, and ongoing education." (RX 2916-001; Foley, Tr. 4716).

Response to Proposed Finding No. 1265

The Proposed Finding is not supported by the cited evidence. First, Foley's testimony does not support the assertion. Second, per the Parties' Joint Stipulations and Admissibility of Exhibits submitted on December 19, 2018, "Third party websites will be admitted into evidence for any non-hearsay purpose." RX2916, a third party website, is admitted into evidence but cannot be used for any non-hearsay purpose. Complaint Counsel does not object to the assertion that the statement appears on RX2916. However, the Proposed Finding is improper to the extent it asserts that the statement is true or to the extent it uses the hearsay statement to assert or imply the truth of the statement asserted.

1266. Tralongo has both a small DSO and buying group component to its business. (Foley, Tr. 4590, 4712; RX 2947 (Cavaretta, Dep. at 85-86)).

Response to Proposed Finding No. 1266

Complaint Counsel has no specific response.

1267. Special Markets entered into a software and equipment agreement with Tralongo's buying group in 2015. (Foley, Tr. 4593).

Response to Proposed Finding No. 1267

The Proposed Finding is vague and ambiguous because it does not specify when Schein entered into an agreement with Tralongo's buying group component. The evidence shows that Schein was "still vetting Tralongo" as of November 16, 2015, and there is no evidence of an agreement cited. (CX2395 at 001). As such, the Proposed Finding is misleading to the extent it implies or asserts that Schein did not participate in the conspiracy because it entered into an agreement with a buying group well after the conspiracy became difficult to maintain, or after the April 2015 Benco settlement with the Texas Attorney General that required Benco to log all communications with its competitors, including Schein.

1268. Special Markets engaged in discussions with Tralongo's buying group about a potential partnership on three occasions. (Foley, Tr. 4712).

Response to Proposed Finding No. 1268

The Proposed Finding is vague and ambiguous as to the term "discussions," which is not described, and also because it does not specify when any "discussions" or "occasions" occurred. The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it suggests or implies that Schein's "discussions" with Tralongo disprove Schein's participation in a conspiracy. The record evidence shows the following interactions. First, Foley testified that Schein bid on the Tralongo buying group in early 2011. (Foley, Tr. 4568). There is no documentary evidence regarding such a bid. Second, Schein refused to bid on the Tralongo buying group component during the conspiracy period. (CCFF ¶ 941). On November 10, 2014, Foley wrote to Muller: "I also got an email from Tralongo, another growing BG that we said no to." (CCFF ¶ 941 (quoting CX2081 at 002)). Foley had also instructed his sales team not to meet with the Tralongo buying group in 2013 or 2014. (CCFF ¶¶ 943-947). Documents clearly show Foley's instructions and that Schein

declined to bid on Tralongo's buying group component during the conspiracy period. (CX2083 at 001 (Statement of Foley: [Tralongo] is a buying group so we declined to bid (Rhonda declined at my direction.)"); CX2697 at 001 (Statement of Foley: [Tralongo] is a buying group so we walked away from them –did not bid on the business."); CX2094 at 001 (Statement of Foley: "Schein, [Patterson] and Benco all refused to bid on [Tralongo]'s business when they entered the GPO/Buying Group world. . . ."); *see also* Foley, Tr. 4594-4595, CCFF ¶¶ 944-947). Third, Schein was "still vetting" Tralongo as of November 16, 2015. (CX2395 at 001). Foley testified that Schein entered into a merchandise agreement with Tralongo's buying group component in 2016, or well after the conspiracy became difficult to maintain following the April 2015 Benco settlement with the Texas Attorney General that required Benco to log all communications with its competitors, including Schein. (CCFF ¶¶ 941-947; SF 1281). Indeed, the record evidence shows that Schein's conduct with respect to Tralongo's buying group component is consistent with the record evidence—Schein worked with buying groups before the conspiracy, turned down buying groups pursuant to a policy during the conspiracy, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

1269. Schein first began discussions with Tralongo about a potential partnership with its buying group in 2011. (Foley, Tr. 4568, 4712-13).

Response to Proposed Finding No. 1269

The Proposed Finding is vague and ambiguous as to the phrase "first began discussions," as it does not specify the date or time period. Foley testified that Schein first interacted with Tralongo in "early 2011." (Foley, Tr. 4568).

1270. At that time, Special Markets submitted a bid to Tralongo for its buying group business. (Foley, Tr. 4568, 4712-13).

Response to Proposed Finding No. 1270

The Proposed Finding is vague and ambiguous as to the phrase “at that time.” Foley testified that Schein first interacted with Tralongo in “early 2011.” (Foley, Tr. 4568).

1271. However, Schein did not win the bid, and Tralongo ultimately partnered with Darby. (Foley, Tr. 4713).

Response to Proposed Finding No. 1271

Complaint Counsel has no specific response.

1272. Around 2014, Tralongo approached Special Markets about submitting a second bid for its buying group business. (Foley, Tr. 4568, 4713).

Response to Proposed Finding No. 1272

Complaint Counsel has no specific response.

1273. Mr. Foley again engaged in discussions with Tralongo in 2014. (Foley, Tr. 4713).

Response to Proposed Finding No. 1273

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein contracted with Tralongo in 2014. Schein refused to bid on the Tralongo buying group component in 2014 during the conspiracy period. (CCFF ¶ 941). On November 10, 2014, Foley wrote to Muller: “I also got an email from Tralongo, another growing BG that we said no to.” (CCFF ¶ 941 (quoting CX2081 at 002)). Foley had also instructed his sales team not to meet with the Tralongo buying group in 2013 or 2014. (CCFF ¶¶ 943-947). Documents clearly show Foley’s instructions and that Schein declined to bid on Tralongo’s buying group component during the conspiracy period. (CX2083 at 001 (Statement of Foley: [Tralongo] is a buying group so we declined to bid (Rhonda declined at my direction).”); CX2697 at 001 (Statement of Foley: [Tralongo] is a buying group so we

walked away from them –did not bid on the business.”); CX2094 at 001 (Statement of Foley: “Schein, [Patterson] and Benco all refused to bid on [Tralongo]’s business when they entered the GPO/Buying Group world. . . .”); *see also* Foley, Tr. 4594-4595, CCFF ¶¶ 944-947).

Third, Schein was “still vetting” Tralongo as of November 16, 2015. (CX2395 at 001). Foley testified that Schein entered into a merchandise agreement with Tralongo’s buying group component in 2016, or well after the conspiracy became difficult to maintain following the April 2015 Benco settlement with the Texas Attorney General that required Benco to log all communications with its competitors, including Schein. (CCFF ¶¶ 941-947; SF 1281).

Indeed, the record evidence shows that Schein’s conduct with respect to Tralongo’s buying group component is consistent with the record evidence—Schein worked with buying groups before the conspiracy, turned down buying groups pursuant to a policy during the conspiracy, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

1274. After vetting the group, Special Markets declined to submit a second bid to Tralongo. (Foley, Tr. 4568-69).

Response to Proposed Finding No. 1274

To the extent the phrase “after vetting the group” implies Schein rejected Tralongo’s buying group after vetting it, that is misleading and contrary to the weight of the record evidence.

The record evidence shows Schein rejected Tralongo in 2014 because it was a buying group. On November 10, 2014, Foley wrote to Muller: “I also got an email from Tralongo, another growing BG that we said no to.” (CCFF ¶ 941 (quoting CX2081 at 002)). Foley had also instructed his sales team not to meet with the Tralongo buying group in 2013 or 2014. (CCFF ¶¶ 943-947). Documents clearly show Foley’s instructions and that Schein declined to bid on

Tralongo's buying group component during the conspiracy period. (CX2083 at 001 (Statement of Foley: [Tralongo] is a buying group so we declined to bid (Rhonda declined at my direction).")); CX2697 at 001 (Statement of Foley: [Tralongo] is a buying group so we walked away from them –did not bid on the business."); CX2094 at 001 (Statement of Foley: "Schein, [Patterson] and Benco all refused to bid on [Tralongo]'s business when they entered the GPO/Buying Group world. . . ."); *see also* Foley, Tr. 4594-4595, CCFF ¶¶ 944-947).

1275. Special Markets declined to submit a new bid because Tralongo was not agreeable to offering Schein's software, equipment or services to its members, in addition to supplies. (Foley, Tr. 4568-69, 4713-14). Special Markets felt that there was thus no "stickiness," and Tralongo was focused only on obtaining low pricing to compete with Darby. (Foley, Tr. 4568-69, 4713). For all of these reasons, Schein did not see any advantage to working with Tralongo at that time. (Foley, Tr. 4713-14).

Response to Proposed Finding No. 1275

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein did not bid on Tralongo in 2014 because of concerns regarding "stickiness." The record evidence shows that Schein rejected Tralongo because it was a buying group. On November 10, 2014, Foley wrote to Muller: "I also got an email from Tralongo, another growing BG that we said no to." (CCFF ¶ 941 (quoting CX2081 at 002)). Foley had also instructed his sales team not to meet with the Tralongo buying group in 2013 or 2014. (CCFF ¶¶ 943-947). Documents clearly show Foley's instructions and that Schein declined to bid on Tralongo's buying group component during the conspiracy period. (CX2083 at 001 (Statement of Foley: [Tralongo] is a buying group so we declined to bid (Rhonda declined at my direction).")); CX2697 at 001 (Statement of Foley: [Tralongo] is a buying group so we walked away from them –did not bid on the business."); CX2094 at 001 (Statement of Foley: "Schein, [Patterson] and Benco all refused to bid on [Tralongo]'s

business when they entered the GPO/Buying Group world. . . .”); *see also* Foley, Tr. 4594-4595, CCFF ¶¶ 944-947).

1276. Schein’s decision in 2014 not to move forward with a second bid for Tralongo’s buying group had nothing to do with Tralongo being a buying group. (Foley, Tr. 4714).

Response to Proposed Finding No. 1276

The Proposed Finding is inaccurate and contrary to the weight of the record evidence. Schein refused to bid on the Tralongo buying group component in 2014 during the conspiracy period. (CCFF ¶ 941). The record evidence shows that Schein rejected Tralongo because it was a buying group. On November 10, 2014, Foley wrote to Muller: “I also got an email from Tralongo, another growing BG that we said no to.” (CCFF ¶ 941 (quoting CX2081 at 002)). Foley had also instructed his sales team not to meet with the Tralongo buying group in 2013 or 2014. (CCFF ¶¶ 943-947). Documents clearly show Foley’s instructions and that Schein declined to bid on Tralongo’s buying group component during the conspiracy period. (CX2083 at 001 (Statement of Foley: [Tralongo] is a buying group so we declined to bid (Rhonda declined at my direction).”); CX2697 at 001 (Statement of Foley: [Tralongo] is a buying group so we walked away from them –did not bid on the business.”); CX2094 at 001 (Statement of Foley: “Schein, [Patterson] and Benco all refused to bid on [Tralongo]’s business when they entered the GPO/Buying Group world. . . .”); *see also* Foley, Tr. 4594-4595, CCFF ¶¶ 944-947).

1277. Schein’s decision in 2014 not to move forward with a second bid for Tralongo’s buying group had nothing to do with Benco or Patterson. (Foley, Tr. 4715).

Response to Proposed Finding No. 1277

The Proposed Finding is misleading and contrary to the weight of the record evidence to it asserts that Schein’s rejection of Tralongo’s buying group component was not pursuant to an agreement not to discount to buying groups because Foley denied discussing Tralongo with

Benco or Patterson. The record evidence shows that Foley and Schein understood in 2013, 2014, and 2015 that the Big Three would not discount to buying groups. First, on October 1, 2013, Benco's Ryan called Foley and informed him that Benco would not bid on Smile Source. (CCFF ¶¶ 1009, 1012). On that 18 minute phone call, Foley "got the impression that they're anti buying group." (CCFF ¶¶ 1010, 1012). Foley testified that Ryan wanted to know whether Schein would bid on Smile Source. (CCFF ¶ 1013). Muller then reported the call with Ryan to his boss, Muller, and stated: "Next time we talk remind me to tell you about my conversation with Pat Ryan at SM Benco. They're anti Buying Group and Smile Source recently reached out to them. I'm being careful not to cross any boundaries, like collusion." (CCFF ¶ 1017 (quoting CX0243 at 001)). In 2014, Foley explained that the Big Three were on the same page regarding the Texas Dental Association's buying group in a March 5, 2014 email: "The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott." (CCFF ¶ 1138 (quoting CX2106 at 001)). Then in 2015, Foley wrote to Schein employees in a October 28, 2015 email: "Keep in mind that I and others have been in contact with Tralongo over the years. Schein, PDCO and Benco all refused to bid on their business when they entered the GPO/Buying Group world." (CCFF ¶ 1195 (quoting CX2094 at 001); *see also* CCFF ¶¶ 947, 1185). Moreover, Foley had known about Sullivan's anti-buying group stance since February 2012. (CCFF ¶ 729). As such, the record evidence shows that Foley and Schein knew the Big Three would not discount to buying groups, and Schein rejected Tralongo knowing that their competitors would not bid on buying groups.

The record evidence shows that on November 10, 2014, Foley wrote to Muller: "I also got an email from Tralongo, another growing BG that we said no to." (CCFF ¶ 941 (quoting

CX2081 at 002)). Foley had also instructed his sales team not to meet with the Tralongo buying group in 2013 or 2014. (CCFF ¶¶ 943-947). Documents clearly show Foley's instructions and that Schein declined to bid on Tralongo's buying group component during the conspiracy period. (CX2083 at 001 (Statement of Foley: [Tralongo] is a buying group so we declined to bid (Rhonda declined at my direction).")); CX2697 at 001 (Statement of Foley: [Tralongo] is a buying group so we walked away from them –did not bid on the business."); CX2094 at 001 (Statement of Foley: "Schein, [Patterson] and Benco all refused to bid on [Tralongo]'s business when they entered the GPO/Buying Group world. . . ."); *see also* Foley, Tr. 4594-4595, CCFF ¶¶ 944-947).

1278. In October 2015, Mr. Foley wrote internally, "Schein, PDCO and Benco all refused to bid on [Tralongo's] business when they entered the GPO/Buying Group world...." (CX 2094). Mr. Foley testified that he "had no direct knowledge" of whether PDCO or Benco bid on Tralongo. (Foley, Tr. 4595). Rather, he was just reporting market intelligence based on the fact that he had "never run into them at any buying group opportunities." (Foley, Tr. 4595). There is no evidence that Mr. Foley or anyone at Schein ever discussed Tralongo with anyone at Patterson or Benco. (Foley, Tr. 4714-15).

Response to Proposed Finding No. 1278

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts Foley's statement in CX2094 reflects market intelligence, or to the extent it asserts that Foley had no direct knowledge that the Big Three would not discount to buying groups. The record evidence shows that Foley and Schein understood in 2013, 2014, and 2015 that the Big Three would not discount to buying groups. First, on October 1, 2013, Benco's Ryan called Foley and informed him that Benco would not bid on Smile Source. (CCFF ¶¶ 1009, 1012). On that 18 minute phone call, Foley "got the impression that they're anti buying group." (CCFF ¶¶ 1010, 1012). Foley testified that Ryan wanted to know whether Schein would bid on Smile Source. (CCFF ¶ 1013). Muller then reported the call with Ryan to his boss, Muller, and stated: "Next time we talk remind me to tell you about my

conversation with Pat Ryan at SM Benco. They're anti Buying Group and Smile Source recently reached out to them. I'm being careful not to cross any boundaries, like collusion." (CCFF ¶ 1017 (quoting CX0243 at 001)). In 2014, Foley made the statement in CX2094, and explained that the Big Three were on the same page regarding the Texas Dental Association's buying group: "The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott." (CCFF ¶ 1138 (quoting CX2094 at 001)). Then in 2015, Foley wrote to Schein employees in a October 28, 2015 email: "Keep in mind that I and others have been in contact with Tralongo over the years. Schein, PDCO and Benco all refused to bid on their business when they entered the GPO/Buying Group world." (CCFF ¶ 1195 (quoting CX2094 at 001); *see also* CCFF ¶¶ 947, 1185). Moreover, Foley had known about Sullivan's anti-buying group stance since February 2012. (CCFF ¶ 729). As such, the record evidence shows that Foley and Schein knew the Big Three would not discount to buying groups, and Schein rejected Tralongo knowing that their competitors would not bid on buying groups. To the extent that the Proposed Finding asserts or implies that lack of communication about Tralongo disproves rejection of Tralongo pursuant to a conspiracy, that is misleading and contrary to the weight of the record evidence. (*See* Response to Proposed Finding No. 1277).

1279. In 2015, Tralongo became open to using Schein for software and equipment and re-approached Schein about a potential partnership. (Foley, Tr. 4717-18).

Response to Proposed Finding No. 1279

Complaint Counsel has no specific response.

1280. Schein entered into an agreement with Tralongo to provide software and equipment services to Tralongo's buying group members in October 2015. (Foley, Tr. 4593, 4718-20).

Response to Proposed Finding No. 1280

The Proposed Finding is inaccurate and contrary to the evidence. The documentary evidence shows that Schein was “still vetting” Tralongo as of November 2015 and the 2015 Service Agreement for Tralongo is dated “12/16/2015.” (CX2395 at 001; [REDACTED]).

Moreover, the Proposed Finding is misleading to the extent it asserts or implies that Schein did not participate in the conspiracy because it entered into an agreement with a buying group *after* the conspiracy became difficult to maintain following Benco’s April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein.

1281. In 2016, Schein submitted a bid for the merchandise side of Tralongo’s buying group. (Foley, Tr. 4718-4720).

Response to Proposed Finding No. 1281

Complaint Counsel has no specific response to the statement that Schein submitted a bid on Tralongo’s buying group in 2016. However, the Proposed Finding is misleading to the extent it asserts or implies that Schein did not participate in the conspiracy because it entered into an agreement with a buying group *after* the conspiracy became difficult to maintain following Benco’s April 2015 settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein.

1282. Schein’s relationship with Tralongo was eventually transferred from Special Markets to Schein’s APC division. (RX 2497 (Cavaretta, Dep. at 88)).

Response to Proposed Finding No. 1282

The Proposed Finding is not supported by the evidence cited, as RX2497 is not the deposition transcript of Cavaretta.

1283. Shortly thereafter, Tralongo was acquired by Dental Whale. (RX 2947 (Cavaretta, Dep. at 86)).

Response to Proposed Finding No. 1283

Complaint Counsel has no specific response.

1284. As a group of independent dentists receiving discounts based on the group's collective purchases, Tralongo's buying group arm meets Complaint Counsel's definition of a buying group. (Complaint ¶ 3).

Response to Proposed Finding No. 1284

The Proposed Finding is inaccurate because it mischaracterizes the definition of buying group set forth in the Complaint. The definition does not equate "a group of independent dentists receiving a discount on dental supplies" to a buying group. The definition states that "Buying Groups are organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products." (Complaint ¶ 3). However, Complaint Counsel has no specific response to the statement that Tralongo's buying group arm is a buying group.

1285. Complaint Counsel does not identify Tralongo as a Buying Group that Schein did not enter into an agreement with as a result of the alleged conspiracy. (RX 3087-004).

Response to Proposed Finding No. 1285

The Proposed Finding is inaccurate, as Complaint Counsel identified Tralongo as one of the buying groups that Schein rejected during the conspiracy period in compliance with an agreement to reject buying groups. (Complaint Counsel's Post-Trial Brief, at 75; *see also* Complaint Counsel's Post-Trial Brief, Attachment C, at C-1). Complaint Counsel does not dispute that RX3087, Complaint Counsel's Second Amended Response and Objections to Henry Schein Inc.'s First Set of Interrogatories, does not list Tralongo.

QQ. Unified Smiles.

1286. Unified Smiles was founded by Mr. and Ms. Knysz, the former owners of Great Expressions Dental Centers, a successful DSO, and a long-time Schein partner. (RX 2174; Foley, Tr. 4543).

Response to Proposed Finding No. 1286

Complaint Counsel has no specific response.

1287. On December 8, 2011, Jan Knysz, the former owner of Great Expressions, reached out to Schein. Ms. Knysz “had moved on” and was “in the process of developing” a new entity, called Unified Smiles. (CX 2062-004-05).

Response to Proposed Finding No. 1287

Complaint Counsel has no specific response.

1288. Four days later, on December 12, 2011, Mr. Foley met with Ms. Knysz to discuss this new project. (CX 2062). The Unified Smiles group “did not [even] exist” when Mr. Foley met with Ms. Knysz – it “had zero customers.” (Foley, Tr. 4684-86, 4689, 4543).

Response to Proposed Finding No. 1288

The Proposed Finding is misleading to the extent it implies Schein did not reject Unified Smiles per an agreement not to discount to buying groups. The record evidence shows that on December 21, 2011, Foley turned down Unified Smile, writing to Knysz: “[U]nless you have some ‘ownership’ of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups.” (CCFF ¶ 719 (quoting CX2062 at 001)). Foley was aware at the time that Unified Smiles wanted to create a buying group, not a DSO. (Foley, Tr. 4549). Foley sent Unified Smiles minimum requirements for ownership, which Foley testified were “rules” to distinguish between DSOs and buying groups. (Foley, Tr. 4546-4547; CCFF ¶¶ 723-726). Foley also informed Unified Smiles that it would not work with Unified Smiles unless it met Schein’s requirements to be a DSO. (CCFF ¶ 725). Following Schein’s rejection of Unified Smiles, Foley forwarded the rejection to his direct report, Rhonda Durante, attaching the minimum requirements for ownership that he had sent

to Unified Smiles. (CCFF ¶¶ 743-744; CX2062 at 001, 006; Foley, Tr. 4542, 4547-4548).

Following the December 21, 2011 email, Schein did not bid for Unified Smiles' business.

(CCFF ¶ 727). Schein continued to refuse to work with Unified Smiles because it was a

buying group. On December 20, 2013, Foley wrote to Francis Keefe regarding Unified

Smiles: "It's a buying group that we do not participate with, as with all buying groups."

(CCFF ¶ 788 (quoting CX2073 at 001); Foley, Tr. 4552). Complaint Counsel has no specific

response to the remainder of the Proposed Finding.

1289. Ms. Kynsz asked Mr. Foley to "meet in confidence" in the basement of the Great Expressions Dental Center, because she did not want to "get anyone at [Great Expressions] stirred up." (Foley, Tr. 4684; CX 2062-002).

Response to Proposed Finding No. 1289

The Proposed Finding is misleading to the extent it implies Schein did not reject Unified

Smiles per an agreement not to discount to buying groups. The record evidence shows that on

December 21, 2011, Foley turned down Unified Smile, writing to Knysz: "[U]nless you have

some 'ownership' of your practices Henry Schein considers your business model as a Buying

Group, and we no longer participate in Buying Groups." (CCFF ¶ 719 (quoting CX2062 at

001)). Foley was aware at the time that Unified Smiles wanted to create a buying group, not a

DSO. (Foley, Tr. 4549). Foley sent Unified Smiles minimum requirements for ownership,

which Foley testified were "rules" to distinguish between DSOs and buying groups. (Foley,

Tr. 4546-4547; CCFF ¶¶ 723-726). Foley also informed Unified Smiles that it would not

work with Unified Smiles unless it met Schein's requirements to be a DSO. (CCFF ¶ 725).

Following Schein's rejection of Unified Smiles, Foley forwarded the rejection to his direct

report, Rhonda Durante, attaching the minimum requirements for ownership that he had sent

to Unified Smiles. (CCFF ¶¶ 743-744; CX2062 at 001, 006; Foley, Tr. 4542, 4547-4548).

Following the December 21, 2011 email, Schein did not bid for Unified Smiles' business.

(CCFF ¶ 727). Schein continued to refuse to work with Unified Smiles because it was a buying group. On December 20, 2013, Foley wrote to Francis Keefe regarding Unified Smiles: “It’s a buying group that we do not participate with, as with all buying groups.” (CCFF ¶ 788 (quoting CX2073 at 001); Foley, Tr. 4552). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1290. Ms. Kynsz did not want Great Expressions to know that Schein was meeting with her, which made Mr. Foley uncomfortable. (Foley, Tr. 4684-85).

Response to Proposed Finding No. 1290

The Proposed Finding is misleading to the extent it implies Schein did not reject Unified Smiles per an agreement not to discount to buying groups. The record evidence shows that on December 21, 2011, Foley turned down Unified Smile, writing to Knysz: “[U]nless you have some ‘ownership’ of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups.” (CCFF ¶ 719 (quoting CX2062 at 001)). Foley was aware at the time that Unified Smiles wanted to create a buying group, not a DSO. (Foley, Tr. 4549). Foley sent Unified Smiles minimum requirements for ownership, which Foley testified were “rules” to distinguish between DSOs and buying groups. (Foley, Tr. 4546-4547; CCFF ¶¶ 723-726). Foley also informed Unified Smiles that it would not work with Unified Smiles unless it met Schein’s requirements to be a DSO. (CCFF ¶ 725). Following Schein’s rejection of Unified Smiles, Foley forwarded the rejection to his direct report, Rhonda Durante, attaching the minimum requirements for ownership that he had sent to Unified Smiles. (CCFF ¶¶ 743-744; CX2062 at 001, 006; Foley, Tr. 4542, 4547-4548). Following the December 21, 2011 email, Schein did not bid for Unified Smiles’ business. (CCFF ¶ 727). Schein continued to refuse to work with Unified Smiles because it was a buying group. On December 20, 2013, Foley wrote to Francis Keefe regarding Unified

Smiles: “It’s a buying group that we do not participate with, as with all buying groups.”

(CCFF ¶ 788 (quoting CX2073 at 001); Foley, Tr. 4552). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1291. Ms. Knysz presented Mr. Foley with a copy of Great Expressions’ “proprietary pricing” it received from Schein, and demanded the same pricing for Unified Smiles. But Great Expressions received its pricing by reason of being Schein’s fifth largest corporate customer. Unified Smiles had “no customers whatsoever.” (Foley, Tr. 4543-46; 4684-87).

Response to Proposed Finding No. 1291

The Proposed Finding is misleading to the extent it implies Schein did not reject Unified Smiles per an agreement not to discount to buying groups. The record evidence shows that on December 21, 2011, Foley turned down Unified Smile, writing to Knysz: “[U]nless you have some ‘ownership’ of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups.” (CCFF ¶ 719 (quoting CX2062 at 001)). Foley was aware at the time that Unified Smiles wanted to create a buying group, not a DSO. (Foley, Tr. 4549). Foley sent Unified Smiles minimum requirements for ownership, which Foley testified were “rules” to distinguish between DSOs and buying groups. (Foley, Tr. 4546-4547; CCFF ¶¶ 723-726). Foley also informed Unified Smiles that it would not work with Unified Smiles unless it met Schein’s requirements to be a DSO. (CCFF ¶ 725). Following Schein’s rejection of Unified Smiles, Foley forwarded the rejection to his direct report, Rhonda Durante, attaching the minimum requirements for ownership that he had sent to Unified Smiles. (CCFF ¶¶ 743-744; CX2062 at 001, 006; Foley, Tr. 4542, 4547-4548). Following the December 21, 2011 email, Schein did not bid for Unified Smiles’ business. (CCFF ¶ 727). Schein continued to refuse to work with Unified Smiles because it was a buying group. On December 20, 2013, Foley wrote to Francis Keefe regarding Unified Smiles: “It’s a buying group that we do not participate with, as with all buying groups.”

(CCFF ¶ 788 (quoting CX2073 at 001); Foley, Tr. 4552). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1292. Mr. Foley learned that Ms. Knysz was not entirely truthful. Her representation that Unified Smiles would “administer operations the same way as [Great Expressions] with all purchases running through [its] corporate office” turned out not to be true. (CX 2062-003-04).

Response to Proposed Finding No. 1292

The Proposed Finding is not supported by the cited evidence and should be disregarded, as CX2062 does not show whether any statements in the document were “truthful” or whether any “turned out not to be true.” Nonetheless, the Proposed Finding is misleading to the extent it implies Schein did not reject Unified Smiles per an agreement not to discount to buying groups. The record evidence shows that on December 21, 2011, Foley turned down Unified Smile, writing to Knysz: “[U]nless you have some ‘ownership’ of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups.” (CCFF ¶ 719 (quoting CX2062 at 001)). Foley was aware at the time that Unified Smiles wanted to create a buying group, not a DSO. (Foley, Tr. 4549). Foley sent Unified Smiles minimum requirements for ownership, which Foley testified were “rules” to distinguish between DSOs and buying groups. (Foley, Tr. 4546-4547; CCFF ¶¶ 723-726). Foley also informed Unified Smiles that it would not work with Unified Smiles unless it met Schein’s requirements to be a DSO. (CCFF ¶ 725). Following Schein’s rejection of Unified Smiles, Foley forwarded the rejection to his direct report, Rhonda Durante, attaching the minimum requirements for ownership that he had sent to Unified Smiles. (CCFF ¶¶ 743-744; CX2062 at 001, 006; Foley, Tr. 4542, 4547-4548). Following the December 21, 2011 email, Schein did not bid for Unified Smiles’ business. (CCFF ¶ 727). Schein continued to refuse to work with Unified Smiles because it was a buying group. On December 20, 2013, Foley wrote to Francis Keefe regarding Unified Smiles: “It’s a buying group that we do not

participate with, as with all buying groups.” (CCFF ¶ 788 (quoting CX2073 at 001); Foley, Tr. 4552).

1293. Mr. Foley discovered that Unified Smiles would be a price-only buying group, with no demonstrable mechanism of compliance. (CX 2062-001; Foley, Tr. 4688-89 (“she would not be able to drive compliance if she did create her buying group and ... she would be price only.”)).

Response to Proposed Finding No. 1293

To the extent the Proposed Finding implies that Unified Smiles was rejected because it was “price-only” or because it had no “demonstrable mechanism of compliance,” the record evidence shows that such distinctions were not made in the documents contemporaneous with Foley’s interaction with Unified Smiles or his communications with Unified Smiles. (Foley, Tr. 4736-4737). In fact, the record evidence shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685). Thus, to the extent that the Proposed Finding implies that lack of a “demonstrable mechanism of compliance” was the reason for the rejection of Unified Smiles, it is misleading and contrary to the weight of the evidence.

In fact, the record evidence shows that on December 21, 2011, Foley turned down Unified Smile, writing to Knysz: “[U]nless you have some ‘ownership’ of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups.” (CCFF ¶ 719 (quoting CX2062 at 001)). Foley was aware at the time that Unified Smiles wanted to create a buying group, not a DSO. (Foley, Tr. 4549). Foley sent Unified Smiles minimum requirements for ownership, which Foley testified were “rules” to distinguish between DSOs and buying groups. (Foley, Tr. 4546-4547; CCFF ¶¶ 723-726). Foley also informed Unified Smiles that it would not work with Unified Smiles unless it met Schein’s requirements to be a DSO. (CCFF ¶ 725). Following Schein’s rejection of Unified

Smiles, Foley forwarded the rejection to his direct report, Rhonda Durante, attaching the minimum requirements for ownership that he had sent to Unified Smiles. (CCFF ¶¶ 743-744; CX2062 at 001, 006; Foley, Tr. 4542, 4547-4548). Following the December 21, 2011 email, Schein did not bid for Unified Smiles' business. (CCFF ¶ 727). Schein continued to refuse to work with Unified Smiles because it was a buying group. On December 20, 2013, Foley wrote to Francis Keefe regarding Unified Smiles: "It's a buying group that we do not participate with, as with all buying groups." (CCFF ¶ 788 (quoting CX2073 at 001); Foley, Tr. 4552).

1294. After this meeting, Mr. Foley tried to communicate to Ms. Kynsz that Schein could not extend her DSO pricing if she was not operating as a DSO. (Foley, Tr. 4687-88). Unified Smiles also did not have the "\$5M + of business" like Great Expressions did that would allow Schein to "negotiate[] pricing from our vendor/suppliers based on ... proven volume." (CX 2062-001).

Response to Proposed Finding No. 1294

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies that Schein did not reject Unified Smiles per an agreement not to discount to buying groups. The record evidence shows otherwise. It shows that on December 21, 2011, Foley turned down Unified Smile, writing to Knysz: "[U]nless you have some 'ownership' of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups." (CCFF ¶ 719 (quoting CX2062 at 001)). Foley was aware at the time that Unified Smiles wanted to create a buying group, not a DSO. (Foley, Tr. 4549). Foley sent Unified Smiles minimum requirements for ownership, which Foley testified were "rules" to distinguish between DSOs and buying groups. (Foley, Tr. 4546-4547; CCFF ¶¶ 723-726). Foley also informed Unified Smiles that it would not work with Unified Smiles unless it met Schein's requirements to be a DSO. (CCFF ¶ 725). Following Schein's rejection of Unified Smiles, Foley forwarded the rejection to his direct report,

Rhonda Durante, attaching the minimum requirements for ownership that he had sent to Unified Smiles. (CCFF ¶¶ 743-744; CX2062 at 001, 006; Foley, Tr. 4542, 4547-4548). Following the December 21, 2011 email, Schein did not bid for Unified Smiles' business. (CCFF ¶ 727). Schein continued to refuse to work with Unified Smiles because it was a buying group. On December 20, 2013, Foley wrote to Francis Keefe regarding Unified Smiles: "It's a buying group that we do not participate with, as with all buying groups." (CCFF ¶ 788 (quoting CX2073 at 001); Foley, Tr. 4552).

1295. As Mr. Foley explained to Ms. Kynsz, absent "some 'ownership'" of the individual locations, Schein would consider Unified Smiles to be a "buying group" and it could not extend DSO pricing to her. (CX 2062-001).

Response to Proposed Finding No. 1295

Complaint Counsel has no specific response.

1296. Without compliance, Schein could not negotiate "chargebacks" with manufacturers, and extending Unified Smiles DSO pricing would "lead to cannibalization" and "friction" with "EXISTING customers." (CX 2062-001; Foley, Tr. 4543-46, 4688)).

Response to Proposed Finding No. 1296

The Proposed Finding is misleading to the extent it implies Schein rejected Unified Smiles because of manufacturer or cannibalization concerns. The record evidence shows that Schein refused to work with Unified Smiles if it was a buying group. The record evidence shows that on December 21, 2011, Foley turned down Unified Smile, writing to Knysz: "[U]nless you have some 'ownership' of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups." (CCFF ¶ 719 (quoting CX2062 at 001)). Foley was aware at the time that Unified Smiles wanted to create a buying group, not a DSO. (Foley, Tr. 4549). Foley sent Unified Smiles minimum requirements for ownership, which Foley testified were "rules" to distinguish between DSOs and buying groups. (Foley, Tr. 4546-4547; CCFF ¶¶ 723-726). Foley also informed Unified Smiles that

it would not work with Unified Smiles unless it met Schein's requirements to be a DSO. (CCFF ¶ 725). Following Schein's rejection of Unified Smiles, Foley forwarded the rejection to his direct report, Rhonda Durante, attaching the minimum requirements for ownership that he had sent to Unified Smiles. (CCFF ¶¶ 743-744; CX2062 at 001, 006; Foley, Tr. 4542, 4547-4548). Following the December 21, 2011 email, Schein did not bid for Unified Smiles' business. (CCFF ¶ 727). Schein continued to refuse to work with Unified Smiles because it was a buying group. On December 20, 2013, Foley wrote to Francis Keefe regarding Unified Smiles: "It's a buying group that we do not participate with, as with all buying groups." (CCFF ¶ 788 (quoting CX2073 at 001); Foley, Tr. 4552).

1297. In accordance with the 2010 Guidance developed with Mr. Sullivan, Mr. Muller, and Mr. Steck (SF 208-10), Mr. Foley explained that in order to get DSO pricing, Schein would consider the extent to which Unified Smiles could act as an "owner/partner" for its individual practices and further elaborated "we are not talking about 100% ownership." (CX 2062-001-02).

Response to Proposed Finding No. 1297

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein applied the 2010 Guidance (defined in SF 210 as "if a buying group 'could drive compliance, then ... they could be a good opportunity for Schein'") during the conspiracy period. The record evidence shows that Schein did not evaluate certain characteristics of buying groups to decide whether or not to do business with them during the conspiracy period. The record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). The

record evidence is replete with examples of buying groups that Schein turned down during the conspiracy period pursuant to an instruction to do so without any evaluation of the buying groups characteristics. (Complaint Counsel's Post-Trial Brief, at Attachment C).

The Proposed Finding is also misleading to the extent it implies Schein rejected Unified Smiles because of compliance concerns. The record evidence shows that Schein refused to work with Unified Smiles if it was a buying group. It shows that on December 21, 2011, Foley turned down Unified Smile, writing to Knysz: "[U]nless you have some 'ownership' of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups." (CCFF ¶ 719 (quoting CX2062 at 001)). Foley was aware at the time that Unified Smiles wanted to create a buying group, not a DSO. (Foley, Tr. 4549). Foley sent Unified Smiles minimum requirements for ownership, which Foley testified were "rules" to distinguish between DSOs and buying groups. (Foley, Tr. 4546-4547; CCFF ¶¶ 723-726). Foley also informed Unified Smiles that it would not work with Unified Smiles unless it met Schein's requirements to be a DSO. (CCFF ¶ 725). Following Schein's rejection of Unified Smiles, Foley forwarded the rejection to his direct report, Rhonda Durante, attaching the minimum requirements for ownership that he had sent to Unified Smiles. (CCFF ¶¶ 743-744; CX2062 at 001, 006; Foley, Tr. 4542, 4547-4548). Following the December 21, 2011 email, Schein did not bid for Unified Smiles' business. (CCFF ¶ 727). Schein continued to refuse to work with Unified Smiles because it was a buying group. On December 20, 2013, Foley wrote to Francis Keefe regarding Unified Smiles: "It's a buying group that we do not participate with, as with all buying groups." (CCFF ¶ 788 (quoting CX2073 at 001); Foley, Tr. 4552).

1298. Mr. Foley in fact offered discounted pricing to the not yet formed Unified Smiles group, but Ms. Kynsz was adamant about receiving the Great Expressions pricing. (Foley, Tr. 4692; CX 2062).

Response to Proposed Finding No. 1298

The Proposed Finding is also misleading to the extent it implies Schein offered to work with Unified Smiles as a buying group. The record evidence shows that Schein refused to work with Unified Smiles if it was a buying group. It shows that on December 21, 2011, Foley turned down Unified Smile, writing to Knysz: “[U]nless you have some ‘ownership’ of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups.” (CCFF ¶ 719 (quoting CX2062 at 001)). Foley was aware at the time that Unified Smiles wanted to create a buying group, not a DSO. (Foley, Tr. 4549). Foley sent Unified Smiles minimum requirements for ownership, which Foley testified were “rules” to distinguish between DSOs and buying groups. (Foley, Tr. 4546-4547; CCFF ¶¶ 723-726). Foley also informed Unified Smiles that it would not work with Unified Smiles unless it met Schein’s requirements to be a DSO. (CCFF ¶ 725). Following Schein’s rejection of Unified Smiles, Foley forwarded the rejection to his direct report, Rhonda Durante, attaching the minimum requirements for ownership that he had sent to Unified Smiles. (CCFF ¶¶ 743-744; CX2062 at 001, 006; Foley, Tr. 4542, 4547-4548). Following the December 21, 2011 email, Schein did not bid for Unified Smiles’ business. (CCFF ¶ 727). Schein continued to refuse to work with Unified Smiles because it was a buying group. On December 20, 2013, Foley wrote to Francis Keefe regarding Unified Smiles: “It’s a buying group that we do not participate with, as with all buying groups.” (CCFF ¶ 788 (quoting CX2073 at 001); Foley, Tr. 4552).

1299. On December 21, 2011, Mr. Foley individually made the decision to turn down Ms. Kynsz and Unified Smiles, and he communicated this to Ms. Kynsz via email. (Foley, Tr. 4692-93; CX 2062).

Response to Proposed Finding No. 1299

Complaint Counsel has no specific response to the statement that Unified Smiles was turned down. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Unified Smiles was not turned down pursuant to a conspiracy. The record evidence clearly shows that Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups regardless of type during the conspiracy period. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). By February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-954). The record evidence is replete with examples of buying groups that Schein rejected during the conspiracy period. (CCFF ¶¶ 661-954; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322, 1178-1198).

1300. Mr. Foley told Ms. Knysz that Schein “no longer participates in Buying Groups.” (CX 2062-001). Mr. Foley acknowledged this portion of his email was “poorly worded.” (Foley, Tr. 4691). Special Markets was still participating with buying groups at the time, and the 2010 Guidance allowed for buying groups that, unlike Unified Smiles, could drive compliance. (Foley, Tr. 4657, 4690-91). Nonetheless, rather than spend the time to provide Ms. Knysz with such a nuanced explanation, Mr. Foley chose to end the discussions more definitively because the secret basement meeting made him “uneasy” and he did not want to “argue with her anymore.” (Foley, Tr. 4684-85, 4691).

Response to Proposed Finding No. 1300

The first and second sentences of the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts that Foley's statement was "poorly worded." Schein continued to refuse to work with Unified Smiles, because it was a buying group, throughout the conspiracy. On December 20, 2013, Foley wrote to Francis Keefe regarding Unified Smiles: "It's a buying group that we do not participate with, as with all buying groups." (CCFF ¶ 788 (quoting CX2073 at 001); Foley, Tr. 4552).

The third and fourth sentences of the Proposed Finding ("Nonetheless, rather than spend the time to provide Ms Knysz . . .) is also misleading to the extent it implies Schein rejected Unified Smiles for reasons other than it's classification as a buying group, or that Schein allowed for only those buying groups that could drive compliance. The record evidence shows that on December 21, 2011, Foley turned down Unified Smile, writing to Knysz: "[U]nless you have some 'ownership' of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups." (CCFF ¶ 719 (quoting CX2062 at 001)). Foley was aware at the time that Unified Smiles wanted to create a buying group, not a DSO. (Foley, Tr. 4549). Foley sent Unified Smiles minimum requirements for ownership, which Foley testified were "rules" to distinguish between DSOs and buying groups. (Foley, Tr. 4546-4547; CCFF ¶¶ 723-726). Foley also informed Unified Smiles that it would not work with Unified Smiles unless it met Schein's requirements to be a DSO. (CCFF ¶ 725). Following Schein's rejection of Unified Smiles, Foley forwarded the rejection to his direct report, Rhonda Durante, attaching the minimum requirements for ownership that he had sent to Unified Smiles. (CCFF ¶¶ 743-744; CX2062 at 001, 006;

Foley, Tr. 4542, 4547-4548). Following the December 21, 2011 email, Schein did not bid for Unified Smiles' business. (CCFF ¶ 727).

The third sentence is also vague as to the phrase "Special Markets was still participating with buying groups at the time," as it does not specify which groups or the precise time period, which is critical to determining whether such an assertion is relevant, much less accurate.

The record evidence shows that neither HSD nor Special Markets was contracting with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100; Complaint Counsel's Post-Trial Brief, at Attachment C).

1301. At trial, Mr. Foley confirmed that he was the sole decision maker with respect to Unified Smiles. (Foley, Tr. 4692-94; CX 2062).

Response to Proposed Finding No. 1301

The Proposed Finding is misleading and irrelevant. The record shows that Foley rejected Unified Smiles in December 2011, pursuant to Schein's then-existing policy against buying groups. Foley was also aware of Sullivan's instructions on buying groups at the time. Shortly thereafter, in February 2012, Foley instructed his direct report, referring to his conversation with Sullivan about buying groups, that "this is a corporate decision, not to participate in these." (CCFF ¶ 756 (quoting CX0238 at 001; Foley, Tr. 4554-4556)). The Proposed Finding that Foley was the sole decision-maker, and that he had no discussions with Sullivan about this particular group, is irrelevant.

1302. Prior to making his decision, Mr. Foley did not discuss turning down Unified Smiles with anyone at Schein. (Foley, Tr. 4694). Mr. Foley's direct supervisor, Hal Muller was made aware of Mr. Foley's decision, after Mr. Foley notified Unified Smiles. (CX 2063).

Response to Proposed Finding No. 1302

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent the statement implies that Schein did not participate in a conspiracy in rejecting

Unified Smiles. The record evidence shows that the December 2011 rejection of Unified Smiles followed Sullivan's change in position regarding buying groups after communications with Benco that year. (CCFF ¶¶ 661-732). The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1303. Mr. Foley never spoke with Mr. Sullivan about Unified Smiles. (Foley, Tr. 4694).

Response to Proposed Finding No. 1303

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent the statement implies that Schein did not participate in a conspiracy in rejecting Unified Smiles. The record evidence shows that the December 2011 rejection of Unified Smiles followed Sullivan's change in position regarding buying groups after communications with Benco that year, and that the rejection was a corporate decision. (CCFF ¶¶ 661-732). The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732). Foley rejected Unified Smiles in December 2011, pursuant to Schein's then-existing policy against buying groups, as he was aware of Sullivan's instructions on buying groups at the time. Indeed, in February 2012, Foley instructed his direct report, referring to his conversation with Sullivan about buying groups, that "this is a corporate decision, not to participate in these." (CCFF ¶ 756 (quoting CX0238 at 001; Foley, Tr. 4554-4556)).

1304. Mr. Foley never spoke with anyone at Benco or Patterson about Unified Smiles. (Foley, Tr. 4696).

Response to Proposed Finding No. 1304

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent the statement implies that Schein did not participate in a conspiracy in rejecting Unified Smiles. The record evidence shows that the December 2011 rejection of Unified Smiles followed Sullivan's change in position regarding buying groups after communications with Benco that year, and that the rejection was a corporate decision. (CCFF ¶¶ 661-732). The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732). Foley rejected Unified Smiles in December 2011, pursuant to Schein's then-existing policy against buying groups, as he was aware of Sullivan's instructions on buying groups at the time. Indeed, in February 2012, Foley instructed his direct report, referring to his conversation with Sullivan about buying groups, that "this is a corporate decision, not to participate in these." (CCFF ¶ 756 (quoting CX0238 at 001); Foley, Tr. 4554-4556).

1305. Neither Ms. Kynsz nor anyone else from Unified Smiles ever responded to the December 21, 2011 email. (Foley, Tr. 4694).

Response to Proposed Finding No. 1305

Complaint Counsel has no specific response.

1306. On January 5, 2012 – a few weeks after Schein had declined to extend Unified Smiles DSO pricing – Unified Smiles announced the group's launch. (CX 1145).

Response to Proposed Finding No. 1306

Complaint Counsel has no specific response.

1307. Complaint Counsel's expert, Dr. Marshall, did not conduct a profitability study of Unified Smiles. (*See* CX 7100; CX 7101; Marshall, Tr. 2986-87).

Response to Proposed Finding No. 1307

This Proposed Finding is inaccurate and misleading to the extent that it suggests that Dr. Marshall should have done a profitability analysis for Unified Smiles. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CCFF ¶¶ 1639-1684). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED]).

To the extent that Schein claims that these profitability analyses are not representative of other buying groups, Dr. Marshall explained that he studied five different relationships with the Kois Buyers Group and Smile Source because, in addition to having gotten off the ground, these buying groups operate in geographies (Seattle and Atlanta) in which Schein, Patterson, and Benco are likely to have their lowest collective share of sales and another distributor was likely to have a high share of sales. (CX7101 at 045-046, 064 (¶¶ 107-112, 165) (Marshall Expert Rebuttal Report)). These facts addressed potential concerns that the relative sizes of Schein and Patterson make it more costly for them to supply buying groups, both because (1) Schein and Patterson are likely to find itself more profitable to discount when they have a lower share of sales and (2) where Burkhart and Atlanta Dental are large, it illuminates whether a full-service distributor found it profitable to supply a buying group so in a geographic area in which its share of sales was relatively large. (CX7101 at 64 (¶ 165) (Marshall Expert Rebuttal Report)). Differences between the Kois Buyers Group, with its single regional full-service distributor, and Smile Source, with its changing network of distributors over time, provide further reasons to believe that the experiences of distributors with these two groups provides some information about likely outcomes with other potential

buying groups that went nowhere as a result of being rejected by Schein, Patterson, and/or Benco. (CX7101 at 64 (¶ 166) (Marshall Expert Rebuttal Report)). [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]; *see also* CX8040 (Marshall, Dep. at 212 (explaining that Kois and Smile Source are “the same in the sense of the definition I offer in paragraph 139.”)). Dr. Marshall elaborated that for buying groups generally “[a]ll these groups will have different management and they’ll be issues that are different between them. But, again, these fall within what’s identified in paragraph 139 of my report.” (CX8040 (Marshall, Dep. at 212)).

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

1308. Thus, the evidence indicates that Schein declined to do business with Unified Smiles for unilateral and legitimate reasons. It did not coordinate with Benco or Patterson on its response to Unified Smiles (SF 1286-304), and it considered the risk of cannibalization as well as Unified Smiles’ ability or inability to move volume towards Schein. As Mr. Foley testified, Schein did offer Unified Smiles discounts, just not the steep discounts it offered to large DSOs that had a proven record of driving volume. (Foley, Tr. 4543-44). The evidence supports Schein’s deliberate, unilateral, and rational approach to buying groups, not an agreement to boycott them.

Response to Proposed Finding No. 1308

The Proposed Finding is not supported by any citation to the record evidence and should be disregarded. Moreover, it is misleading to the extent it implies Schein rejected Unified Smiles for reasons other than its classification as a buying group. The record evidence shows

that the December 2011 rejection of Unified Smiles followed Sullivan's change in position regarding buying groups after communications with Benco that year, and that the rejection was a corporate decision. (CCFF ¶¶ 661-732). The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732). Foley rejected Unified Smiles in December 2011, pursuant to Schein's then-existing policy against buying groups, as he was aware of Sullivan's instructions on buying groups at the time. Indeed, in February 2012, Foley instructed his direct report, referring to his conversation with Sullivan about buying groups, that "this is a corporate decision, not to participate in these." (CCFF ¶ 756 (quoting CX0238 at 001; Foley, Tr. 4554-4556)).

Furthermore, to the extent the Proposed Finding implies that Unified Smiles was rejected because of "cannibalization" or "volume" considerations, the record evidence shows that such distinctions were not made in the documents contemporaneous with Foley's interaction with Unified Smiles or his communications with Unified Smiles. (Foley, Tr. 4736-4737). In fact, the record evidence shows that buying groups were profitable for distributors even without contractual volume guarantees. (CCFF ¶ 1685). The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent the statement implies that Schein did not participate in a conspiracy in rejecting Unified Smiles. (*See* Responses to Proposed Finding Nos. 1286-1304).

RR. Universal Dental Alliance ("Dental Alliance").

1309. Complaint Counsel contends that "Schein did not enter into agreements with Buying Groups between 2011 and 2015, including ... Dental Alliance." (RX 3087-004).

Response to Proposed Finding No. 1309

Complaint Counsel has no specific response.

1310. “Dental Alliance” refers to Universal Dental Alliance, a Raleigh-based buying group and Schein customer. (*See, e.g.*, RX 2350-002-09 (listing Raleigh address and 7% discount for group’s members); Steck, Tr. 3770-71; Sullivan, Tr. 4239-41).

Response to Proposed Finding No. 1310

Complaint Counsel has no specific response.

1311. Dental Alliance describes itself as “a group purchasing organization (GPO) that focuses exclusively on the dental and oral surgery industries. [Its] sole function is to leverage the buying power of our members for discounted pricing on supplies, equipment, and increased customer services.” (RX 2350-001).

Response to Proposed Finding No. 1311

Complaint Counsel has no specific response.

1312. Dental Alliance is incorporated in Raleigh, North Carolina. (RX 2350-002).

Response to Proposed Finding No. 1312

Complaint Counsel has no specific response.

1313. In 2011, Ryan Steck, a Regional Manager for Schein in Raleigh, North Carolina, proposed “an arrangement” for Universal Dental Alliance members where members could get “a 7% discount for a business pledge of \$25,000-\$30,000.” (RX 2612-017; Steck, Tr. 3771-72).

Response to Proposed Finding No. 1313

Complaint Counsel has no specific response.

1314. Ryan Steck discussed the Dental Alliance opportunity with Dave Steck, Vice President and General Manager for Schein, and the two formulated a proposal for the buying group, which would provide members with a “straight 7% discount.” (RX 2612-016; Steck, Tr. 3771-72).

Response to Proposed Finding No. 1314

Complaint Counsel has no specific response.

1315. To incent the buying group to focus on “incremental sales and not Henry Schein customers,” Schein also paid the group administrative fees ranging from 1.5% to 3% based on whether the sales were incremental or cannibalistic. (RX 2612-016-17; Steck, Tr. 3772-73 (testifying offer was meant “to financially incentivize the buying group to focus on incremental sales and not on Henry Schein customers,” to help Schein “grow the business, not just continue to farm the business” it already had.)).

Response to Proposed Finding No. 1315

Complaint Counsel has no specific response.

1316. Schein proposed setting up two discount codes for Dental Alliance members. (Steck, Tr. 3772-73). Both “would give the end user a straight 7% discount,” but one code would apply to current Schein customers who purchased “\$20,000 or more in merchandise in [the] prior 12 months.” (RX 2612-016). The other code “would be for non-HSD customer[s] ... (defined as less than 20K annually in merchandise).” (RX 2612-016).

Response to Proposed Finding No. 1316

Complaint Counsel has no specific response.

1317. Dave Steck explained the offer this way: “the second [discount code] is for incremental business to Henry Schein. So we are rebating a group on a higher rate than we would on business we already had.” (Steck, Tr. 3772-73).

Response to Proposed Finding No. 1317

Complaint Counsel has no specific response.

1318. The offer was designed “to financially incentivize the buying group to focus on incremental sales and not on Henry Schein customers,” to help Schein “grow the business, not just continue to farm the business” it already had. (Steck, Tr. 3773).

Response to Proposed Finding No. 1318

Complaint Counsel has no specific response.

1319. In or around July 2011, Schein entered a three-year contract with Dental Alliance that would automatically renew on June 30, 2014. (RX 2350-005 (unsigned copy of 2011 contract); Sullivan, Tr. 4241 (confirming RX 2350 represents the contract Schein signed with the Dental Alliance in 2011); *see also* RX 3076-015 (confirming contract renewal date of 6/30/2014)).

Response to Proposed Finding No. 1319

Complaint Counsel has no specific response. The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein’s relationship with Dental Alliance during the conspiracy period disproves any allegation of Schein’s participation in a conspiracy. The record shows, and Schein’s Proposed Finding No. 1319 concedes, that the unsigned agreement between Schein and Dental Alliance was from

July 2011. (RX2350 at 002 (unsigned agreement with Dental Alliance dated July 2011)). The relationship was established by a regional manager, Ryan Steck, three months before Sullivan was informed of it. (RX2349 at 001 (Schein Vice President Paul Hinsch informed Sullivan on October 20, 2011: “It seems there is a buying group that [regional manager] Ryan Steck has worked something out for.”)). Before Hinsch’s October 20, 2011 email, Sullivan was unaware of the Dental Alliance, or that it was a buying group. (Sullivan, Tr. 4239 (Sullivan was unaware of Dental Alliance in October 2011); RX2349 at 001-002 (after being informed of the Dental Alliance in October 2011, Sullivan responded: “What is this? ... Do we have an arrangement with them?”)). The record also shows that Sullivan never approved of Dental Alliance. After Sullivan was informed of Dental Alliance, he wrote: “[w]e’ve got to undertake this.” (RX2349 at 001). Sullivan testified at trial that by “[w]e’ve got to undertake this,” he meant that he wanted to understand what Dental Alliance was: “I think I meant to say understand this. I just wanted to understand what it was.” (Sullivan, Tr. 4240). There are no documents and no testimony to support the assertion in the Proposed Finding that Sullivan ever approved Dental Alliance.

Schein’s relationship with Dental Alliance is also the subject of inter-firm communications between Sullivan and Cohen, in which Cohen confronted Sullivan for cheating on the agreement not to sell to buying groups via a text message. (CCFF ¶¶ 994-1004). The record evidence shows that on March 26, 2013, Cohen sent Sullivan a text message asking about market intelligence that Schein was discounting to Dental Alliance and reassured Sullivan that Schein had turned down Dental Alliance. (CCFF ¶¶ 994-997). In response, Sullivan tried to call Cohen the following morning. (CCFF ¶ 998).

1320. Schein’s 2011 contract with Dental Alliance met the terms Schein proposed including, “at minimum 7% discount from catalog (list) price for Universal Dental Alliance

members,” a 3% quarterly rebate (paid to the group) for sales to new customers, and a 1.5% rebate (paid to the group) for sales to existing customers. (RX 2350-004, -009).

Response to Proposed Finding No. 1320

Complaint Counsel has no specific response. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein’s relationship with Dental Alliance during the conspiracy period disproves any allegation of Schein’s participation in a conspiracy.

The record shows, and Schein’s Proposed Finding No. 1319 concedes, that the unsigned agreement between Schein and Dental Alliance was from July 2011. (RX2350 at 002 (unsigned agreement with Dental Alliance dated July 2011)). The relationship was established by a regional manager, Ryan Steck, three months before Sullivan was informed of it. (RX2349 at 001 (Schein Vice President Paul Hinsch informed Sullivan on October 20, 2011: “It seems there is a buying group that [regional manager] Ryan Steck has worked something out for.”)). Before Hinsch’s October 20, 2011 email, Sullivan was unaware of the Dental Alliance, or that it was a buying group. (Sullivan, Tr. 4239 (Sullivan was unaware of Dental Alliance in October 2011); RX2349 at 001-002 (after being informed of the Dental Alliance in October 2011, Sullivan responded: “What is this? ... Do we have an arrangement with them?”)). The record also shows that Sullivan never approved of Dental Alliance. After Sullivan was informed of Dental Alliance, he wrote: “[w]e’ve got to undertake this.” (RX2349 at 001). Sullivan testified at trial that by “[w]e’ve got to undertake this,” he meant that he wanted to understand what Dental Alliance was: “I think I meant to say understand this. I just wanted to understand what it was.” (Sullivan, Tr. 4240). There are no documents or testimony to support the assertion in the Proposed Finding that Sullivan ever approved Dental Alliance.

Schein's relationship with Dental Alliance is also the subject of inter-firm communications between Sullivan and Cohen, in which Cohen confronted Sullivan for cheating on the agreement not to sell to buying groups via a text message. (CCFF ¶¶ 994-1004). The record evidence shows that on March 26, 2013, Cohen sent Sullivan a text message asking about market intelligence that Schein was discounting to Dental Alliance and reassured Sullivan that Schein had turned down Dental Alliance. (CCFF ¶¶ 994-997). In response, Sullivan tried to call Cohen the following morning. (CCFF ¶ 998).

1321. The agreement obligated the Dental Alliance to "ensure that each Group Member will utilize [Schein] for \$20,000 of dental supply business" in order to be "recognized as a beneficiary of this Agreement." (RX 2350-003; *see also* Steck, Tr. 3772 (Schein asked Dental Alliance's "members to individually commit to volume ... in order to get the 7 percent discount.")).

Response to Proposed Finding No. 1321

Complaint Counsel has no specific response.

1322. The Dental Alliance contract was automatically renewed on June 30, 2014, and Schein continued to do business with them. (RX 3076-015; RX 2612-005 (December 15, 2014 email noting that Schein was "negotiating a new contract"); RX 2612-001 (April 30, 2015 email showing quarterly rebates for Q1 2015)).

Response to Proposed Finding No. 1322

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein's relationship with Dental Alliance during the conspiracy period disproves any allegation of Schein's participation in a conspiracy. Schein's relationship with Dental Alliance is the subject of inter-firm communications between Sullivan and Cohen, in which Cohen confronted Sullivan for cheating on the agreement not to sell to buying groups via a text message. (CCFF ¶¶ 994-1004). The record evidence shows that on March 26, 2013, Cohen sent Sullivan a text message asking about market intelligence that Schein was discounting to Dental Alliance and reassured Sullivan that Schein had turned

down Dental Alliance. (CCFF ¶¶ 994-997). In response, Sullivan tried to call Cohen the following morning. (CCFF ¶ 998). The Proposed Finding is also misleading to the extent it asserts that Sullivan never acted to terminate the Dental Alliance buying group, or never took any action concerning it following Cohen's text messages, as Sullivan testified (and as Schein concedes in Proposed Finding No. 1546) that he thought the text messages about Dental Alliance were about Atlantic Dental Care not Dental Alliance, a separate entity. (Sullivan, Tr. 4198).

1323. Schein's 2011 contract with Dental Alliance directly contradicts Complaint Counsel's allegation that Schein boycotted Dental Alliance. (RX 3087-004).

Response to Proposed Finding No. 1323

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein's relationship with Dental Alliance during the conspiracy period disproves any allegation of Schein's participation in a conspiracy. The record shows, and Schein's Proposed Finding No. 1319 concedes, that the unsigned agreement between Schein and Dental Alliance was from July 2011. (RX2350 at 002 (unsigned agreement with Dental Alliance dated July 2011)). The relationship was established by a regional manager, Ryan Steck, three months before Sullivan was informed of it. (RX2349 at 001 (Schein Vice President Paul Hinsch informed Sullivan on October 20, 2011: "It seems there is a buying group that [regional manager] Ryan Steck has worked something out for.")). Before Hinsch's October 20, 2011 email, Sullivan was unaware of the Dental Alliance, or that it was a buying group. (Sullivan, Tr. 4239 (Sullivan was unaware of Dental Alliance in October 2011); RX2349 at 001-002 (after being informed of the Dental Alliance in October 2011, Sullivan responded: "What is this? ... Do we have an arrangement with them?")). The record also shows that Sullivan never approved of Dental Alliance. After

Sullivan was informed of Dental Alliance, he wrote: “[w]e’ve got to undertake this.”

(RX2349 at 001). Sullivan testified at trial that by “[w]e’ve got to undertake this,” he meant that he wanted to understand what Dental Alliance was: “I think I meant to say understand this. I just wanted to understand what it was.” (Sullivan, Tr. 4240). There are no documents or testimony to support the assertion in the Proposed Finding that Sullivan ever approved Dental Alliance.

Schein’s relationship with Dental Alliance is also the subject of inter-firm communications between Sullivan and Cohen, in which Cohen confronted Sullivan for cheating on the agreement not to sell to buying groups via a text message. (CCFF ¶¶ 994-1004). The record evidence shows that On March 26, 2014, Cohen sent Sullivan a text message asking about market intelligence that Schein was discounting to Dental Alliance and reassured Sullivan that Schein had turned down Dental Alliance. (CCFF ¶¶ 994-997). In response, Sullivan tried to call Cohen the following morning. (CCFF ¶ 998).

1324. Schein’s 2011 agreement with Dental Alliance also provided “either party may terminate this Agreement upon 60 days prior written notice.” (RX 2350-005-06).

Response to Proposed Finding No. 1324

Complaint Counsel has no specific response.

1325. On October 20, 2011, Tim Sullivan learned Schein was working with Dental Alliance. (Sullivan, Tr. 4241; Steck, Tr. 3771-72; RX 2349-001-02 (Mr. Sullivan: “What is this?” Paul Hinsch, Schein Vice President of Merchandise Marketing: “A buying group.” Mr. Sullivan: “We’ve got to undertake this.”)). Mr. Sullivan did not take any action to terminate Schein’s relationship with Dental Alliance. (Sullivan, Tr. 4240).

Response to Proposed Finding No. 1325

The second sentence of the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it suggests Sullivan’s action or lack therefore disprove Schein’s participation in a conspiracy. The record evidence shows that Sullivan was unaware of the

Dental Alliance, or that it was a buying group, before October 20, 2011. (Sullivan, Tr. 4239 (Sullivan was unaware of Dental Alliance in October 2011); RX2349 at 001-002 (after being informed of the Dental Alliance in October 2011, Sullivan responded: “What is this? ... Do we have an arrangement with them?”)). The record also shows that Sullivan never approved of Dental Alliance. After Sullivan was informed of Dental Alliance, he wrote: “[w]e’ve got to undertake this.” (RX2349 at 001). Sullivan testified at trial that by “[w]e’ve got to undertake this,” he meant that he wanted to understand what Dental Alliance was: “I think I meant to say understand this. I just wanted to understand what it was.” (Sullivan, Tr. 4240). There are no documents or testimony to support the assertion in the Proposed Finding that Sullivan ever approved Dental Alliance.

The record evidence shows that Schein’s relationship with Dental Alliance during the conspiracy period is the subject of inter-firm communications between Sullivan and Cohen, in which Cohen confronted Sullivan for cheating on the agreement not to sell to buying groups via a text message. (CCFF ¶¶ 994-1004). On March 26, 2014, Cohen sent Sullivan a text message asking about market intelligence that Schein was discounting to Dental Alliance and reassured Sullivan that Schein had turned down Dental Alliance. (CCFF ¶¶ 994-997). In response, Sullivan tried to call Cohen the following morning. (CCFF ¶ 998). Complaint Counsel has no specific response to the first sentence of the Proposed Finding.

1326. Mr. Sullivan’s conduct directly contradicts Complaint Counsel’s allegation that Mr. Sullivan and other top Schein executives refused “to provide discounts to or otherwise contract with buying groups.” (Complaint ¶ 8).

Response to Proposed Finding No. 1326

The Proposed Finding is not supported by any citation to the record evidence, as the Complaint does not state that any conduct contradicts Complaint Counsel’s allegations, and should be disregarded. Nonetheless, the record evidence shows that (1) the Dental Alliance

agreement was established in July 2011 by a Schein Regional Manager; (2) that Sullivan learned of the agreement in October 2011, months after the relationship had been established; and (3) that Sullivan never approved the agreement with Dental Alliance. (*See* Response to Proposed Finding No. 1319). Moreover, Sullivan testified (as Schein concedes in Proposed Finding Nos. 1328 and 1546) that he thought the text messages about Dental Alliance were about Atlantic Dental Care, and he did not realize at the time that Cohen was discussing a separate entity called Dental Alliance. (Sullivan, Tr. 4198; *See* Responses to Proposed Finding Nos. 1322, 1546).

Schein's relationship with Dental Alliance during the conspiracy period is the subject of inter-firm communications between Sullivan and Cohen, in which Cohen confronted Sullivan for cheating on the agreement not to sell to buying groups via a text message. (CCFF ¶¶ 994-1004). On March 26, 2014, Cohen sent Sullivan a text message asking about market intelligence that Schein was discounting to Dental Alliance and reassured Sullivan that Schein had turned down Dental Alliance. (CCFF ¶¶ 994-997). In response, Sullivan tried to call Cohen the following morning. (CCFF ¶ 998). Thus, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein's conduct regarding Dental Alliance disproves its participation in a conspiracy.

1327. Mr. Sullivan never communicated with Chuck Cohen about Dental Alliance other than receiving an unsolicited text message from Chuck Cohen on March 26, 2013 to which Mr. Sullivan did not respond. (Sullivan, Tr. 4197; CX 0196-008).

Response to Proposed Finding No. 1327

The Proposed Finding is misleading and contrary to the weight of the evidence. First, Sullivan testified (as Schein concedes in Proposed Finding No. 1546) that he thought the text messages about Dental Alliance were about Atlantic Dental Care ("ADC"), and he did not realize at the time that Cohen was discussing a separate entity called Dental Alliance.

(Sullivan, Tr. 4198; *See* Responses to Proposed Finding Nos. 1322, 1546). Second, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it characterizes Cohen’s text message to Sullivan about buying group Universal Dental Alliance (“Dental Alliance”) as “unsolicited.” The record evidence shows that Sullivan and Cohen were communicating about buying groups and ADC in March 2013 when Cohen texted Sullivan about Dental Alliance. On March 26, 2013, Cohen notified Sullivan of market intelligence that Schein may be doing business with a buying group and told Sullivan Benco had turned down the Dental Alliance buying group. (Cohen, Tr. 558, CCFF ¶¶ 995-1004). Sullivan tried to call Cohen the following morning but did not reach him. (CCFF ¶ 998 (citing CX6027 at 028 (Row 247); Sullivan, Tr. 3959). The record evidence also shows that text message about Dental Alliance followed a March 25, 2013 phone call between Sullivan and Cohen about ADC and whether it was a buying group. (CCFF ¶ 1036; Cohen, Tr. at 547-548; *see also* CX0301 (Cohen, IHT at 271-272 (“[W]e were exchanging information about whether Atlantic Dental Care was a group buying or group purchase organization or a DSO.”))). It also followed Sullivan and Cohen’s exchange of text messages about ADC. (CCFF ¶¶ 1044-1047). Moreover, Cohen’s testimony about the text message contradicts Schein’s claim that it was unsolicited. (CCFF ¶ 1004; CX0301 (Cohen, IHT at 287 (“Q. And why were you sending Mr. Sullivan this text? A. The context could have been in the conversation we had the day before. Maybe he said he hadn’t heard of it before. I can’t say, from this vantage point, why I sent it to him. Probably answering a question that was asked or offering information. It might be that.”))).

1328. When Mr. Sullivan received the text message, he thought Chuck Cohen was referring to a different group, Atlantic Dental Care, which Complaint Counsel does not contend is a buying group. (Sullivan, Tr. 4198).

Response to Proposed Finding No. 1328

Complaint Counsel has no specific response.

1329. After receiving the unsolicited text message from Mr. Cohen, Mr. Sullivan called Mr. Cohen the next day to “be very clear with him that ... Chuck ... cannot be sending information on what Benco’s doing with customers.” (Sullivan, Tr. 4197-98).

Response to Proposed Finding No. 1329

The Proposed Finding is contrary to the weight of the evidence, which shows that Sullivan never told Cohen to stop contacting him about customers or buying groups. Cohen testified at trial that he did not recall Sullivan ever telling Cohen to stop contacting him about buying groups, or ever giving Cohen the impression that the two men should not be talking about buying groups. (CCFF ¶ 1090). At trial, Sullivan claimed that during the April 3, 2013 call, Sullivan told Cohen that he should “stop sending me information about customers.”

(Sullivan, Tr. 3966). Sullivan’s testimony is contrary to sworn testimony that he provided at his investigational hearing when he was asked about the same April 3, 2013 phone call. At his investigational hearing, Sullivan testified that he did not know what his April 3, 2013 call with Cohen was about, but that he did not believe it was possible that the call related to Atlantic Dental Care. (CCFF ¶ 1089 (citing CX0311 (Sullivan, IHT at 310-311))).

The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it characterizes Cohen’s text message to Sullivan about buying group Universal Dental Alliance (“Dental Alliance”) as “unsolicited.” The record evidence shows that Sullivan and Cohen were communicating about buying groups and ADC in March 2013 when Cohen texted Sullivan about Dental Alliance. On March 26, 2013, Cohen notified Sullivan of market intelligence that Schein may be doing business with a buying group and told Sullivan Benco had turned down the Dental Alliance buying group. (Cohen, Tr. 558, CCFF ¶¶ 995-1004). Sullivan tried to call Cohen the following morning but did not reach him. (CCFF ¶

998 (citing CX6027 at 028 (Row 247)); Sullivan, Tr. 3959). The record evidence also shows that text message about Dental Alliance followed a March 25, 2013 phone call between Sullivan and Cohen about ADC and whether it was a buying group. (CCFF ¶ 1036; Cohen, Tr. at 547-548; *see also* CX0301 (Cohen, IHT at 271-272 (“[W]e were exchanging information about whether Atlantic Dental Care was a group buying or group purchase organization or a DSO.”))). It also followed Sullivan and Cohen’s exchange of text messages about ADC. (CCFF ¶¶ 1044-1047). Moreover, Cohen’s testimony about the text message contradicts Schein’s claim that it was unsolicited. (CCFF ¶ 1004; CX0301 (Cohen, IHT at 287 (“Q. And why were you sending Mr. Sullivan this text? A. The context could have been in the conversation we had the day before. Maybe he said he hadn’t heard of it before. I can’t say, from this vantage point, why I sent it to him. Probably answering a question that was asked or offering information. It might be that.”))).

1330. While Mr. Cohen does not recall Mr. Sullivan making this point, Mr. Sullivan’s testimony is corroborated by Mr. Sullivan’s later internal email about the Texas Dental Association, instructing members of his team that “Agree that we should NOT be having these discussions w[ith] Benco. Chuck has not contacted me nor would he on such a topic.” (Cohen, Tr. 559; RX 2362; Sullivan, Tr. 4207-08 (Mr. Sullivan was confident Mr. Cohen would not contact him about the TDA because “I was very clear that, Chuck, you and I should not and cannot be talking about this type of stuff.”))).

Response to Proposed Finding No. 1330

The Proposed Finding is contrary to the weight of the evidence and misleading to the extent it asserts that contemporaneous documents corroborate Sullivan’s testimony. The citation to RX2362 does not support the Proposed Finding, because it is from October 2013, over 6 months after the communications about ADC and Dental Alliance, and because it relates to a separate buying group, the Texas Dental Association buying group. (RX2362 at 001-002 (October 16, 2013 email about the Texas Dental Association)). Schein’s claim that this corroborates anything about the Dental Alliance or ADC communications also is misleading

and contrary to the evidence because Cohen did in fact reach out to Sullivan about buying groups on multiple occasions. (CCFF ¶ 679).

The Proposed Finding is also contrary to the weight of the evidence, which shows that Sullivan never told Cohen to stop contacting him about customers or buying groups. Cohen testified at trial that he did not recall Sullivan ever telling Cohen to stop contacting him about buying groups, or ever giving Cohen the impression that the two men should not be talking about buying groups. (CCFF ¶ 1090). At trial, Sullivan claimed that during the April 3, 2013 call, Sullivan told Cohen that he should “stop sending me information about customers.” (Sullivan, Tr. 3966). Sullivan’s testimony is contrary to sworn testimony that he provided at his investigational hearing when he was asked about the same April 3, 2013 phone call. At his investigational hearing, Sullivan testified that he did not know what his April 3, 2013 call with Cohen was about, but that he did not believe it was possible that the call related to Atlantic Dental Care. (CCFF ¶ 1089 (citing CX0311 (Sullivan, IHT at 310-311))).

1331. Mr. Sullivan “never talked with anyone” about Mr. Cohen’s text message about Universal Dental Alliance. (Sullivan, Tr. 4200-01).

Response to Proposed Finding No. 1331

The Proposed Finding is irrelevant and misleading. Sullivan testified (as Schein concedes in Proposed Finding Nos. 1328 and 1546) that he thought the text messages about Dental Alliance were about Atlantic Dental Care, and he did not realize at the time that Cohen was discussing a separate entity called Dental Alliance. (Sullivan, Tr. 4198; *see also* Responses to Proposed Finding Nos. 1322, 1546). Schein’s relationship with Dental Alliance during the conspiracy period is the subject of inter-firm communications between Sullivan and Cohen, in which Cohen confronted Sullivan for cheating on the agreement not to sell to buying groups via a text message. (CCFF ¶¶ 994-1004). As such, whether Sullivan shared Cohen’s

text message regarding Dental Alliance with anyone else has no bearing on the allegations regarding this inter-firm communication. The record evidence shows that on March 26, 2013, Cohen sent Sullivan a text message asking about market intelligence that Schein was discounting to Dental Alliance and reassured Sullivan that Schein had turned down Dental Alliance. (CCFF ¶¶ 994-997). In response, Sullivan tried to call Cohen the following morning. (CCFF ¶ 998). Moreover, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that because “Sullivan ‘never talked with anyone’ regarding Mr. Cohen’s text message” it disproves a participation in a conspiracy.

1332. At no point during the alleged conspiracy period or thereafter did Mr. Sullivan take any action “to kill” Schein’s partnership with Dental Alliance, and never terminated the contract. (Sullivan, Tr. 4240).

Response to Proposed Finding No. 1332

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Sullivan’s action or lack of action regarding Dental Alliance disproves Schein’s participation in a conspiracy. Sullivan testified (as Schein concedes in Proposed Finding Nos. 1328 and 1546) that he thought the text messages about Dental Alliance were about Atlantic Dental Care, and he did not realize at the time that Cohen was discussing a separate entity called Dental Alliance. (Sullivan, Tr. 4198; *see also* Responses to Proposed Finding Nos. 1322, 1546). Moreover, the record evidence shows that Schein’s relationship with Dental Alliance during the conspiracy period is the subject of inter-firm communications between Sullivan and Cohen, in which Cohen confronted Sullivan for cheating on the agreement not to sell to buying groups via a text message. (CCFF ¶¶ 994-1004). On March 26, 2013, Cohen sent Sullivan a text message asking about market intelligence that Schein was discounting to Dental Alliance and reassured Sullivan that

Schein had turned down Dental Alliance. (CCFF ¶¶ 994-997). In response, Sullivan tried to call Cohen the following morning. (CCFF ¶ 998). Thus, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein's conduct regarding Dental Alliance disproves its participation in a conspiracy. Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1333. Schein continued working with Dental Alliance and paying it rebates through at least April 2015. (RX 2612-001-09 (listing quarterly rebates for Universal Dental Alliance from 2011 into 2015); RX 2613-001 (listing sales to group members for January through March 2015)).

Response to Proposed Finding No. 1333

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein's payment or rebates to Dental Alliance disproves its participation in a conspiracy. Sullivan testified (as Schein concedes in Proposed Finding Nos. 1328 and 1546) that he thought the text messages about Dental Alliance were about Atlantic Dental Care, and he did not realize at the time that Cohen was discussing a separate entity called Dental Alliance. (Sullivan, Tr. 4198; *see also* Responses to Proposed Finding Nos. 1322, 1546). In addition, Schein's relationship with Dental Alliance during the conspiracy period is the subject of inter-firm communications between Sullivan and Cohen, in which Cohen confronted Sullivan for cheating on the agreement not to sell to buying groups via a text message. (CCFF ¶¶ 994-1004). On March 26, 2013, Cohen sent Sullivan a text message asking about market intelligence that Schein was discounting to Dental Alliance and reassured Sullivan that Schein had turned down Dental Alliance. (CCFF ¶¶ 994-997). In response, Sullivan tried to call Cohen the following morning. (CCFF ¶ 998). Thus, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein's conduct regarding Dental Alliance disproves its participation

in a conspiracy. Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1334. Benco rejected Universal Dental Alliance in 2012 because it was a buying group, and knew Schein was offering Dental Alliance a 7% discount. (Cohen, Tr. 557-58; CX 0061-001).

Response to Proposed Finding No. 1334

The Proposed Finding is misleading and contrary to the record of evidence, to the extent it asserts that Benco rejected Dental Alliance because it knew Schein was working with Dental Alliance. The record evidence shows that Cohen had received marketing intelligence about Schein working with a buying group, and that he thought the information was false. On March 26, 2013, Cohen notified Sullivan of market intelligence that Schein may be doing business with a buying group, and told Sullivan that Benco had turned down the Dental Alliance buying group. (CCFF ¶ 1001; Cohen, Tr. 558; *see also* CCFF ¶¶ 995-1000, 1002-1004). Cohen texted Sullivan on March 26, 2013 (CX6027) and told him the market intelligence could be a rumor or false information that Schein was working with that buying group. (CCFF ¶ 1000). Cohen's text message to Sullivan on March 26, 2013 stated: "Could be a rumor, sometimes stories go around. Thanks." (CCFF ¶ 997).

1335. Schein's sales to and continued relationship with Universal Dental Alliance during the alleged conspiracy contradicts Complaint Counsel's conspiracy allegations. (Complaint ¶ 1).

Response to Proposed Finding No. 1335

The Proposed Finding is not supported by any citation to the record evidence, as the Complaint does not state that any conduct contradicts the conspiracy, and should be disregarded. Nonetheless, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein's payment or rebates to Dental Alliance disproves its participation in a conspiracy. Sullivan testified (as Schein concedes in Proposed Finding Nos. 1328 and 1546) that he thought the text messages about

Dental Alliance were about Atlantic Dental Care, and he did not realize at the time that Cohen was discussing a separate entity called Dental Alliance. (Sullivan, Tr. 4198; *see also* Responses to Proposed Finding Nos. 1322, 1546).

In addition, Schein's relationship with Dental Alliance during the conspiracy period is the subject of inter-firm communications between Sullivan and Cohen, in which Cohen confronted Sullivan for cheating on the agreement not to sell to buying groups via a text message. (CCFF ¶¶ 994-1004). On March 26, 2013, Cohen sent Sullivan a text message asking about market intelligence that Schein was discounting to Dental Alliance, which Cohen thought was false, and reassured Sullivan that Schein had turned down Dental Alliance. (CCFF ¶¶ 994-997). In response, Sullivan tried to call Cohen the following morning. (CCFF ¶ 998). Thus, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein's conduct regarding Dental Alliance disproves its participation in a conspiracy.

IV. THE EVIDENCE REFUTES COMPLAINT COUNSEL'S CLAIM THAT SCHEIN CHANGED ITS PRACTICES AT THE START OR AFTER THE END OF THE ALLEGED CONSPIRACY.

1336. Complaint Counsel claims its alleged conspiracy is supported by evidence that Schein "abruptly" and "radically" changed its behavior towards buying groups, first in December 2011 and again in April 2015. (CC Pretrial Br. at 18; Kahn, Tr. 19; SF 1339, 1392, 1636). The evidence does not support this claim.

Response to Proposed Finding No. 1336

The second sentence of the Proposed Finding is not supported by any citation to the evidence and should be disregarded. Moreover, it is contrary to the weight of the record evidence. The record evidence establishes that Schein changed its conduct. The record evidence shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the

conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

1337. Mr. Cavaretta, who worked closely with Mr. Sullivan through the relevant period, testified that he noticed no change in Mr. Sullivan's behavior regarding buying groups from 2011 through 2015. (Cavaretta, Tr. 5530). As discussed below, the documentary and testimonial evidence supports Mr. Cavaretta's observation.

Response to Proposed Finding No. 1337

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it suggests that Sullivan did not participate in a conspiracy because Cavaretta testified about "Sullivan's behavior." Moreover, Cavaretta's observation of "Sullivan's behavior" is irrelevant. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to "KILL the buying group model," and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). This is in stark contrast to the

record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 1159-1166, 1316-1322).

A. The Evidence Does Not Support the Claim that Schein Changed Its Practices at the Start of the Alleged Conspiracy.

1338. In its Complaint, Complaint Counsel alleged that "Schein had historically worked with some Buying Groups, but began pursuing an anti-Buying Group strategy" following alleged but unidentified "frequent inter-firm communications between Benco's Managing Director Chuck Cohen and Schein's President Tim Sullivan prior to July 2012." (Complaint ¶ 33). Complaint Counsel also alleges that after July 2012, "Sullivan and other top Schein executives began instructing its sales force to avoid selling to Buying Groups." (Complaint ¶ 34).

Response to Proposed Finding No. 1338

The phrase in the Proposed Finding, "alleged but unidentified" is inaccurate. Complaint Counsel has identified, and the record evidence is replete with, examples of interfirm communications between Cohen and Sullivan between 2011 and 2015. (CCFF ¶¶ 327-354; *see also* CCFF ¶¶ 284-326). Complaint has no specific response to the remainder of the Proposed Finding.

1339. In its pretrial brief, Complaint Counsel was more precise: "By December 2011, Schein's practice of working with buying groups had changed." Complaint Counsel called this a "radical change," claiming "Schein abruptly altered its prior pro-buying group position to match Benco's no-buying group policy." (CC Pretrial Br. at 12-13, 18, 48; *see also* Kahn, Tr. 34 ("[B]y late 2011, Schein had changed its buying group strategy. It no longer participated in buying groups."); Kahn, Tr. 26).

Response to Proposed Finding No. 1339

Complaint Counsel has no specific response.

1340. The evidence does not support these alleged changes in behavior by Schein.

Response to Proposed Finding No. 1340

The Proposed Finding is vague and not supported by any citation to the evidence and should be disregarded. Moreover, it is contrary to the weight of the record evidence. The record evidence establishes that Schein changed its conduct. The record evidence shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

1341. Complaint Counsel's suggestion that Schein developed a new internal policy in 2011 to not do business with buying groups is directly contradicted by sworn testimony. (RX 2941 (Sullivan, Dep. at 512) ("Q. Does Henry Schein have any policy against doing business with price-only buying groups? A. No. Q. Does Henry Schein have any policy whatsoever regarding doing business with buying groups? A. Other than we will do business with buying groups."); Titus, Tr. 5193 ("Q. Are you aware of any policy at Henry Schein, either in Special Markets or Henry Schein Dental, not to work with buying groups? A. No, I have not because that policy did not exist."); Steck, Tr. 3709 ("Are you aware of any policy that says Schein should not do business with buying groups? A. I am not."); Meadows, Tr. 2470 ("We didn't have a policy not to do business with buying groups."); Sullivan, Tr. 3997-98 ("Henry Schein Dental always had an interest in buying groups that involved private practice members in some form or capacity. A. We worked with several, yes.")).

Response to Proposed Finding No. 1341

The Proposed Finding is contrary to the weight of the record evidence, and witness denials of a policy do not negate the documentary evidence confirming that Schein enforced a policy not to do business with buying groups during the conspiracy. (*See* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). In fact, the record evidence shows that Schein worked with buying groups before the conspiracy, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732).

In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups.

(CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups. (Complaint Counsel’s Post-Trial Brief, at Attachment C). For example:

- December 21, 2011: Randy Foley, Director of Sales for Special Markets, rejected buying group Unified Smiles, stating, “[U]nless you have some ‘ownership’ of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups.” (CCFF ¶ 719 (quoting CX2062 at 001)).
- January 26, 2012: Western Zone Manager Joe Cavaretta wrote to sales representatives, “It is dangerously close but I told him we would not do business with a GPO.” (CCFF ¶ 750 (quoting CX0168 at 001)).
- February 20, 2012: Foley wrote to his direct report, Strategic Account Manager Debbie Torgersen-Foster, “Honestly, within Schein we have a few buying groups (BG) that we wish we didn’t have . . . So, this is a corporate decision, not to participate in these.” (CX0238 at 001, CCFF ¶¶ 754, 757).
- June 8, 2012: Regional Account Manager Andrea Hight wrote to her boss, Foley and Zone Manager Kathleen Titus: “I explained that we do not accommodate GPOs” (CCFF ¶ 771 (quoting CX2423 at 004)).
- July 17, 2012: Meadows wrote to his direct report: “I have to tell you Ron and Dan made a decision that is against what Tim Sullivan has directed us to do in regards to supporting Buying groups. We do not want our customers organizing and creating what are known as GPOs it takes the value away from the distributor.” (CCFF ¶ 773 (quoting CX0170 at 001)).
- May 29, 2013: Cavaretta wrote to two Schein employees, “We try to avoid buying groups at all costs and therefore don’t really recognize them.” (CCFF ¶¶ 785 (quoting CX2509 at 001)).
- December 20 2013: Foley told his counterpart at Colgate, one of Schein’s manufacturer partners: “It’s a buying group that we do not participate with, as with all buying groups.” (CCFF ¶¶ 788 (quoting CX2073 at 001), 789).
- July 16, 2014: Titus wrote to Cavaretta and Regional Managers Glenn Showgren and Brian Brady: “I [spoke with] Joe about the [buying group] agreement. [Sullivan] was not in favor of it.” (CCFF ¶ 795 (quoting CX2219 at 001)).

- July 17, 2014: Titus wrote to Showgren and Zone Manager Kevin Upchurch: “We had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. . . It went to [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)).
- August 20, 2014: Schein employee George Khoury asked Andrea Hight whether Schein was meeting with any GPOs. (CX2441 at 001). Hight responded: “We have had lots of GPO requests (Kathleen and I) and we have been shutting them down. We had one situation which looked closer to a GPO/MSO and came up with a way to be exclusive in order to consider but even Tim wasn’t comfortable walking in the ‘grey’ are [sic] this created so no GPOs which is I think a good rule.” (CX2441 at 001).
- Then on August 29, 2014, Titus wrote to Cavaretta: “It doesn’t help to have a GPO policy if [Special Markets] is opening up these consulting firms.” (CCFF ¶ 808 (quoting CX2220 at 001)).
- October 8, 2014: a regional manager wrote to Titus, Schein’s Director of Group Practices: “I recently had a conversation with Kathleen regarding this group and they are nothing more than a GPO. It is my understanding that this violates our policy as we do not engage with GPOs.” (CCFF ¶¶ 811, 812 (quoting CX0260 at 002)).
- November 5, 2014: Eastern Area Sales Director Jake Meadows wrote to a Regional Manager: “We do not currently participate with GPOs. . . .” (CCFF ¶ 828 (quoting CX2358 at 001)).
- July 1, 2015: Sullivan to Cavaretta, “The Dec ‘offsite’ last year I left with a goal to see if we could get Hal [Muller] to shut [Dental Gator] down” (CCFF ¶¶ 836 (quoting CX0246 at 001)).

1342. Contrary to Complaint Counsel’s claim that Schein had a “pro-buying group position” before the alleged conspiracy, its internal characterizations and evaluations of buying groups has long been one of skepticism, well before 2011. (*See, e.g.*, RX2405-001 (2002: “[W]e have held a pretty firm line on saying No to virtually all of them.... [T]his type of GPO would kill the margins for both manufacturers and distributors.... [T]here would be no increased volume and just lower costs.... In my opinion we need to stop this effort”); CX 2296-001 (2010: “I do not support us opening Buying Clubs.”); CX 2503 (2010: I do not believe in selling to Buying Groups – and we have closed some down already....”); CX 2451 (2010 “[N]ot interested in GPOs. The risk is much greater if we do sign th[a]n if we don’t.”); CX 2153 (2010: “[O]n Buying Groups—and the fact that we need to let these groups know when they call us; that they need to ... have complete control of purchasing policy that would force the distributor purchases to Schein.”); CX 2111 (2010: “We also determined at the beginning of the year (Dave, Tim, Randy and myself) that we would entertain organizations that could force compliance.”); CX 2113 (2010: “neither of us support concept of buying groups.... [T]he risk to overall HIS ... for margin erosion”).

Response to Proposed Finding No. 1342

The Proposed Finding is misleading and contrary to the weight of the record evidence. The record evidence, including CX2113 cited here, shows that Sullivan decided that the risk of buying groups outweighed the risks and that he was “inclined to ‘allow’” working with buying groups before the conspiracy. (CCFF ¶ 438; *see also* CCFF ¶¶ 432-437). Indeed, regardless of how Schein now characterizes its position regarding buying groups before the conspiracy period, the record evidence shows that it sold to buying groups, like the Long Island Dental Forum, Dental Co-op of Utah, Smile Source, and Dentists for a Better Huntington, before the conspiracy. (CCFF ¶¶ 440-444). Schein viewed these buying group relationships to be beneficial, as revenue and profit opportunities, before the conspiracy period. (CCFF ¶¶ 445-453).

1343. Indeed, as discussed above, before 2011, Schein evaluated buying groups on a case-by-case basis, doing business with some (*e.g.*, Dental Co-Op, Smile Source) but not others (*e.g.*, CF Dental Group) depending on the group’s characteristics. (*See, e.g.*, RX 2713; CX 2296).

Response to Proposed Finding No. 1343

Complaint Counsel has no specific response.

1344. Schein behaved in the same manner after 2011, evaluated buying groups on a case-by-case basis, doing business with some (*e.g.*, MeritDent, Schulman Group) and not others (*e.g.*, PGMS, Dentistry Unchained) depending on the group’s characteristics. (SF 690-716, 969-81, 1047-67, 1093-104; *see also, e.g.*, RX 2256; CX 2809).

Response to Proposed Finding No. 1344

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein’s approach to buying groups *prior* to the conspiracy period was consistent *into and during* the conspiracy period. The record evidence shows that Schein did not evaluate certain characteristics of buying groups to decide whether or not to do business with them during the conspiracy period. The record evidence shows that Schein

worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728- 870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

Moreover, evidence regarding MeritDent, Schulman Group, PGMS, and Dentistry Unchained are consistent with the record evidence showing Schein’s participation in a conspiracy, or entirely irrelevant. Sullivan rejected MeritDent and PGMS. (*See* Responses to Proposed Finding Nos. 969-981 (MeritDent), 1046-1077 (PGMS)). The Schulman Group, a group that Sullivan was unaware of and told was not a buying group, and Dentistry Unchained, a group that approached Schein after the conspiracy period, similarly do not have any bearing on Sullivan’s instruction to his sales force to reject buying groups during the conspiracy period. (*See* Responses to Proposed Finding Nos. 1093-1104 (Schulman Group), 690-716 (Dentistry Unchained)).

1345. Complaint Counsel relies on a single email from December 21, 2011 for its allegation that Schein had “abruptly” switched to a “no-buying group policy” by that date. (CC Pretrial Br. at 12, 18 (citing CX 2062); RXD 0031 (CC Opening, Slide 13 (same))). The email is from Randy Foley, who was the Director of Sales for Special Markets at the time, to a potential customer. It is not an announcement of a change in company policy, nor did Mr. Foley have the authority to announce overall corporate policy. He was not in charge of the Special Markets division, and he had no authority over Schein’s HSD division. Further, Mr. Foley’s testimony at trial (regarding his own email), directly undermines Complaint Counsel’s allegation. (Foley, Tr. 4690-91). CX 2062, on its face, cannot support the weight Complaint Counsel would give it.

(*See also* Foley, Tr. 4658-59, 4690 (denying that Schein had changed its approach to buying groups)).

Response to Proposed Finding No. 1345

The Proposed Finding is misleading in its assertion that “Complaint Counsel relies on a single email” to show Schein’s change in conduct. In fact, Complaint Counsel has identified significant evidence, which shows Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). The Proposed Finding is also misleading, as Complaint Counsel does not assert that Foley had authority to announce company policy. Regardless, consistent with the weight of the record evidence, CX2062 is just one example of Schein’s changed approach to buying groups and another example of a Schein executive enforcing Schein’s policy against buying groups.

1346. The evidence of Schein’s behavior before and after December 21, 2011 also supports the Court’s finding. Complaint Counsel’s position is belied by the fact that the day after Mr. Foley’s email, Mr. Cavaretta outlined a proposal to do business with the buying group MeritDent after discussing with HSD leadership. (Cavaretta, Tr. 5579, 5581-82; Sullivan, Tr. 4241-42; CX 2458).

Response to Proposed Finding No. 1346

The Proposed Finding is misleading and contrary to the weight of the evidence. The record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). Evidence regarding MeritDent is consistent with the record evidence. Sullivan rejected MeritDent but Schein's sales force worked with despite his instruction. (*See* Responses to Proposed Finding Nos. 969-981 (MeritDent)).

1347. Less than two months after Mr. Foley's email, Schein had entered into a purchasing agreement with MeritDent buying group. (RX 2393-005; Cavaretta, Tr. 5582, 5649).

Response to Proposed Finding No. 1347

The Proposed Finding is misleading and contrary to the weight of the evidence. Evidence regarding MeritDent is consistent with the record evidence showing Schein's participation in a conspiracy. The record evidence shows that Sullivan instructed against working with MeritDent, and to the extent that there was an agreement with MeritDent, there is no evidence Sullivan was aware of it or approved it. (CX2458 at 001; *see also* Responses to Proposed Finding Nos. 969-981 (MeritDent)). The record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate

rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

1348. And six months after Mr. Foley's December 21, 2011 email, Mr. Foley memorialized Schein's partnership with Dental Partners of Georgia in a written agreement. (SF 680-90).

Response to Proposed Finding No. 1348

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein's relationship with Dental Partners of Georgia evidences a relationship with a buying group during the conspiracy period. Schein did not consider Dental Partners of Georgia to be a buying group. (RX2543 at 001; *see also* Responses to Proposed Finding Nos. 680-689).

1349. Complaint Counsel also claims Smile Source's decision to switch from Schein to Burkhart in 2012 was in furtherance of the conspiracy and indicative of a change in behavior. (Kahn, Tr. 40-42). Complaint Counsel argues that a comparison of Mr. Sullivan's emails about Smile Source in 2010 (CX 2113) and 2012 (CX 0199) makes Schein's change in conduct "particularly obvious." (Kahn, Tr. 40). Again, the evidence does not support Complaint Counsel's position.

Response to Proposed Finding No. 1349

The first sentence of the Proposed Finding mischaracterizes Complaint Counsel's statement. Complaint Counsel stated that two emails, one in 2010 and one in 2012, evidence a change in conduct with respect to buying groups not that "Smile Source's decision to switch from

Schein to Burkhart in 2012 was in furtherance of the conspiracy.” The third sentence of the Proposed Finding is not supported by any citation to the evidence and should be disregarded.

Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1350. As discussed above, CX 2113 was written at a time in 2010 that Schein’s partnership with Smile Source was creating conflicts with Schein’s sales representatives in the field. (SF 1350). Mr. Sullivan’s 2010 email states that neither he nor Hal Muller “support [the] concept of buying groups.” (CX 2113). This refutes Complaint Counsel’s assertion that Schein had a “pro-buying group position” before the alleged conspiracy started in December 2011.

Response to Proposed Finding No. 1350

The third sentence of the Proposed Finding is not supported by any citation to the record evidence and should be disregarded. Nonetheless, the weight of the record evidence, including CX2113 cited here, shows that Sullivan decided that the risk of buying groups outweighed the risks and that he was “inclined to ‘allow’” working with buying groups. (CCFF ¶ 438; *see also* CCFF ¶¶ 432-437). The record evidence shows that it sold to buying groups, like the Long Island Dental Forum, Dental Co-op of Utah, Smile Source, and Dentists for a Better Huntington, before the conspiracy. (CCFF ¶¶ 440-444). Schein viewed these buying group relationships to be beneficial, as revenue and profit opportunities, before the conspiracy period. (CCFF ¶¶ 445-453). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1351. Despite Mr. Sullivan’s and Mr. Muller’s skepticism of buying groups, the two decided in 2010 that Smile Source was a buying group worth retaining, noting “we need time with them to create a win-win-plan going forward.” (CX 2113). Mr. Sullivan said the same thing about the Kois group in 2014. (SF 898-900, 909-10; RX 2062-002; Sullivan, Tr. 4228-30). The evidence thus indicates that Schein employed a consistent and careful approach to buying groups, looking for groups that offered win-win possibilities throughout the entire period. Complaint Counsel’s alleged abrupt change in behavior does not appear in the record.

Response to Proposed Finding No. 1351

Complaint Counsel has no specific response to the first sentence of the Proposed Finding.

The second sentence is inaccurate and contrary to the weight of the record evidence. The

record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. Sullivan communicated to Muller and his boss, Breslawski, regarding Kois on September 8, 2014: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). On October 23, 2014, Sullivan also stated in response to information about Kois: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014 and stated that it would “pass” on working with the buying group. (CCFF ¶ 928-929; *see also* Responses to Proposed Finding Nos. 839-936). The third and fourth sentences are not supported by any citation to the record evidence and should be disregarded. Nonetheless, they are also contrary to the weight of the record evidence, which shows Schein’s change in conduct. It shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-1100, 1159-1166, 1316-1322). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

1352. Mr. Sullivan’s 2012 email is consistent with Schein’s pre-2012 behavior. (*See* SF 189-221). CX 0199 was written after Smile Source had decided to end its partnership with Schein. (SF 1122). Consistent with Mr. Sullivan’s 2010 non-support for the “concept of buying groups,” Mr. Sullivan wrote in 2012, when Schein was trying to retain the business of Smile

Source members despite its decision to switch to Burkhart, that he is “really interested to see how and what we can do to retain these customers and judge how effective their buying group model is. Let’s really take this serious and get after it. I’m really less concerned about actual revenues, although very important too, rather more about what we can do to KILL the[ir] buying group model!” (CX 0199-001; Sullivan, Tr. 4146).

Response to Proposed Finding No. 1352

The Proposed Finding is Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein’s approach to buying groups *prior* to the conspiracy period was consistent *into and during* the conspiracy period. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728- 870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy, which it viewed to be beneficial, and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 1159-1166, 1316-1322).

1353. As Mr. Sullivan explained, “when Smile Source terminated us ... I definitely wanted to kill – you know, go after ... Smile Source’s model, and the customers that they were now attempting to switch to someone else.” (Sullivan, Tr. 3932-33, 3935-37 (“We wanted to keep the business.”)). Mr. Sullivan’s skepticism of the buying group model is inconsistent with

Complaint Counsel's alleged change in behavior, as is Mr. Sullivan's desire to keep the business of Smile Source members.

Response to Proposed Finding No. 1353

The Proposed Finding is contradictory, as it asserts that Sullivan was skeptical of buying groups but wanted to keep the business of buying group members. To the extent the Proposed Finding implies or asserts that Schein's approach to buying groups *prior* to the conspiracy period was consistent *into and during* the conspiracy period, it is misleading and contrary to the weight of the record evidence. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to "KILL the buying group model," and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322, 1178-1198).

1354. In fact, every time an opportunity to do business with Smile Source arose, Schein was interested. (CX 2899-001 (Feb. 2011: Tim Sullivan is "very excited about our future together"); RX 2090-001 [REDACTED]; CX 2580 (Oct. 2013: Tim Sullivan "would enjoy catching up with you ... [and] learning more"); RX 2328-001 (Nov. 2013: Tim Sullivan "absolutely would like to discuss further"); CX 2588-001 (Feb. 2014: Schein is "excited about

the opportunity and will move the process along as fast as possible”); RX 2444-001 (Aug. 2015: Tim Sullivan would “love to connect again”); CX 2607 (Jan. 2016: Tim Sullivan would “like to find a date in the coming weeks that you could visit us ... [so] [w]e can walk you through our proposal...”); CX 2612-001 (Dec. 2016: Tim Sullivan “hope[s] and expect[s] that some day we will partner again...”); RX 2091-001 [REDACTED]

[REDACTED]). Schein’s interactions with Smile Source are indicative of Schein’s unilateral, consistent approach to buying groups, not Complaint Counsel’s alleged change in conduct.

Response to Proposed Finding No. 1354

The Proposed Finding misleading and contrary to the weight of the record evidence in its assertion that Schein’s interactions with Smile Source indicate a unilateral and consistent approach to buying groups and that Schein was interested in doing business with Smile Source at every opportunity. The record shows that the Smile Source relationship was terminated, that Schein did not work with Smile Source during Source during the conspiracy, that Sullivan was pleased when the relationship ended at the beginning of 2012, and that Schein’s interactions with Smile Source in 2014 was an attempt at cheating. (*See Responses to Proposed Finding Nos. 1105-1186*). The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728- 870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy

became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322, 1178-1198).

1355. The evidence does not support a conclusion that Schein drastically or abruptly changed its behavior with regard to buying groups in December 2011 or any time in 2012. Schein expressed skepticism towards buying groups before and after 2011. Schein signed up a buying group immediately after Complaint Counsel claims the conspiracy began. And Schein continued to do business with existing and new buying groups throughout the alleged conspiracy period.

Response to Proposed Finding No. 1355

The Proposed Finding does not contain a single citation to the record evidence and should be disregarded. Nonetheless, for the reasons set forth above in the Responses to Proposed Finding Nos. 1336 to 1354, the Proposed Finding is contrary to the weight of the record evidence.

B. The Evidence Does Not Support Complaint Counsel's Claim that Schein Executives Instructed Employees Not to Do Business with Buying Groups.

1356. Complaint Counsel claims that as a result of the alleged conspiracy, beginning sometime in 2011 or 2012 "Sullivan and other top Schein executives began instructing its sales force to avoid selling to Buying Groups." (Complaint ¶ 34; RX 3087-004 ("[B]eginning in 2011 and lasting into 2015, Schein executives began instructing sales managers and sales personnel not to provide discounts to or compete for the business of Buying Groups ..."); CC Pretrial Br. at 18-19 ("[F]ollowing communications with Benco in 2011, Sullivan and other Schein executives directed the salesforce to refuse buying groups."); Kahn, Tr. 42 ("By 2012, Schein's executives started instructing its employees not to do business with buying groups.")).

Response to Proposed Finding No. 1356

Complaint Counsel has no specific response.

1357. The evidence is to the contrary.

Response to Proposed Finding No. 1357

The Proposed Finding is not only vague, but it does not contain a single citation to the record evidence and should be disregarded.

1. *Every Schein Trial Witness Denied Any Instructions to Not Do Business with Buying Groups.*

1358. The only Schein executives that Complaint Counsel has identified by name in connection with its allegations related to instructing employees are Tim Sullivan, Joe Cavaretta, Jake Meadows, and Randy Foley (Complaint ¶ 34 (“Sullivan and other top Schein executives began instructing its sales force to avoid selling to Buying Groups.”); CC Pretrial Br. at 18-19 (citing CX 2458, CX 2234, CX 2358 and CX 0176)).

Response to Proposed Finding No. 1358

Complaint Counsel has no specific response. The Proposed Finding is misleading to the extent it asserts Complaint Counsel has not asserted that other Schein executives also instructed the Schein sales force to reject buying groups. The record evidence shows that Schein ensured compliance with the agreement through instructions and communications between executives and Schein’s sales force. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). Schein witnesses have offered contradictory, inconsistent, and changing testimony about their statements in contemporaneous documents that Schein did not work with buying groups. Vice President of Sales Meadows wrote on October 25, 2014: “Just for clarity, we are NOT participating in any GPOs regardless of what they promise to bring us.” (CCFF ¶ 816 (CX2354 at 001 (emphasis in original))). At the time of his deposition, Meadows did not recall writing this email, and he could not think of anything that would refresh his recollection as to what he meant by the words that he used in the email. (CCFF ¶ 825 (Meadows, Tr. 2432-2433; CX8016 (Meadows, Dep. at 147-148))). At trial, Meadows changed his testimony to state that he meant that HSD was supposed to bring buying groups to Special Markets. (Meadows, Tr. 2428-2429). Meadows’ testimony is contradicted by other Schein witness testimony, which established that HSD had primary responsibility for buying

groups at the time, and by Schein's own Proposed Findings, which assert that Special Markets only had responsibility for buying groups before 2014. (SF 237).

Meadows offered inconsistent and contradictory testimony about other contemporaneous documents. On July 17, 2012, Meadows wrote to a Henry Schein field sales consultant, Patty Delikat: "I have to tell you Ron and Dan made a decision that is against what Tim Sullivan has directed us to do in regards to supporting Buying groups. We do not want our customers organizing and creating what are known as GPOs it takes the value away from the distributor." (CCFF ¶ 773 (quoting CX0170 at 001)). Meadows first testified at his deposition that he meant that the Schein employees had made a decision on a buying group without getting authorization from Meadows first, and that he did not recall any direction from Sullivan with regard to buying groups. (CX8016 (Meadows, Dep., at 135-137)). At trial, Meadows testified that he was referring to a direction from Sullivan to send buying groups to Special Markets. (Meadows, Tr. 2638-2639). Sullivan's testimony is also inconsistent with Meadows' explanation. When Sullivan was asked about Meadows' statement at his investigational hearing, Sullivan did not refer to any such direction to send buying groups to Special Markets. (CX0311 (Sullivan, IHT at 242-244)). Rather, Sullivan testified at trial that he was involved in decisions about all buying groups, including those relating to Special Markets. (CCFF ¶ 738).

Other Schein witnesses provided testimony about the meaning behind their contemporaneous statements that contradicts Meadows' explanations. On May 29, 2013, VP of Sales Cavaretta wrote: "We try to avoid buying groups at all costs and therefore don't really recognize them." (CCFF ¶ 785 (quoting CX2509 at 001)). Cavaretta testified that he meant that neither HSD nor Special Markets would deal with buying groups: "from a business standpoint, it didn't

make sense. And we weren't really doing business with buying groups at that time, so and in not really recognizing them, they didn't fit either in HSD at that time or special markets. . . .”

(CX8033 (Cavaretta, Dep. at 204-205); *see* Response to Proposed Finding No. 236).

Cavaretta also changed his testimony at trial to provide a different explanation for his statement, claiming that he was only referring to buying groups that take title to supplies. (*See* Response to Proposed Finding No. 236).

Schein witnesses, such as Foley, could not provide any explanations for their contemporaneous statements that Schein did not deal with buying groups when asked about them at their deposition. On December 20, 2013, Foley told one of Schein’s manufacturer partners regarding Unified Smiles: “It’s a buying group that we do not participate with, as with all buying groups.” (CCFF ¶ 788). At his deposition, Foley testified, “I don’t understand why I said that” when asked about this statement. (CX8003 (Foley, Dep. at 262)). On September 14, 2014, Foley wrote “[a]s with other buying groups we continue to say no (at least try to).” (CCFF ¶ 810). Foley testified at deposition: “I’m not sure what I was trying to convey at that time by making that statement,” and that he could not think of anything that would refresh his recollection as to what he meant. (CX8003 (Foley, Dep. at 287-289)).

1359. Every Schein witness who testified at trial denied giving and/or receiving any instructions to not do business with buying groups. (Sullivan, Tr. 4019-20; Cavaretta, Tr. 5531-34, 5592; Meadows, Tr. 2580, 2578, 2594-95; Foley, Tr. 4602; Steck, Tr. 3709-10; Titus, Tr. 5193, 5247-48).

Response to Proposed Finding No. 1359

The Proposed Finding is misleading and contrary to the weight. The record evidence and contemporaneous documents show otherwise. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶

661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728- 870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). For example:

- December 21, 2011: Randy Foley, Director of Sales for Special Markets, rejected buying group Unified Smiles, stating, “[U]nless you have some ‘ownership’ of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups.” (CCFF ¶ 719 (quoting CX2062 at 001)).
- January 26, 2012: Western Zone Manager Joe Cavaretta wrote to sales representatives, “It is dangerously close but I told him we would not do business with a GPO.” (CCFF ¶ 750 (quoting CX0168 at 001)).
- February 20, 2012: Foley wrote to his direct report, Strategic Account Manager Debbie Torgersen-Foster, “Honestly, within Schein we have a few buying groups (BG) that we wish we didn’t have . . . So, this is a corporate decision, not to participate in these.” (CX0238 at 001, CCFF ¶¶ 754, 757).
- June 8, 2012: Regional Account Manager Andrea Hight wrote to her boss, Foley and Zone Manager Kathleen Titus: “I explained that we do not accommodate GPOs” (CCFF ¶ 771 (quoting CX2423 at 004)).
- July 17, 2012: Meadows wrote to his direct report: “I have to tell you Ron and Dan made a decision that is against what Tim Sullivan has directed us to do in regards to supporting Buying groups. We do not want our customers organizing and creating what are known as GPOs it takes the value away from the distributor.” (CCFF ¶ 773 (quoting CX0170 at 001)).
- May 29, 2013: Cavaretta wrote to two Schein employees, “We try to avoid buying groups at all costs and therefore don’t really recognize them.” (CCFF ¶¶ 785 (quoting CX2509 at 001)).
- December 20 2013: Foley told his counterpart at Colgate, one of Schein’s manufacturer partners: “It’s a buying group that we do not participate with, as with all buying groups.” (CCFF ¶¶ 788 (quoting CX2073 at 001), 789).

- July 16, 2014: Titus wrote to Cavaretta and Regional Managers Glenn Showgren and Brian Brady: “I [spoke with] Joe about the [buying group] agreement. [Sullivan] was not in favor of it.” (CCFF ¶ 795 (quoting CX2219 at 001)).
- July 17, 2014: Titus wrote to Showgren and Zone Manager Kevin Upchurch: “We had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. . . It went to [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)).
- On August 20, 2014: Schein employee George Khoury asked Andrea Hight whether Schein was meeting with any GPOs. (CX2441 at 001). Hight responded: “We have had lots of GPO requests (Kathleen and I) and we have been shutting them down. We had one situation which looked closer to a GPO/MSO and came up with a way to be exclusive in order to consider but even Tim wasn’t comfortable walking in the ‘grey’ are [sic] this created so no GPOs which is I think a good rule.” (CX2441 at 001).
- Then on August 29, 2014, Titus wrote to Cavaretta: “It doesn’t help to have a GPO policy if [Special Markets] is opening up these consulting firms.” (CCFF ¶ 808 (quoting CX2220 at 001)).
- October 8, 2014: a regional manager wrote to Titus, Schein’s Director of Group Practices: “I recently had a conversation with Kathleen regarding this group and they are nothing more than a GPO. It is my understanding that this violates our policy as we do not engage with GPOs.” (CCFF ¶¶ 811, 812 (quoting CX0260 at 002)).
- November 5, 2014: Eastern Area Sales Director Jake Meadows wrote to a Regional Manager: “We do not currently participate with GPOs. . . .” (CCFF ¶ 828 (quoting CX2358 at 001)).
- July 1, 2015: Sullivan to Cavaretta, “The Dec ‘offsite’ last year I left with a goal to see if we could get Hal [Muller] to shut [Dental Gator] down” (CCFF ¶¶ 836 (quoting CX0246 at 001)).

In addition, Schein witnesses have offered contradictory, inconsistent, and changing testimony about their statements in contemporaneous documents that Schein did not work with buying groups. Vice President of Sales Meadows wrote on October 25, 2014: “Just for clarity, we are NOT participating in any GPOs regardless of what they promise to bring us.” (CCFF ¶ 816 (CX2354 at 001 (emphasis in original))). At the time of his deposition, Meadows did not recall writing this email, and he could not think of anything that would refresh his recollection as to what he meant by the words that he used in the email. (CCFF ¶

825 (Meadows, Tr. 2432-2433; CX8016 (Meadows, Dep. at 147-148)). At trial, Meadows changed his testimony to state that he meant that HSD was supposed to bring buying groups to Special Markets. (Meadows, Tr. 2428-2429). Meadows' testimony is contradicted by other Schein witness testimony, which established that HSD had primary responsibility for buying groups at the time, and by Schein's own Proposed Findings, which assert that Special Markets only had responsibility for buying groups before 2014. (SF 237).

Meadows offered inconsistent and contradictory testimony about other contemporaneous documents. On July 17, 2012, Meadows wrote to a Henry Schein field sales consultant, Patty Delikat: "I have to tell you Ron and Dan made a decision that is against what Tim Sullivan has directed us to do in regards to supporting Buying groups. We do not want our customers organizing and creating what are known as GPOs it takes the value away from the distributor." (CCFF ¶ 773 (quoting CX0170 at 001)). Meadows first testified at his deposition that he meant that the Schein employees had made a decision on a buying group without getting authorization from Meadows first, and that he did not recall any direction from Sullivan with regard to buying groups. (CX8016 (Meadows, Dep., at 135-137)). At trial, Meadows testified that he was referring to a direction from Sullivan to send buying groups to Special Markets. (Meadows, Tr. 2638-2639). Sullivan's testimony is also inconsistent with Meadows' explanation. When Sullivan was asked about Meadows' statement at his investigational hearing, Sullivan did not refer to any such direction to send buying groups to Special Markets. (CX0311 (Sullivan, IHT at 242-244)). Rather, Sullivan testified at trial that he was involved in decisions about all buying groups, including those relating to Special Markets. (CCFF ¶ 738).

Other Schein witnesses provided testimony about the meaning behind their contemporaneous statements that contradicts Meadows' explanations. On May 29, 2013, VP of Sales Cavaretta wrote: "We try to avoid buying groups at all costs and therefore don't really recognize them." (CCFF ¶ 785 (quoting CX2509 at 001)). Cavaretta testified that he meant that neither HSD nor Special Markets would deal with buying groups: "from a business standpoint, it didn't make sense. And we weren't really doing business with buying groups at that time, so and in not really recognizing them, they didn't fit either in HSD at that time or special markets. . . ." (CX8033 (Cavaretta, Dep. at 204-205); *see* Response to Proposed Finding No. 236).

Cavaretta also changed his testimony at trial to provide a different explanation for his statement, claiming that he was only referring to buying groups that take title to supplies. (*See* Response to Proposed Finding No. 236).

Schein witnesses, such as Foley, could not provide any explanations for their contemporaneous statements that Schein did not deal with buying groups when asked about them at their deposition. On December 20, 2013, Foley told one of Schein's manufacturer partners regarding Unified Smiles: "It's a buying group that we do not participate with, as with all buying groups." (CCFF ¶ 788). At his deposition, Foley testified, "I don't understand why I said that" when asked about this statement. (CX8003 (Foley, Dep. at 262)). On September 14, 2014, Foley wrote "[a]s with other buying groups we continue to say no (at least try to)." (CCFF ¶ 810). Foley testified at deposition: "I'm not sure what I was trying to convey at that time by making that statement," and that he could not think of anything that would refresh his recollection as to what he meant. (CX8003 (Foley, Dep. at 287-289)).

1360. Every Schein trial witness confirmed that Mr. Sullivan, President of HSD, never instructed them to not do business with buying groups. (Cavaretta, Tr. 5530-34, 5592; Meadows, Tr. 2468, 2578, 2594-95; Foley, Tr. 4602; Steck, Tr. 3709-10; Titus, Tr. 5193, 5248).

Response to Proposed Finding No. 1360

The Proposed Finding is misleading and contrary to the weight of the record evidence if it asserts or implies that any denial of an instruction by Sullivan proves there was no instruction or proves that Schein did not participate in a conspiracy. As set forth above in Response to Proposed Finding No. 1359, the record evidence shows otherwise. For example, on February 20, 2012, Foley wrote to his direct report, Strategic Account Manager Debbie Torgersen-Foster: “Honestly, within Schein we have a few buying groups (BG) that we wish we didn’t have . . . So, this is a corporate decision, not to participate in these.” (CX0238 at 001, CCFF ¶¶ 754, 757). On July 17, 2012, Meadows wrote to his direct report: “I have to tell you Ron and Dan made a decision that is against what Tim Sullivan has directed us to do in regards to supporting Buying groups. We do not want our customers organizing and creating what are known as GPOs it takes the value away from the distributor.” (CCFF ¶ 773 (quoting CX0170 at 001)). On July 17, 2014, Titus wrote to Showgren and Zone Manager Kevin Upchurch: “We had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. . . It went to [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)).

1361. No Schein witness who testified at trial ever heard of any instruction from Mr. Sullivan not to do business with buying groups. (Cavaretta, Tr. 5530-34; Meadows, Tr. 2468; Foley, Tr. 4602; Steck, Tr. 3709-10; Titus, Tr. 5193).

Response to Proposed Finding No. 1361

The Proposed Finding is misleading and contrary to the weight of the record evidence. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed

the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728- 870). set forth above in Response to Proposed Finding No. 1359, the record evidence contains dozens of documents that confirm Sullivan’s directives, confirm that Schein enforced a policy against buying groups, and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

1362. Mr. Sullivan testified that he never instructed Schein’s sales force to avoid selling to buying groups and is not aware of anybody at Schein ever giving such instructions. (Sullivan, Tr. 4019-20).

Response to Proposed Finding No. 1362

The Proposed Finding is misleading and contrary to the weight of the record evidence. The Proposed Finding is contrary to the weight of the record evidence. The record evidence shows that Schein worked with buying groups before the conspiracy, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728- 870). The record evidence contains dozens of documents that show Sullivan’s directives and Schein’s enforcement of a policy against buying groups. (Complaint Counsel’s Post-Trial Brief, at Attachment C). For example:

- July 17, 2011: Tim Sullivan, President of Schein, informed other Schein executives: “I don’t think you will ever see a full service dealer get involved with GPOs.” (CCFF ¶ 705 (quoting CX0185 at 001)).
- December 7, 2011, Sullivan told his employees that he did “NOT want to lead in getting [buying groups] started in dental.” He explained that buying groups were “a very slippery slope.” (CCFF ¶ 709 (CX2456 at 001)).

- December 22, 2011, Sullivan, told Western Zone Manager Joe Cavaretta that he did not want to “be the first company to open the floodgates to the dangerous world of GPOs.” (CCFF ¶ 713 (CX2458 at 001)).
- December 21, 2011: Randy Foley, Director of Sales for Special Markets, rejected buying group Unified Smiles, stating, “[U]nless you have some ‘ownership’ of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups.” (CCFF ¶ 719 (quoting CX2062 at 001)).
- January 26, 2012: Western Zone Manager Joe Cavaretta wrote to sales representatives, “It is dangerously close but I told him we would not do business with a GPO.” (CCFF ¶ 750 (quoting CX0168 at 001)).
- February 2, 2012, Sullivan wanted to know “what we can do to KILL the buying group model!!” (CCFF ¶ 729 (quoting CX0199 at 001 (emphasis in original))).
- February 20, 2012: Foley wrote to his direct report, Strategic Account Manager Debbie Torgersen-Foster, “Honestly, within Schein we have a few buying groups (BG) that we wish we didn’t have . . . So, this is a corporate decision, not to participate in these.” (CX0238 at 001, CCFF ¶¶ 754, 757).
- June 8, 2012: Regional Account Manager Andrea Hight wrote to her boss, Foley and Zone Manager Kathleen Titus: “I explained that we do not accommodate GPOs” (CCFF ¶ 771 (quoting CX2423 at 004)).
- July 17, 2012, Northwest Zone Manager Jake Meadows wrote to his direct report: “I have to tell you Ron and Dan made a decision that is against what Tim Sullivan has directed us to do in regards to supporting Buying groups. We do not want our customers organizing and creating what are known as GPOs it takes the value away from the distributor.” (CCFF ¶ 773 (quoting CX0170 at 001)).
- May 29, 2013: Cavaretta wrote to two Schein employees, “We try to avoid buying groups at all costs and therefore don’t really recognize them.” (CCFF ¶¶ 785 (quoting CX2509 at 001)).
- December 20 2013: Foley told his counterpart at Colgate, one of Schein’s manufacturer partners: “It’s a buying group that we do not participate with, as with all buying groups.” (CCFF ¶¶ 788 (quoting CX2073 at 001), 789).
- July 18, 2014, Upchurch told Titus and Cavaretta: “From [Sullivan], HSD does not want to enter the GPO world.” (CCFF ¶ 806 (quoting CX2221 at 002)).
- September 8, 2014, Sullivan wrote: “I still believe [buying groups are a] slippery slope . . . and don’t plan to take the lead role.” (CCFF ¶ 809 (quoting CX2469 at 002)).

- October 8, 2014: a regional manager wrote to Titus, Schein’s Director of Group Practices: “I recently had a conversation with Kathleen regarding this group and they are nothing more than a GPO. It is my understanding that this violates our policy as we do not engage with GPOs.” (CCFF ¶¶ 811, 812 (quoting CX0260 at 002)).
- November 5, 2014: Eastern Area Sales Director Jake Meadows wrote to a Regional Manager: “We do not currently participate with GPOs. . . .” (CCFF ¶ 828 (quoting CX2358 at 001)).
- January 7, 2015, Muller to his boss, Jim Breslawski, Chairman and CEO of Henry Schein, Inc. and Sullivan: “Buying Groups: Do we keep saying no?” (CCFF ¶ 839 (CX2141 at 001-002)).
- July 1, 2015: Sullivan to Cavaretta, “The Dec ‘offsite’ last year I left with a goal to see if we could get Hal [Muller] to shut [Dental Gator] down” (CCFF ¶¶ 836 (quoting CX0246 at 001)).

Moreover, there are no documents in the record that evidence Sullivan’s approval of a buying group. At trial, Schein introduced an email from November 20, 2015, in which Sullivan wrote, “[t]o be clear, we have nothing against Buying Groups per se....” (RX2360 at 001). Sullivan sent the email to Schein executives, as well as Schein’s trial counsel in this matter John McDonald and Colin Kass. (RX2360 at 001). Sullivan testified at trial that he copied Schein’s trial counsel on the email because he knew it was a “sensitive topic,” because of the FTC’s investigation of Respondents, investigations of Respondents by the Texas Attorney General and the Arizona Attorney General concerning alleged antitrust violations, and lawsuits against Respondents alleging antitrust violations. (Sullivan, Tr. 4352-4356).

1363. Further, Mr. Sullivan never implemented any policy at Schein to not do business with or to not give discounts to buying groups. (Sullivan, Tr. 4086-87).

Response to Proposed Finding No. 1363

The Proposed Finding is misleading and contrary to the weight of the record evidence as set forth in Response to Proposed Finding No. 1362 above.

1364. Schein did provide discounts to or compete for the business of new buying groups for Mr. Sullivan’s “entire 21 years at Schein.” (Sullivan, Tr. 4020-21).

Response to Proposed Finding No. 1364

The Proposed Finding is misleading and contrary to the weight of the record evidence. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728- 870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). Moreover, there are no documents in the record that evidence Sullivan’s approval of a buying group. At trial, Schein introduced an email from November 20, 2015, in which Sullivan wrote, “[t]o be clear, we have nothing against Buying Groups per se....” (RX2360 at 001). Sullivan sent the email to Schein executives, as well as Schein’s trial counsel in this matter John McDonald and Colin Kass. (RX2360 at 001). Sullivan testified at trial that he copied Schein’s trial counsel on the email because he knew it was a “sensitive topic,” because of the FTC’s investigation of Respondents, investigations of Respondents by the Texas Attorney General and the Arizona Attorney General concerning alleged antitrust violations, and lawsuits against Respondents alleging antitrust violations. (Sullivan, Tr. 4352-4356).

1365. Even Complaint Counsel asked Mr. Sullivan to confirm that “Schein has done business with buying groups in the past and does business with buying groups today,” to which he responded: “That’s correct.” (Sullivan, Tr. 3912).

Response to Proposed Finding No. 1365

The Proposed Finding is misleading because it mischaracterizes the cited evidence, which does not specify a specific time period. Complaint Counsel, and the record evidence, established that Schein worked with buying groups prior to the conspiracy and that it competed for buying groups after the conspiracy. (CCFF ¶¶ 432-453, 1159-1166, 1316-1322; *see also* Sullivan, Tr. 3912-3914).

1366. Mr. Cavaretta, one of Schein’s top sales executives in the Western Area, testified that in his 18 years at Schein he never instructed the sales force to avoid selling to buying groups. (Cavaretta, Tr. 5532-33).

Response to Proposed Finding No. 1366

The Proposed Finding is misleading and contrary to the weight of the record evidence. As set forth in Responses to Proposed Finding Nos. 142 and 1362, the record evidence shows that Schein worked with buying groups before the conspiracy, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728- 870). The record evidence contains dozens of documents that confirm that Schein, including Cavaretta, enforced a policy against buying groups.

(Complaint Counsel’s Post-Trial Brief, at Attachment C). For example:

- January 26, 2012: Western Zone Manager Joe Cavaretta wrote to sales representatives, “It is dangerously close but I told him we would not do business with a GPO.” (CCFF ¶ 750 (quoting CX0168 at 001)).
- May 29, 2013: Cavaretta wrote to two Schein employees, “We try to avoid buying groups at all costs and therefore don’t really recognize them.” (CCFF ¶¶ 785 (quoting CX2509 at 001)).
- October 8, 2014: a regional manager wrote to Titus, Schein’s Director of Group Practices: “I recently had a conversation with Kathleen regarding this group and they

are nothing more than a GPO. It is my understanding that this violates our policy as we do not engage with GPOs.” (CCFF ¶¶ 811, 812 (quoting CX0260 at 002)).

- July 1, 2015: Sullivan to Cavaretta, “The Dec ‘offsite’ last year I left with a goal to see if we could get Hal [Muller] to shut [Dental Gator] down” (CCFF ¶¶ 836 (quoting CX0246 at 001)).

1367. Mr. Cavaretta is not aware of any other executives at Schein giving an instruction to avoid selling to buying groups, and he was never given any such instruction. (Cavaretta, Tr. 5533).

Response to Proposed Finding No. 1367

As set forth in Responses to Proposed Finding Nos. 142, 148, 150, 152, 154, 1362, and 1365 the Proposed Finding is misleading and contrary to the weight of the record evidence. The record evidence contains dozens of documents that confirm that Schein enforced the policy against buying groups, confirm that Schein executives instructed the sales force not to discount to buying groups, and confirm that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

1368. In fact, Mr. Sullivan specifically directed Mr. Cavaretta to come up with a strategy to work with buying groups during the alleged conspiracy. (Cavaretta, Tr. 5530-31).

Response to Proposed Finding No. 1368

The Proposed Finding is misleading and contrary to the weight of the record evidence. The record evidence does not show that Schein evaluated buying groups during the conspiracy period or that it served buying groups during the conspiracy period. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728- 870). The record evidence contains dozens of

documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy.

(Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

1369. Further, Mr. Cavaretta never instructed anyone to not offer discounts to or not compete for the business of new buying groups. (Cavaretta, Tr. 5532-33).

Response to Proposed Finding No. 1369

As set forth above in Responses to Proposed Finding Nos. 1366-1368, the Proposed Finding is contrary to the weight of the record evidence. The record evidence contains dozens of documents that confirm that Schein, including Cavaretta, enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

1370. Similarly, Mr. Cavaretta is not aware of any other executives at Schein giving instructions to not offer discounts to or to not compete for the business of new buying groups, and he was never given any such instructions. (Cavaretta, Tr. 5533).

Response to Proposed Finding No. 1370

As set forth above in Responses to Proposed Finding Nos. 1366-1369, the Proposed Finding is contrary to the weight of the record evidence. The record evidence contains dozens of documents that confirm that Schein, including Cavaretta, enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

1371. Mr. Cavaretta characterized Complaint Counsel's allegation that Schein instructed its sales force to reject buying groups as "false." (Cavaretta, Tr. 5534-35).

Response to Proposed Finding No. 1371

As set forth above in Responses to Proposed Finding Nos. 1366-1370, the Proposed Finding is contrary to the weight of the record evidence. The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups by instructing its sales force to reject buying groups, and it also shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy or instruction. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

1372. Contrary to the Complaint's allegations, Mr. Cavaretta explained that Schein "did business with buying groups and we were also putting a strategy together for buying groups so we could grow with them." (Cavaretta, Tr. 5532, 5535; Complaint ¶ 34).

Response to Proposed Finding No. 1372

The Proposed Finding is misleading and contrary to the weight of the record evidence. As set forth in Response to Proposed Finding No. 142, the record evidence shows that Schein worked with buying groups before the conspiracy, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to "KILL the buying group model," and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728- 870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups. (Complaint Counsel's Post-Trial Brief, at Attachment C). October 8, 2014: a regional manager wrote to Titus, Schein's Director of Group Practices: "I recently had a conversation with Kathleen regarding this group and they are nothing more than a GPO. It is my understanding that this violates our policy as we do not engage with GPOs." (CCFF ¶¶ 811, 812 (quoting CX0260 at 002)). This is in stark contrast to the record evidence that shows Schein worked with buying groups

before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322, 1178-1198).

1373. Mr. Cavaretta testified that he "spent a lot of days and hours and, quite frankly, years putting a structure together" for the Mid-Market and buying group space. (Cavaretta, Tr. 5535).

Response to Proposed Finding No. 1373

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein served buying groups during the conspiracy period, or to the extent it asserts that Mid-Markets was created to serve buying groups. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to "KILL the buying group model," and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728- 870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Mid-Market was created to serve buying groups during the conspiracy period. The record evidence shows that the Mid-Market group was formed to serve small DSOs, group practices, and community health centers. (Steck, Tr. 3690). Brady, who developed protocols for engaging with buying groups that came to be in September

2015 (after the agreement began to fall apart), testified that this was a “sidebar task” that “didn't have to do with my -- my main focus, the majority focus of my job” which was to work with Mid-Market group practice customers, not buying groups. (CX8020 (Brady, Dep. at 148-149)). Brady testified that he did not recall Schein having any buying groups in the Mid-Market group when he took over in January 2015. (CX8020 (Brady, Dep. at 128) (“Q. Were there any buying groups of independent dentists that existed in Mid Market when you took over in January of 2015? A. Not when I took over in 2015 that I can recall.”)). In September 2015, Brady sent an email to Schein executives about plans to engage with buying groups. (CX0192 at 002). Brady wrote: “[t]raditionally, Schein has rarely engaged with these groups, but times are changing rapidly in the dental market and we must begin to engage.” (CX0192 at 002). The record evidence also shows that even as of January 2016, Schein still had to “figure out if the [Mid-Market] is going to be responsible for [buying groups].” (CX2280 at 001; Cavaretta, Tr. 5637-5638).

1374. Schein never stopped working with buying groups during Mr. Cavaretta’s 18-year tenure at HSD. (Cavaretta, Tr. 5536).

Response to Proposed Finding No. 1374

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts Schein’s consistently worked with buying groups. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728- 870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that

Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154, 1362-1373). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322, 1178-1198).

1375. Mr. Meadows, one of Schein's top sales executives in the Eastern Area, never received any direction from Mr. Sullivan, Mr. Steck, Mr. Chatham, Mr. Breslawski, Mr. Bergman or anybody else at Henry Schein not to do business with buying groups. (Meadows, Tr. 2578, 2580, 2620-21).

Response to Proposed Finding No. 1375

The Proposed Finding is misleading and contrary to the weight of the record evidence. As set forth above in Responses to Proposed Finding Nos. 142 and 1362-1374, the record evidence contains dozens of documents that confirm that Schein, and specifically Meadows, enforced a policy against buying groups during the conspiracy period. (Complaint Counsel's Post-Trial Brief, at Attachment C). For example, on July 17, 2012, Meadows wrote to his direct report: "I have to tell you Ron and Dan made a decision that is against what Tim Sullivan has directed us to do in regards to supporting Buying groups. We do not want our customers organizing and creating what are known as GPOs it takes the value away from the distributor." (CCFF ¶ 773 (quoting CX0170 at 001)). On October 25, 2014, Meadows wrote to Jeff Reichardt, a Zone Manager: "Do not forward. Quick note. I've received a few [field sales consultant] phone calls over the last few weeks regarding group purchasing organizations (GPO). Just for clarity, we are NOT participating in any GPOs regardless of

what they promise to bring us. We can discuss on Monday [Eastern Area] call.” (CCFF ¶ 816 (quoting CX2354 at 001 (emphasis in original))). And again on November 3, 3015, Meadows to Cavaretta: “[Sullivan] was going off about how we do not have any buying group agreements and that we will not do them. Soap boxing about HSD and buying groups.” (CCFF ¶ 850 (quoting CX0176 at 001)).

1376. In writing to an FSC that regional managers “made a decision that is against what Tim Sullivan has directed us to do in regards to supporting Buying groups[,]” Mr. Meadows meant only that HSD “regional managers, FSCs and zone managers were not supposed to be gathering or presenting offers to buying groups or building offers for buying groups” at that time, because Special Markets had primary responsibility for buying groups and established buying group formularies. (Meadows, Tr. 2474-76, 2636-38; CX 0170).

Response to Proposed Finding No. 1376

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that HSD did “were not supposed to be gathering or presenting offers to buying groups” without Special Markets. The record evidence shows that HSD and Special Markets were both responsible for buying groups. (Foley, Tr. 4523). The record evidence shows that Special Markets and HSD communicated and coordinated regarding buying group strategy and that buying group opportunities were directed to HSD. (CX0309 (Muller, IHT at 94-95) (“Q. . . . Prior to 2014, when a buying group was interested in working with Henry Schein, which division would that buying group be directed toward? A. If it was for the private practitioner, it would go to Henry Schein dental. If it was for a special markets world type of customer, it would go to me”); CX2060 at 001 (Special Markets executive Foley stated in 2011: “If it turns out to be a DSO, all ours. If it turns out to be more of a local buying group, HSD (if they even want it)”); CX0165 at 002 (In 2011, Special Markets Manager Kathleen Titus declined a buying group and sent it to HSD, and stated: “The participants are Private Practices which rules SM out.”))). Buying groups were

better served by HSD. (CX2509 at 001) (“Henry Schein Dental manages customers who are buying groups, not Special Markets.”); Cavaretta, Tr. 5639-5640; CX2504 at 003 (In 2011, Special Markets Manager Kathleen Titus stated that GPOs are “a better fit for HSD than SM.”)). The head of HSD, Sullivan, and Special Markets, Muller, discussed and coordinated regarding buying group strategy between the two divisions and transferred a pre-existing, pre-conspiracy buying group from Special Markets to HSD. (CCFF ¶¶ 901-902; *see also* Responses to Proposed Finding Nos. 23, 29-30). Ultimately, the record evidence shows that HSD and Special Markets coordinated regarding buying group and both rejected buying groups during the conspiracy period. (CCFF ¶¶ 661-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

1377. Mr. Meadows clarified that he “never got direction from Tim Sullivan not to do business with buying groups.” (Meadows, Tr. 2476, 2594-95, 2620).

Response to Proposed Finding No. 1377

The Proposed Finding is misleading and contrary to the weight of the record evidence. As set forth above in Responses to Proposed Finding Nos. 142 and 1362-1375, the record evidence contains dozens of documents that confirm Sullivan’s directives to Schein executives, including Meadows, and to the sales force that Schein would not work with buying groups. (Complaint Counsel’s Post-Trial Brief, at Attachment C). For example, on July 17, 2012, Meadows wrote to his direct report: “I have to tell you Ron and Dan made a decision that is against what *Tim Sullivan has directed us to do* in regards to supporting Buying groups. We do not want our customers organizing and creating what are known as GPOs it takes the value away from the distributor.” (CCFF ¶ 773 (quoting CX0170 at 001) (emphasis added)). On October 25, 2014, Meadows wrote to Jeff Reichardt, a Zone Manager: “Do not forward. Quick note. I’ve received a few [field sales consultant] phone calls over the last few weeks

regarding group purchasing organizations (GPO). Just for clarity, we are NOT participating in any GPOs regardless of what they promise to bring us. We can discuss on Monday [Eastern Area] call.” (CCFF ¶ 816 (quoting CX2354 at 001 (emphasis in original))). And again on November 3, 3015, Meadows to Cavaretta: “[Sullivan] was going off about how we do not have any buying group agreements and that we will not do them. Soap boxing about HSD and buying groups.” (CCFF ¶ 850 (quoting CX0176 at 001) (emphasis added))).

1378. Mr. Meadows did not provide any instruction to Schein’s sales force to not do business with buying groups. (Meadows, Tr. 2596-97).

Response to Proposed Finding No. 1378

The Proposed Finding is misleading and contrary to the weight of the record evidence. As set forth above in Responses to Proposed Finding Nos. 142 and 1362-1376, the record evidence contains dozens of documents that confirm that Schein, and specifically Meadows, enforced a policy against buying groups during the conspiracy period and instructed the sales force not to do business with buying groups. (Complaint Counsel’s Post-Trial Brief, at Attachment C). For example, on July 17, 2012, Meadows wrote to his direct report: “I have to tell you Ron and Dan made a decision that is against what Tim Sullivan has directed us to do in regards to supporting Buying groups. We do not want our customers organizing and creating what are known as GPOs it takes the value away from the distributor.” (CCFF ¶ 773 (quoting CX0170 at 001))). On October 25, 2014, Meadows wrote to Jeff Reichardt, a Zone Manager: “Do not forward. Quick note. I’ve received a few [field sales consultant] phone calls over the last few weeks regarding group purchasing organizations (GPO). Just for clarity, we are NOT participating in any GPOs regardless of what they promise to bring us. We can discuss on Monday [Eastern Area] call.” (CCFF ¶ 816 (quoting CX2354 at 001 (emphasis in original))). And again on November 3, 3015, Meadows to Cavaretta: “[Sullivan] was going off about

how we do not have any buying group agreements and that we will not do them. Soap boxing about HSD and buying groups.” (CCFF ¶ 850 (quoting CX0176 at 001)).

1379. Mr. Foley, former Director and later VP of Sales for Special Markets, testified that he has never been instructed to not do business with buying groups, and similarly did not instruct others to not do business with buying groups. (Foley, Tr. 4601-02, 4652).

Response to Proposed Finding No. 1379

As set forth in Responses to Proposed Finding 142-143, the Proposed Finding is misleading and contrary to the weight of the record evidence. The record evidence shows that Schein worked with buying groups before the conspiracy, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728- 870). The record evidence contains dozens of documents that confirm Sullivan’s directives and Schein’s enforcement of that policy against buying groups. (Complaint Counsel’s Post-Trial Brief, at Attachment C). For example:

- December 21, 2011: Randy Foley, Director of Sales for Special Markets, rejected buying group Unified Smiles, stating, “[U]nless you have some ‘ownership’ of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups.” (CCFF ¶ 719 (quoting CX2062 at 001)).
- February 20, 2012: Foley wrote to his direct report, Strategic Account Manager Debbie Torgersen-Foster, “Honestly, within Schein we have a few buying groups (BG) that we wish we didn’t have . . . So, this is a corporate decision, not to participate in these.” (CX0238 at 001, CCFF ¶¶ 754, 757).
- June 8, 2012: Regional Account Manager Andrea Hight wrote to her boss, Foley and Zone Manager Kathleen Titus: “I explained that we do not accommodate GPOs” (CCFF ¶ 771 (quoting CX2423 at 004)).
- May 29, 2013: Cavaretta wrote to two Schein employees, “We try to avoid buying groups at all costs and therefore don’t really recognize them.” (CCFF ¶¶ 785 (quoting CX2509 at 001)).

- December 20 2013: Foley told his counterpart at Colgate, one of Schein's manufacturer partners: "It's a buying group that we do not participate with, as with all buying groups." (CCFF ¶¶ 788 (quoting CX2073 at 001), 789).

1380. Mr. Foley clarified that there was never any corporate decision not to participate in all buying groups and both Special Markets and HSD provided discounts to buying groups the entire time he was employed by Schein. (Foley, Tr. 4603, 4606, 4728-29).

Response to Proposed Finding No. 1380

As set forth in Responses to Proposed Finding Nos. 1379 and 142-143, the Proposed Finding is misleading and contrary to the weight of the record evidence. The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). For example, on February 20, 2012, Foley wrote to his direct report, Strategic Account Manager Debbie Torgersen-Foster: "Honestly, within Schein we have a few buying groups (BG) that we wish we didn't have . . . So, this is a corporate decision, not to participate in these." (CX0238 at 001, CCFF ¶¶ 754, 757).

1381. Ms. Titus, Director of Mid-Market, Western United States, confirmed that none of her superiors during her 24 years at Henry Schein – including Jake Meadows, Brian Brady, Joe Cavaretta, Randy Foley, and Hal Muller – ever instructed her to not do business with buying groups. (Titus, Tr. 5192-93).

Response to Proposed Finding No. 1381

The Proposed Finding is misleading and contrary to the weight of the record evidence. The record evidence shows that Schein worked with buying groups before the conspiracy, instructed its sales force to reject buying groups during the conspiracy period and complied with that instruction, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF

¶¶ 432-453, 661-954, 1159-1166, 1316-1322). As set forth above in Response to Proposed Finding No. 142, the record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups during the conspiracy period, which Titus was aware of and understood. (Complaint Counsel’s Post-Trial Brief, at Attachment C). For example, on July 16, 2014, Titus wrote to Cavaretta and Regional Managers Glenn Showgren and Brian Brady: “I [spoke with] Joe about the [buying group] agreement. [Sullivan] was not in favor of it.” (CCFF ¶ 795 (quoting CX2219 at 001)). On July 17, 2014, Titus wrote to Showgren and Zone Manager Kevin Upchurch: “We had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. . . It went to [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)). Then on August 29, 2014, Titus wrote to Cavaretta: “It doesn’t help to have a GPO policy if [Special Markets] is opening up these consulting firms.” (CCFF ¶ 808 (CX2220 at 001)).

1382. Rather, Ms. Titus testified that in June 2014, Mr. Cavaretta told her that Schein needed to have a more formal offering with respect to buying groups and asked that she “build th[at] portfolio.” (Titus, Tr. 5221).

Response to Proposed Finding No. 1382

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein developed a “formal offering” for buying groups or that it served buying groups during the conspiracy period. As set forth above in Responses to Proposed Finding Nos. 142, 148, 150, 152, 154, and 1381, the record evidence establishes that Schein indiscriminately rejected buying groups during the conspiracy in order to ensure internal compliance with the agreement, and that it did so by instructing its sales force to refuse to sell to all buying groups. The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups during the conspiracy period,

which Titus was aware of and understood. (Complaint Counsel’s Post-Trial Brief, at Attachment C). For example, on July 16, 2014, Titus wrote to Cavaretta and Regional Managers Glenn Showgren and Brian Brady: “I [spoke with] Joe about the [buying group] agreement. [Sullivan] was not in favor of it.” (CCFF ¶ 795 (quoting CX2219 at 001)). On July 17, 2014, Titus wrote to Showgren and Zone Manager Kevin Upchurch: “We had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. . . It went to [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799 (quoting CX2235 at 001)). Then on August 29, 2014, Titus wrote to Cavaretta: “It doesn’t help to have a GPO policy if [Special Markets] is opening up these consulting firms.” (CCFF ¶ 808 (CX2220 at 001)).

1383. In sum, no one at Schein ever instructed Ms. Titus to not do business with buying groups. (Titus, Tr. 5193).

Response to Proposed Finding No. 1383

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein developed a “formal offering” for buying groups or that it served buying groups during the conspiracy period. As set forth above in Responses to Proposed Finding Nos. 142, 148, 150, 152, 154, 1381, and 1382, the record evidence establishes that Schein indiscriminately rejected buying groups during the conspiracy in order to ensure internal compliance with the agreement, and that it did so by instructing its sales force to refuse to sell to all buying groups. The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups during the conspiracy period, which Titus was aware of and understood. (Complaint Counsel’s Post-Trial Brief, at Attachment C). For example, on July 16, 2014, Titus wrote to Cavaretta and Regional Managers Glenn Showgren and Brian Brady: “I [spoke with] Joe about the [buying

group] agreement. [Sullivan] was not in favor of it.” (CCFF ¶ 795 (quoting CX2219 at 001)).

On July 17, 2014, Titus wrote to Showgren and Zone Manager Kevin Upchurch: “We had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. . . It went to [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.”

(CCFF ¶ 799 (quoting CX2235 at 001)). Then on August 29, 2014, Titus wrote to Cavaretta:

“It doesn’t help to have a GPO policy if [Special Markets] is opening up these consulting firms.” (CCFF ¶ 808 (CX2220 at 001)).

1384. Ms. Titus commented at trial that Complaint Counsel’s allegations were “personally diminishing . . . because [she] spent so much of [her] career at Henry Schein working with buying groups.” (Titus, Tr. 5192).

Response to Proposed Finding No. 1384

As set forth above in Responses to Proposed Finding Nos. 142, 148, 150, 152, 154, 1381, 1382, and 1382, the record evidence establishes that Schein indiscriminately rejected buying groups during the conspiracy in order to ensure internal compliance with the agreement, and that it did so by instructing its sales force to refuse to sell to all buying groups. The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups during the conspiracy period, which Titus was aware of and understood.

(Complaint Counsel’s Post-Trial Brief, at Attachment C).

1385. The evidence does not support Complaint Counsel’s allegation in the Complaint that Mr. Sullivan and other Schein executives instructed Schein’s sales force not to do business with buying groups. (Complaint ¶ 34).

Response to Proposed Finding No. 1385

The Proposed Finding is not supported by a citation to the Complaint and should be disregarded. Nonetheless, the Proposed Finding is contrary to the weight of the record evidence. As set forth in the Responses to Proposed Finding Nos. 1358 to 1384, the record evidence shows that Schein worked with some buying groups prior to 2011, but by

December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728- 870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154)

2. *HSD’s Regional Sales Teams Had the Authority to Do Business with Buying Groups.*

1386. HSD’s regional managers had the authority to discount to and do business with buying groups locally. (Sullivan, Tr. 3920). HSD’s regional managers have, in fact, entered into such buying group agreements. (Cavaretta, Tr. 5576-78; RX 2232-001; CX 2263; RX 2638; Steck, Tr. 3837-38; CX 8020 (Brady, Dep. at 75-76)).

Response to Proposed Finding No. 1386

Complaint Counsel has no specific response to the first sentence of the Proposed Finding.

The second sentence of the Proposed Finding is vague and overbroad and should be disregarded. It does not describe or specify what buying group agreements were entered into, when they were entered into, or whether such agreements were approved or known to Sullivan. The Proposed Finding is also misleading and contrary to the weight of the record evidence if it implies that a regional manager’s ability to contract with buying groups, whether that is unknown to Sullivan or against Sullivan’s directives, disproves Sullivan’s directives to the sales force *during* the conspiracy not to work with buying groups. (*See* CCFF ¶¶ 661-1100; Complaint Counsel’s Post-Trial Brief, at Attachment C).

1387. Even after primary responsibility for buying groups shifted from Special Markets to Mid-Market, Tim Sullivan did not have the final say about whether HSD would do business with

a buying group. (Sullivan, Tr. 4113). Others within HSD or Mid-Market had the authority to decide whether or not to partner with a buying group. (Sullivan, Tr. 4113).

Response to Proposed Finding No. 1387

The Proposed Finding is misleading and contrary to the weight of the record evidence. First, it is misleading and contrary to the weight of the record evidence in its assertion that “primary responsibility for buying groups shifted from Special Markets to Mid-Market.” The record evidence shows that the Mid-Market group was formed to serve small DSOs, group practices, and community health centers. (Steck, Tr. 3690). Brady, who developed protocols for engaging with buying groups that came to be in September 2015 (after the agreement began to fall apart), testified that this was a “sidebar task” that “didn't have to do with my -- my main focus, the majority focus of my job” which was to work with Mid-Market group practice customers, not buying groups. (CX8020 (Brady, Dep. at 148-149)). Brady testified that he did not recall Schein having any buying groups in the Mid-Market group when he took over in January 2015. (CX8020 (Brady, Dep. at 128) (“Q. Were there any buying groups of independent dentists that existed in Mid Market when you took over in January of 2015? A. Not when I took over in 2015 that I can recall.”)). In September 2015, Brady sent an email to Schein executives about plans to engage with buying groups. (CX0192 at 002). Brady wrote: “[t]raditionally, Schein has rarely engaged with these groups, but times are changing rapidly in the dental market and we must begin to engage.” (CX0192 at 002). The record evidence also shows that even as of January 2016, Schein still had to “figure out if the [Mid-Market] is going to be responsible for [buying groups].” (CX2280 at 001; Cavaretta, Tr. 5637-5638).

The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.”

(CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728- 870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322, 1178-1198).

1388. When approached by local HSD sales teams regarding buying group opportunities, Mr. Sullivan may give his opinion, but “it would be up to ... them,” to make a decision. (Sullivan, Tr. 4113-14; Cavaretta, Tr. 5609 (With respect to PGMS buying group, Mr. Cavaretta stated: “Tim is an empowering leader, and he said ... whatever you want to do we do.”)).

Response to Proposed Finding No. 1388

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Sullivan did not issue a directive not to do business with buying groups. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728- 870). The record evidence contains dozens of documents that confirm that Schein enforced a

policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent it asserts or implies that Sullivan did not reject PGMS. In fact, the record evidence shows that Sullivan “shot down” the PGMS agreement. (CCFF ¶¶ 799-805). Titus understood that Sullivan had shot down the PGMS agreement, even though PGMS was willing to be exclusive with Schein, and that the message from above was that GPOs were not good for Schein.” (CCFF ¶¶ 800-805; *see also* CCFF ¶ 808, Responses to Proposed Finding Nos. 1046-1077).

1389. There were occasions when Mr. Sullivan gave his opinion that HSD should not work with a buying group, but HSD proceeded to work with the buying group anyway. (Sullivan, Tr. 4114). Similarly, though Mr. Sullivan thought the ADC buying group “smell[ed] bad[,]” the HSD local team (including Michael Porro and Bobby Anderson) made the decision to “go for it” and bid on ADC. (Sullivan, Tr. 4212-13).

Response to Proposed Finding No. 1389

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein’s bid on ADC reflects HSD bidding on a buying group despite Sullivan’s opinion that it “smell[ed] bad.” The record evidence establishes that Benco’s Cohen and Sullivan shared competitively sensitive information regarding ADC to confirm whether it qualified as a buying group and to ensure that they were not deviating from prior assurances not to discount to buying groups. (CCFF ¶¶ 1022-1100). Only after the two competitors shared competitively sensitive information did Schein bid on ADC. (CCFF ¶¶ 1092-1093).

1390. There are other HSD buying group decisions that Mr. Sullivan had no role in whatsoever. (Cavaretta, Tr. 5595-96 (Steadfast Medical), 5602-03 (Dental Co-Op of Utah)).

Response to Proposed Finding No. 1390

The Proposed Finding is misleading and contrary to the weight of the record evidence. The record evidence shows Schein terminated its pre-existing, legacy buying group relationships with Steadfast and the Dental Co-op of Utah during the conspiracy pursuant to Sullivan's directives to Schein executives and the sales force to do so. (*See Responses to Proposed Finding Nos. 581-633 (Dental Co-Op of Utah), 1199-1242 (Steadfast)*).

1391. The fact that HSD's regional sales teams had the authority to do business with buying groups – and did so – is inconsistent with the alleged instructions given by Mr. Sullivan and other Schein executives, as described in the Complaint. (Complaint ¶¶ 1, 34).

Response to Proposed Finding No. 1391

The Proposed Finding is not supported by a citation to the Complaint. Nonetheless, the Proposed Finding is misleading and contrary to the weight of the record evidence. The record evidence establishes that Schein ensured internal compliance with the agreement by instructing its sales force to refuse to sell to all buying groups during the conspiracy period, and indeed, the sales forces' authority or ability to do business with buying groups had no bearing on that directive. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to "KILL the buying group model," and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the

conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322, 1178-1198).

C. The Evidence Does Not Support the Claim that Schein Changed its Practices at the End of the Alleged Conspiracy Period.

1392. Complaint Counsel argues that Schein made another “radical course change[]” and “began competing for buying groups after the conspiracy ended” “in April of 2015.” (CC Pretrial Br. at 49-50; Kahn, Tr. 19, 54). In support, Complaint Counsel argues that “by late 2015 ... Schein entered into a number of buying group arrangements,” pointing specifically to Schein's 2017 agreement with Smile Source and a 2017 internal Benco text messages noting “Schein recognizing 5-10 GPOs.” “Smile Source for sure.” (CC Pretrial Br. at 50; Kahn, Tr. 54-55 (citing CX 1527)).

Response to Proposed Finding No. 1392

The Proposed Finding is misleading and mischaracterizes Complaint Counsel's statements to the extent it asserts Complaint Counsel has stated that the conspiracy ended in April 2015.

Complaint Counsel has stated that the conspiracy was “impossible to maintain” after April 2015, not that the conspiracy ended on April 2015. (Kahn, Tr. 19). Complaint Counsel has no specific response otherwise.

1393. Contrary to Complaint Counsel's assertion of a “radical course change,” however, the evidence already discussed shows Schein has always done business with at least “five to ten” buying groups starting well before the end of the alleged conspiracy period, including Alpha Omega, Long Island Dental Forum, the Dental Co-Op, Dental Partners of Georgia, OrthoSynetics, Smile Source, Comfort Dental, Advantage Dental Group, the Denali Group, Dentists for a Better Huntington, Khyber Pass, Dental Associates of Virginia, Intermountain Dental Associates, Universal Dental Alliance, Nevada Dental Cooperative, Steadfast Medical, MeritDent, the Schulman Group, Dental Gator, Klear Impakt, Stark County Dental Society, Corydon Palmer Dental Society, Tralongo, Breakaway, and others. (SF 377-1335).

Response to Proposed Finding No. 1393

The Proposed Finding is misleading and contrary to the weight of the record evidence in asserting that the listed entities “show[] Schein has always done business with at least ‘five to

ten' buying groups starting well before the end of the alleged conspiracy period.” It is also not supported by the cited evidence. Evidence regarding each of those groups either proves Schein's participation in a conspiracy or is irrelevant to the inquiry. (*See Responses to Proposed Finding Nos. 377-1335*). Of the buying groups Schein has addressed, only four are buying groups with which Schein reached an agreement *during* the conspiracy, but *none* were approved by Sullivan and all were against Sullivan's instructions not to deal with buying groups. Those are Dental Gator, Dental Alliance, Schulman Group, and MeritDent. (*See Responses to Proposed Finding Nos. 634-675 (Dental Gator), 1309-1335 (Dental Alliance), 1093-1104 (Schulman Group), 969-981 (MeritDent)*). As explained above in the set of proposed findings for each buying group, none of the four disprove Schein's participation in a conspiracy. Aside from four buying groups, all of the groups Schein identifies are either (1) not buying groups (e.g., Comfort Dental), (2) pre-conspiracy “legacy” relationships (e.g., Smile Source), or (3) post-conspiracy relationships (e.g., Klear Impakt). (*See Responses to Proposed Finding Nos. 493-511 (Comfort Dental), 1105-1186 (Smile Source), 802-838 (Klear Impakt)*). Moreover, the record evidence shows that Schein's pre-conspiracy, legacy buying groups that were not terminated flew under the radar, and Schein executives were not aware of their existence, referring to them as “inherited messes” when they were discovered post-conspiracy. (CCFF ¶ 1767). Indeed, the record evidence shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy pursuant to Sullivan's directives and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all

communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

1394. Schein’s agreement with Smile Source in 2017 was nothing new. Indeed, Schein had tried to win Smile Source’s business in 2012 and 2014, the beginning and middle of the alleged conspiracy. (RX 2213; Steck, Tr. 3789). And, as Smile Source’s President Trevor Maurer wrote in 2017, [REDACTED] (RX 2091). The fact that Schein failed to win Smile Source’s business in 2014 and it took three years to finally consummate a deal is consistent with Schein’s unilateral approach to buying groups, not with Complaint Counsel’s alleged conspiracy.

Response to Proposed Finding No. 1394

The Proposed Finding is misleading and contrary to the weight of the record evidence. The record evidence shows that Schein’s conduct regarding Smile Source was consistent with its participation in a conspiracy. The record evidence shows that relationship with Smile Source ended at the beginning of 2012, that Schein did not work with Smile Source during the conspiracy, and that Schein’s 2014 bid on Smile Source was an attempt at cheating on the agreement. (*See* Responses to Proposed Findings No. 1105-1186). In fact, Schein did not win Smile Source’s business in 2014 in its attempt to cheat on the agreement because [REDACTED]

[REDACTED]. As such, the Proposed Finding is inaccurate and misleading as to the assertion that Schein tried to consummate a deal that “took three years.”

1395. The evidence does not support Complaint Counsel’s contention that Schein suddenly started saying “yes” to buying groups after 2015. Just as it had done in the years before 2015, the evidence shows that Schein continued to evaluate each buying group on a case-by-case basis after the alleged conspiracy period, saying yes to some and no to others. For example, after over a year of discussions and negotiations with IDGB, Schein ultimately decided in 2016 that the partnership did not make business sense. (SF 774-78). Similarly, Schein decided not to further pursue partnerships with TDSC and Dentistry Unchained after over a year of negotiations after the alleged conspiracy period. (SF 468-86). Accordingly, this Court finds that, rather than beginning to compete for buying groups anew in 2015, Schein continued competing for buying groups as it had in the years before 2015.

Response to Proposed Finding No. 1395

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein's conduct regarding buying groups was consistent. The record evidence shows that it was not. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to "KILL the buying group model," and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728- 870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322, 1178-1198).

Evidence regarding IDBG, TDSC, and Dentistry Unchained, or evidence regarding groups that Schein turned down or considered after the conspiracy period, does not conflict and does not negate this record evidence establishing Schein's blanket rejection of buying groups *during* the conspiracy period pursuant to an instruction as groups that Schein. (*See* Responses to Proposed Finding Nos. 765-785 (IDBG), Dentistry Unchained (690-716), 468-486 (TDSC)).

V. THE COMMUNICATIONS CITED BY COMPLAINT COUNSEL DO NOT EVIDENCE AN AGREEMENT.

A. The Interfirm Communications Cited by Complaint Counsel Do Not Support the Allegation that Schein Joined a Conspiracy in 2011 or Anytime Thereafter.

1396. Complaint Counsel’s “allegations are based on direct competitor communications.... So we need not go to a world where we are only looking at parallel conduct and trying to infer a conspiracy from that. We have direct evidence.” (Kahn, Tr. 31-32; *see also* Kahn, Tr. 65 (“This case comes down to competitors communicating with each other directly about a refusal to discount to buying groups ... followed by a joint refusal to discount to buying groups.”))).

Response to Proposed Finding No. 1396

Complaint Counsel has no specific response.

1397. Further, Complaint Counsel made clear during the trial that the “basis of our case comes down to the nature of the relationship and the communications between Chuck Cohen, Tim Sullivan, and Paul Guggenheim,” and that other communications – such as isolated, unsolicited communications between other employees – “[are] not the basis of our case.” (Kahn, Tr. 4759).

Response to Proposed Finding No. 1397

The Proposed Finding is inaccurate because it mischaracterizes Complaint Counsel’s statement. The full statement reads: “With respect to the communications between Scott Anderson and Tim Sullivan, that is not the basis of our case. The basis of our case comes down to the nature of the relationship and the communications between Chuck Cohen, Tim Sullivan and Paul Guggenheim, Your Honor. And so to the extent that he is quoting text messages between Scott Anderson and Tim Sullivan, that is not the core of our case.” (Kahn, Tr. 4759). The inclusion of the phrase “isolated, unsolicited communications between other employees” is improper, not supported, and misleading.

1. *Alleged Schein-Benco Communications.*

1398. Mr. Cohen cannot recall ever hearing from Schein how it felt about buying groups. (Cohen, Tr. 848).

Response to Proposed Finding No. 1398

The Proposed Finding is incomplete, inaccurate, misleading, and contrary to the weight of the evidence. First, this finding omits that Cohen testified that, based on text messages with Sullivan, he understood that “the policy that Henry Schein had was that they do not recognize GPOs.” (CCFF ¶ 676). Second, the evidence shows that Cohen informed Sullivan of Benco’s no buying group policy. (CCFF ¶¶ 662-664; *see also* CX0301 (Cohen, IHT at 195-196) (“Q. Have you ever communicated with anyone at Schein about buying groups? A. I believe I have. Q. Can you tell me about those instances? A. . . I believe I have, at different times, communicated our policy on buying groups.”)). The evidence also shows that Cohen had an understanding in 2012, 2013, and 2014 that Schein (like Benco) did not do business with buying groups. (CCFF ¶¶ 674-678). Cohen’s understanding that Schein did not do business with buying groups was contrary to market rumors that he received indicating that Schein in fact worked with buying groups (though the record evidence shows Schein did not serve buying groups during the conspiracy period). (CCFF ¶¶ 670-673, 681-684, 661-954). And consistent with Benco’s understanding, Schein adopted a no buying group strategy beginning in late 2011. (CCFF ¶¶ 705-870). The evidence also shows that Cohen confronted Sullivan when Benco heard rumors that Schein worked with buying groups (CCFF ¶¶ 955-972; 978-993; 994-997); and Cohen consulted with Sullivan when he did not know whether a customer qualified as a buying group. (CCFF ¶¶ 1022-1060). Cohen also informed Sullivan that Benco would bid on a group because it was not a buying group. (CCFF ¶¶ 1061-1078). The weight of the evidence thus shows that, as a result of communications with Schein, Benco gained the understanding that Schein would adopt a policy against recognizing buying groups. (CCFF ¶¶ 680, 675-678; *see also* 661-674, 681-684, 955-997, 1022-1078).

a. Non-Buying Group Communications Are Not Evidence of a Conspiracy.

1399. Complaint Counsel cites to communications between Schein and Benco unrelated to buying groups in support of their alleged conspiracy. (*See, e.g.*, CX 6027-023 (“Tim: You asked me to let you know re Anne Cox. We are hiring her, starts next week. Thanks. Cfc”); CX 6027-027 (A-dec divorces Benco); CX 6027-042 (“Thanks for Amazon change.”); CX 6027-010 (“BTW, I love the way that the Sullivan Foundation/DTAF joint scholarship has turned out.... Thank you for helping to set the standard.”); CX 6027-039 (“Ok. I’ve got Badgers. You’ve got Harvard. For a beer. 🍷”); CX 6027-021 (“Must have had great snow day yesterday!! We had to leave early for airport to get out ahead of it!!”); CX 6027-019 (“Just wrapped up. They boo’d me off the stage. Threw fruit. Ornery crowd. I’m sure you’ll do great!!”)). Such communications, however, are not probative of a conspiracy not to do business with buying groups, but rather are innocuous communications related to hiring issues, manufacturers, Amazon, charities, sports, niceties, and jokes.

Response to Proposed Finding No. 1399

The Proposed Finding is misleading, inaccurate and contrary to the weight of the evidence to the extent that it suggests that the Respondents’ non-buying group communications are not relevant to the conspiracy. The non-buying group communications establish a pattern by which Cohen contacted Sullivan and Guggenheim when he saw the opportunity to advance their “mutual interests” by coordinating their conduct. (CCFF ¶¶ 269-326). Cohen admitted at trial that he had an “open relationship” with Sullivan and Guggenheim. (CCFF ¶¶ 277, 300, 310). This “open relationship” resulted in coordinated conduct in refusing to discount to buying groups. (CCFF ¶¶ 474-1390).

1400. Notably, Complaint Counsel did not identify any communications between Schein and Benco relating to buying groups at the time the alleged conspiracy began in December 2011. (CX 6027-003-18). Instead, at trial, Complaint Counsel introduced two December 2011 emails sent by Mr. Cohen – one to Mr. Sullivan and a second to Mr. Guggenheim – about Procter & Gamble. (Guggenheim, Tr. 1547; Sullivan, Tr. 3890-93; Cohen, Tr. 488; CX 2422, CX 1049, CX 3067.)

Response to Proposed Finding No. 1400

The Proposed Finding is misleading and incomplete. Between March and December 2011, Cohen and Sullivan called each other at least 13 times for a total duration of 50 minutes and

14 seconds, (CCFF ¶ 347 (CX6027 at 012, 016-017)), and exchanged a total of 89 text messages in 2011—23 of which Respondents did not produce content, and which may have contained buying group communications. (CCFF ¶¶ 349-350 (CX6027 at 003-018)).

Sullivan exchanged additional communications with Cohen, including written notes and voicemail messages, that are not reflected in CX6027. (CCFF ¶¶ 353-354 (Sullivan, Tr. 3885 (Sullivan produced all cell phone records but could have called Cohen from a land line); Cohen, Tr. 526 (Cohen sent Sullivan notes by mail from time to time); Sullivan, Tr. 3886 (“Q: And you didn’t keep all of the notes that Chuck Cohen sent you over the years, right? A: No.”)). Cohen and Sullivan saw each other at multiple industry and private events in 2011. (CCFF ¶¶ 358, 380, 379, 381, 363, 383; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment B). Cohen also visited Schein’s companies’ corporate offices near the time of the conspiracy period. (CCFF ¶ 357 (CX1045 (October 2011 email from Chuck Cohen to Rick Cohen: “I’ve personally visited both Schein’s & Patterson’s corporate offices” and discussing accommodating Sullivan and Guggenheim visiting Benco))). In addition to the extensive opportunities for Benco and Schein to communicate about buying groups, Cohen’s notes following a November 2011 meeting with key Schein leaders indicate a desire to “explore opportunities to work together ‘quietly’” and further note that “Schein has a long history of covertly aligning with (co-opting?) competitors and vendors, either through partnerships or small ownership stakes.” (CCFF ¶ 383 (CX1403 at 002)).

1401. Procter & Gamble is a manufacturer; not a buying group. (Sullivan, Tr. 3891; Guggenheim, Tr. 1692 (“They’re a manufacturer ... [N]ot a buying group, no.”)). The emails had “nothing to do with buying groups.” (Guggenheim, Tr. 1692; Cohen, Tr. 833; Sullivan, 4262). Complaint Counsel argues these communications evidence a pattern and practice probative of the alleged buying group conspiracy, but legitimate interfirm communications about manufacturer issues cannot support the alleged conspiracy regarding buying groups, or an inference that Respondents communicated about buying groups at this time.

Response to Proposed Finding No. 1401

The Proposed Finding is misleading and irrelevant. Though there is no explicit reference to buying groups, the e-mails represent an explicit call for help by Cohen to his direct competitors in addressing the issue with Procter & Gamble packaging and pricing of a product because Benco is “a small player in the market, and there’s sometimes when there’s mutual best interest.” (CCFF ¶ 280 (Cohen, Tr. 489)). Specifically, the Procter & Gamble e-mails spell out the collective issue and solution Cohen was proposing to Schein and Patterson. Both emails state, “I think you see the issue: we (all of us) are going to lose money on every box we sell.... When we at Benco called this issue to the attention of P&G management, they replied that no one else (i.e. you, Schein, Burkhardt) seemed concerned about it, so they’re not going to make any changes. Our feeling is that we distributors either need more margin, or P&G needs to take out the cavity rinse.” (CCFF ¶ 295 (CX1049 at 001-002; CX1050 at 001-002; Guggenheim, Tr. 1547-1551; Sullivan, Tr. 3890-3891; CX3067 at 002)). In these e-mails, Cohen sent Benco’s margin and profitability analysis on the product, asking his competitors to raise the same issues with Procter & Gamble. (CCFF ¶ 295).

Whether Benco was explicitly referencing a buying group with these e-mail is irrelevant as the communications are probative of the collective actions undertaken by the Respondents to confront industry threats.

1402. Complaint Counsel introduced an exchange of calls between Mr. Cohen and Mr. Sullivan on January 8, 2013. (CX 6027-026-27). The testimony at trial established that these calls were also about a manufacturer issue: A-dec’s announcement of its “divorce” from Benco. (Cohen, Tr. 770-71 (“January of 2013 was when A-dec and Benco announced that we were getting divorced.”); Sullivan, Tr. 4081-82; *see also* RX 2756 (“Chuck and I finally hooked up today after a few days of failed attempts ... Chuck would not make changes Adec requested so they terminated.”)).

Response to Proposed Finding No. 1402

Complaint Counsel does not object to the Proposed Finding's suggestion that the exchange of calls were "*also* about a manufacturer issue." But, to the extent anything besides buying groups were discussed, it is irrelevant to whether Respondents coordinated a mutual refusal to discount to buying groups. The Proposed Finding is also incomplete and should be given little weight as Cohen did not even articulate the cited testimony until prompted by his own counsel. (Cohen, Tr. 770 ("Q: So any significance in your mind of the dates January 7 and January 8, 2013? A: I believe, in researching for – in preparing for the testimony today, that that was a period of time where Tim and Henry Schein wanted to cancel this competitor hire agreement. Q: Okay. In addition to that, were there any issues with a manufacturer called A-dec around this time? A: Oh, yeah. Sorry.")).

1403. "A-dec is a dental equipment company. It stands for Austin Dental Equipment Company out of Oregon. And it is considered to be the top-of-the-line dental chair and dental unit and dental light and cabinetry." (McFadden, Tr. 2752).

Response to Proposed Finding No. 1403

Complaint Counsel has no specific response.

1404. The loss of A-dec was "traumatic" to Benco and flattened Benco's expansion and growth. (Cohen, Tr. 665-667).

Response to Proposed Finding No. 1404

Complaint Counsel has no specific response.

1405. In January 2013, Schein and Benco had been discussing the sale of Benco to Schein. (Sullivan, Tr. 4081 ("We were surprised to hear that Adec cut off Benco, and [were] actually in the midst of discussions with them about a merger.")).

Response to Proposed Finding No. 1405

Complaint Counsel has no specific response.

1406. Benco's loss of A-dec was "a big deal to -- a potential impact to [the] deal" with Schein. (Sullivan, Tr. 4081; *see also* RX 2756).

Response to Proposed Finding No. 1406

Complaint Counsel has no specific response.

1407. The evidence thus indicates that the January 2013 calls stemmed from Schein-Benco merger talks and concern over Benco losing a major vendor. (Sullivan, Tr. 4081, RX 2756). There is no indication that buying groups were discussed or mentioned on the calls. (Sullivan, Tr. 4081, Cohen, Tr. 770-71). The calls thus cannot support Complaint Counsel's allegations.

Response to Proposed Finding No. 1407

The Proposed Finding is misleading and incomplete. Complaint Counsel alleges, and the evidence proves, that the inter-firm calls are part of a pattern of cooperation among Benco, Schein, and Patterson to confront competitive threats. (CCFF ¶¶ 284-322). The Proposed Finding is misleading to the extent it implies that proof of the content of calls must or should be evidence in this case. Contemporaneous communications without content also show that buying groups were on the mind of Sullivan and Cohen around the time of the calls. Cohen emailed Guggenheim just a few weeks later sharing with that competitor Benco's no buying group policy explicitly. (CCFF ¶ 483). A few months later, Cohen shared with Sullivan Benco's no buying group strategy with regards to potential customer ADC. (CCFF ¶¶ 1032, 1034, 1039-1040). Around the same time, Cohen confronted Sullivan about whether Schein was working with buying group Dental Alliance. (CCFF ¶ 997). Even if A-dec was discussed it does not preclude discussion about buying groups. In any event, the calls themselves are probative of the open relationship between Respondents Benco and Schein that led to horizontal agreements.

1408. Complaint Counsel introduced a series of communications between Mr. Cohen and Mr. Sullivan on March 16, 2010 as evidence of an alleged buying group conspiracy. (CX 6027-001-02; Sullivan, Tr. 4073-76). The March 16, 2010 communications occurred more than a year before Complaint Counsel claims the alleged conspiracy began.

Response to Proposed Finding No. 1408

The Proposed Finding is misleading and incomplete as it suggests that the communications in 2010 are the basis of Complaint Counsel's case against Respondents. First, the communications are one of several examples of Cohen and Sullivan coordinating responses to perceived industry issues, a practice that proceeds and continues through, and is probative of, this particular conspiracy not to discount to buying groups. (CCFF ¶¶ 269-326). The Proposed Finding is irrelevant, incomplete, and misleading because it suggests that evidence of a long-term open relationship and repeated coordinated approaches to industry issues involving suppliers and customers are not a proper basis for an inference that Respondents coordinated a joint refusal to discount to buying group customers. This is just one of many such examples. (CCFF ¶¶ 269-326). The Proposed Finding is incomplete and misleading because Complaint Counsel introduced a significant amount of communications and opportunities to communicate between Mr. Cohen and Mr. Sullivan throughout the start and pendency of the conspiracy. Between March and December 2011, Cohen and Sullivan called each other at least 13 times for a total duration of 50 minutes and 14 seconds, (CCFF ¶ 347 (CX6027 at 012, 016-017)), and exchanged a total of 89 text messages in 2011—23 of which Respondents did not produce content, and which may have contained buying group communications. (CCFF ¶¶ 349-350 (CX6027 at 003-018)). Sullivan exchanged additional communications with Cohen, including written notes and voicemail messages, that are not reflected in CX6027. (CCFF ¶¶ 353-354 (Sullivan, Tr. 3885 (Sullivan produced all cell phone records but could have called Cohen from a land line)); Cohen, Tr. 526 (Cohen sent Sullivan notes by mail from time to time); Sullivan, Tr. 3886 ("Q: And you didn't keep all of the notes that Chuck Cohen sent you over the years, right? A: No.")). Cohen and Sullivan

saw each other at multiple industry and private events in 2011. (CCFF ¶¶ 358, 380, 379, 381, 363, 383; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment B; *see also* Cohen, Tr. 595-597 (Cohen regularly attended the DTA, which is “not that big a meeting.”); CX8015 (Cohen, Dep. at 359-360); Sullivan, Tr. 3878 (Sullivan attends the DTA annual meeting every year, and typically sees and would see Cohen at the meeting); Sullivan, Tr. 3879 (Sullivan attended the Chicago Midwinter Meeting and sometimes saw Cohen there); Sullivan, Tr. 3879-3880 (Sullivan typically attended five to six dental industry conventions each year and “might run into” Cohen at those meetings)). Executives from Benco and Schein visited each other at their companies’ corporate offices near the time of the conspiracy period. (CCFF ¶ 357 (CX1045 (October 2011 email from Chuck Cohen to Rick Cohen “I’ve personally visited both Schein’s & Patterson’s corporate offices” and discussing accommodating Sullivan and Guggenheim visiting Benco))). In addition to the extensive opportunities for Benco and Schein to communicate related to buying groups, Cohen notes following a November 2011 meeting with key Schein leaders indicate a desire to “explore opportunities to work together ‘quietly’” and further note that “Schein has a long history of covertly aligning with (co-opting?) competitors and vendors, either through partnerships or small ownership stakes.” (CX1403 at 002).

1409. Moreover, the March 16, 2010 communications had nothing to do with buying groups, but rather an issue with KaVo’s new handset program. (Sullivan, Tr. 4074-76; CX 2452)

Response to Proposed Finding No. 1409

The Proposed Finding is irrelevant, incomplete, and misleading to the extent that it suggests that evidence of a long-term open relationship and repeated coordinated approaches to industry issues involving suppliers and customers are not relevant to the finding that

Respondents coordinated a joint refusal to discount to buying group customers. This is just one of many such examples. (CCFF ¶¶ 269-326; 474-502; 661-684; 955-1080).

1410. Benco and Schein had distributor agreements with KaVo. (CX 8025 (Sullivan, Dep. at 353-54)). KaVo was offering sample handsets, but “[t]he problem was with their keeping them, it wasn’t like they would then choose the dealer that they want this to be billed through. They were billing the customers directly, which goes against [the distributor] agreement with them.” (Sullivan, Tr. 4074-75).

Response to Proposed Finding No. 1410

Complaint Counsel has no specific response.

1411. There is no evidence that the March 16, 2010 communications had anything to do with buying groups, and they predated the alleged conspiracy by more than a year. They thus cannot support Complaint Counsel’s claims. (Sullivan, Tr. 4261-62). Nor can an inference be made from such communications. The fact that Mr. Sullivan and Mr. Cohen communicated about legitimate business issues provides no support to Complaint Counsel’s allegation that Schein later agreed to behave in a certain way with regard to buying groups at Benco’s behest.

Response to Proposed Finding No. 1411

The Proposed Finding is irrelevant, incomplete, and misleading because it suggests that evidence of a long-term open relationship and repeated coordinated approaches to industry issues involving suppliers and customers are not a proper basis for an inference that Respondents coordinated a joint refusal to discount to buying group customers as well. This is just one of many such examples. (CCFF ¶¶ 269-326). In addition, the second half of the Proposed Finding is not supported by any citation to the record and should be rejected for that reason. Also, the Proposed Finding is misleading because it mischaracterizes the evidence, Sullivan and Cohen did not just communicate about legitimate business issues. Instead, the competitors coordinated on responses to several issues facing dental distributors, (CCFF ¶¶ 287-326), establishing a pattern and a practice which is probative that they took a similar coordinated approach with regards to buying groups. In addition, Complaint Counsel objects to the suggestion that competitors can legitimately coordinate strategies with regard

to suppliers. To the extent Benco or Schein faced “legitimate business issues,” in regards to dental distribution, it does not make it proper fodder for joint communications crafting coordinated strategies among competitors.

1412. Complaint Counsel also introduced a series of communications from Mr. Cohen to Mr. Guggenheim and Mr. Sullivan that related to end-user data that distributors provide to manufacturers. On June 12, 2013, Mr. Cohen sent Mr. Sullivan an email regarding formalizing the industry practice of supplying end-user data to suppliers such as Dentsply, 3M, Hu Friedy, and Ivoclar. (CX 2337). On June 12, 2013, Mr. Cohen sent Mr. Guggenheim a similar email regarding formalizing the industry practice of supplying end-user data to suppliers such as Dentsply, 3M, Hu Friedy, and Ivoclar. (CX 1055). Mr. Cohen’s emails reflect his concern that “manufacturers receive data feeds from [distributors] about sales of their products to end users” without restrictions. (CX 8023 (Guggenheim, Dep. at 81-82); CX 2337; CX 1055).

Response to Proposed Finding No. 1412

The Proposed Finding is misleading and inaccurate because Cohen did not send emails to his competitors to formalize an industry practice as suggested by the Proposed Finding. Rather, Cohen discovered that Benco’s “poison pill” policy of requiring suppliers to give three years notice before selling directly to consumers was not included in Schein’s and Patterson’s supply contracts. (CCFF ¶ 301). Benco was concerned because, in Cohen’s words, “If Benco signed a contract with a manufacturer that contained a poison pill clause, but Schein and Patterson had not” Benco was still at risk. (CCFF ¶ 302 (quoting Cohen, Tr. 487)). In nearly identical emails, Cohen explicitly encouraged his largest competitors Schein and Patterson to insist on the poison pill clause as well. (CCFF ¶ 304 (CX2337 at 001 (“In every negotiation since [the first meeting with the manufacturer], we insisted on, and received, the three-year ‘poison pill’ clause At Benco, we’re NOT changing our stance on this issue, and urge you to re-examine the agreements you’ve already signed to make sure they include the ‘poison pill’ clause.”))); Cohen, Tr. 486-488; Guggenheim, Tr. 1556-1595; CX1055 at 001-002)). Both Guggenheim and Sullivan looked into the issue raised by their competitor, Cohen. (CCFF ¶¶ 307-308). Cohen then wrote to Benco employee, Paul Jackson, “I sent the

email to Tim [Sullivan] and Paul [Guggenheim] . . . Don't sign without the poison pill.”

(CX1023 at 001; CCFF ¶ 309). Cohen testified that this was an example of the open

relationship that existed between the competitors. (CCFF ¶ 310).

1413. Mr. Sullivan did not reply to Mr. Cohen's email or ever discuss the issue with Mr. Cohen. (Sullivan, Tr. 4080).

Response to Proposed Finding No. 1413

The Proposed Finding is misleading and incomplete because it implies that Sullivan did not

act on Benco's request. After receiving Cohen's June 12, 2013 email regarding Benco's

concern with inclusion of poison pill clauses, Sullivan looked into the issue. (CCFF ¶ 308

(CX2337 at 001 (June 13, 2013 email from Sullivan to Paul Hinsch: “Paul, what are your

thoughts in general regarding this issue? . . . Right now, which suppliers do we share such

end-user data with?”))). Sullivan also forwarded Cohen's June 12, 2013, email to his boss.

(CCFF ¶ 308 (Sullivan, Tr. 4079-4080; CX2337 at 001)). In any event, the communications

are probative of the open relationship and pattern of cooperation between Respondents Benco

and Schein. Cohen testified that this was an example of the open relationship that existed

between the competitors. (CCFF ¶ 310).

1414. Mr. Guggenheim told Mr. Cohen that Patterson had already formalized their end-user data sharing in their vendor agreements. (CX 1055; CX 3071; CX 3222; CX 6027-031).

Response to Proposed Finding No. 1414

The Proposed Finding is not supported by the documents cited. CX1055 shows that Paul

Guggenheim agreed to investigate and “get back to [Cohen].” CX3071 shows that

Guggenheim sent an email to Scott Anderson asking, “Can you share the background on our

position with this?” CX3222 shows that Guggenheim later communicated with Cohen that

he was “on top of it.” Finally, CX6027 at 031 is a rough transcript of a message from

Guggenheim to Cohen that references a “policy” and an “agreement.” The Proposed Finding

is also incomplete and misleading. After receiving Cohen's June 12, 2013 email regarding Benco's concern with inclusion of poison pill clauses, Guggenheim looked into the issue. (CCFF ¶ 307 (Guggenheim, Tr. 1560-1564); CX3222 (June 17, 2013 Cohen email to Guggenheim, "I received your message on the HF issue, glad you're on top of it.")). Guggenheim later communicated with Cohen to inform Cohen of what he had learned. (CCFF ¶ 307 (Guggenheim, Tr. 1562-1564)). Guggenheim reported to Cohen Patterson's contracting approach with regards to the poison pill issue and that it had included the clause at issue in its own contracts. (CCFF ¶ 307 (Guggenheim, Tr. 1565); CX6027 at 031 (Row 265) (June 18, 2013 text from Guggenheim to Cohen about Patterson's inclusion of similar clauses)).

1415. The communications concerning end-user data sharing with suppliers have nothing to do with buying groups. (Sullivan, Tr. 4262). They are not evidence of the alleged buying group conspiracy; nor can they support an inference of such a conspiracy, particularly as Mr. Sullivan never responded to Mr. Cohen's inquiries. Instead, he forwarded it internally to legal counsel at Schein. (Sullivan, Tr. 4079-80).

Response to Proposed Finding No. 1415

The Proposed Finding is incomplete, misleading, and is not supported by the cited evidence.

The Proposed Finding is misleading and incomplete as it suggests that Cohen's communications to Schein describing Benco's strategy and urging Schein to adopt a similar insistence on contractual provisions is not probative of whether a similar approach was taken with regards to buying groups. On June 12, 2013, Cohen wrote to Sullivan, "At Benco, we're NOT changing our stance on this issue, and urge you to re-examine the agreements you've already signed to make sure that they include the 'poison pill' clause." (CCFF ¶ 306 (CX2337 at 001)). First, the communications are just one of several examples of Cohen and Sullivan coordinating responses to perceived industry issues, a practice that proceeds and continues through and is probative of this particular conspiracy not to discount to buying

groups. (CCFF ¶¶ 269-326). Second, the Proposed Finding is misleading to the extent it suggests Sullivan was not responsive to Cohen’s suggestion because Sullivan looked into the issue. (CCFF ¶ 308 (CX2337 at 001 (June 13, 2013 email from Sullivan to Paul Hinsch: “Paul, what are your thoughts in general regarding this issue? . . . Right now, which suppliers do we share such end-user data with?”))). Sullivan also forwarded Cohen’s June 12, 2013, email to his boss. (Sullivan, Tr. 4079-4080; CX2337 at 001)). The Proposed Finding is also not supported by the cited evidence whereas Sullivan did not testify that he sent the message to counsel rather, he testified that “I believe I forwarded it to counsel.” (Sullivan, Tr. 4079).

1416. Complaint Counsel introduced a December 2013 task list entry by Mr. Cohen and an April 16, 2014 telephone call between Mr. Sullivan and Mr. Cohen regarding Amazon. (CX 0065; Cohen, Tr. 834; CX 6027-039-42; Sullivan, Tr. 4015, 4246-47 (“A. You’ll see a couple texts later about, you know, thanks for the Amazon change . . . So at that time, he had called me about -- he thought he saw Henry Schein products on Amazon. We don’t sell to Amazon.”))).

Response to Proposed Finding No. 1416

The Proposed Finding is incomplete, inaccurate, and misleading because the task entry Cohen created in December 2013 specifically said: “[w]ork with Schein & Patterson” to discuss a joint response. (CCFF ¶ 311 (Cohen, Tr. 490-492; CX0065 at 001 (“Subject: Discuss Amazon Response re Distributors . . . start the conversations NOW! Work with Schein & Patterson . . .”))). The priority for this Amazon task was “High” and its status is marked “Completed.” (CX0065 at 001). Rick Cohen’s January 2014 email spelled out Benco’s strategy in coordinating with Benco’s competitors on Amazon when he wrote, “Schein won’t talk to Patterson about [Amazon]. They hate each other too much. We could be the glue to make it happen.” (CCFF ¶ 311; CX0066 at 001; *see also* CX0066 at 001 (January 2014 email from Benco Director Rick Cohen to Chuck Cohen, with the subject line “RE: Amazon Response . . .”, “We could be the glue to make it happen. If we had a

schein/patterson/benco response it would be much more effective than a benco only response.”); Cohen, Tr. 490-492)). Chuck Cohen’s reply to his brother’s suggestion about coordinating with Patterson and Schein was: “Good call.” (CCFF ¶ 312; CX0066 at 001). In addition, the Proposed Finding is misleading because the April 16, 2014 call introduced by Complaint Counsel related to the TDA perks program. (CCFF ¶¶ 1133-1135). Finally, Complaint Counsel has no objection to the Proposed Finding with regards to Sullivan’s admissions that Cohen thanked Schein for the Amazon change.

1417. Amazon is not a buying group. Mr. Cohen testified that Amazon is not a buying group. (Cohen, Tr. 834; RX 2952 (Maurer, Dep. at 127)). Communications about Amazon do not support Complaint Counsel’s alleged buying group conspiracy, or an inference of such a conspiracy.

Response to Proposed Finding No. 1417

The Proposed Finding is incomplete, misleading, and against the weight of the evidence.

The Proposed Finding is incomplete because in context, the intra and interfirm communications about Amazon is further evidence of Benco’s pattern of conduct in contacting its top two competitors when faced with an industry threat, and thus, supports finding a conspiracy with regards to buying groups. When Benco feared competition from Amazon, just as with buying groups, Cohen turned to coordination with his closest competitors. (CCFF ¶¶ 311-312). In December 2013, Cohen wrote himself a reminder to “[w]ork with Schein & Patterson” to discuss a joint response to Amazon. (CX0065 at 001; CCFF ¶ 311; Cohen, Tr. 490-492). Benco’s other co-owner Rick Cohen was on the same page, in an email with the subject line “RE: Amazon Response . . .,” Rick Cohen explicitly stated that he wanted to work with his competitors to confront the Amazon threat: “We could be the glue to make it happen. If we had a schein/patterson/benco response it would be much more effective than a benco only response.” (CCFF ¶¶ 311-

312; CX0066 at 001 (January 2014)). Chuck Cohen's reply to his brother's suggestion about coordinating with Patterson and Schein was: "Good call." (CCFF ¶ 312; CX0066 at 001). In fact, Cohen testified about coordinating with Schein and Patterson to achieve "mutual best interests." (Cohen, Tr. 484-489 ("Sometimes our mutual best interest is good for me"); CCFF ¶ 284). Complaint Counsel has no specific response to the portion of the Proposed Finding that states that Amazon is not a buying group.

The Proposed Finding is against the weight of the evidence because the Amazon communications illustrate the "open relationship" among Schein, Patterson, and Benco. (See Complaint Counsel's Post-Trial Brief Section I(A) ("Benco Maintained an 'Open Relationship' With Patterson and Schein For the Big Three's 'Mutual Best Interest.'")). Cohen wished to "maintain" these open relationships so Benco could "tap into" them in future (CCFF ¶ 282; CX1045 at 001), and he admitted he approached Sullivan and Guggenheim about issues facing them in the dental supply distribution business and felt comfortable doing so. (CCFF ¶¶ 277-282). The Amazon communications are just one example of Benco's pattern of turning to its competitors to shape collective strategies. (CCFF ¶ 284 (Guggenheim, Tr. 1546, 1547 ("Q. Is it fair to say that in the past Benco's Chuck Cohen has contacted you about various dental issues that he wanted you to look into? A. Yeah, that's fair to say.")); Sullivan, Tr. 4080 ("Q. So we've looked at three instances, that KaVo Kerr handpiece issue, the P&G issue, and now the poison pill issue, where Mr. Cohen reached out to you about manufacturers. A. Correct."); CCFF ¶¶ 285-310).

1418. Complaint Counsel introduced communications related to charitable work and organizations. (Cohen, Tr. 773-774; Sullivan, Tr. 4280; CX 6027-010 ("the Sullivan Foundation/DTAF joint scholarship"); CX 6027-012 ("DTAF fund"); CX 6027-043 ("family

foundation’’)). Communications related to charity work are not evidence of an alleged buying group conspiracy, nor do they support an inference of one.

Response to Proposed Finding No. 1418

The Proposed Finding is misleading and incomplete and inaccurate. The communications between the executives of rival dental supply distributors Benco, Schein, and Patterson during the conspiracy reflect an open relationship between the competitors. (CCFF ¶¶ 269-393). Further, frequent communications among Cohen, Sullivan, and Guggenheim are probative of the pattern and practice Respondents shared of addressing issues, of all sorts, collectively rather than competitively. (CCFF ¶¶ 284-326; 1123-1155; 1156-1158). The Proposed Finding is misleading to the extent that it implies that text messages containing communications between key executives at Benco, Patterson, and Schein are not relevant to show the close personal relationship, frequency of communications and opportunity of these individuals to meet and to collude. The non-buying group communications establish a pattern by which Cohen contacted Sullivan and Guggenheim when he saw the opportunity to advance their “mutual interests” by coordinating their conduct. (CCFF ¶¶ 269-326). Cohen admitted at trial that he had an “open relationship” with Sullivan and Guggenheim. (CCFF ¶¶ 277, 300, 310). This “open relationship” resulted in coordinated conduct in refusing to discount to buying groups. (CCFF ¶¶ 474-1390).

1419. Similarly, banter about sports and jokes cannot support Complaint Counsel’s alleged conspiracy, or an inference of it. (CX 6027-038 (“Good pick, #2 seed. They’ll have to get past Creighton & McDermott, will be tough.”); CX 6027-007 (“I’m going to Yankee Stadium for game 5 tomorrow nite. Go Yanks!”); CX 6027-043 (“Weekend lacrosse tourney here at St. Thomas academy...”); CX 6027-027 (“Problem with this joke is if Stan says ‘Great!’ It’s a risk...”); CX 6027-051 (“Teasing and jokes are always welcome!! :-))”).

Response to Proposed Finding No. 1419

The Proposed Finding is misleading to the extent that it implies that text messages containing personal communications between key executives at Patterson and Schein are not relevant to

show the close personal relationship, frequency of communications and opportunity of these individuals to meet and to collude. The Proposed Finding is misleading, inaccurate and contrary to the weight of the evidence to the extent that it suggests that the Respondents' non-buying group communications are not relevant to the conspiracy. The non-buying group communications establish a pattern by which Cohen contacted Sullivan and Guggenheim when he saw the opportunity to advance their "mutual interests" by coordinating their conduct. (CCFF ¶¶ 269-326). Cohen admitted at trial that he had an "open relationship" with Sullivan and Guggenheim. (CCFF ¶¶ 277, 300, 310). This "open relationship" resulted in coordinated conduct in refusing to discount to buying groups. (CCFF ¶¶ 474-1390).

b. Unified Smiles.

1420. Complaint Counsel cites an unsolicited text message from Mr. Cohen to Mr. Sullivan on January 12, 2012 and a follow-up call on January 13, 2012 as evidence that "Benco [e]nforced [an] [a]greement [w]ith Schein" and "monitored and continually confronted Schein on suspicions of cheating." (Kahn, Tr. 43; RXD 0101 (CC Opening, Slide 17); CC Pretrial Br. at 14-15; CX 2347; CX 1118).

Response to Proposed Finding No. 1420

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Complaint Counsel does not cite any other evidence generally to support its position that Benco confronted Schein when it received market intelligence that indicated that Schein was deviating from their agreement. The weight of the evidence shows that Benco confronted Schein at least four times when it received market intelligence that indicated that Schein was deviating from their agreement. (CCFF ¶¶ 955-1021). Complaint Counsel objects to the term "unsolicited" to the extent that it suggests that Sullivan was not a willing participant in communications with Cohen; such a Proposed Finding is contrary to the weight of the evidence. (*See* CCFF ¶¶ 966; 1031; 1033; 1035; 1047; 1058-1060).

The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Complaint Counsel does not cite any other specific evidence to support its position that the January 13, 2012 telephone call between Cohen and Sullivan is an example of Benco confronting Schein when it received market intelligence indicating that Schein was deviating from the agreement. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961). Within minutes of receiving the news, Benco's Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message "For Timmy conversation," referring to Tim Sullivan of Schein. (CCFF ¶¶ 958-960). Cohen agreed, responding on January 13, 2012 "Talking this AM..." (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Cohen does not have an independent recollection of what was discussed on that January 13, 2012 call with Sullivan. (CCFF ¶ 970). Sullivan also does not have an independent recollection of what was discussed on the January 13, 2012 call. (Sullivan, Tr. 4218 ("Q. Do you recall what you talked about? A. I don't. . . ."); (Sullivan, Tr. at 4218-4220 (admitting that he "assumed" that the call related to merger or employment issues)). Less than thirty minutes before the scheduled call with Sullivan, Cohen emailed Benco employees to reinforce Benco's no buying group policy. (CCFF ¶¶ 971-972).

1421. There is no record of what was discussed on this call. (Kahn, Tr. 43; CC Pretrial Br. at 14-15; Cohen, Tr. 747; Sullivan, Tr. 4218-19, 4272-73).

Response to Proposed Finding No. 1421

The Proposed Finding is vague as to “this call,” which is not described or specified. To the extent that the Proposed Finding refers to the January 13, 2012 call with Sullivan, Complaint Counsel objects to the Proposed Finding as inaccurate and misleading to the extent that it suggests that there is no contemporaneous evidence establishing what was discussed on the telephone call; or that Ryan’s direction to Cohen to discuss Unified Smiles with Sullivan is not evidence of what was discussed on the call. (CCFF ¶¶ 958-960). The weight of the record evidence shows that Sullivan and Cohen discussed Unified Smiles on that telephone call. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961). Within minutes of receiving the news, Benco’s Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message “For Timmy conversation,” referring to Tim Sullivan of Schein. (CCFF ¶¶ 958-960). Cohen agreed, responding on January 13, 2012 “Talking this AM...” (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Cohen admitted he “had buying groups on his mind” on January 13, 2012 at 8:39 a.m., less than thirty minutes before his call with Sullivan. (CCFF ¶ 971; Cohen, Tr. 516). Further, Cohen testified that thirty minutes before his call with Sullivan, Cohen emailed Benco employees reinforcing Benco’s no buying group policy. (CCFF ¶ 972).

1422. Neither Mr. Sullivan nor Mr. Cohen testified that their January 13, 2012 call was about Unified Smiles. (Cohen, Tr. 747; Sullivan, Tr. 4218-19, 4272-73). Rather, both Mr. Cohen and Mr. Sullivan testified that they discussed employment issues in California relating to certain employees recruited by Benco. (Cohen, Tr. 747; Sullivan, Tr. 4218-19).

Response to Proposed Finding No. 1422

The Proposed Finding is factually inaccurate, misleading, and against the weight of the evidence. Both Sullivan and Cohen testified that they did not recall what they discussed on the January 13, 2012 telephone call. Cohen testified that he did not recall the contents of the January 13, 2012 call. (CCFF ¶ 970; Cohen, Tr. 973 (“Q. You don’t recall the contents of that [January 13, 2012] call; right? A. I do not.”)). Cohen also testified that he did not “have an independent recollection of” the January 13, 2012 call. (CCFF ¶ 970; Cohen, Tr. 974 (“I don’t have an independent recollection of that [January 13, 2012 call], that is true.”)). Cohen testified that he simply “assumed” that call was about an employment issue. (Cohen, Tr. 973). This trial testimony is corroborated by deposition testimony, where Cohen testified “I don’t know what we talked about or didn’t talk about.” (CX8015 (Cohen, Dep. at 211)). Sullivan testified that he does not recall what he discussed with Cohen on the January 13, 2012 call. (Sullivan, Tr. 4218 (“Q. Do you recall what you talked about? A. I don’t. . . .”)). Sullivan also admits that he “assumed” that it related to merger or employment issues. (Sullivan, Tr. at 4218-4220). Notably, Sullivan’s testimony is contrary to prior testimony in which he testified that he heard of Unified Smiles through a message from Cohen. (CX8025 (Sullivan, Dep. at 393 (“Have you ever heard of a group called Unified Smiles? A. Only through a message I got from Chuck”)); *see also* (Sullivan, Tr. at 4346 (acknowledging that he changed his testimony)). In the absence of witness memory on the substance of the call, the contemporaneous documents are the only evidence in the record of what transpired—and those documents confirm that Cohen scheduled a call with Sullivan in response to Ryan’s email informing Cohen of market rumors that Schein worked with buying group, Unified Smiles. (CCFF ¶¶ 958-967). Additionally, Cohen admitted he “had buying groups on his

mind” on January 13, 2012 at 8:39 a.m., less than thirty minutes before his call with Sullivan. (CCFF ¶ 971; Cohen, Tr. 516). Cohen testified that thirty minutes before his call with Sullivan, Cohen emailed Benco employees reinforcing Benco’s no buying group policy. (CCFF ¶ 972; Cohen, Tr. 514; CX1051). The Proposed Finding is also misleading and inaccurate to the extent that it suggests that Cohen and Sullivan could not have discussed both employment issues and buying groups.

1423. Complaint Counsel notes that, on the morning of the call, Mr. Cohen reviewed Benco’s Large Group (“LG”) policy, which was drafted to respond to a different group, called Nexus. (CX 1051; Cohen, Tr. 512-515, 878-82; CX 0006). There is no evidence, however, of “any connection between [his] revision of the LG policy and [his] call with Mr. Sullivan.” (Cohen, Tr. 877). In that regard, Mr. Cohen denied sharing Benco’s buying group policy with Mr. Sullivan. (Cohen, Tr. 747-48, 877-78).

Response to Proposed Finding No. 1423

The Proposed Finding is misleading, incomplete, and against the weight of the evidence. Contemporaneous documents show that Cohen scheduled the January 13, 2012 call with Sullivan to discuss Schein doing business with buying group Unified Smiles. (CCFF ¶¶ 958-968; *see also* CCFF ¶ 958 (Ryan forwarding email regarding Unified Smiles to Cohen and writing “For Timmy conversation”); CCFF ¶ 965 (CX2347 at 001 (texting Sullivan to set up call on Thursday, January 12, 2012))). Further corroborating that Cohen and Sullivan discussed buying groups on the January 13, 2012 telephone call, Cohen admitted he “had buying groups on his mind” on January 13, 2012 at 8:39 a.m., less than thirty minutes before his call with Sullivan. (CCFF ¶ 971; Cohen, Tr. 516). Further, Cohen testified that thirty minutes before his call with Sullivan, Cohen emailed Benco employees reinforcing Benco’s no buying group policy. (CCFF ¶ 972; Cohen, Tr. 514; CX1051). Specifically, on January 13, 2012 at 8:39 a.m., Cohen emailed Ryan and asked him to tell Benco’s VP of Sales, Mike McElaney, to review Benco’s no buying group policy with Benco’s sales management team.

(CCFF ¶ 972; Cohen, Tr. 515 (“Q. So there in that second sentence in your e-mail on January 13, 2012, less than 30 minutes before your call with Tim Sullivan, you were telling . . . Patrick Ryan [to] tell the VP of sales to review Benco’s no-buying group policy with the team? A. With the management team, the sales management team. Yes.”); CX1051 at 001). Also, just before the call, Cohen found Ryan’s two-day old email about having a conversation with Sullivan about buying group Unified Smiles, and wrote: “Talking this AM...” with Sullivan (Cohen Tr. 503; CX1052 at 001; *see also* CX8015 (Cohen, Dep. at 216); CX8037 (Ryan, Dep. at 110); CCFF ¶¶ 957-973.) The Proposed Finding that Cohen denied sharing Benco’s buying group policy is misleading, incomplete, and contrary to the weight of the evidence. Cohen testified repeatedly that he shared Benco’s no buying group policy with Sullivan. (CCFF ¶¶ 661-664 (Cohen, Tr. 501 (“Q. You did communicate Benco’s no-buying group policy to Mr. Sullivan, correct? A. I believe I did. Yes.”); CX8015 (Cohen, Dep. at 241 (“I can’t estimate a specific number. I know I’ve done it at least once.”); CX0301 (Cohen, IHT at 195-196 (“Q. Have you ever communicated with anyone from Schein about buying groups? A. I believe I have. . . I don’t recall any specifics, but I believe I have, at different times, communicated our policy on buying groups.”))). The Proposed Finding is also not supported by the evidence cited. Cohen testified that he did not share Benco’s revision of the LG policy on the January 13, 2012 telephone call with Sullivan (Cohen, Tr. 877-878), not that he never shared Benco’s buying group policy with Sullivan.

1424. Complaint Counsel also argues that an inference can be made that Unified Smiles was discussed on the January 13, 2012 call from an internal Benco document. (CX 2062). There is no support for such an inference, not only because the testimony is to the contrary, but also because the sequence of events does not support it.

Response to Proposed Finding No. 1424

The second sentence of the Proposed Finding is factually inaccurate and contrary to the weight of the evidence. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961). Within minutes of receiving the news, Benco's Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message "For Timmy conversation," referring to Tim Sullivan of Schein. (CCFF ¶¶ 958-960). Two days later, Cohen located Ryan's email about Schein discounting to Unified Smiles and agreed, responding on January 13, 2012 "Talking this AM..." (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Cohen does not have an independent recollection of what was discussed on that January 13, 2012 call with Sullivan. (CCFF ¶ 970). Sullivan also does not have an independent recollection of what was discussed on the January 13, 2012 call. (Sullivan, Tr. 4218 ("Q. Do you recall what you talked about? A. I don't. . . ."); (Sullivan, Tr. at 4218-4220 (admitting that he "assumed" that the call related to merger or employment issues)). Less than thirty minutes before the scheduled call with Sullivan, Cohen emailed Benco employees to reinforce Benco's no buying group policy. (CCFF ¶¶ 971-972). The contemporaneous evidence undeniably shows that Benco was *planning* to confront Schein about discounting to a buying group. Benco offered no explanation as to why Ryan sent Cohen information about Schein discounting to a buying group for the stated purpose of a conversation with Sullivan. (CCFF ¶ 963; CX8037 (Ryan, Dep. at 100 ("Q. Sitting here today, can you think of any reason why you said: "For Timmy conversation?" A. No."))). The weight of the evidence

thus shows that Sullivan and Cohen discussed buying group Unified Smiles on the January 13, 2012 telephone call. (CCFF ¶ 969). The Proposed Finding is also factually inaccurate to the extent that it suggests that Complaint Counsel cites CX2062 as evidence of what transpired on the January 13, 2012 telephone call. CX2062 is an internal Schein document in which Schein refuses to bid for Unified Smiles, explaining, “we no longer participate in Buying Groups.”

1425. Unified Smiles approached Benco and Schein demanding DSO-level discounted pricing. (CX 2062; CX 1145; Foley Tr. 4687-88).

Response to Proposed Finding No. 1425

The Proposed Fact that Unified Smiles demanded “DSO-level discounted pricing” is not supported by the evidence cited. CX1145 shows that Unified Smiles approached Benco seeking its participation in the buying group it was starting. (CX1145). CX2062 shows that Unified Smiles approached Schein to discuss “Schein’s potential role” in the buying group it was starting. (CX2062 at 005). Neither document supports the statement that Unified Smiles “demand[ed] DSO-level discounted pricing.” (CX2062; CX1145). CX1145 shows that Unified Smiles’s mission was to “provide independent dental practitioners the same competitive advantage as large corporate dental providers while maintaining the ability to make your own decisions about what is best for the dental health of your patients.” (CX1145 at 002).

1426. For Schein, Mr. Foley had the authority to approve or disapprove Unified Smiles. (Foley, Tr. 4692-93; CX 2062). As discussed in more detail above, Mr. Foley independently made the decision to turn down Unified Smiles for DSO pricing (though he offered lower discounts) based on its inability to guarantee purchasing volume like a DSO, and the threat of cannibalization posed by Unified Smiles. (SF 1286-308). Mr. Foley communicated this to Unified Smiles’ Ms. Knysz via email on December 21, 2011. (Foley, Tr. 4691-93; CX 2062). Mr. Foley never communicated with anyone at Benco or Patterson regarding Unified Smiles. (Foley, Tr. 4696).

Response to Proposed Finding No. 1426

The Proposed Finding is factually inaccurate, incomprehensible, and contrary to the weight of the evidence. The Proposed Finding is misleading to the extent that it suggests that Benco and Schein did not reach an agreement to refuse to discount to buying groups. (CCFF ¶¶ 661-1158, 1167-1198). The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Schein's agreement with Benco was not relevant to its decision to reject Unified Smiles. (CCFF ¶¶ 661-1158, 1167-1198). After reaching an agreement with Benco in 2011, Schein complied with its agreement in December 2011 by refusing to discount to Unified Smiles. (CCFF ¶¶ 661-1158, 1167-1198). The Proposed Finding is incomplete and misleading because Foley turned down the buying group due to a no buying group policy. (CCFF ¶¶ 719-720 (CX2062 at 001 ("[U]nless you have some 'ownership' of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups.")). Additionally, whether or not Foley may have had authority to approve or disapprove Unified Smiles, his decision to reject Unified Smiles was informed by Schein's policy in December 2011 that it "no longer participate[d] in Buying Groups." (CCFF ¶¶ 719-720 (CX2062 at 001 ("[U]nless you have some 'ownership' of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups.")). The Proposed Finding is also not supported by the cited evidence for the statement that Unified Smiles sought DSO pricing.

1427. On January 5, 2012 – a few weeks after Schein declined to extend Unified Smiles DSO pricing – Unified Smiles announced the group's launch via a letter. (CX 1145).

Response to Proposed Finding No. 1427

The Proposed Finding that “Schein declined to extend Unified Smiles DSO pricing” a few weeks before January 5, 2012 is not supported by the document cited. Complaint Counsel has no specific response.

1428. On January 11, 2012, a local Benco representative forwarded the letter to Benco’s Pat Ryan, adding that Schein was likely involved. (CX 1144).

Response to Proposed Finding No. 1428

The Proposed Finding is incomplete because the letter cited states, “Dr. Aksu thought that Schein would be [participating in this buying group].” (CX1144 at 001). Complaint Counsel has no specific response to the remainder of this Proposed Finding.

1429. Mr. Ryan responded, “We’ve already spoken to them and turned them down,” and forwarded the letter to Chuck Cohen, also noting, “For Timmy conversation.” (CX 1144; CX 1052). Though Schein and Benco had already each independently declined to do business with Unified Smiles, Complaint Counsel contends Mr. Ryan’s proposed conversation regarding Unified Smiles took place on January 13, 2012. (Kahn, Tr. 42-43 (CC Opening, Slide 16); CC Pretrial Br. at 14-15). The evidence does not support that contention.

Response to Proposed Finding No. 1429

The Proposed Finding is misleading and against the weight of the evidence because Schein and Benco did not independently decline to do business with buying group Unified Smiles. They declined Unified Smiles due to their agreement not to offer discounts to buying groups. (CCFF ¶¶ 955-977). After reaching an agreement with Benco in 2011, Schein complied with its agreement in December 2011 by refusing to discount to Unified Smiles. (CCFF ¶¶ 661-1158, 1167-1198). In rejecting Unified Smiles in December 2011, Foley specified that he was employing a new policy not to work with buying groups: “we no longer participate in Buying Groups.” (CCFF ¶¶ 719-720 (CX2062 at 001 (“[U]nless you have some ‘ownership’ of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups.”))). Ryan’s email to Cohen (“For Timmy conversation”)

about Schein's potential work with a buying group is significant because it reflects enforcement of the agreement not to do business with buying groups. (CCFF ¶¶ 955-977).

The Proposed Finding is also misleading and contrary to the weight of the evidence because contemporaneous documents reflect that Cohen scheduled a call with Sullivan to discuss Schein doing business with buying group Unified Smiles. (*See* Response to Proposed Finding 1424).

1430. In late October, 2011, Benco recruited four or five Schein employees from the Fresno, CA area. (Sullivan, Tr. 4270-72). This was especially problematic for Schein because it was effectively a "group hiring event" and there were other "idiosyncrasies of California employment law." (Sullivan, Tr. 4270). Benco and Schein had entered into a competitive hiring agreement in 1998 as part of an agreement settling litigation with each other over non-compete issues relating to the hiring of each other's sales reps. (Cohen, Tr. 639-40). This required Mr. Cohen and Mr. Sullivan to talk every few years to renegotiate the agreement, as well as periodically throughout the year as issues came up relating to certain employees or employee groups. (Cohen, Tr. 735-37).

Response to Proposed Finding No. 1430

The Proposed Finding is misleading because Sullivan did not testify that the recruitment happened in late October, 2011; rather he testified in response to a leading question from his counsel that it "Sounds right" that Mr. Rotert and his group left Schein for Benco in the fall of 2011. (Sullivan, Tr. 4270). The Proposed Finding is also misleading because Sullivan did not testify that Benco's hiring of the Fresno, California group was "especially problematic." (Sullivan, Tr. 4270). Complaint Counsel also objects to use of the word "competitive" to describe the hiring agreement. The agreement was between competitors (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054) that involved a "significant" business strategy (Cohen, Tr. 637; Benco's Proposed Finding No. 72) and lowered costs of doing business by agreeing to "rules of the road" with a competitor (Cohen, Tr. 639-640; CCFF ¶¶ 313-319)). The agreement limited the number of hires between the two companies (Sullivan, Tr. 3894 ("Q. And does this confirm that the number – the limit on the number of hires between Benco

and Schein was three per zone per half a year? A. Yes, it does.”); Ryan, Tr. 1057-1058) and increased the “sit-out” time of others (Ryan, Tr. 1057 (“Q. And if I’m understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That’s my recollection.”)). The agreement expanded over time to cover additional employees. (CX6027 at 025 (Row 223); Sullivan, Tr. 3894 (Cohen texted Sullivan “‘We agreed that she would sit even though she didn’t have a contract.’ Do you see that? A. I do. Q. And ‘sit’ there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That’s correct.”)). For all these reasons, “competitive” is an inaccurate description of this horizontal hiring agreement between competitors. The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Cohen and Sullivan did not discuss buying group Unified Smiles on their January 13, 2012 call. (See Response to Proposed Finding 1424). Complaint Counsel has no specific response to the remainder of this Proposed Finding.

1431. These specific issues caused Mr. Sullivan and Mr. Cohen to have several discussions over several months. (Sullivan, Tr. 4270-71). Indeed, Mr. Cohen knew that Mr. Sullivan was “hot” about Benco’s recruitment of Schein’s reps around this time due to texts Mr. Sullivan had sent Mr. Cohen about the issue. (Cohen, Tr. 747, 750-51).

Response to Proposed Finding No. 1431

The Proposed Finding is misleading to the extent it suggests that enforcing and discussing one agreement (hiring) precludes enforcement and discussion of a second agreement (buying groups). The Proposed Finding is also unclear and vague as to what is being referred to by the phrases “these specific issues” and “the issue.” The Proposed Finding is factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Cohen and Sullivan did not discuss buying group Unified Smiles on their January 13, 2012 call. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to

the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961). Within minutes of receiving the news, Benco's Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message "For Timmy conversation," referring to Tim Sullivan of Schein. (CCFF ¶¶ 958-960). Based on the market intelligence, Ryan understood at the time that Schein would be participating in the Unified Smiles buying group. CCFF ¶ 957. Cohen agreed to communicate with Sullivan, responding on January 13, 2012 "Talking this AM..." (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Cohen does not have an independent recollection of what was discussed on that January 13, 2012 call with Sullivan. (CCFF ¶ 970). Sullivan also does not have an independent recollection of what was discussed on the January 13, 2012 call. (Sullivan, Tr. 4218 ("Q. Do you recall what you talked about? A. I don't. . . .")); (Sullivan, Tr. at 4218-4220 (admitting that he "assumed" that the call related to merger or employment issues)). Less than thirty minutes before the scheduled call with Sullivan, Cohen emailed Benco employees to reinforce Benco's no buying group policy. (CCFF ¶¶ 971-972). The weight of the evidence shows that Sullivan and Cohen discussed buying group Unified Smiles on the January 13, 2012 telephone call. (CCFF ¶ 969).

Complaint Counsel has no specific response to the remainder of this Proposed Finding

1432. Benco's Pat Ryan was involved and aware of these discussions between Mr. Cohen and Mr. Sullivan concerning these issues. (Ryan, Tr. 1174-76).

Response to Proposed Finding No. 1432

The Proposed Finding that Ryan was "involved" in discussions between Sullivan and Cohen is not supported by the evidence cited. (Ryan, Tr. 1174-1176). Complaint Counsel has no specific response except to note that Ryan was aware of the hiring agreement discussions as

well as the buying group discussions between Schein and Benco as evidenced by, among other things, the Unified Smiles buying group email he forwarded to Cohen suggesting it was for a conversation with Sullivan. (CCFF ¶¶ 958-960; *see also* CCFF ¶¶ 982, 527).

1433. When Mr. Ryan received the January 11, 2012 email from the local representative providing the Unified Smiles launch letter, he was aware that Mr. Cohen and Mr. Sullivan would be having a conversation concerning the Fresno recruits in the coming days. (Ryan, Tr. 1176).

Response to Proposed Finding No. 1433

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Cohen and Sullivan did not discuss buying group Unified Smiles on their January 13, 2012 call. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961). Within minutes of receiving the news, Benco's Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message "For Timmy conversation," referring to Tim Sullivan of Schein. (CCFF ¶¶ 958-960). Based on the market intelligence, Ryan understood at the time that Schein would be participating in the Unified Smiles buying group. CCFF ¶ 957. Cohen agreed to communicate with Sullivan, responding on January 13, 2012 "Talking this AM..." (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Cohen does not have an independent recollection of what was discussed on that January 13, 2012 call with Sullivan. (CCFF ¶ 970). Sullivan also does not have an independent recollection of what was discussed on the January 13, 2012 call. (Sullivan, Tr. 4218 ("Q. Do you recall what you talked about? A. I don't. . . ."); (Sullivan, Tr. at 4218-4220 (admitting that he "assumed" that the call related to merger or employment issues)). Less than thirty minutes before the scheduled call with Sullivan, Cohen emailed Benco employees

to reinforce Benco's no buying group policy. (CCFF ¶¶ 971-972). The weight of the evidence shows that Sullivan and Cohen discussed buying group Unified Smiles on the January 13, 2012 telephone call. (CCFF ¶ 969). The Proposed Finding is misleading to the extent it suggests that enforcing and discussing one agreement (hiring) precludes enforcement and discussion of a second agreement (buying groups). Complaint Counsel has no specific response to the remainder of this Proposed Finding.

1434. On January 12, 2012, Mr. Cohen texted Mr. Sullivan to set up a call, and the two spoke the next day. (CX 2347; CX 6027-018-19).

Response to Proposed Finding No. 1434

Complaint Counsel has no specific response to this Proposed Finding.

1435. On January 13, 2012, Mr. Cohen called Mr. Sullivan at 9:03 am, and the two spoke for 11 minutes and 34 seconds. (CX 1118; CX 6027-019; Cohen, Tr. 747-48).

Response to Proposed Finding No. 1435

Complaint Counsel has no specific response to this Proposed Finding.

1436. Mr. Cohen's review of employment records refreshed his recollection concerning the substance of the January 13, 2012 phone call. (CX 1118; Cohen, Tr. 741-42).

Response to Proposed Finding No. 1436

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence.

Cohen testified that he did not have an independent recollection of what was discussed on the January 13, 2012 call. (CCFF ¶ 970 (Cohen, Tr. 973-975)). Cohen testified that he did not recall the contents of his telephone call with Sullivan on January 13, 2012. (Cohen, Tr. 973; *see also* CCFF ¶ 970)). Cohen also testified that he does not have any recollection of what he discussed with his attorney on the call before his call with Sullivan and on the call with his attorney after his call with Sullivan. (Cohen, Tr. 974; *see also* CCFF ¶ 970)). This trial testimony is corroborated by deposition testimony, where Cohen testified "I don't know what

we talked about or didn't talk about.” (CX8015 (Cohen, Dep. at 211)). The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Cohen and Sullivan did not discuss buying group Unified Smiles on their January 13, 2012 call. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961). Within minutes of receiving the news, Benco's Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message “For Timmy conversation,” referring to Tim Sullivan of Schein. (CCFF ¶¶ 958-960). Based on the market intelligence, Ryan understood at the time that Schein would be participating in the Unified Smiles buying group. CCFF ¶ 957. Cohen agreed to communicate with Sullivan, responding on January 13, 2012 “Talking this AM...” (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Less than thirty minutes before the scheduled call with Sullivan, Cohen emailed Benco employees to reinforce Benco's no buying group policy. (CCFF ¶¶ 971-972). The weight of the evidence shows that Sullivan and Cohen discussed buying group Unified Smiles on the January 13, 2012 telephone call. (CCFF ¶ 969).

1437. Mr. Cohen “can say with confidence that Tim and [he] were discussing some employee issues that started in – with the movement of reps – some reps in California and resulted in a renegotiation of the competitive hiring agreement.” (Cohen, Tr. 741-42, 746-47).

Response to Proposed Finding No. 1437

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence.

Cohen testified that he did not have an independent recollection of what was discussed on the January 13, 2012 call. (CCFF ¶ 970 (Cohen, Tr. 973-975)). Cohen testified that he did not recall the contents of his telephone call with Sullivan on January 13, 2012. (Cohen, Tr. 973;

see also CCFF ¶ 970)). Cohen also testified that he does not have any recollection of what he discussed with his attorney on the call before his call with Sullivan and on the call with his attorney after his call with Sullivan. (Cohen, Tr. 974; *see also* CCFF ¶ 970)). In the absence of witness memory of the substance of the call, the contemporaneous documents about this call are the *only* evidence in the record of what transpired—which shows Cohen had scheduled the call with Sullivan specifically to discuss Schein doing business with a buying group. CCFF ¶¶ 958-968; *see also* CCFF ¶ 958 (Ryan forwarding email regarding Unified Smiles to Cohen and writing “For Timmy conversation”); CCFF ¶ 965 (CX2347 at 001 (texting Sullivan to set up call on Thursday, January 12, 2012)). The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Cohen and Sullivan did not discuss buying group Unified Smiles on their January 13, 2012 call. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961). Within minutes of receiving the news, Benco’s Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message “For Timmy conversation,” referring to Tim Sullivan of Schein. (CCFF ¶¶ 958-960). Based on the market intelligence, Ryan understood at the time that Schein would be participating in the Unified Smiles buying group. (CCFF ¶ 957). Cohen agreed to communicate with Sullivan, responding on January 13, 2012 “Talking this AM...” (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Less than thirty minutes before the scheduled call with Sullivan, Cohen emailed Benco employees to reinforce Benco’s no buying group policy. (CCFF ¶¶ 971-972).

The weight of the evidence shows that Sullivan and Cohen discussed buying group Unified Smiles on the January 13, 2012 telephone call. (CCFF ¶ 969). Further, there is no evidence that Cohen scheduled the call with Sullivan in response to anything related to the hiring agreement, nor did he schedule the call after speaking with his employment attorney.

Compare CCFF ¶ 958 (Ryan forwarding email regarding Unified Smiles to Cohen and writing “For Timmy conversation”) *and* CCFF ¶ 965 (CX2347 at 001 (texting Sullivan to set up call on Thursday, January 12, 2012)) *with* Cohen, Tr. 748; CX1118 at 001 (testifying that Cohen spoke to an employment lawyer on January 13, 2012 at 7:39 AM). In any event, the call was long enough to have discussed multiple topics.

Finally, Complaint Counsel objects to use of the word “competitive” to describe the hiring agreement. The agreement was between competitors (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054) that involved a “significant” business strategy (Cohen, Tr. 637; Benco’s Proposed Finding No. 72) and lowered costs of doing business by agreeing to “rules of the road” with a competitor (Cohen, Tr. 639-640; CCFF ¶¶ 313-319)). The agreement limited the number of hires between the two companies (Sullivan, Tr. 3894 (“Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does.”); Ryan, Tr. 1057-1058) and increased the “sit-out” time of others (Ryan, Tr. 1057 (“Q. And if I’m understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That’s my recollection.”)). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at pg. 25, line 223; Sullivan, Tr. 3894 (Cohen texted Sullivan “‘We agreed that she would sit even though she didn’t have a contract.’ Do you see that? A. I do. Q. And ‘sit’ there, that refers to this employee not contacting the former Schein customers

that she had worked with. A. That's correct.'')). For all these reasons, "competitive" is an inaccurate description of this horizontal hiring agreement between competitors.

1438. Mr. Cohen also testified that he did not know what Schein's "policies or practices were with respect to buying groups" at this time and doesn't recall Mr. Sullivan sharing anything about Unified Smiles on the call. (Cohen, Tr. 870, 873-74).

Response to Proposed Finding No. 1438

The Proposed Finding is misleading and against the weight of the evidence. The evidence shows that throughout 2011, Cohen received market intelligence indicating that Schein was working with buying groups. Based on the market intelligence Benco received, Cohen understood that Schein worked with buying groups in 2011. (CCFF ¶¶ 665-673). By 2012, however, Cohen no longer believed that Schein would be working with the buying group Smile Source. (CCFF ¶¶ 674-678). In 2013 and 2014, Cohen likewise did not believe that Schein was in the buying group space. (CCFF ¶¶ 675-678; CX0301 (Cohen, IHT at 310 ("Q. . . . And what did you understand Mr. Sullivan's position was on buying groups at the time of this e-mail? A. Well, if we go back to the last wrath of text messages, I think that the policy that Henry Schein had was that they do not recognize GPOs.'))). Cohen's understanding that Schein did not do business with buying groups was contrary to market rumors that he received indicating that Schein in fact worked with buying groups (though the record evidence shows Schein did not work with buying groups during the conspiracy), indicating that the information came from Schein itself. (CCFF ¶¶ 670-673, 681-684, 661-954). The evidence also shows that Cohen shared Benco's no buying group policy with Sullivan. (CCFF ¶¶ 661-664 (Cohen, Tr. 501 ("Q. You did communicate Benco's no-buying group policy to Mr. Sullivan, correct? A. I believe I did. Yes.')); CX8015 (Cohen, Dep. at 241 ("I can't estimate a specific number. I know I've done it at least once.')); CX0301 (Cohen, IHT at 195-196 ("Q. Have you ever communicated with anyone from Schein about

buying groups? A. I believe I have. . . I don't recall any specifics, but I believe I have, at different times, communicated our policy on buying groups.”)). Further placing the start of the conspiracy in 2011, Benco began enforcing the agreement by confronting Schein with market intelligence that Schein was discounting to buying groups in January 2012. (CCFF ¶¶ 955-972). The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Cohen and Sullivan did not discuss buying groups on their January 13, 2012 call. Whether or not Schein provided any information about Unified Smiles on that call, the contemporaneous documents show that Cohen and Sullivan communicated about a buying group on that call. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961). Within minutes of receiving the news, Benco's Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message “For Timmy conversation,” referring to Tim Sullivan of Schein. (CCFF ¶¶ 958-960). Based on the market intelligence, Ryan understood at the time that Schein would be participating in the Unified Smiles buying group. CCFF ¶ 957. Cohen agreed to communicate with Sullivan, responding on January 13, 2012 “Talking this AM...” (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Cohen does not have an independent recollection of what was discussed on that January 13, 2012 call with Sullivan. (CCFF ¶ 970). Sullivan also does not have an independent recollection of what was discussed on the January 13, 2012 call. (Sullivan, Tr. 4218 (“Q. Do you recall what you talked about? A. I don't. . . .”); (Sullivan, Tr. at 4218-4220 (admitting that he “assumed” that the call related to merger or employment

issues)). Less than thirty minutes before the scheduled call with Sullivan, Cohen emailed Benco employees to reinforce Benco's no buying group policy. (CCFF ¶¶ 971-972). The weight of the evidence shows that Sullivan and Cohen discussed buying group Unified Smiles on the January 13, 2012 telephone call. (CCFF ¶ 969).

1439. The context around the January 13, 2012 phone call supports Mr. Cohen's testimony. The morning before the call, at 7:39 am, Mr. Cohen spoke for 23 minutes with his attorney, Joe Dougherty, who was handling the employment matters for Benco. (CX 1118; Cohen, Tr. 747-49). Immediately after the call with Mr. Sullivan, Mr. Cohen again spoke to Mr. Dougherty. (CX 1118; Cohen, Tr. 748-49).

Response to Proposed Finding No. 1439

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence. The contemporaneous documents about this call are the only evidence in the record of what transpired, and they show that Cohen scheduled a call with Sullivan specifically to discuss Schein doing business with a buying group. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961). Within minutes of receiving the news, Benco's Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message "For Timmy conversation," referring to Tim Sullivan of Schein. (CCFF ¶¶ 958-960). Based on the market intelligence, Ryan understood at the time that Schein would be participating in the Unified Smiles buying group. CCFF ¶ 957. Cohen did not inform Ryan that he would not talk to Sullivan regarding a potential customer, Unified Smiles, or otherwise express any confusion regarding the meaning of Ryan's email. (CCFF ¶ 962). Cohen agreed to communicate with Sullivan, responding on January 13, 2012 "Talking this AM..." (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Cohen does not have an independent

recollection of what was discussed on that January 13, 2012 call with Sullivan. (CCFF ¶ 970). Sullivan also does not have an independent recollection of what was discussed on the January 13, 2012 call. (Sullivan, Tr. 4218 (“Q. Do you recall what you talked about? A. I don’t. . . .”); (Sullivan, Tr. at 4218-4220 (admitting that he “assumed” that the call related to merger or employment issues)). Further, there is no evidence that Cohen scheduled the call with Sullivan in response to anything related to the hiring agreement, nor did he schedule the call after speaking with his employment attorney. *Compare* CCFF ¶ 958 (Ryan forwarding email regarding Unified Smiles to Cohen and writing “For Timmy conversation”) *and* CCFF ¶ 965 (CX2347 at 001 (texting Sullivan to set up call on Thursday, January 12, 2012)) *with* Cohen, Tr. 748; CX1118 at 001 (testifying that Cohen spoke to an employment lawyer on January 13, 2012 at 7:39 AM). In any event, the call was long enough to have discussed multiple topics. Additionally, the sequence of events shows that Cohen scheduled the call with Sullivan *after* he received Ryan’s email regarding Unified Smiles (stating simply, “For Timmy conversation”). (CCFF ¶ 958 (Ryan forwarding email regarding Unified Smiles to Cohen and writing “For Timmy conversation”); CCFF ¶ 965; CX2347 at 001 (texting Sullivan to set up call on Thursday, January 12, 2012)). In contrast, Cohen did not set up the call with Sullivan *after* Cohen spoke with his employment lawyer. (*Compare* CCFF ¶ 958 (Ryan forwarding email regarding Unified Smiles to Cohen and writing “For Timmy conversation”) *and* CCFF ¶ 965; CX2347 at 001 (texting Sullivan to set up call on Thursday, January 12, 2012) *with* Cohen, Tr. 748; CX1118 at 001 (testifying that Cohen spoke to an employment lawyer on January 13, 2012 at 7:39 AM)). At 8:39 AM, less than thirty minutes before the scheduled call with Sullivan, Cohen emailed Benco employees to reinforce Benco’s no buying group policy. (CCFF ¶¶ 971-972). The weight of the evidence shows

that Sullivan and Cohen discussed buying group Unified Smiles on the January 13, 2012 telephone call. (CCFF ¶ 969).

1440. Mr. Sullivan does not recall the details of the January 13, 2012 call, but he is certain Unified Smiles was not discussed. Based on the text messages around the time of the call, he believes they discussed Kent Hayes (a Fresno recruit) and employment related issues. (Sullivan, Tr. 4218-20).

Response to Proposed Finding No. 1440

The Proposed Finding is misleading and incomplete. Sullivan testified that he does not recall what he discussed with Cohen on the January 13, 2012 call. (Sullivan, Tr. 4218 (“Q. Do you recall what you talked about? A. I don’t. . . .”); Schein Post-Tr. Br. at 66 (acknowledging that Sullivan lacks specific recollection of the call)). Benco argues that Sullivan testified that he was certain that Unified Smiles was not discussed on the call. (Benco Post-Tr. Br. at 16). Benco is incorrect. Sullivan testified that he does not recall what he discussed with Cohen. (Sullivan, Tr. 4218 (“Q. Do you recall what you talked about? A. I don’t. . . .”)). Sullivan also admits that he “assumed” that it related to merger or employment issues. (Sullivan, Tr. at 4218-4220). Notably, Sullivan’s testimony is contrary to prior testimony in which he testified that he heard of Unified Smiles through a message from Cohen. (CX8025 (Sullivan, Dep. at 393 (“Have you ever heard of a group called Unified Smiles? A. Only through a message I got from Chuck”); *see also* Sullivan, Tr. at 4346)). The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Cohen and Sullivan did not discuss buying group Unified Smiles on their January 13, 2012 call. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961). Within minutes of receiving the news, Benco’s Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message “For Timmy conversation,” referring to Tim

Sullivan of Schein. (CCFF ¶¶ 958-960). Based on the market intelligence, Ryan understood at the time that Schein would be participating in the Unified Smiles buying group. (CCFF ¶ 957). Cohen agreed to communicate with Sullivan, responding on January 13, 2012 “Talking this AM...” (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Cohen does not have an independent recollection of what was discussed on that January 13, 2012 call with Sullivan. (CCFF ¶ 970). Less than thirty minutes before the scheduled call with Sullivan, Cohen emailed Benco employees to reinforce Benco’s no buying group policy. (CCFF ¶¶ 971-972). The weight of the evidence shows that Sullivan and Cohen discussed buying group Unified Smiles on the January 13, 2012 telephone call. (CCFF ¶ 969).

1441. The evidence presented at trial and context around the January 13, 2012 phone call conclusively demonstrate that the phone call concerned hiring issues. There is no support for Complaint Counsel’s suggestion that the conversation reflects the existence of an agreement regarding Unified Smiles or any other buying group.

Response to Proposed Finding No. 1441

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence. The contemporaneous documents about this call are the only evidence in the record of what transpired, and they show that Cohen scheduled a call with Sullivan specifically to discuss Schein doing business with a buying group. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961). Within minutes of receiving the news, Benco’s Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message “For Timmy conversation,” referring to Tim Sullivan of Schein. (CCFF ¶¶ 958-960). Based on the market intelligence, Ryan understood at the time that Schein would be participating in the Unified

Smiles buying group. CCFF ¶ 957. Cohen did not inform Ryan that he would not talk to Sullivan regarding a potential customer, Unified Smiles, or otherwise express any confusion regarding the meaning of Ryan’s email. (CCFF ¶ 962). Cohen agreed to communicate with Sullivan, responding on January 13, 2012 “Talking this AM...” (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Cohen does not have an independent recollection of what was discussed on that January 13, 2012 call with Sullivan. (CCFF ¶ 970). Further, there is no evidence that Cohen scheduled the call with Sullivan in response to anything related to the hiring agreement, nor did he schedule the call after speaking with his employment attorney. *Compare* CCFF ¶ 958 (Ryan forwarding email regarding Unified Smiles to Cohen and writing “For Timmy conversation”) *and* CCFF ¶ 965 (CX2347 at 001 (texting Sullivan to set up call on Thursday, January 12, 2012)) *with* Cohen, Tr. 748; CX1118 at 001 (testifying that Cohen spoke to an employment lawyer on January 13, 2012 at 7:39 AM). Indeed, the sequence of events shows that Cohen scheduled the call with Sullivan *after* he received Ryan’s email regarding Unified Smiles (stating simply, “For Timmy conversation”). (CCFF ¶ 958 (Ryan forwarding email regarding Unified Smiles to Cohen and writing “For Timmy conversation”); CCFF ¶ 965; CX2347 at 001 (texting Sullivan to set up call on Thursday, January 12, 2012)). In contrast, Cohen did not set up the call with Sullivan *after* Cohen spoke with his employment lawyer. (*Compare* CCFF ¶ 958 (Ryan forwarding email regarding Unified Smiles to Cohen and writing “For Timmy conversation”) *and* CCFF ¶ 965; CX2347 at 001 (texting Sullivan to set up call on Thursday, January 12, 2012)) *with* Cohen, Tr. 748; CX1118 at 001 (testifying that Cohen spoke to an employment

lawyer on January 13, 2012 at 7:39 AM)). At 8:39 AM, less than thirty minutes before the scheduled call with Sullivan, Cohen emailed Benco employees to reinforce Benco's no buying group policy. (CCFF ¶¶ 971-972). The weight of the evidence shows that Sullivan and Cohen discussed buying group Unified Smiles on the January 13, 2012 telephone call. (CCFF ¶ 969). Both Sullivan and Cohen testified that they did not recall what they discussed on the January 13, 2012 telephone call. Cohen testified that he did not recall the contents of the January 13, 2012 call. (CCFF ¶ 970; Cohen, Tr. 973 ("Q. You don't recall the contents of that [January 13, 2012] call; right? A. I do not.")). Cohen also testified that he did not "have an independent recollection of" the January 13, 2012 call. (CCFF ¶ 970; Cohen, Tr. 974 ("I don't have an independent recollection of that [January 13, 2012 call], that is true.")). Cohen testified that he simply "assumed" that call was about an employment issue. (Cohen, Tr. 973). Sullivan testified that he does not recall what he discussed with Cohen on the January 13, 2012 call. (Sullivan, Tr. 4218 ("Q. Do you recall what you talked about? A. I don't. . . .")). Sullivan also admits that he "assumed" that it related to merger or employment issues. (Sullivan, Tr. at 4218-4220). Notably, Sullivan's testimony is contrary to prior testimony in which he testified that he heard of Unified Smiles through a message from Cohen. (CX0311 (Sullivan, Dep. at 393) ("Have you ever heard of a group called Unified Smiles? A. Only through a message I got from Chuck")); *see also* Sullivan, Tr. at 4346 (acknowledging that he changed his testimony)). There is no reason to believe that Cohen and Sullivan could not have discussed both employment issues and the no buying group agreement on the 11 minute and 34 second call.

c. Smile Source

1442. The record does not support a finding that Benco and Schein reached any agreement concerning their respective responses to Smile Source.

Response to Proposed Finding No. 1442

The Proposed Finding is misleading and incomplete. First, the totality of the evidence shows that Benco and Schein reached an agreement not to discount to buying groups. (CCFF ¶¶ 661-1158). Second, the Proposed Finding is incomplete and misleading because the evidence shows that Benco and Schein spoke about their respective responses to Smile Source. First, on July 25, 2012, Ryan learned from market intelligence that Schein was working with Smile Source. (CCFF ¶¶ 978-983). Ryan immediately forwarded the email to Cohen, writing, “Better tell your buddy Tim to knock this shit off.” (CCFF ¶¶ 981-986). It is undisputed that Ryan was informing Cohen to tell Sullivan to stop working with Smile Source. (CCFF ¶¶ 984-986). In response, Cohen agreed to confront Sullivan, writing, “Please resend this e-mail without your comment on top so that I can print & send to Tim with a note.” (CCFF ¶¶ 989-992 (quoting CX0018)). Cohen testified he was planning to send a note to Sullivan about Smile Source (CCFF ¶ 991), and he would not be surprised if he did send a note to Sullivan about Smile Source. (CCFF ¶ 992). Later, Ryan went on to speak with Schein on October 1, 2013 after receiving market intelligence that Schein might be discounting to the Smile Source buying group. (CCFF ¶¶ 1005-1019). Ryan spoke to his counter-part Foley at Schein for 18 minutes, and according to Foley, Ryan informed him that Benco would not bid on Smile Source and wanted to know if Schein would bid. (CCFF ¶¶ 1010-1013). Ryan reported the conversation to Cohen saying that he had “talked specifically about” Smile Source with Foley. (CCFF ¶ 1014).

In addition, the Proposed Finding is misleading and incomplete because it omits that Sullivan was excited about Smile Source’s business model in February 2011, but by February 2012 wanted to “KILL” Smile Source’s model. On February 23, 2011, Sullivan was in favor of

working with buying groups, telling his boss that he was very excited about Smile Source's buying group business model. (CCFF ¶ 696). By February 2012, Sullivan's tone had changed: Sullivan informed his employees that he was less concerned about losing Smile Source as a customer than about what Schein could do to "KILL the buying group model," referring to Smile Source's model. (CCFF ¶¶ 729-732). Indeed, following communications between Cohen and Sullivan in 2011, (CCFF ¶ 347), Schein began to articulate its new policy that Schein no longer works with buying groups. (CCFF ¶¶ 719-720 (CX2062 at 001 ("[U]nless you have some 'ownership' of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups.")).

[REDACTED]. (CCFF ¶ 913-914). After the conspiracy, Schein began working with Smile Source again. (CCFF ¶ 1319).

i. The September 26, 2011 Internal Benco Email Relating to Smile Source.

1443. Complaint Counsel asserted that "Benco [d]iscovered Schein's [b]uying [g]roup [a]rrangement in 2011," citing the September 26, 2011 email from Dr. Goldsmith to Benco. (Kahn, Tr. 33; RXD 0006 (citing CX 1116)). Complaint Counsel asserts that this was "an example" of Benco starting to "learn about various relationships with buying groups that Schein had." (Kahn, Tr. 33). Complaint Counsel has not cited any earlier "example." Nor has it identified any communications between Schein and Benco relating to buying groups prior to September 2011. As such, there is no basis for an inference that the alleged conspiracy started earlier.

Response to Proposed Finding No. 1443

The Proposed Finding is compound, misleading, incomplete, and against the weight of the evidence. The weight of the evidence shows that Benco's agreement with Schein began in 2011. While Benco "had no doubt" that Schein was working with buying groups as of September 2011 based on market intelligence (CCFF ¶ 673), after that point, Benco gained the understanding that Schein had a policy *against* doing business with buying groups.

(CCFF ¶¶ 665-684). Despite market rumors that Schein was working with buying groups, Benco understood in 2012, 2013, and 2014 that Schein (like Benco) did *not* do business with these customers. (CCFF ¶¶ 674-678). Consistent with Cohen's knowledge, 2011 was the year that Schein, at the direction of Tim Sullivan, changed its buying group strategy. While Schein had discounted to buying groups historically and profited from such arrangements, by late 2011, Sullivan informed his employees that he did "NOT want to lead in getting" the buying group initiative started in dental (CCFF ¶ 709), and did not "want to be the first company to open the floodgates to the dangerous world" of buying groups. (CCFF ¶¶ 712-714; *see also* CCFF ¶¶ 715-716.) It is undisputed that Benco's Cohen and Schein's Sullivan communicated on multiple occasions throughout 2011. Between March and December 2011 alone, Cohen and Sullivan called each other at least 13 times for a total duration of 50 minutes and 14 seconds. (CCFF ¶ 347 (CX6027 at 012, 016-017)). Cohen and Sullivan also exchanged a total of 89 text messages in 2011, 23 of which the content was not produced and may have contained buying group communications. (CCFF ¶¶ 349-350 (CX6027 at 003-018)). Sullivan exchanged additional communications with Cohen, including written notes and voicemail messages, that are not reflected in CX6027. (CCFF ¶¶ 353-354 (Sullivan, Tr. 3885 (Sullivan produced all cell phone records but could have called Cohen from a land line); Cohen, Tr. 526 (Cohen sent Sullivan notes by mail from time to time); Sullivan, Tr. 3886 ("Q: And you didn't keep all of the notes that Chuck Cohen sent you over the years, right? A: No.")). Additionally, Cohen and Sullivan were in the same place at the same time several times in 2011. (CCFF ¶¶ 358 (Cohen and Sullivan attended the Chicago Mid-Winter Trade Show in 2011); 379 (Cohen and Sullivan participated in the Dental Trade Alliance Foundation Board Meeting held in Las Vegas October 10, 2011); CCFF ¶ 380 (Sullivan and

Cohen attended the American Dental Association Meeting held in Las Vegas October 10-13, 2011); CCFF ¶ 363 (Cohen and Sullivan attended the Dental Trade Alliance Annual Meeting held November 1-3, 2011). And in October 2011 Cohen and Sullivan attended the same party, (CCFF ¶ 381), at the end of November Cohen and Sullivan were at a “confidential” breakfast together in New York City. (CCFF ¶ 383). Importantly, the evidence also shows that Cohen “communicate[d] Benco’s no-buying group policy to Mr. Sullivan.” (CCFF ¶¶ 662-664). The Proposed Finding is misleading and irrelevant because Complaint Counsel does not allege CX1116 represents the start of the alleged conspiracy, rather CX1116 illustrates Benco learned that Schein was dealing with buying groups. Finally, the Proposed Finding is misleading to the extent that it suggests that Complaint Counsel should or could have records of all the communications between competitors, the examples in the record are the tip of the iceberg, and suggest the existence of similar anti-competitive communications below the surface that are not captured in evidence for a variety of reasons that affect anticompetitive conspiracies generally.

1444. The September 26, 2011 email also does not provide a basis for the start of the alleged conspiracy. CX 1116 is an internal Benco email, prompted by an inquiry from Smile Source about entering into a distribution agreement with Benco. It does not reflect any agreement or communication between Schein and Benco. Complaint Counsel has also failed to show any communication between Schein and Benco related to buying groups in this time frame. Both Mr. Cohen and Mr. Sullivan denied having any conversation about Smile Source, and the log of interfirm communications does not show any relevant communications between them at this time. (Cohen, Tr. 856-58, 862; Sullivan, Tr. 4252-53, 4281-82). CX 6027 shows there were no communications between Mr. Cohen and Mr. Sullivan from September 26, 2011 to October 6, 2011, and the October 6, 2011 communications are wholly innocuous texts about sports, inside jokes, trade association meetings, and the like. (CX 6027-006-08).

Response to Proposed Finding No. 1444

The Proposed Finding is compound, misleading, incomplete, and against the weight of the evidence. The Proposed Finding is irrelevant because Complaint Counsel does not allege CX1116 represents the start of the alleged conspiracy, rather CX1116 illustrates Benco

learned that Schein was dealing with buying groups. The Proposed Finding is incomplete and misleading in that it erroneously suggests infrequent contacts because these men had several opportunities to communicate in the time period the Proposed Finding denotes. Specifically, Cohen and Sullivan were in the same place at the same time several times in the time frame between September 26, 2011 and November 1, 2011. (CCFF ¶ 379 (Cohen and Sullivan participated in the Dental Trade Alliance Foundation Board Meeting held in Las Vegas October 10, 2011); CCFF ¶ 380 (Sullivan and Cohen attended the American Dental Association Meeting held in Las Vegas October 10-13, 2011); CCFF ¶ 363 (Cohen and Sullivan attended the Dental Trade Alliance Annual Meeting held November 1-3, 2011). And at the end of November Cohen and Sullivan were at a “confidential” breakfast together in New York City. (CCFF ¶ 383). Finally, the Proposed Finding is incomplete and misleading because of the 89 text messages exchanged between Cohen and Sullivan in 2011, there are 23 text messages with no content available. Finally, the Proposed Finding is misleading to the extent that it suggests that Complaint Counsel should or could have records of all the communications between competitors, the examples in the record are the tip of the iceberg, and suggest the existence of similar anti-competitive communications below the surface that are not captured in evidence for a variety of reasons that affect anticompetitive conspiracies generally.

1445. Schein was doing business with, and continued to do business with, Smile Source following the September 26, 2011 email. (Sullivan, Tr. 4181-82; Goldsmith, Tr. 1947). Benco, in contrast, declined Smile Source’s invitation. (Ryan, Tr. 1182-83). Upon learning that there was “no central ownership or bill paying,” Mr. Cohen concluded that Smile Source was a “GPO,” and instructed Mr. Ryan to “[p]lease pass” on the opportunity. (CX 0004-001). Mr. Ryan then told Smile Source that its “structure meets [Benco’s] definition of GPO, and Benco does not participate in group purchasing organizations.” (CX 1138-001).

Response to Proposed Finding No. 1445

The Proposed Finding is compound, incomplete, misleading. The Proposed Finding is incomplete and misleading because while Schein did do business with Smile Source prior to the start of the conspiracy and after the conspiracy (CCFF ¶¶ 443, 1319), Schein did not continue to work with Smile Source during the conspiracy. Following communications with Benco in 2011 (*see* Response to Proposed Finding No. 1446 for communications between Schein and Benco in 2011), [REDACTED]

[REDACTED]. (CCFF ¶ 913-914). The Proposed Fact is misleading to the extent it implies Benco's denial of buying groups was unilateral. The totality of the evidence shows that Benco and Schein reached an agreement not to discount to buying groups. (CCFF ¶¶ 661-1158). Indeed, Benco reached out to Schein to discuss buying groups on no fewer than six occasions during the conspiracy period. (CCFF ¶ 679).

To the extent the Proposed Finding states Benco declined to do business with Smile Source because it was a buying group, Complaint Counsel has no specific objection.

1446. The evidence is inconsistent with the allegation that any conspiracy had begun by September 2011.

Response to Proposed Finding No. 1446

The Proposed Finding is incomplete, misleading and offers no citation to any evidence and should be rejected. The weight of the evidence shows that Benco's agreement with Schein began in 2011. Benco "had no doubt" that Schein was working with buying groups as of September 2011 based on market intelligence about Smile Source. (CCFF¶ 673; 665-672). By 2012, however, Cohen no longer believed that Schein would be working with the buying group Smile Source, and Benco gained the understanding that Schein had a policy *against* doing business with buying groups. (CCFF ¶¶ 674-678). Thus, despite the market rumors

that Schein was working with buying groups, Benco understood in 2012, 2013, 2014 that Schein (like Benco) did *not* do business with these customers. (CCFF ¶¶ 674-678). Cohen testified, during this time frame, he “understood that Schein, Patterson and Benco all had a similar policy with respect to buying groups.” (CCFF ¶ 677) Consistent with Cohen’s knowledge, 2011 was the year that Schein, at the direction of Tim Sullivan, changed its buying group strategy. While Schein had discounted to buying groups historically and profited from such arrangements, by late 2011, Sullivan informed his employees that he did “NOT want to lead in getting” the buying group initiative started in dental, (CCFF ¶ 709), and did not “want to be the first company to open the floodgates to the dangerous world” of buying groups. (CCFF ¶¶ 712-714; *see also* CCFF ¶¶ 715-716). It is undisputed that Benco’s Cohen and Schein’s Sullivan communicated on multiple occasions throughout 2011. Between March and December 2011 alone, Cohen and Sullivan called each other at least 13 times for a total duration of 50 minutes and 14 seconds. (CCFF ¶ 347 (CX6027 at 012, 016-017)). Cohen and Sullivan also exchanged a total of 89 text messages in 2011, 23 of which the content was not produced and may have contained buying group communications. (CCFF ¶¶ 349-350 (CX6027 at 003-018)). Additionally, Cohen and Sullivan were in the same place at the same time several times in 2011. (CCFF ¶¶ 358 (Cohen and Sullivan attended the Chicago Mid-Winter Trade Show in 2011); 379 (Cohen and Sullivan participated in the Dental Trade Alliance Foundation Board Meeting held in Las Vegas October 10, 2011); CCFF ¶ 380 (Sullivan and Cohen attended the American Dental Association Meeting held in Las Vegas October 10-13, 2011); CCFF ¶ 363 (Cohen and Sullivan attended the Dental Trade Alliance Annual Meeting held November 1-3, 2011). And in October 2011 Cohen and

Sullivan attended the same party, (CCFF ¶ 381), at the end of November Cohen and Sullivan were at a “confidential” breakfast together in New York City. (CCFF ¶ 383).

ii. The July 25, 2012 Email Relating to Smile Source.

1447. The Complaint alleges that the conspiracy between Schein and Benco supposedly started no later than “July 2012,” referencing an *internal* Benco email dated July 25, 2012. (Complaint ¶ 35 (referencing CX 0018)). At trial, Complaint Counsel modified its theory, claiming that the same internal communication reflected an effort by Benco to begin “enforcing the agreement against Schein each time they suspected that Schein was cheating by discounting to a buying group.” (Kahn, Tr. 42-44; RXD 0101 (CC Opening, Slide 17)).

Response to Proposed Finding No. 1447

The Proposed Finding is misleading and inaccurate because Complaint Counsel’s allegation that the conspiracy started no later than July 2012 is completely consistent with the evidence that the conspiracy started in 2011 as that is not later than July 2012. Similarly, that Benco enforced the agreement in July 2012 is consistent with Complaint Counsel’s allegation that the conspiracy started no later than that date. Complaint Counsel has no specific response to the remainder of this Proposed Finding.

1448. CX 0018 does not demonstrate an agreement between Schein and Benco relating to Smile Source or buying groups generally. The email begins with an inquiry from Smile Source’s Dr. Goldsmith to a Benco email address, which was later forwarded to Pat Ryan, Benco’s head of Special Markets. Dr. Goldsmith informed Mr. Ryan that “one of [Smile Source’s] members ... has selected [Benco] as the distributor for [Smile Source’s] east coast operations,” and requested that Benco provide “pricing and service options.” (CX 0018-002).

Response to Proposed Finding No. 1448

The Proposed Finding is incomplete, misleading, and irrelevant. The Proposed Finding omits relevant portions of CX0018 including Ryan’s response where Ryan informed Dr. Goldsmith that Benco would not work with Smile Source because it was a group purchasing organization. (CX0018 at 001). Ryan immediately forwarded the email to Cohen, writing, “Better tell your buddy Tim to knock this shit off.” (CCFF ¶¶ 981-986). Ryan was frustrated when he learned that Schein was doing business with Smile Source because he wanted

Schein to treat buying groups like Benco did. (CX8037 (Ryan, Dep. at 116-117) (“Q. And did Dr. Goldsmith’s reference to Henry Schein doing business with . . . Smile Source frustrate you? . . . A. Yes. Q. Why is that? A. I believe that all distributors should feel like we do.”)). It is undisputed that Ryan was informing Cohen to tell Sullivan to stop working with Smile Source. (CCFF ¶¶ 984-986). In response, Cohen agreed to confront Sullivan, writing, “Please resend this e-mail without your comment on top so that I can print & send to Tim with a note.” (CCFF ¶¶ 990-992 (quoting CX0018 at 001)). Cohen testified he wouldn’t be surprised if he did send a note to Sullivan about Smile Source. (CCFF ¶ 992). The Proposed Finding is also misleading and incomplete because it omits all of the other evidence of an agreement between Schein and Benco. (CCFF ¶¶ 661-1158). Indeed, Benco reached out to Schein to discuss buying groups on no fewer than six occasions during the conspiracy period. (CCFF ¶ 679). The Proposed Finding is also misleading in that it suggests there is no other evidence of Schein and Benco on Smile Source when there is undisputed evidence that Foley and Ryan spoke at length about Smile Source and Benco’s plans with regards to buying groups. (CCFF ¶¶ 1009-1010; CX0243 at 001). Ryan called Foley at Schein on October 1, 2013 after receiving market intelligence that Schein might be discounting to the Smile Source buying group. (CCFF ¶¶ 1005-1019). Ryan spoke to his counterpart at Schein, Foley, for 18 minutes; according to Foley’s description of the call, (1) he got the impression Benco was anti-buying group; (2) Ryan informed Foley that Benco would not bid on Smile Source; and (3) Ryan wanted to know if Schein would bid on Smile Source. (CCFF ¶¶ 1010-1013). Contemporaneous documents confirm that the call was about Smile Source. (CCFF ¶¶ 1013-1014). Ryan reported the conversation to Cohen saying that he had “talked specifically about” Smile Source with Foley. (CCFF ¶ 1014). Foley also reported that he and Ryan

discussed Smile Source on the telephone call. (CCFF ¶ 1017 (quoting CX0243 at 001); Foley, Tr. 4588-4589 (“Next time we talk remind me to tell you about my conversation with Pat Ryan at SM Benco. They’re anti Buying Group and Smile Source recently reached out to them. I’m being careful not to cross any boundaries, like collusion.”)). Complaint Counsel has no specific response to the remainder of this Proposed Finding.

1449. [REDACTED] (Goldsmith, Tr. 2129-30). To the extent Benco had been “selected” as the distributor for Smile Source’s East Coast operations, such selection was made without Benco’s knowledge or consent. (Goldsmith, Tr. 2131-32; Cohen 861; Ryan, Tr. 1053). In response to Dr. Goldsmith’s email, Benco reiterated the same position it had on September 30, 2011 (*see* CX 1138), prior to the alleged start of the conspiracy, that “Benco Dental does not recognize GPOs as a single customer.” (CX 0018-001).

Response to Proposed Finding No. 1449

The first two sentences of the Proposed Finding are not supported by the transcript pages cited. Dr. Goldsmith testified that [REDACTED]

[REDACTED]. The cited Cohen and Ryan trial testimony (Cohen, Tr. 861 and Ryan, Tr. 1053) do not support this Proposed Finding. The Proposed Finding is also misleading and incomplete to the extent that it suggests that Benco’s agreement with Schein did not begin in 2011. (*See* Response to Proposed Finding No. 1446). Complaint Counsel has no specific response to the remainder of this Proposed Finding.

1450. Mr. Ryan then forwarded his response to his boss, Mr. Cohen, saying “tell your buddy Tim to knock this shit off.”¹³ (CX 0018-001). Mr. Ryan testified this was just a “flippant” remark. (Ryan, Tr. 1065-1066, 1191-92). Mr. Cohen responded to Mr. Ryan’s email,

¹³ Mr. Ryan’s comment was based on a mis-reading of Mr. Goldsmith’s underlying email. Mr. Goldsmith’s email states that “[i]n the past, we were in Special Markets division of Henry Schein and worked directly with Tim Sullivan.” (CX 0018-002 (emphasis added)). In fact, Smile Source had terminated its agreement Schein over seven months prior, and was not currently working with Schein. (Goldsmith, Tr. 1947, 2082).

asking him to “[p]lease resend this e-mail without your comment on top so that I can print & send to Tim with a note.” (CX 0018-001).

Response to Proposed Finding No. 1450

Complaint Counsel has no specific response to the first and third sentences of this Proposed Finding. The second sentence of this Proposed Finding is misleading and incomplete.

Rather than flippant, Ryan’s language in the same document Ryan referred to Schein working with a buying group as “this shit” because he had a “strong opinion on GPOs.” (CX0018 at 001; Ryan, Tr. 1065-1066; *see also* CCFF ¶ 982). Further, the Proposed Finding is misleading because it is undisputed that Ryan meant, and Cohen understood, that Ryan wanted Cohen to tell Sullivan to stop working with buying group Smile Source. (CCFF ¶¶ 984-986). Indeed, Cohen did not take Ryan’s remark as flippant; Cohen responded to Ryan’s remark by agreeing to communicate with Sullivan. (CCFF ¶¶ 988-990). Further supporting the notion that Ryan’s statement was not flippant or made in jest, Ryan himself called Schein’s Foley in 2013 when he wondered if Schein was discounting to Smile Source. (CCFF ¶¶ 1006-1017; *see also* Response to Proposed Finding No. 1449).

1451. But rather than forward a clean email to Mr. Cohen as requested, Mr. Ryan followed up with a question about whether Smile Source is in fact a buying group. (CX 1147-01 (forwarding same email string, dated one minute later, noting that “[h]e was quick to tell me he’s a ‘franchise’, not a GPO, although without ownership stake, for all practical purposes, what’s the difference?”)). Mr. Cohen then responded to the question noting that he “agree[d].” (CX 1251).

Response to Proposed Finding No. 1451

The Proposed Finding is misleading, incomplete, and contrary to the weight of the evidence.

First, Cohen did not ask for a “clean email,” instead he asked Ryan to “resend this e-mail without your comment on top.” (CCFF ¶ 990). Ryan complied with that request one minute later when he sent CX1147. Per Cohen’s instructions, Ryan forwarded the same e-mail chain but without his comment, “Better tell your buddy Tim to knock this shit off” at the top.

(Compare CX0018 with CX1147). The timing of this email exchange shows that Ryan forwarded the email, CX1147, in compliance with Cohen's request that Ryan "resend this e-mail without your comment on top." Specifically, Ryan learned that Schein was working with buying group, Smile Source, and forwarded that information to Cohen with a note that said "Better tell your buddy Tim to knock this shit off" at 12:53PM. (CCFF ¶¶ 981-986; CX0018 at 001). At 5:27PM, Cohen responded to Ryan and asked Ryan to "resend this e-mail without your comment on top so that I can print & send to Tim with a note." (CX0018 at 001; CCFF ¶ 990). One minute later, Ryan followed that instruction by resending the e-mail without his initial comment on top. (CX1147 at 001 ("He was quick to tell me he's a 'franchise', not a GPO, although without ownership stake, for all practical purposes, what's the difference.")). While Ryan did not send a "clean email," Cohen never asked for a clean email, and Cohen approved of Ryan's comment in CX1147: one minute later, he wrote, "I agree." (CX1251 at 001). Cohen's email also thanked Ryan for resending the email. (CX1251 at 001 ("Thanks.")). The Proposed Finding is also misleading because it omits that Ryan testified that he wanted Cohen to tell Sullivan to stop working with buying group Smile Source (CCFF ¶¶ 984-986). It also omits that Cohen testified that he was planning to print the email without Ryan's comment and sent it to Sullivan with a note. (CCFF ¶ 991). Cohen also testified that he would not be surprised if he sent Sullivan a physical message about Smile Source and further that he sent such messages to Sullivan from time to time. (CCFF ¶ 992; Cohen, Tr. 526-527; CX0301 (Cohen, IHT at 223)).

1452. There is no evidence that Mr. Cohen actually sent a note to, or otherwise communicated with, Mr. Sullivan about Smile Source or any buying group in or around July 25, 2012. Mr. Cohen testified that he did not recall receiving a clean email from Mr. Ryan, printing out any version of this email, writing a note on a printed out version of the email, giving such a note to an assistant to mail, or himself mailing a note to Mr. Sullivan. (Cohen, Tr. 885-86). Mr. Sullivan also denied receiving any note from Mr. Cohen about Smile Source or buying groups

generally. (Sullivan, Tr. 4252-53).¹⁴ Mr. Ryan also testified that he was unaware of any such communication occurring. (Ryan, Tr. 1248-49).

Response to Proposed Finding No. 1452

The Proposed Finding is misleading and incomplete. The evidence shows that Cohen planned to confront Sullivan in July of 2012 after he learned from Ryan that Schein was working with a buying group, Smile Source. (CCFF ¶¶ 978-983). Ryan learned that Schein was working with buying group, Smile Source, and forwarded that information to Cohen with a note that said “Better tell your buddy Tim to knock this shit off.” (CCFF ¶¶ 981-986). Ryan wanted Cohen to tell Sullivan to stop working with buying group Smile Source (CCFF ¶¶ 984-986). Cohen agreed to do so, responding to Ryan by asking him to resend his email without the commentary so that Cohen could “print & send to Tim with a note.” (CCFF ¶¶ 988-992). Cohen testified that, at the time of his email to Ryan, he planned to print the email and send it to Sullivan with a note. (CCFF ¶ 991). Cohen testified that he might have sent the note to Sullivan. (Cohen, Tr. 526-527). Cohen also testified that he would not be surprised if he sent Sullivan a physical message about Smile Source and further that he sent such messages to Sullivan from time to time. (CCFF ¶ 992; Cohen, Tr. 526-527; CX0301 (Cohen, IHT at 223)). Sullivan likewise acknowledged that Cohen sent him notes in the mail. (Sullivan, Tr. 3885). Moreover, Cohen testified that he did not think that his communications with Sullivan regarding a buying group policy were inappropriate so there is no reason to doubt that he would have followed through on his promise to send the note in the mail. (CX8015 (Cohen, Dep. at 243-244)).

¹⁴ The Complaint alleges that, “[a] *few days after* this exchange” on July 25, 2012, “Ryan rejected Smile Source.” (Complaint ¶ 35). The evidence, however, shows that Mr. Ryan rejected Smile Source on July 25, 2012 *before* the exchange between Mr. Cohen and Mr. Ryan. (CX 0018). Thus, the evidence does not support any inference that Benco’s response to Smile Source was dependent upon any communications or agreement with Schein.

The Proposed Finding is also misleading because Cohen did not testify that he did not print the email, write a note, or send a note in the mail to Sullivan, only that he did not *recall* doing so. (Cohen, Tr. 838, 886). Cohen's contemporaneous email reflects his intent to send a note to Sullivan, and Cohen admitted at trial that, at the time he wrote his email, he had planned to send a note to Sullivan. (CCFF ¶¶ 990-991). The Proposed Finding also fails to include that Sullivan did not keep notes sent to him by Cohen. (Sullivan, Tr. 4253).

Additionally, the Proposed Finding statement that Mr. Sullivan denied receiving any note from Mr. Cohen about Smile Source is not supported by the evidence cited, which states that Mr. Sullivan did not print out any emails from Mr. Cohen about Smile Source, but does not state that Mr. Sullivan did not receive any note from Mr. Cohen about Smile Source.

(Sullivan, Tr. 4253). The Proposed Finding that Ryan testified that he was unaware of any such communication occurring is not supported by the evidence cited. Ryan testified that was unaware of Cohen ever "speaking" to Sullivan about Smile Source; Ryan did not testify that he was unaware of whether Cohen ever sent Sullivan a note in the mail as he committed to do. (Ryan, Tr. 1248-1249). The footnote is also contrary to the weight of the evidence to the extent that it suggests that Benco did not enter into an agreement with Schein, as defined under Section 1 of the Sherman Act, to refuse to discount to buying groups. The totality of Complaint Counsel's evidence, establishes that Benco and Schein reached an agreement. (CCFF ¶¶ 1025-1055; CCFF ¶¶ 661-1158, 1167-1198).

1453. There are no after-the-fact internal documents purporting to memorialize any alleged communication between Mr. Cohen and Mr. Sullivan about Smile Source. Complaint Counsel failed to introduce evidence of any response by Mr. Sullivan to the supposed note. In fact, when Mr. Sullivan next interacted with Smile Source, he wrote, "I would enjoy catching up with you [and] look forward to learning more." (CX 2580). Further, the communications log prepared by Complaint Counsel does not reflect any text or telephone communication between Mr. Sullivan and Mr. Cohen between July 25, 2012 and January 2, 2013. (CX 6027-025-26). Complaint

Counsel also failed to introduce any evidence of any change in conduct by either Schein or Benco that could reasonably be tied to any such communication in July 2012.

Response to Proposed Finding No. 1453

The Proposed Finding is incomplete and misleading. The Proposed Finding omits evidence that Sullivan and Cohen both attended at least three industry trade events between July 25, 2012 and January 2, 2013. (CCFF ¶ 385 (Dental Trade Alliance Meeting); CCFF ¶ 386 (Dental Trade Alliance Breakfast); CCFF ¶ 369 (Greater New York Dental Trade Show)).

The Proposed Finding is misleading because it omits those three opportunities for Cohen and Sullivan to coordinate on buying groups. The Proposed Finding is also misleading in that it fails to note that Sullivan exchanged additional communications with Cohen, including written notes and voicemail messages, that are not reflected in CX6027. (CCFF ¶¶ 353-354 (Sullivan, Tr. 3885 (Sullivan produced all cell phone records but could have called Cohen from a land line); Cohen, Tr. 526 (Cohen sent Sullivan notes by mail from time to time); Sullivan, Tr. 3886 (“Q: And you didn’t keep all of the notes that Chuck Cohen sent you over the years, right? A: No.”)). The Proposed Finding is also misleading in that it suggests there is no other evidence of Schein and Benco on Smile Source when there is undisputed evidence that Foley and Ryan spoke about Smile Source and Benco’s plans with regards to buying groups. (CCFF ¶¶ 1010-1014; CX0243). Ryan called Foley at Schein on October 1, 2013 after receiving market intelligence that Schein might be discounting to the Smile Source buying group. (CCFF ¶¶ 1005-1019). Ryan spoke to his counterpart at Schein, Foley, for 18 minutes; according to Foley’s description of the call, (1) he got the impression Benco was anti-buying group; (2) Ryan informed Foley that Benco would not bid on Smile Source; and (3) Ryan wanted to know if Schein would bid on Smile Source. (CCFF ¶¶ 1010-1013).

Contemporaneous documents confirm that the call was about Smile Source. (CCFF ¶¶ 1013-

1014). Ryan reported the conversation to Cohen saying that he had “talked specifically about” Smile Source with Foley. (CCFF ¶ 1014). Foley also reported that he and Ryan discussed Smile Source on the telephone call. (CCFF ¶ 1017 (quoting CX0243 at 001; Foley, Tr. 4588-4589) (“Next time we talk remind me to tell you about my conversation with Pat Ryan at SM Benco. They’re anti Buying Group and Smile Source recently reached out to them. I’m being careful not to cross any boundaries, like collusion.”)). Additionally, the Proposed Finding also fails to include that Sullivan did not keep notes sent to him by Cohen. (Sullivan, Tr. 4253). Finally, the Proposed Finding is misleading and inaccurate in its suggestion that proof of a change in conduct is required and second that Complaint Counsel did not introduce evidence of any such change. Schein worked with Smile Source prior to the conspiracy period, that relationship ended during the conspiracy, and Schein once again worked with the valuable Smile Source account after the conspiracy ended. (CCFF ¶¶ 1317-1320, 1710-1712, 1722-1725, 1681).

1454. Accordingly, the evidence does not support the allegation that Benco communicated with Schein in or around July 25, 2012 about Smile Source or buying groups, that Benco attempted to “enforce” any pre-existing agreement with Schein, or that Schein reached or re-affirmed any such agreement.

Response to Proposed Finding No. 1454

The Proposed Finding is misleading, incomplete, and contrary to the weight of the evidence. Cohen planned to confront Sullivan in July of 2012 after he learned from Ryan that Schein was working with a buying group, Smile Source. (CCFF ¶¶ 978-983). Ryan learned that Schein was working with buying group, Smile Source, and forwarded that information to Cohen with a note that said “Better tell your buddy Tim to knock this shit off.” (CCFF ¶¶ 981-986). Ryan wanted Cohen to tell Sullivan to stop working with buying group Smile Source (CCFF ¶¶ 984-986). Cohen agreed to do so, responding to Ryan by asking him to

resend his email without the commentary so that Cohen could “print & send to Tim with a note.” (CCFF ¶¶ 988-992). Cohen testified that he might have sent the note to Sullivan. (Cohen, Tr. 526-527). Cohen also testified that he would not be surprised if he sent Sullivan a physical message about Smile Source and further that he sent such messages to Sullivan from time to time. (CCFF ¶ 992; Cohen, Tr. 526-527; CX0301 (Cohen, IHT at 223)). In addition the Proposed Finding is incomplete and misleading because there is other direct evidence of Smile Source communications between Benco and Schein when Ryan spoke with his counterpart at Schein on October 1, 2013 after receiving market intelligence that Schein might be discounting to the Smile Source buying group. (CCFF ¶¶ 1005-1019). Ryan spoke to his counterpart Foley at Schein for 18 minutes; according to Foley, Ryan informed him that Benco would not bid on Smile Source and wanted to know if Schein would bid. (CCFF ¶¶ 1010-1013). Ryan reported the conversation to Cohen saying that he had “talked specifically about” Smile Source with Foley. (CCFF ¶ 1014). The Proposed Finding is also contrary to the weight of the evidence to the extent that it suggests that Benco did not enter into an agreement with Schein, as defined under Section 1 of the Sherman Act, to refuse to discount to buying groups. The totality of Complaint Counsel’s evidence, establishes that Benco and Schein reached an agreement. (CCFF ¶¶ 1025-1055; CCFF ¶¶ 661-1158, 1167-1198).

iii. The October 1, 2013 Call from Mr. Ryan to Mr. Foley.

1455. The Complaint alleges that, “[o]n October 1, 2013, Benco’s Mr. Ryan called his counterpart at Schein, Mr. Foley ... and informed [him] that Benco would not bid” on Smile Source. (Complaint ¶ 57).

Response to Proposed Finding No. 1455

Complaint Counsel has no specific response to the Proposed Finding.

1456. Mr. Foley reported this conversation to his superior, Hal Muller, on October 9, 2013. (CX 0243; Foley, Tr. 4586, 4588).

Response to Proposed Finding No. 1456

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies that Foley followed Schein's antitrust compliance policy by reporting the call, or to the extent it implies that Foley was concerned about the call. The evidence shows that Foley did not follow Schein's antitrust compliance policy and never made a formal report about the call. At trial, Foley testified that he waited a week to tell his boss, Muller, about the call with Benco's Ryan even though Foley testified that he told Ryan that the call was against company policy. (Foley Tr., 4579, Foley, Tr. 4586). Foley previously testified that he did not feel an urgency to report the call. (CX8003 (Foley, Dep. at 360-361)). On October 9, 2013, Foley wrote to Muller: "Next time we talk remind me to tell you about my conversation with Pat Ryan at SM Benco. They're anti Buying Group and Smile Source recently reached out to them. I'm being careful not to cross any boundaries, like collusion." (CCFF ¶ 1017 (quoting CX0243 at 001); Foley, Tr. 4588-4589). Foley did not report the call to anyone else at Schein, although he was required to report the call to Schein's Legal Department, the Human Resources Department or the Senior Vice President of Administration of the Company." (CCFF ¶ 1050; CX2673 at 017).

The weight of the evidence shows that Foley shared information about Schein's policies toward buying groups. Following the call on October 1, 2013 with Foley, Ryan wrote to his boss, Cohen: "[Smile Source is] [v]ery familiar. Talked to them three times. Nothing is different. Randy at Schein and I talked specifically about them. Buh-bye." (CCFF ¶ 1014 (quoting CX0019 at 001); Ryan, Tr. 1101). Ryan's reference to "Randy" in CX0019 meant Foley. (CCFF ¶ 1014 (citing Ryan, Tr. 1101)). Ryan's email does not reference any

statement by Foley not to discuss Smile Source or Foley wanting to end the call. Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1457. Mr. Foley's summary to Mr. Muller did not relay Benco's plans as to whether it would bid on Smile Source; it merely says that Benco was "anti-Buying Group" and that "Smile Source recently reached out to them." (CX 0243-001).

Response to Proposed Finding No. 1457

The Proposed Finding is misleading and contrary to the weight of the evidence, which shows that Foley's October 9, 2013 email to Muller relayed Benco's plans not to bid for Smile Source. Foley testified that Benco's Ryan informed Foley that Benco would not bid on Smile Source on the October 1, 2013 phone call. (Foley, Tr. 4579; CX0306 (Foley, IHT at 176, 183, 185); CX8003 (Foley, Dep. at 354-355) ("I received a call from Pat Ryan at Benco Dental . . . he basically was making a statement – it was around the Smile Source time – that they didn't like working with buying groups and wasn't going to bid on it.")). Foley also testified that on the October 1, 2013 phone call, Ryan wanted to know whether Schein would bid on Smile Source. (CX0306 (Foley, IHT at 182)). Although Foley's email to Muller did not use the word "bid," Foley told Muller that Benco was "anti Buying Group" in the context of Smile Source: "They're anti Buying Group and Smile Source recently reached out to them." (CX0243 at 001; Foley, Tr. 4588-4589). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1458. Even if Mr. Foley's email supported an inference that Benco turned Smile Source down in 2013, it does not support an inference that the rejection occurred *after* the call with Mr. Foley. Thus, the Complaint's use of the future subjunctive "*would*," implying that the decision was made after the call with Mr. Foley, is pure speculation.

Response to Proposed Finding No. 1458

The Proposed Finding is misleading and contrary to the weight of the evidence. Foley testified that Ryan told him that Benco would not bid for Smile Source. (Foley, Tr. 4576

(Ryan told Foley about Benco “not wanting to bid on Smile Source”); CX0306 (Foley, IHT at 176) (“he called me to tell me that -- that he received a bid for Smile Source and that he wasn't going to bid on it.”). The weight of the evidence shows that Benco turned down Smile Source after Ryan’s call with Foley in October 2013. Following these communications, Benco declined to work with Smile Source in 2013 and 2014. [REDACTED]

[REDACTED]; Ryan, Tr. 1131; *see also* CX8015 (Cohen, Dep. at 266-267) (Benco did not do business with Smile Source in 2014)).

1459. Complaint Counsel argues that an inference should be drawn from the fact that the call with Mr. Foley lasted 18 minutes. Nothing in the length of the call suggests the subject matter of the call, let alone that Schein and Benco reached any agreement concerning Smile Source or buying groups.

Response to Proposed Finding No. 1459

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts that Complaint Counsel is relying on the length of the call alone as evidence of an agreement. Nonetheless, Foley’s testimony about the October 1, 2013 phone call is contrary to the evidence, which shows that Foley’s call with Ryan about Smile Source lasted for 18 minutes. (Ryan, Tr. 1100-1101; Foley, Tr. 4578-4579; CX6027 at 036 (Row 290)). Foley previously testified that the call last only one minute (CX0306, Foley, IHT at 179 (testifying that the call was “very short,” and lasted one minute). At trial, Foley testified that once Ryan mentioned Smile Source, the call only lasted a minute or two longer and that he then hung up (Foley, Tr. 4578). Foley previously testified that Ryan “immediately” began talking about Smile Source during the call. (CX0306, Foley IHT at 178). Further, the discussion about Smile Source is the only thing that Foley was specifically able to recall at trial about the 18

minute phone call. (Foley, Tr. 4579). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1460. Mr. Foley testified that he did not recall the call taking that long, and that the call likely began with pleasantries and small talk. (Foley, Tr. 4585-86).

Response to Proposed Finding No. 1460

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts that Complaint Counsel is relying on the length of the call alone as evidence of an agreement. Nonetheless, Foley's testimony about the October 1, 2013 phone call is contrary to the evidence, which shows that Foley's call with Ryan about Smile Source lasted for 18 minutes. (Ryan, Tr. 1100-1101; Foley, Tr. 4578-4579; CX6027 at 036 (Row 290)). Foley previously testified that the call last only one minute (CX0306, Foley, IHT at 179 (testifying that the call was "very short," and lasted one minute)). At trial, Foley testified that once Ryan mentioned Smile Source, the call only lasted a minute or two longer and that he then hung up. (Foley, Tr. 4578). Foley previously testified that Ryan "immediately" began talking about Smile Source during the call. (CX0306 (Foley IHT at 178)). Further, the discussion about Smile Source is the only thing that Foley was specifically able to recall at trial about the 18 minute phone call. (Foley, Tr. 4579). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1461. Mr. Foley testified that he did not tell Mr. Ryan anything about Schein's approach or strategy regarding buying groups. (Foley, Tr. 4579-80). Mr. Foley also did not disclose any information about Schein's plans with respect to Smile Source, or whether Schein was going to bid. (Foley, Tr. 4579-80).

Response to Proposed Finding No. 1461

The Proposed Finding is contrary to the weight of the evidence. Foley's testimony about the October 1, 2013 phone call is contrary record evidence, including Foley's prior testimony. (See Response to Proposed Finding No. 1459). The record evidence does not support Foley's

testimony that he provided no information in response to Ryan. The weight of the evidence shows that Foley shared information about Schein's policies toward buying groups.

Following the call on October 1, 2013 with Foley, Ryan wrote to his boss, Cohen: "[Smile Source is] [v]ery familiar. Talked to them three times. Nothing is different. Randy at Schein and I talked specifically about them. Buh-bye." (CX0019 at 001; Ryan, Tr. 1101).

Ryan's reference to "Randy" in CX0019 meant Foley. (Ryan, Tr. 1101). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1462. The evidence does not support an inference that Mr. Foley reached any agreement with Mr. Ryan about Smile Source. Mr. Foley's email to Mr. Muller stated that during the call he was "being careful not to cross any boundaries, like collusion." (CX 0243; Foley, Tr. 4705 ("I didn't share any information about Schein or Schein's policies"), 4579 ("I know I did not share any information about Schein or make any return comment about what Schein would do...."))).

Response to Proposed Finding No. 1462

The Proposed Finding is contrary to the weight of the evidence. The weight of the evidence shows that Foley shared information about Schein's policies toward buying groups. Ryan and Foley spoke for 18 minutes; Foley testified that Ryan informed him that Benco would not bid on Smile Source and wanted to know if Schein would bid. (CCFF ¶¶ 1010-1013).

Following the call on October 1, 2013 with Foley, Ryan wrote to his boss, Cohen: "[Smile Source is] [v]ery familiar. Talked to them three times. Nothing is different. Randy at Schein and I talked specifically about them. Buh-bye." (CX0019 at 001; Ryan, Tr. 1101).

Ryan's reference to "Randy" in CX0019 meant Foley. (Ryan, Tr. 1101). Ryan's email does not reference any statement by Foley not to discuss Smile Source or Foley wanting to end the call. Foley's testimony about the October 1, 2013 phone call is contrary to the call log evidence, as well as Foley's prior testimony. (*See* Response to Proposed Finding No. 1459).

Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1463. Mr. Foley only took the call because he believed it to be an attempt to recruit him. (Foley Tr. 4576).

Response to Proposed Finding No. 1463

The Proposed Finding is contrary to the weight of the evidence and irrelevant. Foley's testimony about why he answered the call does not negate the fact that Foley and Ryan discussed Smile Source on the call. (CCFF ¶ 1009-1021). Foley's testimony about the October 1, 2013 phone call is contrary to the call log evidence, as well as Foley's prior testimony. (*See* Responses to Proposed Finding No. 1459). The record evidence does not support Foley's testimony that he provided no information in response to Ryan. The weight of the evidence shows that Foley shared information about Schein's policies toward buying groups. Ryan and Foley spoke for 18 minutes; Foley testified that Ryan informed him that Benco would not bid on Smile Source and wanted to know if Schein would bid. (CCFF ¶¶ 1010-1013). Following the call on October 1, 2013 with Foley, Ryan wrote to his boss, Cohen: "[Smile Source is] [v]ery familiar. Talked to them three times. Nothing is different. Randy at Schein and I talked specifically about them. Buh-bye." (CX0019 at 001; Ryan, Tr. 1101). Ryan's reference to "Randy" in CX0019 ¶ meant Foley. (Ryan, Tr. 1101). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1464. In addition, by this point, Mr. Foley had no responsibility for Smile Source, since (i) the account had been transferred to HSD three years prior, and (ii) this post-dates the creation of Mid-Market, after which primary responsibility for buying groups had shifted to HSD. (Foley, Tr. 4579, 4608 (Mr. Foley "had no responsibility for bidding on Smile Source, [so] I had nothing to share and wouldn't share anything..."); Steck, Tr. 3689; RX 2714).

Response to Proposed Finding No. 1464

The Proposed Finding is contrary to the weight of the evidence and irrelevant. The record evidence shows that Foley did continue to have involvement in HSD's decisions relating to Smile Source in 2014, even though he did not have direct responsibility for the customer.

(Foley, Tr. 4654). The record evidence shows that Foley shared the information he learned from the call with Ryan with Hal Muller, President of Special Markets. (CX0243 at 001; Foley, Tr. 4588-4589). Moreover, Hal Muller internally discussed buying groups with Sullivan. (CCFF ¶ 901).

1465. In fact, on November 20, 2013, less than two months after this communication between Benco's Mr. Ryan and Schein's Mr. Foley, Tim Sullivan told Mr. Goldsmith of Smile Source directly: "[y]es, we absolutely would like to discuss further" and noted that they would "need more than a few minutes together on a convention floor." (RX 2328-001).

Response to Proposed Finding No. 1465

The Proposed Finding is contrary to the weight of the evidence to the extent it asserts or implies that Schein acted differently toward buying groups during the conspiracy, or that Schein's actions were inconsistent with the alleged agreement. Patterson and Benco also agreed to meet with Smile Source in the 2013-2014 period, as Schein concedes in its prior Proposed Findings. (*See* SF 1147, 1154).

Complaint Counsel contends that Schein's 2014 Proposal to Smile Source was an attempt at cheating on the agreement. (*See* Kahn, Tr. 61). The record evidence supports Complaint Counsel's allegations that Schein's interactions with Smile Source in 2014 was an attempt at cheating, and does not undermine Complaint Counsel's allegations of an agreement. (*See* Response to Proposed Finding No. 1156).

1466. As noted below, in contrast to Benco, Schein did seek to negotiate a deal with Smile Source in 2014. Thus, Schein's conduct was not consistent with a conspiracy. (CX 2508; Steck, Tr. 3782; Foley, Tr. 4654; Sullivan, Tr. 4167-70).

Response to Proposed Finding No. 1466

The Proposed Finding is contrary to the weight of the evidence to the extent it asserts or implies that Schein acted differently toward buying groups during the conspiracy, or that Schein's actions were inconsistent with the alleged agreement. Patterson and Benco also

agreed to meet with Smile Source in the 2013-2014 period, as Schein concedes in its prior Proposed Findings. (*See* SF 1147, 1154).

Complaint Counsel contends that Schein's 2014 Proposal to Smile Source was an attempt at cheating on the agreement. (*See* Kahn, Tr. 61). The record evidence supports Complaint Counsel's allegations that Schein's interactions with Smile Source in 2014 was an attempt at cheating, and does not undermine Complaint Counsel's allegations of an agreement. (*See* Response to Proposed Finding No. 1156).

d. Atlantic Dental Care ("ADC").

1467. The Complaint alleges that, "[i]n late February 2013, pursuant to the agreement, each of the Respondents refused to submit a bid for a customer called Atlantic Dental Care ..., as each of the Distributors believed it to be a Buying Group." (Complaint, ¶ 42).

Response to Proposed Finding No. 1467

Complaint Counsel has no specific response.

1468. Complaint Counsel asserts that Respondents' conduct relating to the buying group Atlantic Dental Care ("ADC") demonstrates the existence of an agreement among Respondents to boycott buying groups. (CC Pretrial Br. at 27-32). The evidence does not support that allegation.

Response to Proposed Finding No. 1468

The Proposed Finding is incomplete, misleading, inaccurate, and is not supported by any evidence in the record. The evidence regarding ADC, in combination with the totality of the evidence, demonstrates the existence of an agreement among Respondents not to discount to buying groups. In 2013, ADC approached Schein, Patterson, and Benco asking for a bid for its \$3.5 million dental supply business; all three initially refused to bid, believing it was a buying group. (CCFF ¶¶ 1022-1024 (Benco); CCFF ¶¶ 534-549 (Patterson's initial response to ADC: "I've coached Anthony on how to stay out of this with grace"); CCFF ¶¶ 1097 (CX2021 at 013 (Schein: "Our first reaction to this was it was simply a buying group and we

were going to walk away.”))). Indeed, Benco initially thought ADC was a buying group. (CCFF ¶¶ 1022-1024; CX0021 at 002 (Benco’s initial response to ADC: “We’re out.”); Ryan, Tr. 1093-1094 (admitting that in the middle of the day on March 25, 2013, he believed ADC was a buying group and therefore wrote, “We’re out.”). Despite Benco’s initial reaction, ADC “was adamant that they [were] not a buying group,” but a DSO. (CX0021 at 001 (He Zhao told Patrick Ryan that ADC “is adamant that they are not a buying group and that ADC owns all the practices involved.”). Unsure whether Benco could bid on the customer, Cohen contacted Sullivan to discuss ADC creating a calendar entry reminding him to call Tim Sullivan regarding buying groups on March 25, 2013. (CCFF ¶ 1028). Cohen texted Sullivan asking for a call, and the two set up a time to talk at 5 p.m. on that very day, March 25, 2013. (CCFF ¶¶ 1029-1032). Cohen and Sullivan spoke on the call regarding a customer, ADC. (CCFF ¶¶ 1034-1035). Cohen testified that he and Sullivan were “exchanging information” about whether ADC was a buying group or a DSO. (CCFF ¶¶ 1036-1037). Cohen admitted at trial he was seeking “facts, knowledge, conjecture” from Sullivan to “help us form an opinion and a ruling on how we would handle that account.” (CCFF ¶ 1037; Cohen, Tr. 720). Two days later, Cohen learned, through outside counsel hired by Benco, that ADC was not a buying group. (CCFF ¶¶ 1061-1065). Benco decided to bid. (CCFF ¶ 1066). Cohen contacted Sullivan the same day to tell him that Benco would be bidding on a potential \$3.5 million customer, ADC. (CCFF ¶¶ 1068-1070). After the information that Benco would bid on a potential large customer they had been discussing, Sullivan told his team working on ADC that Benco would bid. (CCFF ¶¶ 1084-1086; CCFF ¶ 1091 (CX2054 at 001)). Cohen admitted at trial that he told Sullivan of Benco’s bidding plans because wanted to maintain “a high level of credibility” with Sullivan (CCFF ¶ 1075-

1076). Patterson declined to bid on ADC, believing that it was a buying group. (CCFF ¶¶ 534-543). On May 31, 2013, Patterson's Guggenheim received an email from a branch manager informing him that Benco had successfully bid on ADC. (CCFF ¶ 565). After learning that Benco bid for and won ADC's business (CX0094), Guggenheim located an email from Cohen from four months earlier, which explained Benco's no buying group policy (CX0056), and he responded to Cohen. (CCFF ¶ 568; Guggenheim, Tr. 1627). On June 6, 2013, Guggenheim sent an email to Cohen and asked his competitor to "shed some light on [Benco's] business agreement with Atlantic Dental Care." (CCFF ¶ 569; CX0095 at 001; Guggenheim, Tr. 1627-1628). Guggenheim viewed Benco's bidding on and doing business with ADC as a deviation from what Cohen previously told him about Benco's policy not to do business with buying groups in February 2013. (CCFF ¶ 572; Guggenheim, Tr. 1628). Cohen understood that Guggenheim's June 2013 email (CX0095) asked how Benco doing business with buying group ADC was consistent with the no buying group policy that Cohen had communicated to Guggenheim in February 2013 (CX0056; CCFF ¶ 573; Cohen, Tr. 561).

i. ADC Issued an RFP in Early 2013.

1469. Complaint Counsel did not introduce any evidence that Schein or Benco refused to submit a bid for ADC in late February 2013, nor did Complaint Counsel present any communications among Respondents in late February 2013 concerning ADC.

Response to Proposed Finding No. 1469

The Proposed Finding is not supported by evidence and is also irrelevant. To the extent that the Proposed Finding suggests that there were no communications among Respondents about ADC in late February 2013, the finding is irrelevant because the relevant communications took place later, beginning in March 2013 when Cohen contacted Sullivan to discuss ADC and when Cohen told Sullivan that Benco will bid on ADC (CCFF ¶ 1069 (quoting CX0196

at 010)); when Sullivan responded to information from Benco about ADC (CCFF ¶¶ 1046-1047; 1069-1070); and finally, months later when Patterson (Guggenheim) followed up about Benco's work with ADC (CCFF ¶ 570); and Cohen responded to Guggenheim with an analysis of why ADC is not a buying group (CCFF ¶ 576). The contemporaneous documents show that Benco and Schein were not going to bid for ADC initially, when they thought it was a buying group. (CCFF ¶ 1097; CX2021 at 013 (Schein: "Our first reaction to this was it was simply a buying group and we were going to walk away."); CCFF ¶¶ 1022-1024; CX0021 at 002 (Benco's initial response to ADC: "We're out.")). Communications between Schein and Benco clearly show that Benco changed its position. (CCFF ¶ 1069 (CX0196) ("Tim: Did some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all the practices. SO it's not a buying group, it's a big group. We're going to bid.")). Further, after that information, Sullivan shared the information that Benco would bid on ADC, (CCFF ¶¶ 1084-1086; CCFF ¶ 1091; CX2054 at 001), and Schein proceeded to bid (CCFF ¶¶ 1093-1097; CX2019; CX2021). Moreover, there is evidence that the Big Three's Cohen, Guggenheim, and Sullivan all attended the Chicago Mid-Winter Meeting together, in-person the last week of February 2013 (CCFF ¶¶ 518-527). On the last day of this Chicago Mid-Winter meeting, a Benco executive in attendance at the meeting sent out messaging to Benco employees reiterating the no buying group policy and informing them that "all of the major dental companies have said, 'NO' [to buying groups], and that's the stance we will continue to take." (CCFF ¶¶ 527; 518-520). The Proposed Finding makes no citation to the record and omits relevant evidence and it should be rejected for all the foregoing reasons.

1470. Schein did not receive ADC's RFP until March 22, 2013, and then it timely submitted a proposal by the RFP's April 8, 2013 deadline (extended from April 5, 2013). (CX 2019; CX 2021; Sullivan, Tr. 4213).¹⁵

Response to Proposed Finding No. 1470

Complaint Counsel had no specific response except to note that relevant anti-competitive communications between Sullivan and Cohen about ADC occurred precisely between March 22, 2013 and April 8, 2013. (CCFF ¶¶ 1022-1092). To the extent that the footnote constitutes a Proposed Finding of Fact, it is misleading and incomplete. Whether or not the VA Beach Buying Group is the same as ADC, the evidence shows that Schein initially planned to walk away from ADC because it was a buying group. Sullivan himself wrote an email about ADC in which he stated that he initially viewed ADC as nothing more than a buying group and planned to "walk away" from the group. (CCFF ¶ 1097). It was not until after conversations with Cohen (in which Cohen informed Sullivan that Benco would bid on ADC because it was not a buying group) that Schein decided to pursue ADC. (CCFF ¶¶ 1069-1070; 1079-1082; 1084-1088; 1091-1095).

1471. Benco timely submitted a proposal to the RFP, and was ultimately awarded the contract. (Cohen, Tr. 724; Ryan, Tr. 1095, 1202).

¹⁵ The record shows that Michael Porro, a Zone General Manager, received an inquiry about a VA Beach Buying Group on February 22, 2013. (CX 2007). Complaint Counsel did not show that this is the same group as ADC, and it appears to be run by different individuals. (*Compare* CX 2007 (Dr. Quigg, and Mr. Holbert) *with* CX 2019 (Messrs. Hosek and Damsey) *and* CX 0020 (listing individuals associated with ADC, which does *not* include either Dr. Quigg or Mr. Holbert)). Even if it were the same entity, however, the Schein FSC and Regional Manager concluded that, offering a discount to the group "could cannibalize our current sales at very reduced margins" and that it "cuts out the FSC." (CX 2007). Mr. Porro agreed with the recommendation from the field that it "was not ... worth pursuing," but he noted he "would love to put together a special program for them...." (CX 2007; CX 2021). Such conduct is consistent with unilateral decision-making. Moreover, Complaint Counsel did not show that Schein actually declined to do business with ADC in late February 2013, and its receipt of the RFP on March 22, 2013 is inconsistent with such an allegation. (*See* CX 2019).

Response to Proposed Finding No. 1471

The Proposed Finding is misleading to the extent it suggests that Benco acted unilaterally with regards to bidding for ADC. Benco communicated its future plans and strategic rationale with regards to ADC with its two most significant competitors. (CCFF ¶¶ 564-588; 1022-1092).

1472. As to Patterson, the record shows that ADC sent Patterson a draft of the RFP in late February 2013, and that Patterson unilaterally decided not to bid for the business. Specifically, on or around February 27, 2013, ADC sent Patterson a copy of a draft RFP that ADC intended to send out. (CX 0092). The same day, Patterson decided not to submit a bid because Patterson does not “currently ... participate with group purchasing organizations.” (CX 0093).

Response to Proposed Finding No. 1472

The Proposed Finding is deficient in numerous ways and should be rejected. First, the Proposed Finding is not supported by the evidence cited in part because it makes several factual statements without any citation. The Proposed Finding offers a citation to CX0092, which shows only that Patterson obtained a draft of an ADC RFP on February 27, 2013. It is unclear from the document how Patterson received it or whether ADC sent it. Further, the document cited shows that Patterson was basing its decision on multilateral rather than unilateral considerations as demonstrated in an omitted part of the exhibit, a Benco executive is concerned about Schein and Benco might “sneak” into this buying group. (CCFF ¶ 549 (quoting CX0093 at 001)). The idea of sneaking makes no sense if there is not an expectation of behavior to deviate from – in this case, that none of the Big Three would bid for an apparent buying group. In addition, Benco cites to CX0093, which also shows the coordinated approach to buying groups, undermining the Proposed Finding’s statement that Patterson’s approach was unilateral. (CX0093 (“Confidential and not for discussion. . . our 2 largest competitors stay out of [buying groups] as well. if you hear differently and have specific proof please send that to me.”)). Finally, Complaint Counsel has no objection to the

cited language in the Proposed Finding that Patterson was “currently” not participating in buying groups as that came after Patterson agreed with Benco to mutually stay away from buying groups in early February interfirm communications about NMDC. (CCFF ¶¶ 474-512).

1473. Complaint Counsel did not introduce any evidence that Patterson communicated with Schein or Benco about its decision not to submit a bid for ADC. (*See* CX 6027).

Response to Proposed Finding No. 1473

The Proposed Finding is incomplete and misleading because it suggests that Patterson did not communicate with Benco about its decision not to bid for ADC, but Guggenheim explicitly challenged Cohen on Benco’s work with ADC, thereby implicitly communicating that Patterson did not bid for ADC. (CCFF ¶ 570 (quoting CX0095 at 001)). The Proposed Finding is also misleading to the extent it suggests that Patterson would have communicated about a decision that is in accord with an agreement not to do business with buying groups; to the extent that Patterson declined a buying group, there would be no need to communicate. Of course, when Patterson thought that Benco had acted outside the agreement by working with buying group ADC, Guggenheim reached out directly and specifically to challenge the perceived aberration in the agreement. (CCFF ¶ 570; CX0095 at 001). The Proposed Finding is also incomplete and misleading because Cohen, Guggenheim, and Sullivan were together at the Chicago Mid-Winter meeting the last week of February 2013. (CCFF ¶ 360). At this meeting, on the last day a Benco executive in attendance at the meeting sent out messaging to Benco employees reiterating the no buying group policy and stating that “all of the major dental companies have said, ‘NO’ [to buying groups], and that’s the stance we will continue to take.” (CCFF ¶¶ 527, 518-520).

1474. Complaint Counsel, nonetheless, asserts than an inference can be drawn that Patterson acted in furtherance of a conspiracy because, in explaining his reasons for not wanting

to bid for ADC, Patterson's Dave Misiak noted that Patterson's "[two] largest competitors stay out of these as well," but that he remained "concerned that Schein and Benco sneak into these co-op bids and deny it." (Complaint ¶ 43 (citing CX 0092 and CX 0093)).¹⁶

Response to Proposed Finding No. 1474

The Proposed Finding is misleading and incomplete to the extent it suggests Complaint Counsel relies on a snippet of a communication to show that Patterson acted in furtherance of a conspiracy. There are many pieces of evidence not mentioned in the Proposed Finding Complaint Counsel relies on to show Patterson acted in furtherance of the conspiracy. At the most specific level the Proposed Finding is misleading and incomplete because it does not share the entire Misiak statement by leaving out contextual statements before and after the quoted words "our two largest competitors stay out of these as well." The full statement is relevant: "Confidential and not for discussion ..our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me." (CX0093 at 001 (emphasis in original); Misiak, Tr. 1356-1358). The Proposed Finding is misleading and incomplete generally because Patterson had refused to bid on ADC with the explicit understanding that Schein and Benco would act similarly. (CX0092; CX0093). But, when Guggenheim learned that Benco bid on and won the ADC account he sought reassurance of Benco's commitment not to discount to buying groups, just like Patterson. (CX0095; CCFF ¶¶ 564-575). Cohen replied to Guggenheim's June 6, 2013 email (CX0095) two days later on June 8, 2013, and he reiterated to Guggenheim that Benco had a no buying-group policy in detail. (Cohen, Tr. 561-562; CX0062 at 001).

1475. The inference is not warranted. Mr. Misiak's communication is consistent with lawful, interdependent behavior, and is inconsistent with a conspiracy. The reference to the

¹⁶ The Complaint also cites an internal Benco text message between Mr. Cohen and Don Taylor about the New Mexico Dental Co-Op, in which Mr. Cohen references a note he sent Patterson's Mr. Guggenheim. (Complaint ¶ 41 (citing CX 0057-006)). Mr. Cohen testified that the note referred to in the text message is the same email he had sent Mr. Guggenheim on February 8, 2013. (Cohen, Tr. 539).

actions of Schein and Patterson is simply an observation about competitors' conduct gleaned from normal competitive intelligence. Mr. Misiak credibly testified that his remark merely reflected his *opinion* based on his experience. (Misiak, Tr. 1357).

Response to Proposed Finding No. 1475

The Proposed Finding is misleading, incomplete, against the weight of the evidence, and is not supported by the record as a whole or by the cited evidence. The Proposed Finding is misleading and incomplete to the extent that it omits facts showing that the reason why Patterson had earlier decided not to bid for the ADC business was precisely because it believed ADC was a buying group. For example, in response to Fruehauf's February 27, 2013 email regarding ADC's bid proposal (CX0092), Misiak instructed Fruehauf and his sales team to "stay out" of selling to GPOs. (CX0093 at 001; Misiak, Tr. 1349, 1354-1355, 1358, 1368; *see also* CX0316 (Misiak, IHT at 243) ("Q. Is it fair to say that you told Anthony to not submit a bid for this Atlantic Dental Care group? A. I think, yeah, that's what I say in this email.")). The record evidence shows that Patterson chose not to bid for ADC because it also believed that Benco and Schein would not bid on ADC because it was a buying group. Thus, in response to Fruehauf's email asking for guidance in responding to a manager's communications about ADC's request for a bid (CX0092), Misiak informed Fruehauf that Schein and Benco – like Patterson – did not participate in buying groups in response. (CX0093 at 001) [REDACTED]

[REDACTED] (emphasis in original); *see also* Misiak, Tr. 1356-1358). Misiak also immediately forwarded Fruehauf's email to Guggenheim, again showing interdependence with regard to buying groups and ADC specifically mentions Schein and Benco again (CX0092 at 001; CCFF ¶539). Misiak stated in his cover email to Guggenheim that he had "coached Anthony [Fruehauf] on how to stay out of this with grace" and that he

was concerned that “Schein and Benco sneak into these co-op bids and deny it.” (CX0092 at 001; *see also* Misiak, Tr. 1371).

1476. Further, Mr. Misiak’s view that Schein “stay[s] out” of buying group relationships is inaccurate, and contradicted by evidence in Patterson’s own files. (CX 0093; Misiak, Tr. 1314-15, 1327; CX 3117; CX 0087).

Response to Proposed Finding No. 1476

The Proposed Finding is misleading and inaccurate to the extent that it suggests that Schein did not have a no buying group policy during the conspiracy. The weight of the evidence shows that Schein instituted a no buying group policy by December 2011. (CCFF ¶¶ 717-870). Complaint Counsel does not object to the statement that Mr. Misiak’s understanding that Schein and Benco stay out of buying groups was contrary to market intelligence.

Indeed, Misiak understood that Schein and Benco “stay out” of buying groups in spite of market intelligence to the contrary. (CCFF ¶ 549; CX0087).

1477. Moreover, Complaint Counsel has not identified any communications between Patterson and Schein from which such knowledge was supposedly gleaned. As for Mr. Misiak’s concern about Schein or Benco “sneaking” into a buying group relationship, such a comment simply reflects the fact that, in a concentrated market, competitors might try to take advantage of a business opportunity while hoping that other competitors do not catch on and follow suit. The absence of a communication between Patterson and Schein or Benco about ADC seeking to allay Mr. Misiak’s concern undermines any inference of a conspiracy.

Response to Proposed Finding No. 1477

The Proposed Finding is misleading and contrary to the weight of the evidence. Misiak specifically wrote that Schein and Benco staying out of these as well as “Confidential and not for discussion,” (CX0093), illustrating that the information was secretive and should be kept hidden and quiet; this suggests that the information was gathered in a discrete way, and was not mere market intelligence. (CCFF ¶¶ 358, 380-383, 379, 363; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment B). Further, the Proposed Finding is illogical: there can be no “sneaking” without mutual expectations of behavior. In fact, the Proposed

Finding inherently suggests the “sneaking” Misiak referenced was taking advantage of the business opportunity of buying groups when the other distributors did not; this is consistent with the allegations in this matter. The timing of this email is notable because it was a mere weeks after Cohen and Guggenheim exchanged assurances that neither would do business with buying groups. (CCFF ¶¶ 474-500). It was also just a few days after Guggenheim, Misiak, and Rogan for Patterson; Cohen and Ryan for Benco, and Sullivan for Schein all attended the Chicago Dental Society industry meeting held from February 21, 2013 through February 23, 2013, and had an opportunity to discuss buying groups together. (CCFF ¶¶ 519-526). On February 23, 2013, the last day of that Chicago Dental Society industry meeting, Ryan of Benco expressed the same message to his employees at Benco: “[A]ll of the major dental companies have said, ‘NO’ [to buying groups], and that’s the stance we will continue to take.” (CCFF ¶¶ 527-528). And a mere days after that, on February 27, 2013, Misiak wrote, “Confidential and not for discussion . . . our 2 largest competitors stay out of these as well.” (CCFF ¶ 549). Complaint Counsel has no objection to the Proposed Finding’s admissions that the dental distribution market is “concentrated” and that working with buying groups was a “business opportunity” to dental distributors.

1478. The preponderance of the evidence does not support the conclusion that Schein, Patterson, and Benco conspired to refuse to submit a bid on ADC in late February 2013. The evidence also does not support the conclusion that Patterson made its decision based on the earlier exchange between Patterson and Mr. Cohen about the New Mexico Dental Co-Op.

Response to Proposed Finding No. 1478

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that Patterson did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement, including instructing its team not to do business with buying groups. The weight of the evidence shows that

Guggenheim communicated with its competitor Benco and Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). Misiak received a copy of Cohen's email on February 8, 2013, clearly stating Benco's no buying group policy. (CCFF ¶ 491; CX0091 at 001; Misiak, Tr. 1329). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). Within a few weeks of Guggenheim's February 8, 2013 email with Cohen (CX0090), Patterson began instructing sales representatives to "stay out" of buying groups. In CX0093, which is a primary example of those communications to the sales team, Misiak instructed his team on February 27, 2013, to "stay out" of buying groups. The evidence shows that Patterson did not make any independent determination of whether it made business sense to do business with ADC. Rather, upon hearing (incorrectly) that ADC was a buying group, Misiak instructed his Regional Manager to "stay out." (CCFF ¶¶ 541-546; CX0093 at 001). There is no question that Misiak knew about Benco's policy when he wrote to Fruehauf about ADC. (CCFF ¶ 491). His statement that "**Confidential and not for discussion ..our 2 largest competitors stay out of these as well**" (CX0093 at 001) (emphasis in the original) shows that he was aware of at least some of the communications underlying the agreement. The weight of the evidence does not support the Proposed Finding.

1479. In any event, evidence of communications between Benco and Patterson about the New Mexico Dental Co-Op or ADC does not implicate Schein.

Response to Proposed Finding No. 1479

The Proposed Finding is misleading, not supported by any cited evidence, and against the weight of the evidence. The evidence shows that Respondents' refusal to do business with buying groups was part of one overarching conspiracy, orchestrated by Benco as the

ringleader. Respondents' contemporaneous documents, replete with explicit references to the Big Three collectively turning down buying groups, demonstrate that each understood the agreement reached all three of them. For example, Benco informed its team that "all of the major dental companies [referring specifically to *Benco, Patterson, and Schein*] have said, 'NO', and that's the stance we will continue to take." (CCFF ¶ 527). Patterson's similarly refer to an overarching agreement among all three Respondents: "[W]e don't need GPO's in the dental business. Schein, Benco, and Patterson have always said no" (CCFF ¶ 1190) and "[c]onfidential and not for discussion ... our 2 largest competitors [*Schein and Benco*] stay out of these as well." (CCFF ¶ 1187). As do Schein's documents: "[t]he good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums," (CCFF ¶ 1185) and "Schein, PDCO and Benco all refused to bid on their business when they entered the GPO/Buying Group world." (CX2094 at 001; *see also* CCFF ¶ 1195).

Moreover, the nature, scope, and goal of Benco's agreement with Patterson was identical to those of Benco's agreement with Schein. (*See* Complaint Counsel's Post-Trial Brief, at 58-60). Additionally, executives from the Big Three communicated with one another about their anticipated response to the TDA buying group. (CCFF ¶¶ 1118-1137). And, erasing any doubt of the overarching conspiracy among all Respondents, when the regional distributor, Burkhardt, rebuffed Benco's invitation to stop working with buying groups (CCFF ¶ 1240) Benco's Ryan asked Cohen to tell Schein and Patterson to stay the course on their no buying group position, just as Benco was maintaining its policy: "CHUCK---maybe what you should do is make sure you tell Tim [Sullivan of Schein] and Paul [Guggenheim of Patterson] to hold their positions as we are." (CCFF ¶¶ 1103-1105).

ii. Schein and Benco's Proposals to ADC in April 2013 Are Not Evidence of an Agreement.

1480. The Complaint alleges that following Patterson's decision not to bid for ADC, "Benco, Schein, and Patterson executives then began communicating about whether ADC was, in fact, a [b]uying [g]roup." (Complaint ¶ 44).

Response to Proposed Finding No. 1480

The Proposed Finding is misleading and inaccurate to the extent it suggests Complaint Counsel alleged that Patterson made an independent decision not to bid for ADC. Rather, Complaint Counsel alleges and the evidence shows Patterson did not bid for ADC because it believed ADC was a buying group. (CCFF ¶¶ 564-583). It is undisputed that Cohen, Sullivan, and Guggenheim communicated about whether ADC was in fact a buying group. (CCFF ¶¶ 570-583; 1034-1036).

1481. Complaint Counsel has not identified any communication between Schein and Patterson about ADC. Complaint Counsel has also failed to identify any communication between Patterson and Benco prior to Benco's submission of a bid in April 2013 about whether ADC was a buying group. The communications about ADC that Complaint Counsel has identified do not show the existence of an agreement among the Respondents, and do not support any inference that Schein was involved in any such agreement.

Response to Proposed Finding No. 1481

The Proposed Finding is compound, misleading, incomplete, not supported by any evidence, and against the weight of the totality of evidence. The Proposed Finding is misleading and not supported by any cited evidence to the extent it suggests that Patterson and Benco would have communicated about whether ADC was a buying group prior to April 2013. Patterson believed ADC was a buying group turned it down in accord with the agreement with no need for communication: Patterson expected Benco would do the same. (CCFF ¶¶ 538-549) (instructing sales force to deny ADC because it was a buying group and noting that Schein and Benco likewise did not participate in buying groups). Communications between Patterson and Benco on ADC were only necessary when Benco did not behave the way

Patterson expected under the shared no-buying group policy, that is Guggenheim viewed Benco's bidding on and doing business with ADC as a deviation from the agreement and what Cohen previously told him in February 2013 about Benco's policy not to do business with buying groups (CX0056; Guggenheim, Tr. 1628; CCFF ¶¶ 570, 572). The record also shows that in June 2013, when Guggenheim learned that Benco was working with ADC, which Patterson thought was a buying group, Guggenheim initiated a communication with Cohen – expressly referencing the earlier communications by attaching Cohen's February email to the new communication – and asking if Benco was changing its position. (CCFF ¶ 570 (CX0095 at 001 ("I'm wondering if your position on buying groups is still as you articulated back in February? Let me know your thoughts. . . . Sometimes these things grow legs without our awareness!")))).

The Proposed Finding is also misleading and incomplete as it suggests that communications about ADC do not show the existence of an agreement against discounting to buying groups. In 2013, ADC approached Schein, Patterson, and Benco asking for a bid for its \$3.5 million dental supply business; all three initially refused to bid, believing it was a buying group. (CCFF ¶¶ 1022-1024 (Benco); CCFF ¶¶ 534-549 (Patterson's initial response to ADC: "I've coached Anthony on how to stay out of this with grace"); CCFF ¶ 1097 (CX2021 at 013 (Schein: "Our first reaction to this was it was simply a buying group and we were going to walk away."))). Indeed, Benco initially thought ADC was a buying group. (CCFF ¶¶ 1022-1024; CX0021 at 002 (Benco's initial response to ADC: "We're out.")). Ryan, Tr. 1093-1094 (admitting that in the middle of the day on March 25, 2013, he believed ADC was a buying group and therefore wrote, "We're out.")). Despite Benco's initial reaction, ADC "was adamant that they [were] not a buying group," but a DSO. (CX0021 at 001 (He Zhao told

Patrick Ryan that ADC “is adamant that they are not a buying group and that ADC owns all the practices involved.”). Unsure whether Benco could bid on the customer, Cohen contacted Sullivan to discuss ADC creating a calendar entry reminding him to call Tim Sullivan regarding buying groups on March 25, 2013. (CCFF ¶ 1028). Cohen texted Sullivan asking for a call, and the two set up a time to talk at 5 p.m. on that very day, March 25, 2013. (CCFF ¶¶ 1029-1032). Cohen and Sullivan spoke on the call regarding a customer, ADC. (CCFF ¶¶ 1034-1035). Cohen testified that he and Sullivan were “exchanging information” about whether ADC was a buying group or a DSO. (CCFF ¶¶ 1036-1037). Cohen admitted at trial he was seeking “facts, knowledge, conjecture” from Sullivan to “help us form an opinion and a ruling on how we would handle that account.” (CCFF ¶ 1037). Two days later, Cohen learned, through outside counsel hired by Benco, that ADC was not a buying group. (CCFF ¶¶ 1061-1065). Benco decided to bid. (CCFF ¶ 1066). Cohen contacted Sullivan the same day to tell him that Benco would be bidding on a potential \$3.5 million customer, ADC. (CCFF ¶¶ 1068-1070). After the information that Benco would bid on a potential large customer they had been discussing, Sullivan told his team working on ADC that Benco would bid. (CCFF ¶¶ 1084-1086; CX2054 at 001). Cohen admitted at trial that he told Sullivan of Benco’s bidding plans because wanted to maintain “a high level of credibility” with Sullivan (CCFF ¶ 1075-1076). Patterson declined to bid on ADC, believing that it was a buying group. (CCFF ¶¶ 534-543). On May 31, 2013, Patterson’s Guggenheim received an email from a branch manager informing him that Benco had successfully bid on ADC. (CCFF ¶ 565). After learning that Benco bid for and won ADC’s business (CX0094), Guggenheim located an email from Cohen from four months earlier, which explained Benco’s no buying group policy (CX0056), and he responded to Cohen. (CCFF ¶

568; Guggenheim, Tr. 1627). On June 6, 2013, Guggenheim sent an email to Cohen and asked his competitor to “shed some light on [Benco’s] business agreement with Atlantic Dental Care.” (CCFF ¶ 569; CX0095 at 001; Guggenheim, Tr. 1627-1628). Guggenheim viewed Benco’s bidding on and doing business with ADC as a deviation from what Cohen previously told him about Benco’s policy not to do business with buying groups in February 2013 (CX0056). (CCFF ¶ 572; Guggenheim, Tr. 1628). Cohen understood that Guggenheim’s June 2013 email (CX0095) asked how Benco doing business with buying group ADC was consistent with the no buying group policy that Cohen had communicated to Guggenheim in February 2013 (CX0056; CCFF ¶ 573; Cohen, Tr. 561).

iii. Communications Between Benco and Schein Relating to ADC Are Not Evidence of an Agreement.

1482. On March 25, 2013, Mr. Cohen received an internal email from Mr. Ryan, attaching an article about ADC’s recent securities offering and noting that he could not “figure out if [ADC] is a buying group or not.” (CX 0020; Ryan, Tr. 1203).

Response to Proposed Finding No. 1482

Complaint Counsel has no specific response.

1483. Following that discussion, Mr. Cohen sent an unsolicited text message to Mr. Sullivan at 3:13 pm on March 25, 2013, asking if Mr. Sullivan was “[a]vailable to talk.” (CX 6027-027; CX 0196-001; Sullivan, Tr. 4187-88).

Response to Proposed Finding No. 1483

Complaint Counsel objects to the term “unsolicited” to the extent that it suggests that Sullivan was not a willing participant in communications with Cohen. (See CCFF ¶¶ 1031, 1033, 1035, 1047, 1058-1060). Complaint Counsel has no specific response to the remainder of this Proposed Finding.

1484. In his text message, Mr. Cohen did not indicate the subject matter he wished to talk about, and Mr. Sullivan testified that he did not know what Mr. Cohen wanted to talk about. (CX 6027-027; Sullivan, Tr. 4187-88; Cohen, Tr. 889).

Response to Proposed Finding No. 1484

Complaint Counsel has no specific response but would note however that Sullivan and Cohen had both attended the Hinman Dental Trade Show just one week earlier. (CCFF ¶ 387). Their interactions there may have obviated the need for specificity in this March 25, 2013 text message.

1485. Mr. Sullivan responded to Mr. Cohen's text message that he was available at 5:00 pm eastern, and he called Mr. Cohen at that time. (CX 6027-027; CX 0196-002).

Response to Proposed Finding No. 1485

Complaint Counsel has no specific response, except to note Sullivan responded within minutes to Cohen's request to talk. (CX 6027 at 027).

1486. Call records show that the call lasted 8 minutes and 35 seconds, but the records do not reveal the content of the call. (CX 6027-027). Both Mr. Cohen and Mr. Sullivan testified about the call.

Response to Proposed Finding No. 1486

Complaint Counsel has no specific response.

1487. Mr. Cohen testified that he did not have a specific recollection of what was said on the March 25, 2013 call. But, based on his review of the documents before and after the call, he believes he called to find out if Mr. Sullivan had any information about ADC, since he could not determine whether it was a buying group. (Cohen, Tr. 553 ("Q. Can you think of any business reason why you and Mr. Sullivan were talking about Atlantic Dental Care? A. Gathering market intelligence."), 721 ("[I]t was to find out if Tim had any information about Atlantic Dental Care.")).

Response to Proposed Finding No. 1487

The Proposed Finding is misleading, contrary to the weight of the evidence, and incomplete.

The cited testimony does not support the Proposed Finding that Cohen only had a recollection of the call based on his review of the documents before and after the call; Cohen did not provide that testimony on the cited pages. Further, Cohen testified that he and Sullivan were "exchanging information about whether Atlantic Dental Care was a . . . group

purchase organization or a DSO.” (CCFF ¶ 1036). Cohen also admitted at trial he was seeking “facts, knowledge, conjecture” from Sullivan to “help us form an opinion and a ruling on how we would handle that account.” (CCFF ¶ 1037; Cohen, Tr. 720). The Proposed Finding is also incomplete because both Cohen and Sullivan testified that ADC was discussed in their call on March 25, 2013. (CCFF ¶¶ 1034-1035).

1488. Mr. Cohen denied having reached any agreement with Mr. Sullivan about ADC, or discussing Benco’s no buying group policy on that call. (Cohen, Tr. 899 (“we did not reach any agreement”), 877-78 (“Q. Did you share this policy with Mr. Sullivan on that call? A. I did not. Q. Did you ever send this policy to Mr. Sullivan? A. I did not.”). Mr. Sullivan corroborated this testimony. (Sullivan, Tr. 3944 (“Q. [D]id Chuck Cohen ever share with you that Benco had a policy of not selling or offering discounts to buying groups? A. He did not. Q. Did Chuck Cohen ever share with you that Benco had a no buying group policy? A. He did not.”), 3946, 4189).

Response to Proposed Finding No. 1488

The Proposed Finding is misleading and against the weight of the evidence. The Proposed Finding is misleading to the extent it suggests that Complaint Counsel must or should show that Schein and Benco reached an agreement on a particular phone call for which there is no transcript. However, the communications about ADC (CCFF ¶¶ 1025-1055), in combination with the totality of the evidence, establish that Benco and Schein reached an agreement not to discount to buying groups. (CCFF ¶¶ 661-1158, 1167-1198). Both Cohen and Sullivan admit the purpose of the telephone call was to discuss ADC (CCFF ¶¶ 1034-1044; BFF 500; Cohen, Tr. 546, 968; CX0301 (Cohen IHT at 271); (Sullivan, Tr. 3946-3947; CX0311 (Sullivan, IHT at 261)). Sullivan testified under oath at his investigational hearing that, in his March 25, 2013 call with Cohen, Cohen “basically said to me that they [Benco] don’t plan to, you know, bid on their– this group . . .” (CCFF ¶¶ 1040; CX0311 (Sullivan, IHT at 260-261); *but see* CCFF 1042 (Sullivan no longer remembered the content of the call by trial.).

Multiple communications on the day of the call between Cohen and Sullivan refer to ADC

and reflect frequent, friendly, responsive communications. (CCFF ¶¶ 1044-1047). To set up the call, Cohen texted Sullivan asking for a time to talk, and two minutes later Sullivan responded and set a time to talk that day. (CCFF ¶ 1030). Sullivan and Cohen spoke on March 25 for 8 minutes and 35 seconds (CCFF ¶ 1032, BFF 498). Four minutes after that call, Sullivan reached out to Cohen to thank him for the ADC call. (CCFF ¶¶ 1033, 1051, 1058; CX6027 at 027 (Row 241) (“Hi Chuck. Thanks for the call.”); Sullivan, Tr. 3957). Next, in the evening of the same day, March 25, 2013, Cohen sent Sullivan a link to an article about ADC by text stating “Here’s a link to the press release we discussed.” (CCFF ¶¶ 1045-1046; CX6027 at 028 (Row 243)). A few minutes later, Sullivan responded “Thanks for the follow up on that article.” (CCFF ¶ 1047; CX6027 at 028 (Row 244); Cohen, Tr. 546; Sullivan, Tr. 3957). Two days later, Cohen texted Sullivan that Benco would in fact bid for the customer that the two men had been discussing precisely *because* ADC was “not a buying group.” (CCFF ¶ 1069; CX0196 at 010 (“Tim: Did some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all the practices. So it’s not a buying group, it’s a big group. We’re going to bid. Thanks.”); Cohen, Tr. 549). There is simply no way to read that text in the absence of an understanding between Cohen and Sullivan about Benco's no buying group policy. Indeed, Cohen’s own explanations for the ADC communications inherently reflect mutual expectations about how the companies would approach buying group customers. At trial, Cohen testified he shared his customer bidding strategy with his competitor because he didn’t want his competitor to think Benco was “duplicitous” or “was trying to head-fake them” (Cohen, Tr. 723; CCFF ¶ 1076). There can be no head-fake or duplicity without prior shared expectations, in this case that Benco

had committed to a no-buying group policy. Finally, Cohen admitted at trial he shared Benco's no buying group policy with Sullivan. (CCFF ¶ 624).

1489. Mr. Cohen also stated he does not recall Mr. Sullivan revealing any information about Schein's policies, plans, or practices concerning ADC or buying groups generally. (Cohen, Tr. 899).

Response to Proposed Finding No. 1489

The Proposed Finding is misleading and against the weight of the evidence. The Proposed Finding is misleading to the extent it suggests Benco did not enter into an agreement with Schein, as defined under Section 1 of the Sherman Act, to refuse to discount to buying groups. The competitors' communications about ADC, combined with the testimony, and the totality of Complaint Counsel's evidence, establishes that Benco and Schein reached an agreement. (CCFF 1025-1055; *see also* CCFF ¶¶ 661-1158, 1167-1198)). The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that Cohen and Sullivan did not discuss ADC on the March 25, 2013 telephone call, as described in Complaint Counsel's Responses to Proposed Finding Nos. 1487-1488. The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Cohen testified that Sullivan did not ever reveal Schein's policies, plans, or practices concerning buying groups. The weight of the evidence shows that Benco gained an understanding that Schein had a policy against doing business with buying groups following conversations with Sullivan in 2011. (CCFF ¶ 680; *see also* 661-684). The evidence shows that throughout 2011, Cohen received market intelligence indicating that Schein was working with buying groups. Based on that market intelligence, Cohen understood that Schein worked with buying groups in 2011. (CCFF ¶¶ 665-673). By 2012, however, Cohen no longer believed that Schein would be working with the buying group Smile Source. (CCFF ¶¶ 674-678). In 2013 and 2014, Cohen likewise did not believe

that Schein was in the buying group space. (CCFF ¶¶ 675-678). Cohen's belief that Schein was not working with buying groups was *contrary* to the market intelligence that he received indicating that Schein did work with buying groups. (CCFF ¶¶ 665-673, 684-685). Indeed, Cohen continued to receive market intelligence indicating that Schein worked with buying groups throughout the conspiracy. CCFF ¶¶ 665-673, 684-685; *see also* CX1104; Ryan, Tr. 1252 (testifying that he received an August 2014 email in which Benco territory reps reported to Ryan that Henry Schein was working with Schulman Group). Consistent with Cohen's knowledge, 2011 was the year that Schein, at the direction of Tim Sullivan, changed its buying group strategy. While Schein had discounted to buying groups historically and profited from such arrangements, by late 2011, Sullivan informed his employees that he did "NOT want to lead in getting" the buying group initiative started in dental. CCFF ¶¶ 709; *see also* CCFF ¶¶ 712-716. It is also undisputed that Benco's Cohen and Schein's Sullivan communicated on multiple occasions throughout 2011. Between March and December 2011 alone, Cohen and Sullivan called each other at least 13 times for a total duration of 50 minutes and 14 seconds. (CCFF ¶ 347 (CX6027 at 012, 016-017)). Cohen and Sullivan also exchanged a total of 89 text messages in 2011, 23 of which the content was not produced and may have contained buying group communications. (CCFF ¶¶ 349-350 (CX6027 at 003-018)). Six of the 23 text messages for which Respondents did not produce content occurred between March and December 2011. (CX6027 at 005, 010-011, 014 (Rows 62, 63, 64, 106, 110, 133)). Sullivan exchanged additional communications with Cohen, including written notes and voicemail messages, that are not reflected in CX6027. (CCFF ¶¶ 353-354 (Sullivan, Tr. 3885 (Sullivan produced all cell phone records but could have called Cohen from a land line)); Cohen, Tr. 526 (Cohen sent Sullivan notes by mail from time to time);

Sullivan, Tr. 3886 (“Q: And you didn’t keep all of the notes that Chuck Cohen sent you over the years, right? A: No.”)). Cohen and Sullivan saw each other at multiple industry events in 2011. (CCFF ¶¶ 358, 380, 379, 381, 363, 383; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment B). The evidence also shows that Cohen “communicate[d] Benco’s no-buying group policy to Mr. Sullivan.” (CCFF ¶¶ 662-664). Contemporaneous internal company documents also demonstrate that Benco was confident that Schein rejected buying groups during the conspiracy notwithstanding market intelligence to the contrary. For example, Benco’s Ryan instructed Benco’s sales team in 2013: “It [doesn’t] catch on here, because so far, all of the major dental companies have said, ‘NO’ [to buying groups], and that’s the stance we will continue to take.” (CCFF ¶¶ 527-528 (CX1149 at 002 (emphasis in original))); Ryan, Tr. 1075-1078, 1080-1083); *see also* CCFF ¶¶ 1191, 1193, 1103)).

1490. Mr. Sullivan testified that he did not tell Mr. Cohen Schein’s “philosophy about buying groups during this call.” (Sullivan, Tr. 4190).

Response to Proposed Finding No. 1490

The Proposed Finding is vague, misleading, and incomplete. The Proposed Finding is vague as it does not indicate the particular call. But to the extent it was the 8 minute call on March 25, 2013, in which Cohen and Sullivan “exchang[ed] information about whether Atlantic Dental Care was a [] group purchasing organization or a DSO.” (CCFF ¶ 1036). While Sullivan changed his testimony at trial, his trial testimony confirmed that he and Cohen discussed Atlantic Dental Care. (CCFF ¶ 1035; Sullivan, Tr. 3946). Previously, Sullivan testified that during that call, Cohen “basically said to me that they [Benco] don’t plan to, you know, bid on their – this group.” (CCFF ¶ 1038). Evidencing a conscious commitment to Schein, Benco’s Cohen shared confidential information with Sullivan, noting that Benco was “going to bid” because ADC was “not a buying group.” (CCFF ¶¶ 1069 (quoting

CX0196 at 010), 1068, 1069-1070). Following Sullivan's receipt of Cohen's March 27, 2013 text message, Sullivan and Cohen tried to reach each other on the telephone several times. On April 3, 2013, they finally connected and spoke for 5 minutes and 36 seconds. (CCFF ¶¶ 1079-1080, 1088).

The Proposed Finding is also misleading and incomplete because evidence shows that as a result of communications with Schein, Benco understood that Schein would adopt a policy against recognizing buying groups. (CCFF ¶¶ 680, 675-678; *see also* Response to Proposed Finding No. 1489). Cohen testified that, based on text messages with Sullivan, he understood that "the policy that Henry Schein had was that they do not recognize GPOs." (CCFF ¶ 676). Consistent with Benco's understanding, Schein adopted a no buying group strategy beginning in late 2011. (CCFF ¶¶ 705-870). Benco and Schein communicated about buying groups multiple other times during the conspiracy. (*E.g.*, CCFF ¶¶ 965-972).

1491. Mr. Sullivan testified that Mr. Cohen asked about ADC on the March 25, 2013 call, that Mr. Sullivan did not know anything about ADC at the time of the call, that he informed Mr. Cohen that they should not be talking about specific customers, and that he tried to change the subject. (Sullivan, Tr. 3946; CX 8025 (Sullivan, Dep. at 344-45, 401-03) (Mr. Sullivan "shut [] down" the conversation and switched the topic to joking about Mr. Cohen recruiting Mr. Sullivan)).

Response to Proposed Finding No. 1491

The Proposed Finding is misleading, incomplete, contrary to the weight of the evidence, and irrelevant in part. The Proposed Finding is irrelevant to the extent that Mr. Sullivan testified at trial he did not know anything about ADC before the call because whether Sullivan knew of ADC before the call, it is undisputed that ADC was discussed in that call, and after the call, Sullivan thanked Cohen. (CCFF ¶¶ 1034-1036, 1038, 1044-1047). The Proposed Finding is also misleading, incomplete and contrary to the weight of the evidence. *First*, Sullivan's contemporaneous communications with Cohen belie the assertion that Sullivan

shut down the conversation or admonished Cohen. Immediately following the March 25, 2013 call, Sullivan thanked Cohen and joked with him. (CCFF ¶¶ 1051-1053). After Cohen promptly sent further information clarifying that ADC was not a buying group, Sullivan thanked him again. (CCFF ¶¶ 1057-1058). And after Cohen sent additional information, *Sullivan* tried to call Cohen two times on March 27, 2013 and April 3, 2013. (CCFF ¶¶ 1079-1080; CX6027 at 028 (Row 247), 029 (Row 250), 029 (Row 255)). Further, despite Sullivan's purported concerns with the call, Sullivan never reported or documented his communications with Cohen about ADC in 2013 to Schein's legal department or anyone else, as he was required to do under Schein's antitrust policy. (CCFF ¶¶ 1049-1050).

Second, Cohen's testimony about the same communications contradicts Sullivan's testimony. Cohen testified at trial that he did not recall Sullivan ever telling Cohen to stop contacting him about buying groups. (CCFF ¶ 1055). Cohen also testified that Sullivan never gave Cohen the impression that they should not be talking about buying groups. (CCFF ¶ 1056). Even Sullivan testified that he has never known Cohen to lie, so Cohen's testimony on this point should be credited. (CX0311 (Sullivan, IHT at 271) ("Q. Have you known Mr. Cohen to lie? A. I know him as an odd personality but to flat out lie, no. I don't communicate that much with him to tell you the truth, but it's -- I don't know him to have lied.")). Cohen also testified that if a rival told him to stop communicating, he would do so. (Cohen, Tr. 968-969). But Cohen did not stop communicating with Sullivan regarding buying groups: in the days following the March 25, 2013 telephone call, Cohen texted Sullivan twice about buying groups. (CCFF ¶¶ 997-1000, 1069). The Proposed Finding also omits that Sullivan contradicted himself under oath regarding the March 25, 2013 call. Sullivan initially testified that Cohen informed him on the March 25, 2013 call that Benco did not plan to bid on the

ADC group. (CCFF ¶¶ 1038-1043; *but see* Sullivan, Tr. 3948 (acknowledging that his testimony changed). In fact, Sullivan testified on three separate occasions at his investigational hearing that Cohen informed Sullivan that Benco did not plan to bid on the ADC group on the March 25, 2013 call: (1) Cohen “basically said to me that they [Benco] don’t plan to, you know, bid on their – this group . . .” (CCFF ¶ 1038; CX0311 (Sullivan, IHT at 260-261)); (2) “Q. During the call Mr. Cohen indicated to you that they were not going to bid on Atlantic Dental Care because it was a buying group; is that right? A. I don’t recall him saying why, just that he was – they were not going to go bid on it.” (CCFF ¶ 1039; CX0311 (Sullivan, IHT at 299-300)); (3) on the March 25, 2013 call, Cohen said, “we’re not interested” in ADC. (CCFF ¶ 1041; CX0311 (Sullivan, IHT at 261)). Similarly, Sullivan testified at his investigational hearing that he had no recollection of why he called Cohen on March 27, 2013, but that it was not even “possible” that the call related to ADC. (CX0311 (Sullivan, IHT at 306)). Sullivan later self-servingly testified that it was his intent on March 27, 2013 to “remind” Cohen that they “should not be talking about this.” (CX8025 (Sullivan, Dep. 409-410; *see also* Sullivan, Tr. 3963, 3965)). Sullivan changed his testimony another time regarding an April 3, 2013 telephone call with Cohen. Sullivan initially testified that he did not believe it was “possible” that the call related to ADC. (CCFF ¶ 1089). Sullivan then changed his story at his deposition to insist that he told Cohen on April 3, 2013 that it was inappropriate to discuss ADC. (CX8025 (Sullivan, Dep. 415, 416)).

The Proposed Finding is also misleading to the extent it suggests Benco did not enter into an agreement with Schein, as defined under Section 1 of the Sherman Act, to refuse to discount to buying groups. The competitors’ communications about ADC, combined with the testimony, and the totality of Complaint Counsel’s evidence, establishes that Benco and

Schein reached an agreement. (CCFF 1025-1055; *see also* CCFF ¶¶ 661-1158, 1167-1198)).

The weight of the evidence shows that Benco gained an understanding that Schein had a policy against doing business with buying groups following conversations with Sullivan in 2011. (CCFF ¶ 680; *see also* 661-684). Cohen understood that Schein worked with buying groups in 2011. (CCFF ¶¶ 665-673). By 2012, however, Cohen no longer believed that Schein would be working with the buying group Smile Source. (CCFF ¶¶ 674-678). In 2013, Cohen likewise did not believe that Schein was in the buying group space. (CCFF ¶¶ 675-678). Cohen's belief that Schein was not working with buying groups was *contrary* to the market intelligence that he received indicating that Schein did work with buying groups and thus based on the agreement.

1492. Mr. Sullivan testified "[Mr. Cohen] started talking about Atlantic Dental Care... He asked if I knew what they were, and I told him I did not. Then he started to tell me more about them, and I immediately stopped him, and I said, 'Chuck, this is not a discussion that you and I should be having' ... and I cut off discussion with him on that topic." (Sullivan, Tr. 3946).

Response to Proposed Finding No. 1492

The Proposed Finding is misleading, incomplete, and contrary to the weight of the evidence.

First, Sullivan's contemporaneous communications with Cohen belie the assertion that

Sullivan shut down the conversation or admonished Cohen. Immediately following the

March 25, 2013 call, Sullivan thanked Cohen and joked with him. (CCFF ¶¶ 1051-1053).

After Cohen promptly sent further information clarifying that ADC was not a buying group,

Sullivan thanked him again. (CCFF ¶¶ 1057-1058). And after Cohen sent additional

information, *Sullivan* tried to call Cohen two times on March 27, 2013 and April 3, 2013.

(CCFF ¶¶ 1079-1080; CX6027 at 028 (Row 247), 029 (Row 250), 029 (Row 255)). Further,

despite Sullivan's purported concerns with the call, Sullivan never reported or documented

his communications with Cohen about ADC in 2013 to Schein's legal department or anyone

else, as he was required to do under Schein's antitrust policy. (CCFF ¶¶ 1049-1050).

Second, Cohen's testimony about the same communications contradicts Sullivan's testimony.

Cohen testified at trial that he did not recall Sullivan ever telling Cohen to stop contacting

him about buying groups. (CCFF ¶ 1055). Cohen also testified that Sullivan never gave

Cohen the impression that they should not be talking about buying groups. (CCFF ¶ 1056).

Even Sullivan testified that he has never known Cohen to lie, so Cohen's testimony on this point should be credited. (CX0311 (Sullivan, IHT at 271) ("Q. Have you known Mr. Cohen

to lie? A. I know him as an odd personality but to flat out lie, no. I don't communicate that much with him to tell you the truth, but it's -- I don't know him to have lied.")). Cohen also

testified that if a rival told him to stop communicating, he would do so. (Cohen, Tr. 968-

969). But Cohen did not stop communicating with Sullivan regarding buying groups: in the

days following the March 25, 2013 telephone call, Cohen texted Sullivan twice about buying groups. (CCFF ¶¶ 997-1000, 1069). *Third*, the Proposed Finding also omits that Sullivan

contradicted himself under oath regarding the March 25, 2013 call. Sullivan initially testified

that Cohen informed him on the March 25, 2013 call that Benco did not plan to bid on the

ADC group. (CCFF ¶¶ 1038-1043; *but see* Sullivan, Tr. 3948 (acknowledging that his

testimony changed). In fact, Sullivan testified on three separate occasions at his

investigational hearing that Cohen informed Sullivan that Benco did not plan to bid on the

ADC group on the March 25, 2013 call: (1) Cohen "basically said to me that they [Benco]

don't plan to, you know, bid on their -- this group . . ." (CCFF ¶ 1038; CX0311 (Sullivan,

IHT at 260-261)); (2) "Q. During the call Mr. Cohen indicated to you that they were not

going to bid on Atlantic Dental Care because it was a buying group; is that right? A. I don't

recall him saying why, just that he was -- they were not going to go bid on it." (CCFF ¶ 1039;

CX0311 (Sullivan, IHT at 299-300)); (3) on the March 25, 2013 call, Cohen said, “we’re not interested” in ADC. (CCFF ¶ 1041; CX0311 (Sullivan, IHT at 261)). Similarly, Sullivan testified at his investigational hearing that he had no recollection of why he called Cohen on March 27, 2013, but that it was not even “possible” that the call related to ADC. (CX0311 (Sullivan, IHT at 306)). Sullivan later self-servingly testified that it was his intent on March 27, 2013 to “remind” Cohen that they “should not be talking about this.” (CX8025 (Sullivan, Dep. 409-410; *see also* Sullivan, Tr. 3963, 3965)). Sullivan changed his testimony another time regarding an April 3, 2013 telephone call with Cohen. Sullivan initially testified that he did not believe it was “possible” that the call related to ADC. (CCFF ¶ 1089). Sullivan then changed his story at his deposition to insist that he told Cohen on April 3, 2013 that it was inappropriate to discuss ADC. (CX8025 (Sullivan, Dep. 415, 416)).

1493. Mr. Sullivan also denied reaching any agreement with Mr. Cohen, and did not disclose any information to Mr. Cohen, about ADC or any buying group. (Cohen, Tr. 968-69; Sullivan, Tr. 4289-90).

Response to Proposed Finding No. 1493

The Proposed Finding is misleading and against the weight of the evidence. The Proposed Finding is misleading to the extent it suggests Benco did not enter into an agreement with Schein, as defined under Section 1 of the Sherman Act, to refuse to discount to buying groups. The competitors’ communications about ADC, combined with the testimony, and the totality of Complaint Counsel’s evidence, establishes that Benco and Schein reached an agreement. (CCFF 1025-1055; *see also* CCFF ¶¶ 661-1158, 1167-1198)). Both Cohen and Sullivan admit the call’s purpose was to discuss ADC (Cohen, Tr. 546, 968; CX0301 (Cohen IHT at 271); (Sullivan, Tr. 3946-3947; CX0311 (Sullivan, IHT at 261)). In prior sworn testimony, Sullivan testified that Cohen informed him on the March 25, 2013 call that Benco did not plan to bid on the ADC group. (CCFF ¶¶ 1038-1043; *but see* Sullivan, Tr. 3948

(acknowledging that his testimony changed). Cohen testified that he and Sullivan were “exchanging information” about whether ADC was a buying group or a DSO. (CCFF ¶¶ 1036-1037). Cohen admitted at trial he was seeking “facts, knowledge, conjecture” from Sullivan to “help us form an opinion and a ruling on how we would handle that account.” (CCFF ¶ 1037; Cohen, Tr. 720).

The Proposed Finding is also misleading and contrary to the weight of the evidence because communications on the day of the call between Cohen and Sullivan refer to ADC and reflect frequent and prompt communications from Sullivan to Cohen. (CCFF ¶¶ 1044-1047). To set up the call, Cohen texted Sullivan asking for a time to talk, and two minutes later Sullivan responded and set a time to talk that day. (CCFF ¶ 1030). Sullivan called Cohen on March 25, 2013 and they spoke 8 minutes and 35 seconds (CCFF ¶ 1032, BFF 498). Four minutes after that call, Sullivan reached out to Cohen to thank him for the ADC call. (CCFF ¶ 1033; CX6027 at 027 (Row 241) (“Hi Chuck. Thanks for the call.”); Sullivan, Tr. 3957). Next, in the evening of the same day, March 25, 2013, Cohen sent Sullivan a link to an article about ADC by text stating “Here’s a link to the press release we discussed” (CX6027 at 028 (Row 243); CCFF ¶¶ 1045-1046). A few minutes later, Sullivan responds “Thanks for the follow up on that article.” (CCFF ¶¶ 1033, 1051, 1058 CX6027 at 028 (Row 244)); Cohen, Tr. 546; Sullivan, Tr. 3957). Sullivan testified that at this time he wanted to be cordial and treat Cohen with respect (Sullivan Tr. 4260-4261). The interfirm communications between Schein and Benco on ADC culminate two days later with a text that Benco would bid precisely because ADC was “not a buying group.” (CCFF ¶ 1069 (CX0196 at 010 (“Tim: Did some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all the practices. So it’s not a buying group, it’s a big group. We’re going to

bid. Thanks.”); Cohen, Tr. 549)). There is simply no way to read that text in the absence of an mutual understanding between Cohen and Sullivan about a no buying group policy.

Indeed, Cohen’s own explanations for the ADC communications inherently reflect mutual expectations about how the companies would approach buying group customers. At trial, Cohen testified he shared his customer bidding strategy with his competitor because he did not want his competitor to think Benco “was trying to head-fake them” (CCFF ¶ 1076; Cohen, Tr. 723). Cohen’s testimony that he did not want his competitor to think Benco was trying to “head-fake” Schein indicates mutual expectations and that Cohen had a sense of obligation to be truthful to his competitor about bidding on buying groups. Finally, Cohen admitted at trial he shared Benco’s no buying group policy with Sullivan (CCFF ¶ 624). For all these reasons the Proposed Finding should be rejected.

1494. Immediately following the call, at 4:09 pm on March 25, 2013, Mr. Sullivan sent Mr. Cohen a text stating, “Yes, I am good with the terms we discussed and I look forward to joining Team Benco! Ps. Want to confirm that the Benco tooth logo will include a picture of me. :)” (CX 6027-027).

Response to Proposed Finding No. 1494

The Proposed Finding is incomplete because it does not include the entire text message from Sullivan to Cohen following the ADC call. (CCFF ¶ 1051). Within minutes after the March 25, 2013 telephone call ended, Sullivan thanked Chuck for the call before he made a joke. (CX6027 at 027 (Row 241)). Sullivan wrote, “Hi Chuck. Thanks for the call. Yes, I am good with the terms we discussed and I look forward to joining Team Benco! Ps. Want to confirm that the Benco tooth logo will include a picture of me.:)” (CX6027 at 027 (Row 241)). The Proposed Finding is also misleading because thanking and joking with Cohen is important to the context because it is not the reaction of someone who is worried that an antitrust policy violation has occurred as Sullivan later claimed. (CCFF ¶¶ 1049-1050).

1495. Both Mr. Sullivan and Mr. Cohen testified that Mr. Sullivan's text message referred to a long-running joke between the two about who was going to work for whom in the event that ongoing merger discussions came to fruition. (Cohen, Tr. 554-55, 897-98; Sullivan, Tr. 3955-56, 4189-90).

Response to Proposed Finding No. 1495

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it suggests that the proceeding phone call, which the parties concede was about ADC, was about something else. (Cohen, Tr. 546, 968; CX0301 (Cohen IHT at 271); (Sullivan, Tr. 3946-3947; CX0311 (Sullivan, IHT at 261)). The admissions combined with the text message from Cohen to Sullivan later that day attaching an article about ADC preclude any inference that ADC was not the topic of that call. (CCFF ¶¶ 1038, 1040, 1043, 1058; CX6027 at 027 (Row 243) (Cohen sent Sullivan a link via text message to an article about ADC and referred to it as "the press release we discussed.")). The joke also tends to preclude Schein's after-the-fact argument that the call made Sullivan uncomfortable and that he had admonished Cohen not to talk about customers. (See Response to Proposed Finding No. 1492).

1496. Regarding the ongoing merger discussions between Schein and Benco, a few days earlier Mr. Cohen and his brother had finalized arrangements to meet with Schein's CEO, Stanley Bergman, and its head of Business Development, Mark Mlotek, to explore M&A opportunities the following Monday, April 1, 2013, in New York. (Cohen, Tr. 892-95; Sullivan, Tr. 4186-87; CX 1476; CX 1486).

Response to Proposed Finding No. 1496

The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that Cohen and Sullivan did not communicate regarding ADC and buying groups in the days surrounding April 1, 2013. (CCFF ¶¶ 994-1004 (March 26, 2013 communications regarding Dental Alliance); CCFF ¶¶ 1022-1098 (communications regarding ADC)). The Proposed Finding is also misleading to the extent that it suggests that

Sullivan played a role in the meeting scheduled for April 1, 2013; the documents and testimony cited reference a meeting with Chuck and Rick Cohen (Benco) and Mark Mlotek and Stanley Bergman (Schein), but do not reference Sullivan's participation or attendance at any such April 1, 2013 meeting. In fact, Sullivan testified that he did not attend the meeting. (Sullivan, Tr. 4186). The Proposed Finding is incomplete in that it excludes evidence indicating that additional topics were discussed during the Schein and Benco merger discussions. Specifically, there were Benco/Schein discussions at the New York home of Stanley Bergman in November of 2011. (CX0231). Following that meeting, Larry Cohen wrote to Schein executives including Sullivan on the risks of "rumors spreading of a 'warmer' Benco – Schein relationship... So, before we did any project together, we'd need to agree upon a plan for confidentiality." (CX0231 at 001). Bergman replied, and included Sullivan and Cohen on the email chain, and wrote "Our historic business sparing has in the end been good for both co's and the dental market place. Having said this, we concur with your thoughts below and are confident that we can work together to advance mutual goals-makes some money and perhaps even have a little fun doing this... we totally agree the confidentiality is critical." (CX0231 at 001).

1497. Mr. Sullivan testified that the ongoing merger discussions between Schein and Benco impacted his interactions with Mr. Cohen. He wanted to be cordial and treat Mr. Cohen with respect because they might be working for one another if a merger went through. (Sullivan, Tr. 4260-61).

Response to Proposed Finding No. 1497

The Proposed Finding is misleading to the extent that it suggests that merger discussions constitute a defense to an anticompetitive agreement. Complaint Counsel has no specific response to the remainder of this finding except to note Cohen and Sullivan had already been working together and had a long-term business relationship. (CCFF ¶¶ 270-271).

1498. Mr. Sullivan's and Mr. Cohen's joke about who would work for whom is consistent with a discussion on the March 25, 2013 call about this upcoming meeting, as are follow-up texts between Mr. Cohen and Mr. Sullivan that continued the joke. (CX 6027-027; *see also* Cohen Tr. 894-95).

Response to Proposed Finding No. 1498

The Proposed Finding is irrelevant and misleading. The Proposed Finding is misleading to the extent it suggests that the call on March 25, 2013 between Sullivan and Cohen was not for the purpose and actually consisted of discussing ADC, which has been conceded. (Cohen, Tr. 546, 968; CX0301 (Cohen IHT at 271); (Sullivan, Tr. 3946-3947; CX0311 (Sullivan, IHT at 261); CX6027 at 028 (Row 243); CCFF ¶¶ 1044-1047); Cohen, Tr. 555 (Cohen admits that this text was a joke, and he did not recall trying to recruit Sullivan to join Benco on the March 25, 2013 telephone call)). The Proposed Finding is irrelevant to the extent anything else might have been mentioned in that call.

1499. Later that evening on March 25, 2013, Mr. Cohen forwarded a link to an article reporting on ADC's financing. (CX 6027-028; CX 6501).

Response to Proposed Finding No. 1499

The Proposed Finding is incomplete because it fails to note the entire message from Cohen to Sullivan attaching a link to the ADC article discussed. The brief message accompanying the linked ADC article is critical to the context because it explicitly refers to the discussion of ADC in the call earlier that day. (CX6027 at 028 (Row 243) ("Here's a link to the press release we discussed <http://marketbrief.com/atlantic-dental-care-plc/d/form-d/2012/11/21/9835185>"); CCFF ¶¶ 1044-1047)). Benco believed that the information in the press release regarding ADC would help determine whether ADC was a buying group. (CCFF ¶ 1048 (CX0304 (Ryan, IHT at 227) (testifying regarding forwarding Cohen the press release about ADC: "Q. Did you think there was something in this information that you pasted into the e-mail that would help determine whether ADC was a buying group? A. I - I

think that's what I thought at the time.")); CX0020 at 001 (email from Ryan to Cohen, forwarding press release regarding ADC); Cohen, Tr. 722 (press release that Cohen sent to Sullivan was about the "merger of Atlantic Dental Care's practices into one entity"); Cohen, Tr. 966 (press release sent to Sullivan contained additional information about ADC)).

1500. In response, Mr. Sullivan simply wrote, "[t]hanks for the follow up on that article. Unusual." (CX 6027-028). Mr. Sullivan did not provide any information about ADC. Nor did Mr. Sullivan reveal Schein's plans for ADC. (CX 6027-028; Sullivan, Tr. 4194; Cohen, Tr. 899).

Response to Proposed Finding No. 1500

The Proposed Fact is misleading to the extent it suggests Sullivan and Cohen did not exchange information about ADC because his text is but one of multiple communications between Sullivan and Cohen about ADC, some of which Sullivan initiated. (CCFF ¶¶ 1060; 1079; CX6027 at 028 (Row 247), 029 (Row 250), 029 (Row 255)). In addition, the Proposed Finding is misleading to the extent it minimizes the mutual reciprocity and encouragement from the multiple ADC communications. (See CCFF ¶¶ 1030-1033; 1045-1047). In addition, the "Thanks" undercuts Sullivan's testimony in these proceedings characterizing his communications as aimed at admonishing Cohen for discussing buying groups.

1501. The preponderance of the evidence thus does not support the allegation that Schein and Benco reached any agreement concerning ADC or buying groups on the March 25, 2013 call. Even if ADC had been discussed on that call, there is no evidence that any agreement was reached; that Schein revealed confidential or competitively sensitive information about its policies, plans, or practices; or that Schein reached an understand with Benco concerning ADC.¹⁷

¹⁷ Complaint Counsel elicited testimony that Mr. Sullivan did not report Mr. Cohen's call to the Schein legal department. (Sullivan, Tr. 3953-55, 4194-96). Of course, the antitrust laws do not impose the obligation on a person to report suspected wrongdoing by another person; it simply prevents agreements in restraint of trade. By admonishing Mr. Cohen, changing the subject, and refraining from providing assurances or competitively sensitive information to Mr. Cohen, Mr. Sullivan complied with the antitrust laws. Indeed, Complaint Counsel asserts that Benco sought to engage Burkhart in similar communications, but that Burkhart similarly declined the invitation. (Complaint ¶¶ 53-59; Reece, Tr. 4486-87). Like Mr. Sullivan, however, Burkhart did not report the communications to the Burkhart legal department. (Reece, Tr. 4486). Burkhart simply refrained from reaching agreement. (Reece, Tr. 4486-87).

Response to Proposed Finding No. 1501

The Proposed Finding should be disregarded. It contains no citations to the record whatsoever and is a broad conclusion of law improperly submitted. In addition, the Proposed Finding is misleading and contrary to the weight of the evidence. The Proposed Finding is misleading to the extent it suggests Benco did not enter into an agreement with Schein, as defined under Section 1 of the Sherman Act, to refuse to discount to buying groups. The competitors' communications about ADC, combined with the testimony, and the totality of Complaint Counsel's evidence, establishes that Benco and Schein reached an agreement. (CCFF ¶¶ 1025-1055; *see also* CCFF ¶¶ 661-1158, 1167-1198)). Both Cohen and Sullivan admit the call's purpose was to discuss ADC (Cohen, Tr. 546, 968; CX0301 (Cohen IHT at 271); (Sullivan, Tr. 3946-3947; CX0311 (Sullivan, IHT at 261))). In prior sworn testimony, Sullivan testified that Cohen informed him on the March 25, 2013 call that Benco did not plan to bid on the ADC group. (CCFF ¶¶ 1038-1043; *but see* Sullivan, Tr. 3948 (acknowledging that his testimony changed)). Cohen testified that he and Sullivan were "exchanging information" about whether ADC was a buying group or a DSO. (CCFF ¶¶ 1036-1037). Cohen admitted at trial he was seeking "facts, knowledge, conjecture" from Sullivan to "help us form an opinion and a ruling on how we would handle that account." (CCFF ¶ 1037; Cohen, Tr. 720). The Proposed Finding is also misleading and contrary to the weight of the evidence because the communications on the day of the call between Cohen and Sullivan refer to ADC and reflect frequent and prompt communications from Sullivan to Cohen. (CCFF ¶¶ 1044-1047). To set up the call, Cohen texted Sullivan asking for a time to talk, and two minutes later Sullivan responded and set a time to talk that day. (CCFF ¶ 1030). Sullivan called Cohen on March 25, 2013 and they spoke 8 minutes and 35 seconds (CCFF ¶

1032, BFF 498). Four minutes after that call, Sullivan reached out to Cohen to thank him for the ADC call. (CCFF ¶ 1033; CX6027 at 027 (Row 241) (“Hi Chuck. Thanks for the call.”); Sullivan, Tr. 3957). Next, in the evening of the same day, March 25, 2013, Cohen sent Sullivan a link to an article about ADC by text stating “Here’s a link to the press release we discussed” (CX6027 at 028 (Row 243); CCFF ¶¶ 1045-1046). A few minutes later, Sullivan responds “Thanks for the follow up on that article.” (CCFF ¶¶ 1033, 1051, 1058 CX6027 at 028 (Row 244)); Cohen, Tr. 546; Sullivan, Tr. 3957). Sullivan testified that at this time he wanted to be cordial and treat Cohen with respect (BFF 508; Sullivan Tr. 4260-4261). The interfirm communications between Schein and Benco on ADC culminate two days later with a text that Benco would bid precisely *because* ADC was “not a buying group.” (CCFF ¶ 1069 (CX0196 at 010 (“Tim: Did some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all the practices. So it’s not a buying group, it’s a big group. We’re going to bid. Thanks.”); Cohen, Tr. 549)). There is simply no way to read that text in the absence of a mutual understanding between Cohen and Sullivan about a no buying group policy. Indeed, Cohen’s own explanations for the ADC communications inherently reflect mutual expectations about how the companies would approach buying group customers. At trial, Cohen testified he shared his customer bidding strategy with his competitor because he did not want his competitor to think Benco “was trying to head-fake them” (CCFF ¶ 1076; Cohen, Tr. 723). Cohen’s testimony that he did not want his competitor to think Benco was trying to “head-fake” Schein indicates mutual expectations and that Cohen had a sense of obligation to be truthful to his competitor about bidding on buying groups. Finally, Cohen admitted at trial he shared Benco’s no buying group policy with Sullivan (CCFF ¶ 624).

1502. Two days later, on March 27, 2013, Mr. Cohen sent Mr. Sullivan another unsolicited text, saying that he “[d]id some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all practices. So it’s not a buying group, it’s a big group. We’re going to bid. Thanks.” (CX 6027-029).

Response to Proposed Finding No. 1502

Complaint Counsel objects to the term “unsolicited” to the extent that it suggests that Sullivan was not a willing participant in communications with Cohen; such a Proposed Finding is contrary to the weight of the evidence. (See CCFF ¶¶ 1031; 1033; 1035; 1047; 1058-1060). Complaint Counsel has no specific response to the remainder of this Proposed Finding.

1503. The first part of Mr. Cohen’s text message – whether ADC is or is not a buying group – is not competitively sensitive information; it simply reflects market research that Benco had performed. (CX 6027-029).

Response to Proposed Finding No. 1503

The Proposed Finding is misleading and contrary to the weight of the evidence. The Proposed Finding is misleading to the extent it suggests that Benco’s analysis of a potential customer, ADC, was not competitively sensitive. In providing such information to Sullivan, Cohen shared confidential and privileged information from its outside counsel retained by Benco to analyze ADC’s SEC filings and incorporation papers. (CCFF ¶¶ 1062-1065, 1068-1069). In Benco’s Proposed Finding (“BFF”) 487, Benco concedes that ADC was “the most difficult and longest evaluations of a group that Benco had ever conducted.” (Cohen, Tr. 718-19; Ryan, Tr. 1199). In its Proposed Findings 490 and 491, Benco admits that the evaluation of ADC took one of its executives months to assess (“Pat Ryan and Benco’s Strategic Markets team spent months assessing ADC. (Cohen, Tr. 719; Ryan, Tr. 1199)”) and that Benco tried several sources to obtain information about ADC. (BFF ¶¶ 490-491) including

hiring outside counsel to analyze ADC's SEC filings and incorporation papers. (BFF 525; CCFF ¶ 1062).

1504. The last sentence of Mr. Cohen's text message – that Benco is going to bid – did reveal Benco's plans. However, it does not evince a pre-existing agreement between the two companies not to do business with buying groups. The text does not reference any pre-existing agreement – or any agreement at all – and does not discuss any information about Schein's plans, policies, or practices. (CX 6027-028-29).¹⁸

Response to Proposed Finding No. 1504

The Proposed Finding is misleading, incomplete, and not supported by the totality of the evidence. The Proposed Finding is misleading to the extent it suggests Benco did not enter into an agreement with Schein, as defined under Section 1 of the Sherman Act, to refuse to discount to buying groups. The competitors' communications about ADC, combined with the testimony, and the totality of Complaint Counsel's evidence, establishes that Benco and Schein reached an agreement. (CCFF ¶¶ 1025-1055; *see also* CCFF ¶¶ 661-1158, 1167-1198)). Both Cohen and Sullivan admit the purpose of the March 25, 2013 telephone call was to discuss ADC (CCFF ¶¶ 1034-1044; Cohen, Tr. 546, 968; CX0301 (Cohen IHT at 271); (Sullivan, Tr. 3946-3947; CX0311 (Sullivan, IHT at 261))). The notably responsive, friendly communications on the day of the call between Cohen and Sullivan refer to ADC and reflect frequent and prompt communications suggesting Sullivan was more than happy to reciprocate. (CCFF ¶¶ 1044-1047). To set up the call, Cohen texted Sullivan asking for a

¹⁸ Complaint Counsel also cites a text message Mr. Cohen sent on March 26, 2013 about a different buying group, the Dental Alliance. (CX 6027-028 (“They apparently get 7% off of catalog pricing [from Schein] just for joining.... [They] contacted me about a year ago and asked if Benco was interested. Told him he was out of his tree.”; “Could be a rumor, sometimes stories go around.”)). Mr. Sullivan testified that he did not recognize, when he received this text, that it was unrelated to ADC. (Sullivan, Tr. 4198). Rather, Mr. Sullivan attempted to call Mr. Cohen to reiterate, in stronger terms, that he should not be discussing specific customers with him. (Sullivan, Tr. 3966; 4198-99). After playing phone tag for some period, Mr. Sullivan delivered this message on April 3, 2017. (Sullivan, Tr. 3963-66; 4205-07; CX 6027-028-29). As for Dental Alliance, the evidence shows that Schein began doing business with Dental Alliance in 2011 and continued to do so through at least the end of 2014. (RX 2349; Sullivan, Tr. 4239-40; Steck, Tr. 3770-71; RX 3076; RX 2753; RX 2612-001-09; RX 2613-001). Thus, Mr. Cohen's March 26, 2013 text message did not result in any change in conduct.

time to talk, and two minutes later Sullivan responded and set a time to talk that day. (CCFF ¶ 1030). Sullivan did call Cohen on March 25, 2013 and they spoke 8 minutes and 35 seconds (CCFF ¶ 1032). Four minutes after that call, Sullivan reached out to Cohen to thank him for the ADC call. (CCFF ¶ 1033; CX6027 at 027 (Row 241) (“Hi Chuck. Thanks for the call.”); Sullivan, Tr. 3957). Next, in the evening of the same day, March 25, 2013, Cohen sent Sullivan a link to an article about ADC by text stating, “Here’s a link to the press release we discussed” (CX6027 at 028 (Row 243); CCFF ¶¶ 1045-1046). A few minutes later, Sullivan responded, “Thanks for the follow up on that article.” (CX6027 at 028 (Row 244)); Cohen, Tr. 546; Sullivan, Tr. 3957). The interfirm communications between Schein and Benco on ADC culminate two days later with a text that Benco would bid precisely *because* ADC was “not a buying group.” (CCFF ¶ 1069 (CX0196 at 010 (“Tim: Did some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all the practices. So it’s not a buying group, it’s a big group. We’re going to bid. Thanks.” Cohen, Tr. 549))). There is simply no way to read that text in the absence of a mutual understanding between Cohen and Sullivan about a no buying group policy. Indeed, Cohen’s own explanations for the ADC communications inherently reflect mutual expectations about how the companies would approach buying group customers. At trial, Cohen testified he shared his customer bidding strategy with his competitor because he did not want his competitor to think Benco was “duplicious” or “was trying to head-fake them” (Cohen, Tr. 723; CCFF 1076). There can be no head-fake or duplicity without mutual expectations, in this case that Benco had a no buying group policy and that it would not bid on buying groups. Finally, Cohen admitted at trial he shared Benco’s no buying group policy with Sullivan (CCFF ¶ 624). For all these reasons, the Proposed Finding should be rejected.

The Proposed Finding is also misleading to the extent it suggests that Schein never gave Benco a basis to understand it had agreed not to work with buying groups. The evidence shows that Cohen informed Sullivan of Benco's no buying group policy. (CCFF ¶¶ 662-664; *see also* CX0301 (Cohen, IHT at 195-196) ("Q. Have you ever communicated with anyone at Schein about buying groups? A. I believe I have. Q. Can you tell me about those instances? A. . . **I believe I have, at different times,** communicated our policy on buying groups.") (emphasis added))). As a result of communications with Schein, Benco gained the understanding that Schein would adopt a policy against recognizing buying groups. (CCFF ¶¶ 680, 675-678). Cohen testified that, based on text messages with Sullivan, he understood that "the policy that Henry Schein had was that they do not recognize GPOs." (CCFF ¶ 676). Consistent with Benco's understanding, Schein adopted a no buying group strategy beginning in late 2011. (CCFF ¶¶ 705-870).

To the extent Schein's footnote is credited as a Proposed Finding, it is misleading and contrary to the weight of the evidence. *First*, Sullivan's contemporaneous communications with Cohen belie the assertion that Sullivan shut down the conversation or admonished Cohen. Immediately following the March 25, 2013 call, Sullivan thanked Cohen and joked with him. (CCFF ¶¶ 1051-1053). After Cohen promptly sent further information clarifying that ADC was not a buying group, Sullivan thanked him again. (CCFF ¶¶ 1057-1058). And after Cohen sent additional information, *Sullivan* tried to call Cohen two times on March 27, 2013 and April 3, 2013. (CCFF ¶¶ 1079-1080; CX6027 at 028 (Row 247), 029 (Row 250), 029 (Row 255)). Further, despite Sullivan's purported concerns with the call, Sullivan never reported or documented his communications with Cohen about ADC in 2013 to Schein's legal department or anyone else, as he was required to do under Schein's antitrust policy.

(CCFF ¶¶ 1049-1050). *Second*, Cohen’s testimony about the same communications contradicts Sullivan’s testimony. Cohen testified at trial that he did not recall Sullivan ever telling Cohen to stop contacting him about buying groups. (CCFF ¶ 1055). Cohen also testified that Sullivan never gave Cohen the impression that they should not be talking about buying groups. (CCFF ¶ 1056). Even Sullivan testified that he has never known Cohen to lie, so Cohen’s testimony on this point should be credited. (CX0311 (Sullivan, IHT at 271) (“Q. Have you known Mr. Cohen to lie? A. I know him as an odd personality but to flat out lie, no. I don't communicate that much with him to tell you the truth, but it's -- I don't know him to have lied.”)). Cohen also testified that if a rival told him to stop communicating, he would do so. (Cohen, Tr. 968-969). But Cohen did not stop communicating with Sullivan regarding buying groups: in the days following the March 25, 2013 telephone call, Cohen texted Sullivan twice about buying groups. (CCFF ¶¶ 997-1000, 1069). The Proposed Finding also omits that Sullivan contradicted himself under oath regarding the March 25, 2013 call. Sullivan initially testified that Cohen informed him on the March 25, 2013 call that Benco did not plan to bid on the ADC group. (CCFF ¶¶ 1038-1043; *but see* Sullivan, Tr. 3948 (acknowledging that his testimony changed)). In fact, Sullivan testified on three separate occasions at his investigational hearing that Cohen informed Sullivan that Benco did not plan to bid on the ADC group on the March 25, 2013 call: (1) Cohen “basically said to me that they [Benco] don’t plan to, you know, bid on their – this group . . .” (CCFF ¶ 1038; CX0311 (Sullivan, IHT at 260-261)); (2) “Q. During the call Mr. Cohen indicated to you that they were not going to bid on Atlantic Dental Care because it was a buying group; is that right? A. I don’t recall him saying why, just that he was – they were not going to go bid on it.” (CCFF ¶ 1039; CX0311 (Sullivan, IHT at 299-300)); (3) on the March 25, 2013 call, Cohen

said, “we’re not interested” in ADC. (CCFF ¶ 1041; CX0311 (Sullivan, IHT at 261)).

Similarly, Sullivan testified at his investigational hearing that he had no recollection of why he called Cohen on March 27, 2013, but that it was not even “possible” that the call related to ADC. (CX0311 (Sullivan, IHT at 306)). Sullivan later self-servingly testified that it was his intent on March 27, 2013 to “remind” Cohen that they “should not be talking about this.”

(CX8025 (Sullivan, Dep. 409-410; *see also* Sullivan, Tr. 3963, 3965)). Sullivan changes his testimony another time regarding an April 3, 2013 telephone call with Cohen. Sullivan initially testified that he did not believe it was “possible” that the call related to ADC.

(CCFF ¶ 1089). Sullivan then changed his story at his deposition to insist that he told Cohen on April 3, 2013 that it was inappropriate to discuss ADC. (CX8025 (Sullivan, Dep. 415, 416)). The Proposed Finding in the footnote that Schein worked with Dental Alliance is misleading and incomplete for the reasons stated in Response to Proposed Finding Nos.

1309-1335.

1505. While Complaint Counsel asserts that Mr. Cohen’s March 27, 2013 text message can be interpreted as an effort to seek clarity as to the application of a pre-existing agreement to ADC, such an assertion would require the fact-finder to first assume the existence of a conspiracy. The Court declines to make such an assumption.

Response to Proposed Finding No. 1505

The Proposed Finding is misleading and contrary to the weight of the evidence for the reasons set forth in Response to Proposed Finding 1504.

1506. The Complaint also alleges that “Cohen and Sullivan [later] exchanged additional text messages and phone calls, culminating in a 5.5 minute phone call on April 3, 2013,” and that “[f]ollowing these communications, both Schein and Benco changed course and submitted a bid for ADC.” (Complaint ¶ 47; *see also* CX 6027-028-29). Complaint Counsel asserts that such communications support an inference that Schein and Benco reached an unlawful agreement. They do not.

Response to Proposed Finding No. 1506

The Proposed Finding is misleading to the extent it suggests Benco did not enter into an agreement with Schein, as defined under Section 1 of the Sherman Act, to refuse to discount to buying groups. The competitors' communications about ADC, combined with the testimony, and the totality of Complaint Counsel's evidence, establishes that Benco and Schein reached an agreement. (CCFF ¶¶ 1025-1055; *see also* CCFF ¶¶ 661-1158, 1167-1198)). The communication following the March 25, 2013 call indicated Sullivan's approval of their discussion. (CCFF ¶¶ CX 6027 ("Hi Chuck. Thanks for the call. Yes, I am good with the terms we discussed and I look forward to joining Team Benco!") Sullivan, Tr. 3956 ("Q: Even though you say you viewed what Chuck Cohen did as crazy and something you would never do, you sent Chuck Cohen a joke about the call a minute later. A: That's correct. Q: And even though you say you told Chuck Cohen to stop communicating with you about this, he, in fact, sent you even more information about Atlantic Dental Care later that same day, right? A: He did."), 3956-3957 (Sullivan acknowledging that Cohen texted him a link "to the press release we discussed," an article about Atlantic Dental Care)). Following the March 25, 2013 call, Sullivan attempted to call Cohen on March 27, 2013 and April 3, 2013. (CCFF ¶¶ 1051 (CX6027 at 028 (Row 247), 029 (Row 250), 029 (Row 255)). Subsequent to these conversations, both Schein and Benco bid on ADC, and Benco won. (CCFF ¶¶ 1080, 1088). Sullivan's internal emails acknowledge, "Our first reaction to [ADC] was it was simply a buying group and we were going to walk away," but following communications with Benco on March 25, 2013 and March 27, 2013, Schein decided to bid. (CCFF ¶ 1097). Complaint Counsel has no specific response to the remainder of this Proposed Finding.

1507. Mr. Sullivan placed a phone call to Mr. Cohen *before* receiving Mr. Cohen's text message that said Benco had determined ADC was not a buying group and that it was going to bid for the business. (CX 6027-028).

Response to Proposed Finding No. 1507

The Proposed Finding is misleading and incomplete. Sullivan initiated more than one communication to Cohen in the time frame Schein was evaluating ADC and following Cohen's messages about ADC. (CCFF ¶¶ 1079-1080). Following the receipt of Cohen's March 27, 2013 text message regarding bidding on ADC, Sullivan attempted to reach Cohen over the phone but was unable to do so. (CCFF ¶ 1080; Sullivan, Tr. 3959; CX6027 at 029 (Row 250)). After failing to connect with Cohen, the very next call Sullivan made was to Michael Porro on March 27, 2013, the zone manager where ADC was located. (CCFF ¶ 1082; Sullivan, Tr. 3968 ("Q. And when you didn't get through to Chuck Cohen, the very next call that you made at the time, on March 27th, was to Mr. Porro, the zone manager in charge of ADC, right? A. Yes."); he then informed Porro and other Schein executives that Schein should bid on ADC. (CCFF ¶¶ 1084-1086; CX2054 at 001). Following a conversation with Sullivan, Porro wrote in an email, "[t]he thinking is that Benco . . . will put in a bid." (CCFF ¶ 1086). Sullivan also attempted to reach Cohen again on April 3, 2013. (CCFF ¶ 1080 (CX6027 at 029 (Row 255))).

1508. Mr. Sullivan's April 3, 2013 call was the first time Mr. Sullivan and Mr. Cohen actually connected after playing phone tag. (CX 6027-028). As such, the evidence does not support an inference that the purpose of the April 3, 2013 call was to express assent to Benco's plan to bid for ADC.

Response to Proposed Finding No. 1508

Complaint Counsel objects to the Proposed Finding as inaccurate, misleading, and not supported by the evidence cited. The Proposed Finding cites to a single page of CX6027 which is Complaint Counsel's communications summary exhibit. While this citation supports

a finding that Sullivan did call Cohen on April 3, 2013, it offers no support for the remainder of this Proposed Finding because that the call and attempted calls do support a strong inference that the purpose of the April 3, 2013 call was to express assent to Benco's assessment and plan to bid for ADC. (CCFF ¶¶ 1088-1090). Further, the Proposed Finding is misleading and without any basis for the suggestion that Sullivan's call to Cohen on April 3, 2013 was not related to either party's plan to bid for ADC. Schein did not bid for ADC until after the April 3, 2013 call. (*See* CCFF ¶ 1094 (Schein sends ADC a proposal on April 8, 2013)).

1509. Rather, Mr. Sullivan credibly testified that he called Mr. Cohen after receiving a text message from Mr. Cohen about a different buying group, the Dental Alliance, to more strongly admonish Mr. Cohen not to discuss specific customers or business strategies. (Sullivan, Tr. 3963 ("I was -- to remind him again, more sternly, that he should not be contacting me about this, which I told him on the first phone call about it."), 3966, 4197-99, 4205-06; *see also* CX 8025 (Sullivan, Dep. at 409-11)).

Response to Proposed Finding No. 1509

The Proposed Finding is misleading, incomplete, and contrary to the weight of the evidence.

First, Sullivan's contemporaneous communications with Cohen belie the assertion that

Sullivan shut down the conversation or admonished Cohen related to the ADC

communications. Immediately following the March 25, 2013 call, Sullivan thanked Cohen

and joked with him. (CCFF ¶¶ 1051-1053). After Cohen promptly sent further information

clarifying that ADC was not a buying group, Sullivan thanked him again. (CCFF ¶¶ 1057-

1058). And after Cohen sent additional information, *Sullivan* tried to call Cohen two times

on March 27, 2013 and April 3, 2013. (CCFF ¶¶ 1079-1080; CX6027 at 028 (Row 247), 029

(Row 250), 029 (Row 255)). Further, despite Sullivan's purported concerns with the ADC

communications, Sullivan never reported or documented his communications with Cohen

about ADC in 2013 to Schein's legal department or anyone else, as he was required to do

under Schein's antitrust policy. (CCFF ¶¶ 1049-1050). *Second*, Cohen's testimony about the same communications contradicts Sullivan's testimony. Cohen testified at trial that he did not recall Sullivan ever telling Cohen to stop contacting him about buying groups. (CCFF ¶ 1055). Cohen also testified that Sullivan never gave Cohen the impression that they should not be talking about buying groups. (CCFF ¶ 1056). Even Sullivan testified that he has never known Cohen to lie, so Cohen's testimony on this point should be credited. (CX0311 (Sullivan, IHT at 271) ("Q. Have you known Mr. Cohen to lie? A. I know him as an odd personality but to flat out lie, no. I don't communicate that much with him to tell you the truth, but it's -- I don't know him to have lied.")). Cohen also testified that if a rival told him to stop communicating, he would do so. (Cohen, Tr. 968-969). But Cohen did not stop communicating with Sullivan regarding buying groups: in the days following the March 25, 2013 telephone call, Cohen texted Sullivan twice about buying groups. (CCFF ¶¶ 997-1000, 1069). *Third*, the Proposed Finding is contrary to the weight of the evidence because Sullivan has contradicted himself under oath about these ADC communications. Sullivan contradicted himself under oath regarding the March 25, 2013 call. Sullivan initially testified that Cohen informed him on the March 25, 2013 call that Benco did not plan to bid on the ADC group. (CCFF ¶¶ 1038-1043; *but see* Sullivan, Tr. 3948 (acknowledging that his testimony changed)). In fact, Sullivan testified on three separate occasions at his investigational hearing that Cohen informed Sullivan that Benco did not plan to bid on the ADC group on the March 25, 2013 call: (1) Cohen "basically said to me that they [Benco] don't plan to, you know, bid on their -- this group . . ." (CCFF ¶ 1038; CX0311 (Sullivan, IHT at 260-261)); (2) "Q. During the call Mr. Cohen indicated to you that they were not going to bid on Atlantic Dental Care because it was a buying group; is that right? A. I don't

recall him saying why, just that he was – they were not going to go bid on it.” (CCFF ¶ 1039; CX0311 (Sullivan, IHT at 299-300)); (3) on the March 25, 2013 call, Cohen said, “we’re not interested” in ADC. (CCFF ¶ 1041; CX0311 (Sullivan, IHT at 261)). Similarly, Sullivan contradicted himself about the March 27, 2013 telephone call to Cohen. Sullivan testified at his investigational hearing that he had no recollection of why he called Cohen on March 27, 2013, but that it was not even “possible” that the call related to ADC. (CX0311 (Sullivan, IHT at 306)). Sullivan later self-servingly testified that it was his intent on March 27, 2013 to “remind” Cohen that they “should not be talking about this.” (CX8025 (Sullivan, Dep. 409-410; *see also* Sullivan, Tr. 3963, 3965)). Sullivan changed his testimony another time regarding an April 3, 2013 telephone call with Cohen. Sullivan initially testified that he did not believe it was “possible” that the call related to ADC. (CCFF ¶ 1089). Sullivan then changed his story at his deposition to insist that he told Cohen on April 3, 2013 that it was inappropriate to discuss ADC. (CX8025 (Sullivan, Dep. 415, 416)). Finally, Complaint Counsel objects to the term “credibly” to describe Sullivan’s testimony for all the reasons stated above.

1510. Mr. Sullivan recalled his admonishment to Mr. Cohen in an October 16, 2013 email stating: “Chuck has not contacted me nor would he on such a topic.” (RX 2362; Sullivan, Tr. 4207-08).

Response to Proposed Finding No. 1510

The Proposed Finding is misleading, factually inaccurate, and contrary to the weight of the evidence. The Proposed Finding is misleading because the document and testimony cited does not relate to the ADC communications; it actually occurred six months after the ADC communications, and related to an entirely different buying group communication, TDA.

The document cited shows that Cohen planned to contact Sullivan to coordinate a response to the TDA buying group, further undermining Sullivan’s testimony that he admonished Cohen

(and providing further support for the no buying group agreement). Indeed, on October 14, 2013, Cohen instructed his Regional Manager in Texas, Ron Fernandez, to contact Schein and Patterson to discuss cutting back support for TDA's meetings and programs because TDA was starting a buying group. (CX1057 at 001; CX8015 (Cohen, Dep. at 362)). The Regional Manager (Ron Fernandez) followed that direction and contacted Glenn Showgren of Schein to coordinate "taking a stand together" against TDA. (CCFF ¶ 1119). Following an interfirm communication between Benco's Fernandez and Schein's Showgren, Showgren provided a detailed report of the call to his supervisor. (CCFF ¶ 1120). Showgren wrote, "Benco considering suspending all activities with the TDA including pulling out of the state show. *Chuck Cohen will be reaching out to, or has reached out to, Tim Sullivan to see if HSD would do the same thing.* Ron wanted to know if I have a relationship with local [Patterson Regional Manager] to see if they would consider pulling out as well." (CCFF ¶ 1120) (emphasis added). This contemporaneous document is yet another document reflecting Cohen's communications, or planned communications, with Sullivan on the topic of buying groups. This contemporaneous document contradicts Sullivan's testimony that he admonished Cohen six months earlier not to discuss buying groups.

The Proposed Finding that RX2362 somehow relates to Sullivan and Cohen's communications regarding ADC is factually inaccurate and contrary to the weight of the evidence. Sullivan specifically testified at trial that he was making no connection between RX2362 and the ADC communications at the time he wrote the email: "Q. And is it fair to say that you thought Chuck Cohen contacting you about the TDA would be in some sense similar to him contacting you about ADC that had previously happened? A. I wasn't think of that when I wrote this here." (Sullivan, Tr. 4341).

The Proposed Finding that Sullivan admonished Cohen is contrary to the weight of the evidence for the reasons stated in Response to Proposed Finding No. 1509.

Moreover, the Proposed Finding is misleading as Sullivan previously testified that Cohen had contacted Sullivan about buying groups and Benco's strategy with buying groups. Sullivan testified under oath at his investigational hearing that, in his March 25, 2013 call with Cohen, Cohen "basically said to me that they [Benco] don't plan to, you know, bid on their— this group . . ." (CCFF ¶¶ 1040; CX0311 (Sullivan, IHT at 260-261); *but see* CCFF 1042 (Sullivan no longer remembered the content of the call by trial.)). Multiple communications on the day of the call between Cohen and Sullivan regarding ADC, reflect frequent, friendly, responsive communications. (CCFF ¶¶ 1044-1047). The Proposed Finding is also misleading because there is direct evidence of Cohen contacting Sullivan about buying groups seriously undermining Sullivan's (erroneous) statement that Cohen and not and would not contact him about buying groups. (*E.g.*, CCFF ¶¶ 955-1021 (at least four examples of Benco confronting Schein about working with buying groups); CCFF ¶¶ 679-681 (multiple instances of Benco reaching out to Schein about buying groups). Indeed, Cohen admitted at trial he shared Benco's no buying group policy with Sullivan (CCFF ¶ 624). Similarly, the Proposed Finding is misleading because there is direct evidence that Cohen contacted Sullivan on the topic of buying groups and shared competitively sensitive information that Benco planned to bid for ADC's business in the future. (CX6027-029) ("[d]id some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all practices. So it's not a buying group, it's a big group. We're going to bid. Thanks.")). For all these reasons, the Proposed Finding should be rejected as outweighed by the totality of evidence.

1511. The record evidence does not indicate any further communications between Mr. Cohen and Mr. Sullivan about any customer or any buying group following the April 3, 2013 call. (*See* CX 6027-030-57).

Response to Proposed Finding No. 1511

The Proposed Finding is both incomplete and misleading. The Proposed Finding is incomplete because it fails to include Cohen’s communication with Sullivan in 2014 when the Texas Dental Association started a buying group program, TDA Perks. Cohen and Sullivan saw TDA as a buying group. (CCFF ¶¶ 1111-1112). On April 16, 2014, Cohen sent an article to Sullivan (and Guggenheim) about the TDA buying group explaining it would level the playing field between dentists and corporate dental practices by leveraging group buying power. (CCFF ¶¶ 1133-1134). Cohen and Sullivan spoke for nine minutes that day. (CCFF ¶ 1135). In addition, the Proposed Finding is misleading and incomplete because on September 16, 2013, in response to a message about Burkhardt’s refusal to stop dealing with buying groups, Ryan told Cohen to “make sure you tell Tim [Sullivan] and Paul [Guggenheim] to hold their positions as we are[.]” (CCFF ¶¶ 1103-1105). Shortly thereafter, Cohen, Guggenheim, Sullivan, and Burkhardt’s Reece were all at the same Dental Trade Alliance Meeting in October of 2013. (CCFF ¶¶ 364-366; 1242-1245). The evidence shows that Cohen spoke with his competitors at that meeting about buying groups—Cohen invited Burkhardt not to work with buying groups at this Dental Trade Association Meeting in October 2013. (CCFF ¶¶ 1238-1241). Taken together, the contemporaneous emails and evidence reflecting (1) that Benco planned to tell Sullivan and Guggenheim to “hold their positions” on buying groups, (CX0023 at 001); (2) that Sullivan, Guggenheim, and Cohen all attended the same DTA meeting the following month in October 2013 (CCFF ¶¶ 364, 366, 1243); (3) that Cohen’s renewed its invitation to Burkhardt to stop discounting to buying groups at the same meeting, (CCFF ¶¶ 1238-1241), constitutes circumstantial evidence that

Cohen sought to reaffirm the no buying group positions with Guggenheim and Sullivan at the DTA meeting in 2013. Moreover, Benco's Ryan and Schein's Foley communicated in October 2013 about buying groups when Ryan confronted Foley regarding the buying group, Smile Source. Ryan spoke to his counterpart Foley at Schein for 18 minutes; and, according to Foley, Ryan informed him that Benco would not bid on Smile Source and wanted to know if Schein would bid. (CCFF ¶¶ 1010-1013). Ryan reported the conversation to Cohen saying that he had "talked specifically about" Smile Source with Foley. (CCFF ¶ 1014).

1512. Complaint Counsel also failed to show that Schein and Benco *changed course* and submitted a bid for ADC following the April 3, 2013 call. Mr. Cohen's March 27, 2013 text message states that Benco was going to submit a bid. It was a declarative statement, and Mr. Cohen neither asked for Mr. Sullivan's assent nor suggested that Benco's decision was contingent on Mr. Sullivan's views. Thus, Benco cannot be said to have changed course following the April 3, 2013 call.

Response to Proposed Finding No. 1512

The Proposed Finding is misleading and incomplete. The text message and the communications relating to ADC show that *Schein* changed its conduct by submitting a bid for ADC after learning from Cohen that Benco would bid. (CCFF ¶¶ 1082-1087). The Proposed Finding is incomplete because it does not include the entire text message from Cohen which shows that Benco was updating Schein about a future change in its own conduct with regard to ADC and shows an understanding that Benco would not bid. The text, "[d]id some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all practices. So it's not a buying group, it's a big group. We're going to bid. Thanks." (CX6027-029), shows Benco is changing course precisely because ADC is *not* a buying group. (CCFF ¶¶ 1068-1071; *see also* CCFF ¶¶ 1072-1074 (Cohen testified it was against Benco's business interest to share the future bidding strategy with Sullivan)). This text message inherently reflects a prior understanding or meeting of the minds between

Cohen and Sullivan, as the message about Benco's new course of action in bidding for ADC, does not make sense without a prior understanding that Benco was not going to bid. (CCFF ¶¶ 1034-1036 (Cohen and Sullivan admit ADC was discussed on March 25, 2013); *See* CCFF ¶¶ 1040, 1043 (Sullivan, Tr. 3948 ("Q. So you testified that Chuck Cohen somehow, at some point, told you that they were not going to bid on Atlantic Dental Care, right? A. That was my recollection at the time."))).

1513. Schein also did not change course following the April 3, 2013 call. Schein received the ADC RFP on March 22, 2013. (CX 2019-002). The Schein Regional Manager, Bobby Anderson, forwarded the RFP to Zone Manager Michael Porro, asking whether "we want to quote." (CX 2019-002). There is no evidence that this email was forwarded to Mr. Sullivan, and no evidence of any communication between Mr. Sullivan and Mr. Porro or other Schein employees about ADC following the March 25, 2013 call between Mr. Cohen and Mr. Sullivan.

Response to Proposed Finding No. 1513

The Proposed Finding is inaccurate, incomplete, and misleading. The Proposed Finding that there is no evidence of communications between Mr. Sullivan and Mr. Porro following the March 25, 2013 call between Sullivan and Cohen is inaccurate and misleading. First, on March 27, 2013, the day Sullivan received the text message from Cohen that ADC was not a buying group and Benco was going to bid, Sullivan called Michael Porro after he was not able to reach Cohen, and Sullivan and Porro spoke for four minutes. (CCFF ¶¶ 1079; 1082-1086). Again, on March 29, 2013 Sullivan called Porro's office twice. (CX4413 at 0813 (rows 3103 and 3104); *see* CX2783 at 89 (Sullivan's mobile phone number ends in -8377); *see* CX2051 at (Porro's office number is 414-290-2526)). On April 1, 2013, days after receiving the March 27, 2013 text message from Cohen stating that ADC was not a buying group and that Benco would be bidding, Sullivan told Porro and other Schein executives that Schein should bid on ADC. (CCFF ¶ 1085; Sullivan, Tr. 3967-3968; CX2021 at 022 (Sullivan email to Porro and four others, subject: "Re: Atlantic Dental Care– HOT. . . I think

we should take a shot at this.”) (emphasis in original)). Additionally, Porro and Sullivan were working in the same office in Wisconsin at this time, where they had in-person conversations. (CX8000 (Porro, Dep. at 309)).

The Proposed Finding is also misleading and inaccurate in that it suggests there is no evidence of any other communication between Sullivan and Porro or other Schein employees, because there are multiple email chains in which Sullivan communicates about ADC to Schein employees, including Porro. For example, subsequent to the March and April 2013 communications between Sullivan and Cohen regarding ADC, Schein bid on ADC (CCFF ¶ 1093; Sullivan, Tr. 3969; CX2020 at 001-007). On April 8, 2013, Porro sent Sullivan Schein’s planned proposal to Atlantic Dental Care. (CCFF ¶ 1094; CX2021 at 001, 026-029). Schein’s planned proposal to ADC included language that permitted Schein to terminate the agreement if Schein discovered that ADC was a buying group. (CCFF ¶ 1095; Sullivan, Tr. 3970-3971; CX2021 at 028). Schein’s planned proposal to ADC stated, “This agreement can be terminated with 30 day notice if . . . Schein finds out that is purely a buying group, defined as ‘pooling individual volume purely to obtain lower prices from suppliers of good and services.’” (CCFF ¶ 1096; CX2021 at 028). Sullivan initially viewed ADC as nothing more than a buying group and planned to “walk away” from the group. In an April 4, 2013, email to Porro, Muller, Steck, Foley, and others, regarding ADC, Sullivan stated, “Our first reaction to this was it was simply a buying group and we were going to walk away.” (CCFF ¶ 1097; CX2021 at 013; Sullivan, Tr. 3969). Following communications with Benco, Sullivan informed Michael Porro and other Schein executives that Schein should bid on ADC. (CCFF ¶¶ 1084-1086; CX2054 at 001). Following a conversation with Sullivan, Porro wrote in an email, “[t]he thinking is that Benco . . . will put in a bid.” (CCFF ¶ 1086).

On April 5, following his communications with Cohen about ADC, Sullivan himself wrote an email to Schein employees that Benco would bid on ADC. (CX0254 at 001). Specifically, Sullivan wrote an email to Porro and others: “I’m guessing the Benco will approach with a ‘no FSC’ proposal.” (CCFF ¶ 1091). The Proposed Finding is thus not supported by the evidence and is factually inaccurate and should be rejected.

1514. On March 29, 2013, Mr. Anderson followed up with Mr. Porro, asking for Mr. Porro’s thoughts on ADC. (CX 2051). Mr. Porro responded that Mr. Sullivan had “heard of this group” and that he had also talked to the Area Directors, Jake Meadows and Joe Caveretta. Mr. Porro explained that his “[f]irst thought” was there is “more harm bidding vs[.] not bidding at all,” and that “[o]thers like this have popped up in [the] country and we passed and survived.” (CX 2051). But he also said that he was nonetheless going to reach out to ADC to find out more. (CX 2051).

Response to Proposed Finding No. 1514

The Proposed Finding is incomplete and misleading because by March 29, 2013 Cohen had told Schein that it determined ADC was not a buying group and would bid. (CCFF ¶ 1069). Sullivan had also spoken to Porro after Benco’s disclosure. (CCFF ¶¶ 1080-1084). Sullivan’s own documents state that he initially viewed ADC as a buying group and planned to walk away. (CCFF ¶ 1097; CX2021 at 013; Sullivan, Tr. 3969). Following Sullivan’s communications with Cohen, on March 31, 2013, Porro wrote in an email that he had talked to Sullivan and “[t]he thinking is that Benco, a decent player in the market and always hungry, will put in a bid.” (CCFF ¶ 1086; CX0198 at 013). On April 1, 2013, days after receiving the March 27, 2013 text message from Cohen stating that ADC was not a buying group and that Benco would be bidding, Sullivan told Porro and other Schein executives that Schein should bid on ADC. (Sullivan, Tr. 3967-3968; CX2021 at 022 (Sullivan email to Porro and four others, subject: “Re: Atlantic Dental Care – HOT. . . I think we should take a shot at this.”) (emphasis in original)). The Proposed Finding in combination with the totality evidence shows that Schein changed course after the interfirm communications with Benco

about ADC. (CCFF ¶¶ 1061-1099). The Proposed Finding is also incomplete because Porro also wrote in that same email, “Tim S has heard of this group.” (CX2051 at 001). Complaint Counsel has no objection to the Proposed Finding to the extent it shows Schein’s inclination not to bid on ADC initially, but after customer-specific discussions with competitor Benco, Schein changed course.

1515. This exchange between Mr. Porro and Mr. Anderson occurred *after* Mr. Cohen’s March 27, 2013 text, and after Mr. Sullivan spoke with Mr. Porro. (CX 6027-028-29). Schein’s view that ADC likely presented “more harm bidding vs[.] not bidding at all” reflects the absence of any agreement between Schein and Benco about how to respond to ADC’s RFP.

Response to Proposed Finding No. 1515

The Proposed Finding is incomplete and misleading because by March 29, 2013 Cohen had told Schein that it determined ADC was not a buying group and would bid. (CCFF ¶ 1069). Sullivan had also spoken to Porro after Benco’s disclosure. (CCFF ¶¶ 1080-1084). Sullivan’s own documents state that he initially viewed ADC as a buying group and planned to walk away. (CCFF ¶ 1097; CX2021 at 013; Sullivan, Tr. 3969). Following Sullivan’s communications with Cohen, on March 31, 2013, Porro wrote in an email that he had talked to Sullivan and “[t]he thinking is that Benco, a decent player in the market and always hungry, will put in a bid.” (CCFF ¶ 1086; CX0198 at 013). On April 1, 2013, days after receiving the March 27, 2013 text message from Cohen stating that ADC was not a buying group and that Benco would be bidding, Sullivan told Porro and other Schein executives that Schein should bid on ADC. (Sullivan, Tr. 3967-3968; CX2021 at 022 (Sullivan email to Porro and four others, subject: “Re: Atlantic Dental Care – HOT. . . I think we should take a shot at this.”) (emphasis in original)). The Proposed Finding in combination with the totality evidence shows that Schein changed course after the interfirm communications with Benco about ADC.

(CCFF ¶¶ 1061-1099). The totality of the evidence shows that Schein changed course after the interfirm communications with Benco about ADC. (CCFF ¶¶ 1061-1099).

1516. On March 31, 2013, Mr. Porro reported on his conversation with ADC. ADC represented that “[it is] not a co-op or a buying group,” as it has “1 corporate structure” and is a “unified group of mature practices.” (CX 0198-013-14).

Response to Proposed Finding No. 1516

The Proposed Finding is incomplete and misleading because by March 31, 2013 Cohen had told Schein that it determined ADC was not a buying group and would bid. (CCFF ¶ 1069). Sullivan had also spoken to Porro after Benco’s disclosure. (CCFF ¶¶ 1080-1084). Sullivan’s own documents state that he initially viewed ADC as a buying group and planned to walk away. (CCFF ¶ 1097; CX2021 at 013; Sullivan, Tr. 3969). Following Sullivan’s communications with Cohen, on March 31, 2013, Porro wrote in an email that he had talked to Sullivan and “[t]he thinking is that Benco, a decent player in the market and always hungry, will put in a bid.” (CCFF ¶ 1086; CX0198 at 013). On April 1, 2013, days after receiving the March 27, 2013 text message from Cohen stating that ADC was not a buying group and that Benco would be bidding, Sullivan told Porro and other Schein executives that Schein should bid on ADC. (Sullivan, Tr. 3967-3968; CX2021 at 022 (Sullivan email to Porro and four others, subject: “Re: Atlantic Dental Care – HOT. . . I think we should take a shot at this.”) (emphasis in original)). The totality of the evidence shows that Schein changed course after the interfirm communications with Benco about ADC. (CCFF ¶¶ 1061-1099). Complaint Counsel has no specific response to the remainder of this Proposed Finding.

1517. Mr. Porro concluded that “[i]t does appear that this is more than a buying group,” as all 53 offices are “financially tied together in some fashion” and that, as a result, “[p]assing on a bid now has more risk.” (CX 0198-014).

Response to Proposed Finding No. 1517

The Proposed Finding is incomplete and misleading because by this time Cohen had told Schein that it determined ADC was not a buying group and would bid. (CCFF ¶ 1069). Sullivan had also spoken to Porro after Benco's disclosure. (CCFF ¶¶ 1080-1084). Sullivan's own documents state that he initially viewed ADC as a buying group and planned to walk away. (CCFF ¶ 1097; CX2021 at 013; Sullivan, Tr. 3969). Following Sullivan's communications with Cohen, on March 31, 2013, Porro wrote in an email that he had talked to Sullivan and "[t]he thinking is that Benco, a decent player in the market and always hungry, will put in a bid." (CCFF ¶ 1086; CX0198 at 013). On April 1, 2013, days after receiving the March 27, 2013 text message from Cohen stating that ADC was not a buying group and that Benco would be bidding, Sullivan told Porro and other Schein executives that Schein should bid on ADC. (Sullivan, Tr. 3967-3968; CX2021 at 022 (Sullivan email to Porro and four others, subject: "Re: Atlantic Dental Care – HOT. . . I think we should take a shot at this.")) (emphasis in original)). The totality of the evidence shows that Schein changed course after the interfirm communications with Benco about ADC. (CCFF ¶¶ 1061-1099). Complaint Counsel has no specific response to the remainder of this Proposed Finding.

1518. Mr. Porro's email also notes that he believed that "Benco, a decent player in the market and always hungry, will put in a bid." (CX 0198-013). By this point, Mr. Cohen had already told Mr. Sullivan that Benco intended to bid. Mr. Sullivan, however, testified that he did not relay this information to Mr. Porro, and believed that Mr. Porro's comment was based on general market intelligence from the field. (Sullivan, Tr. 4200-01; *see also* CX 0198-010 (email from Regional Manager Bobby Anderson noting that "Benco is currently going in with a 15% discount to all [Schein] customers" and has "created problems in accounts that have dealt with [Schein] for years.")). Regardless of the source of Mr. Porro's belief about Benco's bidding intentions, such information just reflected competitive intelligence, not an agreement between Schein and Benco. Indeed, while Mr. Cohen testified that he probably should not have revealed his intention to bid for ADC, Mr. Cohen confirmed there was no mutual exchange of information, no agreement, and no *quid pro quo*. (Cohen, Tr. 723-24, 899, 968-69).

Response to Proposed Finding No. 1518

The Proposed Finding is misleading, compound, and incomplete. The Proposed Finding is misleading and incomplete because Porro's email was not that he believed Benco would bid, rather Porro noted *he had spoken to Sullivan* and "[t]he thinking is that Benco, a decent player in the market and always hungry, will put in a bid." (CX0198 at 013; CCFF ¶ 1082). Porro spoke to Sullivan between the time he initially thought Schein would walk away from the bid and when they decided to bid. (CCFF ¶ 1082; CX8000 (Porro, Dep. at 309) ("Q. You talked to Tim Sullivan between the time when you initially thought you would walk away from ADC to when you put in the bid? . . . A. Based on the entire time [line]."). Porro had ample opportunity to do so because not only did Sullivan call Porro right after he learned Benco would bid (and Sullivan was unable to reach Cohen (CCFF ¶ 1081)), Porro worked in the same office as Sullivan and their conversations were often in person. (CX8000 (Porro, Dep. at 11, 309). Porro also testified that he would not make a decision on a buying group without direction from Sullivan in person or by email. (CX8000 (Porro, Dep. at 154)). Porro testified that Schein ultimately bid for ADC because "[Sullivan] is in favor of it so we moved forward." (CX8000 (Porro, Dep. at 179); *see also* CX2047 (Sullivan admonishing Porro for moving forward with a buying group without prior discussion); CX8000 (Porro, Dep. at 153)). The Proposed Finding is also misleading and incomplete for the reasons stated in Response to Proposed Finding 1517.

1519. Mr. Sullivan responded to Mr. Porro's email saying he "think[s] we should take a shot at this" but should "include full value and not just bid price." (CX 0198-012).

Response to Proposed Finding No. 1519

Complaint Counsel has no specific response except this Proposed Finding shows that Sullivan directed Porro to "take a shot" at ADC *after* Cohen told Sullivan that Benco would

bid. (CCFF ¶ 1069). On April 1, 2013, days after receiving the March 27, 2013 text message from Cohen stating that ADC was not a buying group and that Benco would be bidding, Sullivan told Porro and other Schein executives that Schein should bid on ADC. (Sullivan, Tr. 3967-3968; CX2021 at 022 (Sullivan email to Porro and four others, subject: “Re: Atlantic Dental Care – HOT. . . I think we should take a shot at this.”) (emphasis in original)).

1520. After further discussions with the team and receiving additional information from ADC, however, Mr. Sullivan wrote on April 5, 2013 that “[t]his smells bad,” and that he was returning to the view that Schein has “as much to lose for winning the bid as we do for losing (or not bidding).” (CX 2021-006).

Response to Proposed Finding No. 1520

The Proposed Finding is misleading and incomplete. Sullivan’s comment comes after Porro suggests that ADC really is a buying group. (CX0198 at 004 (April 4, 2014 at 10:55 pm Porro writes “There is still a little bit of gray on this group and how tied together they are. . .”). The Proposed Finding is also misleading because it omits that in the next email in the chain, dated April 8, 2013, Porro wrote, “We are trying to offer a better rounded program as we could be up against a bid (Benco probably) that just goes way low on price.” (CX2021 at 005). Eventually, Porro includes language in the ADC bid that will disqualify the contract if ADC turns out to be a buying group after all. (CCFF ¶¶ 1095-1097; CX2021). Porro had already identified a risk in not working with ADC: on March 31, 2013, in an email to Sullivan and others, Porro identified the risk in not bidding for ADC’s business, and the upside of obtaining new business if Schein won. (CX0198 at 014 (“If we win the upside is the other business we don’t currently get.”)). Finally, the Proposed Finding omits that Sullivan once again changed course and Schein bid on April 8, 2013, once Sullivan was in favor. (CX8000 (Porro, Dep. at 179); CX2021 at 001, 026-029)).

1521. This was two days after the April 3, 2013 call between Mr. Sullivan and Mr. Cohen, during which Complaint Counsel *alleges* that “Schein and Benco changed course and submitted a bid for ADC.” (Complaint ¶ 47). Mr. Sullivan’s skepticism about bidding for ADC on April 5, 2013 is inconsistent with any allegation that Mr. Sullivan and Mr. Cohen reached an agreement on bidding for ADC, or that Schein changed course as a result of the April 3, 2013 communication with Benco.

Response to Proposed Finding No. 1521

The Proposed Finding is misleading, incomplete, and against the weight of the evidence.

Sullivan himself describes the change in an April 4, 2013, email to Porro, Muller, Steck, Foley, and others, regarding ADC, Sullivan stated, “Our first reaction to this was it was simply a buying group and we were going to walk away.” (CX2021 at 013; Sullivan, Tr. 3969). The communications relating to ADC show that Schein changed its approach by submitting a bid for ADC after learning from Cohen that Benco would bid. (CCFF ¶¶ 1082-1087; Sullivan, Tr. 3969; CX2020 at 001-007)). The text message from Cohen to Sullivan “[d]id some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all practices. So it’s not a buying group, it’s a big group. We’re going to bid. Thanks.” (CX6027-029), shows Benco is changing course precisely because ADC is *not* a buying group. (CCFF ¶¶ 1068-1071; *see also* CCFF ¶¶ 1072-1074 (Cohen testified it was against Benco’s business interest to share the future bidding strategy with Sullivan)). Schein did the same, Sullivan stated, “Our first reaction to this was it was simply a buying group and we were going to walk away.” (CX2021 at 013; Sullivan, Tr. 3969). The ADC bid text message inherently reflects a prior understanding or meeting of the minds between Cohen and Sullivan, as the message about Benco’s new course of action in bidding for ADC, does not make sense without a prior understanding that Benco was not going to bid. (CCFF ¶¶ 1034-1036 (Cohen and Sullivan admit ADC was discussed on March 25, 2013); *See* CCFF ¶¶ 1040, 1043 (Sullivan, Tr. 3948 (“Q. So you testified that Chuck Cohen somehow,

at some point, told you that they were not going to bid on Atlantic Dental Care, right? A. That was my recollection at the time.)). In addition, multiple contemporaneous documents note that Schein put in a bid on ADC because Benco would be bidding too. (CX2021 at 005 (“We are trying to offer a better rounded program as we could be up against a bid (Benco probably) that just goes way low on price.”); CCFF ¶ 1086 (“[t]he thinking is that Benco, a decent player in the market and always hungry, will put in a bid.”); CCFF ¶ 1091 (“I’m guessing Benco will approach with a ‘no FSC’ proposal.”)).

1522. The preponderance of the evidence relating to ADC does not, by itself or in conjunction with other evidence, support the conclusion that Schein reached an agreement with Benco to not do business with, or offer discounts to, buying groups.

Response to Proposed Finding No. 1522

The Proposed Finding should be disregarded. It contains no citations to the record whatsoever and is a broad conclusion of law improperly submitted. In addition, the Proposed Finding is misleading and contrary to the weight of the evidence. The Proposed Finding is misleading to the extent it suggests Benco did not enter into an agreement with Schein, as defined under Section 1 of the Sherman Act, to refuse to discount to buying groups. The competitors’ communications about ADC, combined with the testimony, and the totality of Complaint Counsel’s evidence, establishes that Benco and Schein reached an agreement. (CCFF ¶¶ 1025-1055; *see also* CCFF ¶¶ 661-1158, 1167-1198)). Both Cohen and Sullivan admit the purpose of the March 25, 2013 telephone call was to discuss ADC (CCFF ¶¶ 1034-1044; Cohen, Tr. 546, 968; CX0301 (Cohen IHT at 271); (Sullivan, Tr. 3946-3947; CX0311 (Sullivan, IHT at 261)). The notably responsive, friendly communications on the day of the call between Cohen and Sullivan refer to ADC and reflect frequent and prompt communications suggesting Sullivan was more than happy to reciprocate. (CCFF ¶¶ 1044-1047). To set up the call, Cohen texted Sullivan asking for a time to talk, and two minutes

later Sullivan responded and set a time to talk that day. (CCFF ¶ 1030). Sullivan did call Cohen on March 25, 2013 and they spoke 8 minutes and 35 seconds (CCFF ¶ 1032). Four minutes after that call, Sullivan reached out to Cohen to thank him for the ADC call. (CCFF ¶ 1033; CX6027 at 027 (Row 241) (“Hi Chuck. Thanks for the call.”); Sullivan, Tr. 3957). Next, in the evening of the same day, March 25, 2013, Cohen sent Sullivan a link to an article about ADC by text stating, “Here’s a link to the press release we discussed” (CX6027 at 028 (Row 243); CCFF ¶¶ 1045-1046). A few minutes later, Sullivan responded, “Thanks for the follow up on that article.” (CX6027 at 028 (Row 244)); Cohen, Tr. 546; Sullivan, Tr. 3957). The interfirm communications between Schein and Benco on ADC culminate two days later with a text that Benco would bid precisely *because* ADC was “not a buying group.” (CCFF ¶ 1069 (CX0196 at 010 (“Tim: Did some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all the practices. So it’s not a buying group, it’s a big group. We’re going to bid. Thanks.” Cohen, Tr. 549))). There is simply no way to read that text in the absence of a mutual understanding between Cohen and Sullivan about a no buying group policy. Indeed, Cohen’s own explanations for the ADC communications inherently reflect mutual expectations about how the companies would approach buying group customers. At trial, Cohen testified he shared his customer bidding strategy with his competitor because he did not want his competitor to think Benco was “duplicitous” or “was trying to head-fake them” (Cohen, Tr. 723; CCFF 1076). There can be no head-fake or duplicity without mutual expectations, in this case that Benco had a no buying group policy and that it would not bid on buying groups. Finally, Cohen admitted at trial he shared Benco’s no buying group policy with Sullivan (CCFF ¶ 624). For all these reasons, the Proposed Finding should be rejected.

1523. Complaint Counsel asserts that the communications between Mr. Cohen and Mr. Sullivan in March and April 2013 were an attempt to seek clarity concerning the application of a pre-existing agreement to boycott buying groups. The preponderance of the evidence does not support the conclusion that Schein and Benco had reached any such agreement prior to the ADC communications. (SF 1467-537). A contrary finding would require the Court to improperly assume the existence of the conspiracy, and then to interpret the ADC evidence in light of such an assumption.

Response to Proposed Finding No. 1523

The Proposed Finding offers not supported by the evidence and includes sweeping conclusions of law, it should therefore be rejected. The single included citation in the Proposed Finding is incomprehensible as a number range. The interfirm communications in conjunction with the totality of the evidence in this case, establishes a meeting of the minds among Respondents by a preponderance of the evidence. (CCFF ¶¶ 1-2037).

1524. The evidence also does not support an inference that Mr. Sullivan and Mr. Cohen reached an agreement during the March 25, 2013 or April 3, 2013 phone calls.¹⁹ Rather, the evidence shows that Mr. Cohen inquired about ADC and that Mr. Sullivan revealed no information about Schein's policies, practices, or plans relating to ADC or buying groups generally.

Response to Proposed Finding No. 1524

The Proposed Finding is not supported by evidence and at odds with the weight of the evidence in this matter. The Proposed Finding is misleading to the extent it suggests Benco did not enter into an agreement with Schein, as defined under Section 1 of the Sherman Act, to refuse to discount to buying groups. The competitors' communications about ADC, combined with the testimony, and the totality of Complaint Counsel's evidence, establishes that Benco and Schein reached an agreement. (CCFF ¶¶ 1025-1055; *see also* CCFF ¶¶ 661-

¹⁹ Complaint Counsel does not allege that Schein and Benco reached an agreement for the first time on the March 25, 2013 or April 3, 2013 calls. Such an allegation would be inconsistent with their theory of the case that (i) Schein and Benco entered into the alleged conspiracy in 2011, and (ii) Patterson joined a single, unitary ongoing conspiracy on February 8, 2013. Accordingly, there is no need to reach the question of whether Schein and Benco first reached an agreement in early 2013. For completeness, however, as noted above, there is insufficient evidence to support an inference of such an agreement.

1158, 1167-1198)). The Proposed Finding is also contrary to the weight of the evidence to the extent that it suggest that Cohen and Sullivan's communications regarding ADC are not indicative of an agreement. Both Cohen and Sullivan admit the purpose of the March 25, 2013 telephone call was to discuss ADC (CCFF ¶¶ 1034-1044; Cohen, Tr. 546, 968; CX0301 (Cohen IHT at 271); (Sullivan, Tr. 3946-3947; CX0311 (Sullivan, IHT at 261)). The notably responsive, friendly communications on the day of the call between Cohen and Sullivan refer to ADC and reflect frequent and prompt communications suggesting Sullivan was more than happy to reciprocate. (CCFF ¶¶ 1044-1047). To set up the call, Cohen texted Sullivan asking for a time to talk, and two minutes later Sullivan responded and set a time to talk that day. (CCFF ¶ 1030). Sullivan did call Cohen on March 25, 2013 and they spoke 8 minutes and 35 seconds (CCFF ¶ 1032). Four minutes after that call, Sullivan reached out to Cohen to thank him for the ADC call. (CCFF ¶ 1033; CX6027 at 027 (Row 241) ("Hi Chuck. Thanks for the call."); Sullivan, Tr. 3957). Next, in the evening of the same day, March 25, 2013, Cohen sent Sullivan a link to an article about ADC by text stating, "Here's a link to the press release we discussed" (CX6027 at 028 (Row 243); CCFF ¶¶ 1045-1046). A few minutes later, Sullivan responded, "Thanks for the follow up on that article." (CX6027 at 028 (Row 244)); Cohen, Tr. 546; Sullivan, Tr. 3957). The inter-firm communications between Schein and Benco on ADC culminate two days later with a text that Benco would bid precisely *because* ADC was "not a buying group." (CCFF ¶ 1069 (CX0196 at 010 ("Tim: Did some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all the practices. So it's not a buying group, it's a big group. We're going to bid. Thanks." Cohen, Tr. 549)). There is simply no way to read that text in the absence of a mutual understanding between Cohen and Sullivan about a no buying group policy. Indeed, Cohen's own

explanations for the ADC communications inherently reflect mutual expectations about how the companies would approach buying group customers. At trial, Cohen testified he shared his customer bidding strategy with his competitor because he did not want his competitor to think Benco was “duplicitous” or “was trying to head-fake them” (Cohen, Tr. 723; CCFF 1076). There can be no head-fake or duplicity without mutual expectations, in this case that Benco had a no buying group policy and that it would not bid on buying groups. Finally, Cohen admitted at trial he shared Benco’s no buying group policy with Sullivan (CCFF ¶ 624). The Proposed Finding is also misleading because Complaint Counsel does not allege that Schein and Benco first formed their agreement in March 2013, but rather that Schein and Benco reached an agreement in 2011. (*See e.g.*, CCFF ¶¶ 661-1108).

1525. At most, the evidence suggests that Benco revealed information about its plans concerning ADC. Even if the evidence were to support an inference that Benco sought to invite collusion (which it does not, given the denials of both Mr. Sullivan and Mr. Cohen), the evidence does not support the further inference that Schein accepted any such invitation.

Response to Proposed Finding No. 1525

The Proposed Finding offers no citations and is a sweeping conclusion of law, it should therefore be rejected. Further, the Proposed Finding is incorrect that no evidence supports an inference of conspiracy among Respondents. (*See* Complaint Counsel’s Post-Trial Brief and Reply Brief). The competitors’ communications about ADC, combined with the testimony, and the totality of Complaint Counsel’s evidence, establishes that Benco and Schein reached an agreement. (CCFF ¶¶ 1025-1055; *see also* CCFF ¶¶ 661-1158, 1167-1198)). The Proposed Finding is also contrary to the weight of the evidence to the extent that it suggest that Cohen and Sullivan’s communications regarding ADC are not indicative of an agreement. Both Cohen and Sullivan admit the purpose of the March 25, 2013 telephone call was to discuss ADC (CCFF ¶¶ 1034-1044; Cohen, Tr. 546, 968; CX0301 (Cohen IHT at

271); (Sullivan, Tr. 3946-3947; CX0311 (Sullivan, IHT at 261)). The notably responsive, friendly communications on the day of the call between Cohen and Sullivan refer to ADC and reflect frequent and prompt communications suggesting Sullivan was more than happy to reciprocate. (CCFF ¶¶ 1044-1047). To set up the call, Cohen texted Sullivan asking for a time to talk, and two minutes later Sullivan responded and set a time to talk that day. (CCFF ¶ 1030). Sullivan did call Cohen on March 25, 2013 and they spoke 8 minutes and 35 seconds (CCFF ¶ 1032). Four minutes after that call, Sullivan reached out to Cohen to thank him for the ADC call. (CCFF ¶ 1033; CX6027 at 027 (Row 241) (“Hi Chuck. Thanks for the call.”); Sullivan, Tr. 3957). Next, in the evening of the same day, March 25, 2013, Cohen sent Sullivan a link to an article about ADC by text stating, “Here’s a link to the press release we discussed” (CX6027 at 028 (Row 243); CCFF ¶¶ 1045-1046). A few minutes later, Sullivan responded, “Thanks for the follow up on that article.” (CX6027 at 028 (Row 244)); Cohen, Tr. 546; Sullivan, Tr. 3957). The inter-firm communications between Schein and Benco on ADC culminate two days later with a text that Benco would bid precisely *because* ADC was “not a buying group.” (CCFF ¶ 1069 (CX0196 at 010 (“Tim: Did some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all the practices. So it’s not a buying group, it’s a big group. We’re going to bid. Thanks.” Cohen, Tr. 549)). There is simply no way to read that text in the absence of a mutual understanding between Cohen and Sullivan about a no buying group policy. Indeed, Cohen’s own explanations for the ADC communications inherently reflect mutual expectations about how the companies would approach buying group customers. At trial, Cohen testified he shared his customer bidding strategy with his competitor because he did not want his competitor to think Benco was “duplicitous” or “was trying to head-fake them” (Cohen, Tr. 723; CCFF

1076). There can be no head-fake or duplicity without mutual expectations, in this case that Benco had a no buying group policy and that it would not bid on buying groups. Moreover, Cohen previously testified under oath that informing Sullivan of Benco's decision to bid was counter to his rational self-interest: "In fact, there's a counter-business reason, which is, I probably, in saying that we're going to bid, I probably, gave more information . . . than a rational business owner would give, which is, hey, we're bidding on it." (CCFF ¶ 1074; CX0301 (Cohen, IHT at 277); Cohen, Tr. 551-52). Finally, Cohen admitted at trial he shared Benco's no buying group policy with Sullivan (CCFF ¶ 624). The inter-firm communications in conjunction with the totality of the evidence in this case, establishes a meeting of the minds among Respondents by a preponderance of the evidence. (CCFF ¶¶ 1-2037).

The Proposed Finding that Schein did not accept an invitation from Benco is also contrary to the weight of the evidence. The weight of the evidence shows that Schein acted on Benco's invitation by directing its sales force to refuse buying groups. (CCFF ¶¶ 717-860). Further, the evidence shows that Sullivan did not rebuff Cohen. Cohen testified at trial that he did not recall Sullivan ever telling Cohen to stop contacting him about buying groups. (CCFF ¶ 1055). Cohen also testified that Sullivan never gave Cohen the impression that they should not be talking about buying groups. (CCFF ¶ 1056). Even Sullivan testified that he has never known Cohen to lie, so Cohen's testimony on this point should be credited. (CX0311 (Sullivan, IHT at 271) ("Q. Have you known Mr. Cohen to lie? A. I know him as an odd personality but to flat out lie, no. I don't communicate that much with him to tell you the truth, but it's -- I don't know him to have lied.")). Cohen also testified that if a rival told him to stop communicating, he would do so. (Cohen, Tr. 968-969). But Cohen did not stop communicating with Sullivan regarding buying groups: in the days following the March 25,

2013 telephone call, Cohen texted Sullivan twice about buying groups. (CCFF ¶¶ 997-1000, 1069). Additionally, Sullivan's contemporaneous communications with Cohen belie the assertion that Sullivan shut down the conversation or admonished Cohen during the March 25, 2013 call. Immediately following the March 25, 2013 call, Sullivan thanked Cohen and joked with him. (CCFF ¶¶ 1051-1053). After Cohen promptly sent further information clarifying that ADC was not a buying group, Sullivan thanked him again. (CCFF ¶¶ 1057-1058). And after Cohen sent additional information, *Sullivan* tried to call Cohen two times on March 27, 2013 and April 3, 2013. (CCFF ¶¶ 1079-1080; CX6027 at 028 (Row 247), 029 (Row 250), 029 (Row 255)). Further, despite Sullivan's purported concerns with the call, Sullivan never reported or documented his communications with Cohen about ADC in 2013 to Schein's legal department or anyone else, as he was required to do under Schein's antitrust policy. (CCFF ¶¶ 1049-1050). Finally, the Proposed Finding omits that Sullivan contradicted himself under oath regarding the March 25, 2013 call. Sullivan initially testified that Cohen informed him on the March 25, 2013 call that Benco did not plan to bid on the ADC group. (CCFF ¶¶ 1038-1043; *but see* Sullivan, Tr. 3948 (acknowledging that his testimony changed)). In fact, Sullivan testified on three separate occasions at his investigational hearing that Cohen informed Sullivan that Benco did not plan to bid on the ADC group on the March 25, 2013 call: (1) Cohen "basically said to me that they [Benco] don't plan to, you know, bid on their – this group . . ." (CCFF ¶ 1038; CX0311 (Sullivan, IHT at 260-261)); (2) "Q. During the call Mr. Cohen indicated to you that they were not going to bid on Atlantic Dental Care because it was a buying group; is that right? A. I don't recall him saying why, just that he was – they were not going to go bid on it." (CCFF ¶ 1039; CX0311 (Sullivan, IHT at 299-300)); (3) on the March 25, 2013 call, Cohen said, "we're not

interested” in ADC. (CCFF ¶ 1041; CX0311 (Sullivan, IHT at 261)). Similarly, Sullivan testified at his investigational hearing that he had no recollection of why he called Cohen on March 27, 2013, but that it was not even “possible” that the call related to ADC. (CX0311 (Sullivan, IHT at 306)). Sullivan later self-servingly testified that it was his intent on March 27, 2013 to “remind” Cohen that they “should not be talking about this.” (CX8025 (Sullivan, Dep. 409-410; *see also* Sullivan, Tr. 3963, 3965)). Sullivan changed his testimony another time regarding an April 3, 2013 telephone call with Cohen. Sullivan initially testified that he did not believe it was “possible” that the call related to ADC. (CCFF ¶ 1089). Sullivan then changed his story at his deposition to insist that he told Cohen on April 3, 2013 that it was inappropriate to discuss ADC. (CX8025 (Sullivan, Dep. 415, 416)).

1526. Accordingly, the evidence does not support an inference of a conspiracy among Respondents.

Response to Proposed Finding No. 1526

The Proposed Finding is not supported by evidence and at odds with the weight of the evidence in this matter. The Proposed Finding offers no citations and is a sweeping conclusion of law, it should therefore be rejected. The inter-firm communications in conjunction with the totality of the evidence in this case, establishes a meeting of the minds among Respondents by a preponderance of the evidence. (CCFF ¶¶ 1-2037).

1527. Moreover, the ADC evidence, taken as a whole and considered in light of all the record evidence, does not tend to exclude the possibility that Schein acted unilaterally prior to these communications. In fact, the evidence indicates that Schein unilaterally evaluated the ADC opportunity and submitted a bid in light of that evaluation.

Response to Proposed Finding No. 1527

The Proposed Finding is misleading and fails to cite any evidence in support of the argument and should be disregarded as it is not a proper Proposed Finding. The Proposed Finding offers no citations and is a sweeping conclusion of law, it should therefore be rejected.

Specifically, the evidence shows that Benco and Schein took a coordinated approach to ADC as described in more detail in Response to Proposed Finding No. 1525. (*See also* CCFF ¶¶ 1022-1100). The inter-firm communications in conjunction with the totality of the evidence in this case, establishes a meeting of the minds among Respondents by a preponderance of the evidence. (CCFF ¶¶ 1-2037).

1528. On April 4, 2013, Mr. Porro circulated a draft of the ADC proposal to Mr. Sullivan, Mr. Steck, Mr. Anderson, Mr. Steck, and Mr. Chatham. (CX 2021-013-16).

Response to Proposed Finding No. 1528

Complaint Counsel has no specific response.

1529. After receiving feedback from Special Markets, Mr. Porro inquired how ADC was going to drive compliance to purchase from Schein. (CX 2021-008, -012).

Response to Proposed Finding No. 1529

The Proposed Finding is incomplete and misleading because it omits that by this time Cohen had told Schein that it determined ADC was not a buying group and would bid. (CCFF ¶ 1069). Sullivan had also spoken to Porro after Benco's disclosure. (CCFF ¶¶ 1080-1084). Sullivan's own documents state that he initially viewed ADC as a buying group and planned to walk away. (CCFF ¶ 1097; CX2021 at 013; Sullivan, Tr. 3969). Following Sullivan's communications with Cohen, on March 31, 2013, Porro wrote in an email that he had talked to Sullivan and "[t]he thinking is that Benco, a decent player in the market and always hungry, will put in a bid." (CCFF ¶ 1086; CX0198 at 013). Complaint Counsel has no specific response to the remainder of this Proposed Finding.

1530. ADC represented to Schein that the group was united and would "all buy from one supplier provided [they] can get the pricing incentive to do so." (CX 2021-007).

Response to Proposed Finding No. 1530

The Proposed Finding is incomplete and misleading because it omits that by this time Cohen had told Schein that it determined ADC was not a buying group and would bid. (CCFF ¶ 1069). Sullivan had also spoken to Porro after Benco's disclosure. (CCFF ¶¶ 1080-1084). Sullivan's own documents state that he initially viewed ADC as a buying group and planned to walk away. (CCFF ¶ 1097; CX2021 at 013; Sullivan, Tr. 3969). Following Sullivan's communications with Cohen, on March 31, 2013, Porro wrote in an email that he had talked to Sullivan and "[t]he thinking is that Benco, a decent player in the market and always hungry, will put in a bid." (CCFF ¶ 1086; CX0198 at 013). Complaint Counsel has no specific response to the remainder of this Proposed Finding.

1531. Schein's understanding was that ADC did not have an ownership interest in the practices, but the practices were instead unified via contractual arrangement. (CX 8000 (Porro, Dep. at 208-14)).

Response to Proposed Finding No. 1531

The Proposed Finding is incomplete and misleading because it omits that by this time Cohen had told Schein that it determined ADC was not a buying group and would bid. (CCFF ¶ 1069). Sullivan had also spoken to Porro after Benco's disclosure. (CCFF ¶¶ 1080-1084). Sullivan's own documents state that he initially viewed ADC as a buying group and planned to walk away. (CCFF ¶ 1097; CX2021 at 013; Sullivan, Tr. 3969). Following Sullivan's communications with Cohen, on March 31, 2013, Porro wrote in an email that he had talked to Sullivan and "[t]he thinking is that Benco, a decent player in the market and always hungry, will put in a bid." (CCFF ¶ 1086; CX0198 at 013). Complaint Counsel has no specific response to the remainder of this Proposed Finding.

1532. After learning this information, Schein and Special Markets continued to discuss the ADC opportunity internally, and renewed doubts arose as to its benefit. (CX 8000 (Porro, Dep. at 209-210)).

Response to Proposed Finding No. 1532

The Proposed Finding is incomplete and misleading because it omits that by this time Cohen had told Schein that it determined ADC was not a buying group and would bid. (CCFF ¶ 1069). Sullivan had also spoken to Porro after Benco's disclosure. (CCFF ¶¶ 1080-1084). Sullivan's own documents state that he initially viewed ADC as a buying group and planned to walk away. (CCFF ¶ 1097; CX2021 at 013; Sullivan, Tr. 3969). Following Sullivan's communications with Cohen, on March 31, 2013, Porro wrote in an email that he had talked to Sullivan and "[t]he thinking is that Benco, a decent player in the market and always hungry, will put in a bid." (CCFF ¶ 1086; CX0198 at 013). Complaint Counsel has no specific response to the remainder of this Proposed Finding. Complaint Counsel has no specific response to the remainder of this Proposed Finding.

1533. Mr. Sullivan thought "[t]his smells bad" and that Schein had "as much to lose for winning the bid as [it does] for losing (or not bidding)." (CX 2021-006).

Response to Proposed Finding No. 1533

The Proposed Finding is misleading and incomplete. Sullivan's comment comes after Porro suggests that ADC really is a buying group. (CX0198 at 004 (April 4, 2014 at 10:55 pm Porro writes "There is still a little bit of gray on this group and how tied together they are. . ."). The Proposed Finding is also misleading because it omits that in the next email in the chain, dated April 8, 2013, Porro wrote, "We are trying to offer a better rounded program as we could be up against a bid (Benco probably) that just goes way low on price." (CX2021 at 005). Eventually, Porro includes language in the ADC bid that will disqualify the contract if ADC turns out to be a buying group after all. (CCFF ¶¶ 1095-1097; CX2021). Porro had already identified a risk in not working with ADC: on March 31, 2013, in an email to Sullivan and others, Porro identified the risk in not bidding for ADC's business, and the

upside of obtaining new business if Schein won. (CX0198 at 014 (“If we win the upside is the other business we don’t currently get.”)). Finally, the Proposed Finding omits that Sullivan once again changed course and Schein bid on April 8, 2013, once Sullivan was in favor. (CX8000 (Porro, Dep. at 179); CX2021 at 001, 026-029)).

1534. Special Markets’ Mr. Muller also expressed his concerns that partnering with ADC would result in a similar negative reaction from FSCs as had Schein’s prior relationship with Smile Source. (CX 2021-006).

Response to Proposed Finding No. 1534

The Proposed Finding is incomplete and misleading because it omits that by this time Cohen had told Schein that it determined ADC was not a buying group and would bid. (CCFF ¶ 1069). Sullivan had also spoken to Porro after Benco’s disclosure. (CCFF ¶¶ 1080-1084). Sullivan’s own documents state that he initially viewed ADC as a buying group and planned to walk away. (CCFF ¶ 1097; CX2021 at 013; Sullivan, Tr. 3969). Following Sullivan’s communications with Cohen, on March 31, 2013, Porro wrote in an email that he had talked to Sullivan and “[t]he thinking is that Benco, a decent player in the market and always hungry, will put in a bid.” (CCFF ¶ 1086; CX0198 at 013). Complaint Counsel has no specific response to the remainder of this Proposed Finding. Complaint Counsel has no specific response to the remainder of this Proposed Finding.

1535. Despite Mr. Sullivan’s skepticism of the ADC opportunity, he was “overruled” by his local management team, who decided to submit a bid to ADC using a modified, precursor to the “G” plan. (CX 2021-014; Sullivan, Tr. 4213; CX 8000 (Porro, Dep. at 179, 193-94, 209); CX 2020-004 (granting Schein the right to terminate if group “turns out to be purely a buying group,” defined as “pooling individual volume *purely* to obtain lower prices from suppliers” (emphasis added)); Foley, Tr. 4722-23 (describing a call in which Tim Sullivan “gave the green light to the local team to move forward with a bid”)).

Response to Proposed Finding No. 1535

The Proposed Finding is misleading and incomplete to the extent it suggests Sullivan was not the ultimate arbiter of whether Schein would bid for ADC. The Proposed Finding relies on a

citation to Foley describing Sullivan giving the green light. (Foley, Tr. 4722-4723). In accord, Porro also testified Schein bid on ADC when Sullivan became in favor of moving forward with ADC. (CX8000 (Porro, Dep. at 179). The Proposed Finding is misleading and incomplete to the extent it does not include the interdependent nature of determining ADC's status as not a buying group. (CCFF ¶¶ 1022-1098).

1536. The proposal included a formulary that offered discounts on a variety of products and a 10% discount on products outside of the formulary, along with other valued added services. (CX 2021-026).

Response to Proposed Finding No. 1536

Complaint Counsel has no specific response.

1537. Ultimately, ADC was only concerned about the pricing it could offer its members, as ADC turned Schein's proposal down and decided to partner with Benco. (CX 0094).

Response to Proposed Finding No. 1537

The Proposed Finding is not supported by the cited evidence, and in any event is irrelevant.

iv. Communications Between Benco and Patterson Relating to ADC.

1538. In its Opening, Complaint Counsel asserted that "Patterson Enforced [the] Agreement Against Benco," citing a June 16, 2013 email from Mr. Guggenheim to Mr. Cohen asking Mr. Cohen if he "could ... shed some light" on the "supply agreement" Benco signed with ADC, and "wondering if [Benco's] position on buying groups" had changed. (CX 0062-002).

Response to Proposed Finding No.1538

Complaint Counsel has no specific response.

1539. Mr. Cohen responded to Mr. Guggenheim's email noting that Benco still does not "recognize buying groups," but that ADC "meets [Benco's] criteria for a large group practice," since, among other things, the practices have "legally merged together." (CX 0062-001).

Response to Proposed Finding No. 1539

The Proposed Finding is incomplete and misleading. First, it omits that Benco provided Patterson, its close competitor, with a detailed analysis of ADC, a large customer. Cohen's

elaborate response to this question detailed an analysis of how ADC was not a buying group. (CCFF ¶ 574). Cohen’s response provided multiple reasons why ADC was not a buying group, including that ADC had a total of 32 practices; the 32 practices had “legally merged together”; the merged entity was “owned by the former practice owners”; ADC was in the “process of rebranding all of the offices Atlantic Dental Care”; and the company had a board of directors “made up of some of the stakeholders who makes the decisions.” (CCFF ¶ 576; CX0062 at 001; Cohen, Tr. 562-563 (“Q. And then you went on to explain why you believed ADC was not a buying group. A. Yes. . . . What you were explaining to him was that the individual practices of ADC had actually merged together; is that what you were saying? A. Yes. Q. And that meant they weren’t a buying group, but they were a corporate or big group. A. DSO. Yes.”)). Second, Benco also committed to adhere to the same policy in the future. Specifically, that Cohen that would “continue monitoring the process to ensure that ADC delivers on their commitment to us,” including ensuring that ADC was not a buying group. (CCFF ¶ 577; Cohen, Tr. 563-564; CX0062 at 001)).

1540. The email does not reference Schein, and therefore, it does not support an inference that Schein participated in any agreement with Patterson or Benco.

Response to Proposed Finding No. 1540

The Proposed Finding is not supported by any citation to the record evidence and should be disregarded. Nonetheless, the Proposed Finding is vague as to “The email,” which is neither described nor specified. It is also misleading and against the weight of the evidence to the extent it asserts that the specific email (assumed to be CX062) does not support any inference extended to Schein. The record evidence shows that Cohen habitually initiated similar communications with both Patterson and Schein, albeit separately. (CCFF ¶¶ 284-310 (several examples of Cohen sending nearly identical emails to Guggenheim and Sullivan)).

e. Universal Dental Alliance (“Dental Alliance”)

1541. Complaint Counsel cites two unsolicited text messages that Mr. Cohen sent on March 26, 2013 to Mr. Sullivan about a buying group called Universal Dental Alliance (which Mr. Cohen referred to as the Dental Alliance). (CC Pretrial Br. at 15-16; CX 2670; CX 6504). Complaint Counsel claims Mr. Cohen’s texts were an effort to enforce the alleged agreement.

Response to Proposed Finding No. 1541

The Proposed Finding is misleading and contrary to the weight of the evidence, to the extent it characterizes Cohen’s text message to Sullivan about buying group Universal Dental Alliance (“Dental Alliance”) as “unsolicited.” The record evidence shows that Sullivan and Cohen were communicating about buying groups and ADC in March 2013, when Cohen texted Sullivan about Dental Alliance. On March 26, 2013, Cohen notified Sullivan of market intelligence that Schein may be doing business with a buying group and told Sullivan that Benco had turned down the Dental Alliance buying group. (Cohen, Tr. 558; CCFF ¶¶ 995-1004). Sullivan tried to call Cohen the following morning but did not reach him. (CCFF ¶ 998 (CX6027 at 028 (Row 247)); Sullivan, Tr. 3959). The record evidence shows that text message about Dental Alliance followed a March 25, 2013 phone call between Sullivan and Cohen about Atlantic Dental Care (“ADC”) and whether it was a buying group. (CCFF ¶ 1036 (Cohen, Tr. at 547-548); *see also* CX0301 (Cohen, IHT at 271-272 (“[W]e were exchanging information about whether Atlantic Dental Care was a group buying or group purchase organization or a DSO.”))). It also followed Sullivan and Cohen exchanging text messages about ADC. (CCFF ¶¶ 1044-1047). Moreover, Cohen’s testimony about the text message contradicts Schein’s claim that it was unsolicited. (CX0301 (Cohen, IHT at 287) (“Q. And why were you sending Mr. Sullivan this text? A. The context could have been in the conversation we had the day before. Maybe he said he hadn’t heard of it before. I can’t say, from this vantage point, why I sent it to him. Probably answering a question that was

asked or offering information. It might be that.”)). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

1542. Dental Alliance was a North Carolina-based, self-described “group purchasing organization” focused on “the dental and oral surgery industries.” (RX 2350).

Response to Proposed Finding No. 1542

Complaint Counsel has no specific response.

1543. As described above, Schein began doing business with Dental Alliance in July 2011 and continued to do so through at least 2015. (SF 1313-22, 1333; RX 2349; Sullivan, Tr. 4239-41; RX 2350-002-09; Steck, Tr. 3770-71; RX 3076-015; RX 2612; RX 2753).

Response to Proposed Finding No. 1543

Complaint Counsel has no specific response to the Proposed Finding, other than it is contrary to the weight of the evidence and misleading, to the extent it asserts that Sullivan knew of the Dental Alliance buying group in July 2011 or ever approved of it. The record evidence shows that (1) the Dental Alliance agreement was established in July 2011 by a Schein Regional Manager; (2) Sullivan learned of the agreement in October 2011, months after the relationship had been established; and (3) Sullivan never approved the agreement with Dental Alliance. Specifically, after Sullivan was first informed of Dental Alliance in October 2011, he wrote: “[w]e’ve got to undertake this.” (RX2349 at 001). Sullivan testified at trial that by “[w]e’ve got to undertake this,” he meant that he wanted to understand what Dental Alliance was: “I think I meant to say understand this. I just wanted to understand what it was.” (Sullivan, Tr. 4240; *see also* Responses to Proposed Finding Nos. 1319, 1544).

1544. Mr. Sullivan was included on the internal email chain explaining the buying group, and he expressed his approval to his team: “[w]e’ve got to undertake this.” (RX 2349).

Response to Proposed Finding No. 1544

Complaint Counsel has no specific response to the Proposed Finding, other than it is contrary to the weight of the evidence and misleading, to the extent it asserts that Sullivan knew of the

Dental Alliance buying group in July 2011 or ever approved of it. The record evidence shows that (1) the Dental Alliance agreement was established in July 2011 by a Schein Regional Manager; (2) Sullivan learned of the agreement in October 2011, months after the relationship had been established; and (3) Sullivan never approved the agreement with Dental Alliance. (*See Responses to Proposed Finding Nos. 1319, 1543*).

The record shows, and Schein's Proposed Finding No. 1542 concedes, that the agreement between Schein and Dental Alliance was established in July 2011 by a regional manager, Ryan Steck, months before Sullivan was informed of it. (RX2349 at 001 (Schein Vice President Paul Hinsch informed Sullivan on October 20, 2011: "It seems there is a buying group that [regional manager] Ryan Steck has worked something out for.")). Sullivan was previously unaware of the Dental Alliance, or that it was a buying group, before October 20, 2011. (Sullivan, Tr. 4239 (Sullivan was unaware of Dental Alliance in October 2011); RX2349 at 001-002 (after being informed of the Dental Alliance in October 2011, Sullivan responded: "What is this? . . . Do we have an arrangement with them?"); SF 1542). The record shows that Sullivan never approved of Dental Alliance. After Sullivan was informed of Dental Alliance, he wrote: "We've got to undertake this." (RX2349 at 001). Sullivan testified at trial that by "We've got to undertake this," he meant that he wanted to understand what Dental Alliance was: "I think I meant to say understand this. I just wanted to understand what it was." (Sullivan, Tr. 4240). There are no documents and no testimony to support the assertion in the Proposed Finding that Sullivan ever approved Dental Alliance.

1545. In his March 2013 text message, Mr. Cohen wrote: "They [Dental Alliance] apparently get 7% off of catalog [from Schein] just for joining.... [They] contacted me about a year ago and asked if Benco was interested. Told him he was out of his tree." Mr. Cohen added in a follow-up text message: "Could be a rumor, sometimes stories go around." (CX 6027-028; CX 2670; Cohen, Tr. 557-58).

Response to Proposed Finding No. 1545

The Proposed Finding is misleading to the extent it does not quote the entire contents of the text messages from Cohen to Sullivan about Dental Alliance. Cohen stated:

“As per my guy in Raleigh: ‘Dental alliance. They apparently get 7% off of catalog pricing just for joining. Dr. Ben Koren is the dentist involved. A guy named Sam contacted me about a year ago and asked if Benco was interested. Told him he was out of his tree.’ Could be a rumor, sometimes stories go around. Thanks.”

(CCFF ¶¶ 997 (Cohen, Tr. 557-558; CX6027 at 028 (Rows 245-246); CX0061 at 001); *see also* CX0196 at 008-009, Sullivan, Tr. 4196-4197).

1546. When Mr. Sullivan received the text messages, he thought they related to ADC. (Sullivan, Tr. 4198).

Response to Proposed Finding No. 1546

Complaint Counsel has no specific response.

1547. Mr. Sullivan did not respond to the text messages; instead, he attempted to call Mr. Cohen to reiterate, in stronger terms, that he should not be discussing specific customers with him. (Sullivan, Tr. 4197-98; CX 6027-028-29). After playing phone tag with Mr. Cohen, Mr. Sullivan was able to deliver a “much stronger message” on April 3, 2013. (Sullivan, Tr. 4205-06; CX 6027-029).

Response to Proposed Finding No. 1547

The Proposed Finding is contrary to the weight of the evidence, which shows that Sullivan never told Cohen to stop contacting him about customers or buying groups. When Cohen contacted Sullivan about ADC and buying groups on March 25, 2013, Sullivan thanked Cohen for the call, joked with him, and continued communicating with him about buying groups, including through another phone call on April 3, 2013. (CCFF ¶ 1051-1080, 1088-1090). Cohen testified at trial that he did not recall Sullivan ever telling Cohen to stop contacting him about buying groups, or ever giving Cohen the impression that the two men

should not be talking about buying groups. (CCFF ¶ 1090 (Cohen, Tr. 559)). At trial, Sullivan claimed that during the April 3, 2013 call, Sullivan told Cohen that he should “stop sending me information about customers.” (Sullivan, Tr. 3966). Sullivan’s testimony is contrary to sworn testimony that he provided at his investigational hearing when he was asked about the same April 3, 2013 phone call. At his investigational hearing, Sullivan testified that he did not know what his April 3, 2013 call with Cohen was about, but that he did not believe it was possible that the call related to Atlantic Dental Care. (CCFF ¶ 1089 (CX0311 (Sullivan, IHT at 310-311))).

1548. The Universal Dental Alliance evidence does not support Complaint Counsel’s theory, and Mr. Cohen’s unsolicited text message in many ways contradicts Complaint Counsel’s theory.

Response to Proposed Finding No. 1548

The Proposed Finding is not supported by any citation to the record evidence and should be disregarded. Nonetheless, the Proposed Finding is contrary to the weight of the evidence, as Sullivan and Cohen’s communications about Dental Alliance support Complaint Counsel’s allegations of a pre-existing agreement about buying groups. (*See* Responses to Proposed Finding Nos. 1541-1548).

1549. Mr. Sullivan knew about Schein’s relationship with this buying group as early as October 20, 2011, and potentially earlier. (RX 2349).

Response to Proposed Finding No. 1549

The Proposed Finding is contrary to the weight of the evidence, to the extent it asserts that Sullivan knew of Dental Alliance before October 20, 2011. The record evidence shows that (1) the Dental Alliance agreement was established in July 2011 by a Schein Regional Manager, (2) that Sullivan learned of the agreement in October 2011, months after the

relationship had been established, and (3) Sullivan never approved the agreement with Dental Alliance. (*See* Response to Proposed Finding No. 1544).

1550. Mr. Cohen's text messages confirm that Schein and Benco made different, independent business decisions as to buying groups during the alleged conspiracy period and did not coordinate when making such decisions. Schein said yes to Universal Dental Alliance in 2011, and Benco said no in 2012. (RX 2612-013-14; Steck, Tr. 3770-71; Ryan, Tr. 1172 (Benco's Mr. Ryan "[r]eiterated our policy and told them that there was no way for us to work together in the way they wanted to.")).

Response to Proposed Finding No. 1550

The Proposed Finding cites no evidence in the record to support its conclusion, constitutes legal argument, and should be disregarded. The Proposed Finding is contrary to the weight of the evidence, which shows that Sullivan and Cohen were communicating about buying groups in March and April 2013, pursuant to a pre-existing agreement. The record evidence shows that on March 26, 2013, Cohen notified Sullivan of market intelligence that Schein may be doing business with a buying group, and told Sullivan Benco had turned down the Dental Alliance buying group. (Cohen, Tr. 558, CCFF ¶¶ 995-1004). The record evidence shows that text message about Dental Alliance followed a March 25, 2013 phone call between Sullivan and Cohen about Atlantic Dental Care ("ADC") and whether it was a buying group. (Cohen, Tr. at 547-548; *see also* CX0301 (Cohen, IHT at 271-272 ("[W]e were exchanging information about whether Atlantic Dental Care was a group buying or group purchase organization or a DSO."))). (CCFF ¶ 1036). It also followed Sullivan and Cohen exchanging text messages about ADC. (CCFF ¶¶ 1044-1047). Moreover, the record evidence shows that (1) the Dental Alliance agreement was established in July 2011 by a regional manager, (2) Sullivan learned of the agreement in October 2011, months after the relationship had been established, and (3) Sullivan never approved the agreement with Dental Alliance. (*See* Responses to Proposed Finding Nos. 1544).

1551. Mr. Sullivan testified that he “never spoke to [Mr. Cohen] about Dental Alliance,” that the two text messages (*see* CX 6027-028 (citing CX 2670 and CX 6504)) were the only communications he ever received from Mr. Cohen about this group, that he never responded to the text messages, and that he never called Mr. Cohen about this group. (CX 0311 (Sullivan, IHT at 307-08); RX 2941 (Sullivan, Dep. at 475-77)).

Response to Proposed Finding No. 1551

The Proposed Finding is misleading and irrelevant to the extent it asserts that Sullivan never followed up specifically about the Dental Alliance, because Sullivan testified (as Schein concedes in Proposed Finding No. 1546) that he thought the text messages about Dental Alliance related to Atlantic Dental Care, and Sullivan did not realize it was about a separate buying group called Dental Alliance (Sullivan, Tr. 4198). The record evidence, however, shows that Sullivan and Cohen continued to communicate by phone and text message following Cohen’s texts about Dental Alliance. For instance, Sullivan tried to call Cohen the following morning but did not reach him. (CX6027 at 028 (Row 247); Sullivan, Tr. 3959).

1552. Nothing in Mr. Cohen’s text messages is indicative of an agreement with Schein or an effort to enforce an agreement with Schein by trying to stop Schein from doing business with Universal Dental Alliance. Schein continued doing business with Universal Dental Alliance, Mr. Cohen did not share any competitively sensitive information, and Mr. Sullivan did not respond.

Response to Proposed Finding No. 1552

The Proposed Finding is not supported by any citation to the record evidence and should be disregarded. Nonetheless, the Proposed Finding is contrary to the weight of the evidence, which shows that Cohen acted pursuant to an agreement in contacting Sullivan about Dental Alliance. By telling Sullivan that Benco had not bid on Dental Alliance, Benco was sharing competitively sensitive information with Sullivan. (CCFF ¶¶ 1061-1077). Cohen previously testified under oath that informing Sullivan of Benco’s decision to bid was counter to his rational self-interest: “In fact, there’s a counter-business reason, which is, I probably, in saying that we’re going to bid, I probably, gave more information . . . than a rational business

owner would give, which is, hey, we're bidding on it." (CCFF ¶ 1074; CX0301 (Cohen, IHT at 277); Cohen, Tr. 551-52). Cohen offered no explanation at trial for why he sent his own employee's email to Sullivan or why he notified Sullivan of rumors of Schein discounting to a buying group. (*See* Cohen, Tr. 557-558). The Proposed Finding is also misleading to the extent it asserts that Sullivan never acted to terminate the Dental Alliance buying group, or never took any action concerning it following Cohen's text messages. Sullivan testified (as Schein concedes in Proposed Finding No. 1546) that he thought the text messages about Dental Alliance were about Atlantic Dental Care. (Sullivan, Tr. 4198).

f. The September 16, 2013 Internal Benco Email re Burkhart

1553. Complaint Counsel relies on an *internal* September 16, 2013 Benco email as evidence of the alleged conspiracy.

Response to Proposed Finding No. 1553

The Proposed Finding is incomprehensible and vague as it makes no citation to any evidence or document whatsoever. To the extent it suggests that that contemporaneous documents are not proper evidence, it is inaccurate and should be disregarded. Finally, the Proposed Finding is misleading to the extent it suggests Complaint Counsel relies on a single email for proof of the conspiracy.

1554. On September 16, Benco Vice President of Sales Mike McElaney spoke with Burkhart's "Jeff Reece at length ... about buying groups," and reported that "JEFF DOES NOT GET IT!" (CX 0023). Upon receiving this report, Benco's Pat Ryan suggest to Chuck Cohen that "*maybe* what you should do is make sure you tell Tim and Paul to hold their positions as we are." (CX 0023 (emphasis added)).

Response to Proposed Finding No. 1554

Complaint Counsel has no specific response except to clarify that the cited document refers to interfirm communications between Benco and Burkhart. Further, at trial, Ryan testified that his September 16, 2013, email referred to telling Tim Sullivan and Paul Guggenheim to

hold their “position” of not working with buying groups, just as Benco was holding its position of not working with buying groups. (CCFF ¶¶ 1103-1104; Ryan, Tr. 1114-1115; *see also* Cohen, Tr. 581-582).

1555. But Mr. Cohen denied having had any discussions with Mr. Sullivan about buying groups in response to or otherwise following this email. (Cohen, Tr. 901-02). Moreover, Complaint Counsel’s log of communications does not reflect any such communications. (CX 6027).

Response to Proposed Finding No. 1555

The Proposed Finding is misleading and incomplete. First, Cohen did not testify that he did not have any discussions with Sullivan about buying groups in response to or following this email; rather, he testified specifically that he did not “call” Sullivan in response to this email. (Cohen, Tr. 901-02). The Proposed Finding is also misleading and incomplete because the communications log does not reflect all the communications between the competitors; indeed, (1) Sullivan testified that he may also have called Cohen from his office land line telephone, the records for which were not produced (CCFF ¶ 354); (2) Cohen sent Sullivan notes by mail from time to time and Sullivan did not keep or produce those documents (CCFF ¶¶ 350, 353); and (3) the executives saw each other often during the conspiracy period, in person, at industry events where they admitted to speaking with each other (CCFF ¶¶ 355-377, 379, 381, 383, 385-387). The Proposed Finding is misleading specifically because following this email exchange in September 16, 2013, Cohen, Sullivan, and Guggenheim all attended the Dental Trade Alliance (“DTA”) Meeting, held October 15-18, 2013 in Ponte Vedra Beach, FL. (CCFF ¶¶ 364 (Dental Trade Alliance Meeting)). The evidence shows that Cohen spoke with his competitors at that meeting about buying groups. In fact, Cohen invited a fourth competitor, Burkhart, not to work with buying groups at this Dental Trade Association Meeting in October 2013. (CCFF ¶¶ 1238-1241). In sum, the

evidence shows (1) a contemporaneous email reflecting that Benco planned to tell Sullivan and Guggenheim to “hold their positions” on buying groups, (CX0023 at 001); (2) the following month, Sullivan, Guggenheim, and Cohen all attended the same DTA meeting, providing an opportunity to discuss buying groups (CCFF ¶¶ 364, 366, 1243); and (3) Cohen invited Burkhart to stop discounting to buying groups at the same meeting (CCFF ¶¶ 1238-1241). Taken together, this is evidence that Cohen sought to reaffirm the no buying group positions with Guggenheim and Sullivan at the DTA meeting in 2013.

g. Communications Regarding the Texas Dental Association (“TDA”) Are Not Evidence of a Conspiracy Regarding Buying Groups.

1556. While Complaint Counsel does “not allege a group boycott of the [TDA] trade show,” they allege “inter-firm communications” about the TDA “are evidence of [Respondents’] conscious commitment to coordinate their response to the threat of Buying Groups.” (Kahn, Tr. 52; Complaint ¶ 74).

Response to Proposed Finding No. 1556

Complaint Counsel has no specific response.

i. Each Respondent Made a Unilateral Decision Regarding the 2014 TDA Trade Show.

1557. In September 2013, the TDA entered into an agreement with SourceOne, an operator of a website that offered discounts on dental supplies. (CX 9024 (Osio, Dep. at 365-66, 378-79)). Pursuant to that agreement, SourceOne agreed to operate a website under the name TDAPerks Supplies, and the TDA agreed to endorse or promote this website to its members. (CX 9024 (Osio, Dep. at 378-79)). Neither SourceOne, nor the TDA, were the actual sellers of the supplies that members purchased through the TDAPerks Supplies portal. Rather, SourceOne had one or more traditional distributors who shipped the products to customers. (CX 9024 (Osio, Dep. at 403-04, 428-29)).

Response to Proposed Finding No. 1557

Complaint Counsel has no specific response.

1558. Between December 2013 and March of 2014, Schein sought to engage the TDA in discussions concerning the TDAPerks Supplies Program, and the fact that the TDA was no longer a neutral platform based on its endorsement of one of Schein’s competitors. (Cavaretta, Tr. 5614-15; RX 0194; RX 0211). Internal Schein documents suggest that Schein executives

were becoming frustrated with the TDA's lack of responsiveness. (Cavaretta, Tr. 5614-15 ("after six to eight months of trying to get a meeting with them, we finally got the meeting in April"); RX 0211). Accordingly, Schein discussed that, if the TDA continued to refuse to meet with Schein or continued to endorse SourceOne, that it would not attend the TDA show in 2014. (RX 2361).

Response to Proposed Finding No. 1558

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not communicate with Patterson or Benco regarding its anticipated response to the TDA buying group. The record evidence shows that TDA Perks is a buying group created by TDA, and that Schein viewed TDA Perks as a buying group. (CCFF ¶¶ 1110, 1112). The record evidence is clear—the Big Three viewed TDA's creation of a buying group as a threat, high-level executives and regional managers alike engaged in interfirm communications with their competitors about a response, and none of the Big Three attended TDA's annual meeting. (CCFF ¶¶ 1109-1155). The Proposed Finding is also misleading because it contains characterizations contrary to the testimony and documents cited. Neither Cavaretta's testimony nor the document cited (RX0211) support the characterization of Schein executives "becoming frustrated with the TDA's lack of responsiveness." On the contrary, in an email with the subject line "Meeting with TDA Perks," Schein's Showgren stated: "Looks like the ball is rolling for the meeting." (RX0211 at 001).

1559. On April 3, 2014, Schein's Dean Kyle and Joe Caveretta met with representatives of the TDA. (Cavaretta, Tr. 5614-15; RX 2361). They requested that the TDA switch partners from SourceOne to Schein. (RX 2361 ("Proposed we work together instead of against each other"). They also told the TDA that, if it continued to endorse SourceOne, Schein would not attend the TDA show in 2014. (RX 2361).

Response to Proposed Finding No. 1559

The Proposed Finding is misleading and incomplete as to RX2361. RX2361, an April 4, 2014 email to TDA, makes no specific reference to TDA continuing to endorse SourceOne.

Rather, it states: “We are very encouraged by your willingness to look at future opportunities and we look forward to hearing what the board decides later today. Please know Henry Schein will not be able to attend the TDA meeting in May until we are better aligned.” (RX2361 at 003). The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not communicate with Patterson or Benco regarding its anticipated response to the TDA buying group. The record evidence shows that TDA Perks is a buying group created by TDA, and that Schein viewed TDA Perks as a buying group. (CCFF ¶¶ 1110, 1112). The record evidence is clear—the Big Three viewed TDA’s creation of a buying group as a threat, high-level executives and regional managers alike engaged in interfirm communications with their competitors about a response, and none of the Big Three attended TDA’s annual meeting. (CCFF ¶¶ 1109-1155).

1560. The TDA informed Schein that it intended to continue its partnership with SourceOne, and on April 8, 2014, the TDA removed Schein from the public floorplan of the 2014 TDA tradeshow. (RX 0232).

Response to Proposed Finding No. 1560

The Proposed Finding is not supported by the evidence cited. RX0232 does not establish

“[t]he TDA informed Schein that it intended to continue its partnership with SourceOne.”

1561. On April 9, 2014, Benco informed the TDA that it was not going to attend the TDA tradeshow in 2014. (CX 0303 (McElaney, IHT at 142, 145, 149)). Benco made this decision unilaterally. (CX 0303 (McElaney, IHT at 144 (“it wasn’t worth the costs anymore ... and the convention was no longer a level playing field”))).

Response to Proposed Finding No. 1561

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies there is evidence that Benco’s decision to withdraw from the 2014 TDA tradeshow was unilateral. On the contrary, contemporaneous documents show that Benco’s decision was dependent on what it knew about the decisions of its competitors. (CCFF ¶

1144 (quoting CX0063 at 001 (April 9, 2014 Cohen email instructing Benco’s McElaney, “Let’s pull out, if Schein and Patterson are as well. Thanks.”)); *see also* CCFF ¶¶ 1133-1137 (Benco communicated with both Schein and Patterson about TDA buying group). The Proposed Finding is further misleading to the extent that it implies that decisions made by Benco—after express communications about attending the 2014 TDA Annual Meeting between key personnel at competing distributors—constitute unilateral actions. The weight of the evidence shows that the three Respondents communicated with each other about the plans of their competitors at the time they were making their decisions regarding attending the TDA Annual Meeting. On October 14, 2013, Cohen instructed his Regional Manager in Texas, Ron Fernandez, to contact Schein and Patterson to discuss cutting back support for TDA’s meetings and programs because TDA was starting a buying group. (CCFF ¶ 1118). Fernandez followed that direction and contacted Patterson and Schein employees to coordinate “taking a stand together” against TDA. (CCFF ¶ 1119 (quoting CX1278 (Excel worksheet “Chats” tab at row 9))); CX1328 at 007 (Benco’s Response to RFA ¶ 8) (Benco’s Fernandez spoke with Schein’s Showgren by telephone about TDA Perks Supplies on October 15, 2013); CX0178 at 002-003; CX1289 at 001; CX0108 at 001 (“As for Patterson, we have briefly discussed this TDAPerks site . . . with our dealer competitors at the local San Antonio & Houston level. . . .”); CCFF ¶ 1121 (Benco’s Fernandez communicated with Patterson’s Hyden by telephone in late 2013 about the 2014 TDA Annual Meeting)). Finally, the Proposed Finding is not supported by the evidence cited, and is, therefore, unreliable. The quotation from McElaney’s testimony (CX0303 (McElaney, IHT at 144)) is not even a statement of Mr. McElaney’s own views or factual recollections; rather, he was repeating what others had allegedly told him. As unreliable double hearsay, this testimony

should be accorded no weight. With respect to the one statement that Benco informed the TDA that it was not going to attend the 2014 TDA tradeshow, Complaint Counsel has no specific response.

1562. After the TDA announced the TDAPerks Supplies program, Patterson had discussions with TDA management. (CX 3378). Patterson decided not to attend the TDA's meeting and in response, on November 6, 2013 the TDA "released the reserve status on the Patterson Dental booth space and ... assigned [it] to other vendors." (RX 0166; CX 9024 (Osio, Dep. at 481-82 ("[T]hey never even got a booth."))).

Response to Proposed Finding No. 1562

The Proposed Finding is misleading and not supported by the evidence cited. Although RX0166 states that the TDA "released the reserve status on the Patterson Dental booth space," the document states that the reason that it released Patterson's space is that Patterson had failed to sign a contract or pay the required deposit to hold its space. (RX0166 at 00001-00002.) RX0116 further states that "Clint Edens, Regional Manager for Patterson Dental has reached out to [TDA's] Dr. Duncan and they are trying to schedule a time to meet sometime in December," which indicates that Patterson was continuing to engage with TDA about possible attendance at the 2014 TDA Annual Meeting. The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not communicate with Patterson or Benco regarding its anticipated response to the TDA buying group. The record evidence shows that TDA Perks is a buying group created by TDA, and that Schein viewed TDA Perks as a buying group. (CCFF ¶¶ 1110, 1112). The record evidence is clear—the Big Three viewed TDA's creation of a buying group as a threat, high-level executives and regional managers alike engaged in interfirm communications with their competitors about a response, and none of the Big Three attended TDA's annual meeting. (CCFF ¶¶ 1109-1155).

1563. The evidence shows that Patterson made its decision unilaterally. (CX 0316 (Misiak, IHT at 300-02 (Mr. Edens, a Patterson regional president, decided to withdraw because the “TDA decided to compete with Patterson, made some slanderous comments about Patterson and the pricing structures, and we had a growing concern about supporting a competitor and making strategic investments, which is what a trade show booth is”).²⁰ There is no evidence of any communication between Patterson and either Benco or Schein concerning Patterson’s decision not to attend the TDA trade show.

Response to Proposed Finding No. 1563

The Proposed Finding is inaccurate, misleading, and contrary to the weight of the record evidence. The record evidence shows that to Patterson communicated with its competitors Schein and Benco and shared information about its plans to withdraw from the 2014 TDA Annual Meeting. First, Patterson communicated with Benco. For example, in late 2013, Benco’s Regional Manager Ron Fernandez communicated with Patterson’s John Hyden by telephone about the 2014 TDA Annual Meeting. (CCFF ¶ 1121). On that call, Hyden told Fernandez that Patterson would not be attending the 2014 TDA Annual Meeting. (CCFF ¶ 1121). Second, high-ranking executives at Schein and Patterson also communicated about a response to TDA Perks, which Patterson’s Misiak described to his colleague as: “[Steck] already told me they were out.” (CCFF ¶¶ 1123-1133). Finally, to the extent that Schein is including the language in footnote 20 as part of its finding, that portion of the Proposed Finding should also be disregarded, as it cites no support for the assertion. Indeed, the documents noted in footnote 20 evidence interfirm communications and are part of the record evidence, described in this Response and above, and they show that the Big Three viewed the TDA Perks as a threat, communicated about a response to that threat, and did not attend the 2014 TDA Annual Meeting. (CCFF ¶¶ 1109-1155).

²⁰ All evidence of interfirm communication presented by Complaint Counsel to support their conspiracy claim is three to seven months *after* Patterson declined to present at the TDA meeting. (CX 0101 (April 22, 2014); CX 1062 (April 16, 2014); CX 0157 (January 14, 2014), CX 6027-036 ((line 298) January 6, 2014)).

ii. The October 2013 Fernandez-Showgren Call is Not Evidence of an Agreement.

1564. On October 15, 2013, Benco’s Texas Regional Manager, Ron Fernandez, called Schein’s Texas Regional Manager, Glenn Showgren, to discuss the TDA. (RX 2362-002; RX 1126 (Fernandez, Dep. at 72-73)). Neither Mr. Showgren nor Mr. Fernandez were called to testify at trial, and no testimony was elicited at trial concerning this call or the document summarizing it.

Response to Proposed Finding No. 1564

The second sentence of the Proposed Finding is misleading to the extent that it implies that the documents—which are in the record— cannot be considered without additional testimony. Complaint Counsel has no specific response to the statement that, “On October 15, 2013, Benco’s Texas Regional Manager, Ron Fernandez, called Schein’s Texas Regional Manager, Glenn Showgren, to discuss the TDA.” The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not communicate with Patterson or Benco regarding its anticipated response to the TDA buying group. The record evidence shows that TDA Perks is a buying group created by TDA, and that Schein viewed TDA Perks as a buying group. (CCFF ¶¶ 1110, 1112). The record evidence is clear—the Big Three viewed TDA’s creation of a buying group as a threat, high-level executives and regional managers alike engaged in interfirm communications with their competitors about a response, and none of the Big Three attended TDA’s annual meeting. (CCFF ¶¶ 1109-1155).

1565. There is no evidence that Mr. Showgren solicited the call from Mr. Fernandez. Mr. Showgren relayed the contents of the unsolicited call internally at Schein, and appropriately noted the potential for antitrust concerns. (RX 2362-002). Specifically, the document states that “Benco [is] considering suspending all activities with the TDA including pulling out of the state show.” (RX 2362-002). It further says that “Chuck Cohen will be reaching out, or has reached out to, Tim Sullivan to see if HSD would do the same thing.” The email concludes by stating that Mr. Showgren “laid out ground rules that [he] will NOT discuss a pricing response and any action would have to be cleared by [Schein’s] Legal Team before communicating with the TDA.” (RX 2362-002).

Response to Proposed Finding No. 1565

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not communicate with Patterson or Benco regarding its anticipated response to the TDA buying group. The record evidence shows that TDA Perks is a buying group created by TDA, and that Schein viewed TDA Perks as a buying group. (CCFF ¶¶ 1110, 1112). The record evidence is clear—the Big Three viewed TDA’s creation of a buying group as a threat, high-level executives and regional managers alike engaged in interfirm communications with their competitors about a response, and none of the Big Three attended TDA’s annual meeting. (CCFF ¶¶ 1109-1155).

1566. RX 2362 does not reflect any agreement by Schein to not attend the TDA trade show. The document also does not show that Schein disclosed any confidential information about its business plans or strategies with respect to TDA attendance.

Response to Proposed Finding No. 1566

The Proposed Finding is not supported by any citation to the record evidence and should be disregarded. Nonetheless, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not communicate with Patterson or Benco regarding its anticipated response to the TDA buying group. The record evidence shows that TDA Perks is a buying group created by TDA, and that Schein viewed TDA Perks as a buying group. (CCFF ¶¶ 1110, 1112). The record evidence is clear—the Big Three viewed TDA’s creation of a buying group as a threat, high-level executives and regional managers alike engaged in interfirm communications with their competitors about a response, and none of the Big Three attended TDA’s annual meeting. (CCFF ¶¶ 1109-1155).

1567. Complaint Counsel did not introduce any evidence that Mr. Showgren had any further communications with Mr. Fernandez following Mr. Fernandez’s October 15, 2013 call.

Response to Proposed Finding No. 1567

The Proposed Finding is inaccurate and contrary to the weight of the record evidence. In an email on October 15, 2013 to Cavaretta and others titled “Ron Fernandez Call,” Showgren stated: “I will be having lunch with Ron week after next to discuss concerns and share what we have found about the [TDA Perks] program.” (RX2362 at 002). The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not communicate with Patterson or Benco regarding its anticipated response to the TDA buying group. The record evidence shows that TDA Perks is a buying group created by TDA, and that Schein viewed TDA Perks as a buying group. (CCFF ¶¶ 1110, 1112). The record evidence is clear—the Big Three viewed TDA’s creation of a buying group as a threat, high-level executives and regional managers alike engaged in interfirm communications with their competitors about a response, and none of the Big Three attended TDA’s annual meeting. (CCFF ¶¶ 1109-1155).

1568. Mr. Showgren’s summary of the call was forwarded to Mr. Sullivan. Mr. Sullivan reiterated the concern that Mr. Showgren expressed, opening his reply with: “Agree that we should NOT be having these discussions [with] Benco. Chuck has not contacted me nor would he on such a topic.” (RX 2362-001). This shows that Mr. Sullivan was aware of antitrust concerns relating to competitor communications and that he took appropriate steps to ensure that he and his team complied with the antitrust laws. (RX 2362-001; Sullivan, Tr. 4207-08, 4340-41). This evidence weighs against any inference that Schein entered into any agreement with Benco or Patterson to restrain trade.

Response to Proposed Finding No. 1568

The Proposed Finding is misleading, incomplete, and not supported by the evidence cited. It is misleading to the extent that it implies that RX2362 does not reflect on-going conversations between Schein and Benco about acting to restrict the growth of buying groups. RX2362 not only reflects the conversations that Schein’s Showgren had with Benco’s Fernandez (RX2362 at 003), it reflects Cavaretta’s statements urging continued

dialog with Benco. (RX2362 at 001-002 (October 16, 2013 email from Cavaretta to Sullivan, “Hey Tim, I’m not sure if Chuck [Cohen] contacted you about the TDA yet. I do believe we need to have some serious conversations with them about their strategy. We can start the conversations from the local level but I’m on board with pulling out of shows if this is the direction dental associations want to take things.”)). The portion of the Proposed Finding addressing actions to ensure antitrust compliance is also unsupported Sullivan’s testimony. Nothing in the cited testimony references what steps, if any, Sullivan took to ensure that his team complied with the antitrust laws. The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not communicate with Patterson or Benco regarding its anticipated response to the TDA buying group. The record evidence shows that TDA Perks is a buying group created by TDA, and that Schein viewed TDA Perks as a buying group. (CCFF ¶¶ 1110, 1112). The record evidence is clear—the Big Three viewed TDA’s creation of a buying group as a threat, high-level executives and regional managers alike engaged in interfirm communications with their competitors about a response, and none of the Big Three attended TDA’s annual meeting. (CCFF ¶¶ 1109-1155).

1569. Complaint Counsel has not introduced any evidence of a call between Mr. Cohen and Mr. Sullivan concerning the TDA. Both Mr. Sullivan and Mr. Cohen denied that any such call occurred. (Sullivan, Tr. 4246-47, 4250, 4285; CX 8015 (Cohen, Dep. at 364-65)). The call and text message log prepared by Complaint Counsel also does not show any such communication. (CX 6027).

Response to Proposed Finding No. 1569

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not communicate with Patterson or Benco regarding its anticipated response to the TDA buying group. The record evidence shows that TDA Perks is a buying group created by TDA, and that Schein viewed TDA Perks as a

buying group. (CCFF ¶¶ 1110, 1112). The record evidence is clear—the Big Three viewed TDA’s creation of a buying group as a threat, high-level executives and regional managers alike engaged in interfirm communications with their competitors about a response, and none of the Big Three attended TDA’s annual meeting. (CCFF ¶¶ 1109-1155). The Proposed Finding is also misleading to the extent that it implies that a phone conversation did not occur because that call is not shown in CX6027 (Communications Log). Sullivan exchanged additional communications with Cohen, including written notes and voicemail messages, that are not reflected in CX6027. (CCFF ¶¶ 353-354).

1570. The Complaint, referencing a December 11, 2013 text message, alleges that “Benco’s Texas regional manager stated” that he has “been talking to the directors of Schein and Patterson” and that “[w]e are going to be taking a stand together against them.” (Complaint ¶ 71). Complaint Counsel did not introduce that text message into evidence or call Mr. Ron Fernandez, the author of that text message, to testify at trial.

Response to Proposed Finding No. 1570

The Proposed Finding is inaccurate, as the December 11, 2013 text message from Fernandez is in evidence. That document, CX1278 (Excel worksheet “Chats” tab at row 9), states, “I have been talking to the directors of Schein and Patterson. We are going to be taking a stand together against them.” (CCFF ¶ 1119). The Proposed Finding is also inaccurate in its assertion that a document is not in evidence merely because Fernandez was not called to testify. The Proposed Finding is also misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not communicate with Patterson or Benco regarding its anticipated response to the TDA buying group. The record evidence shows that TDA Perks is a buying group created by TDA, and that Schein viewed TDA Perks as a buying group. (CCFF ¶¶ 1110, 1112). The record evidence is clear—the Big Three viewed TDA’s creation of a buying group as a threat, high-level executives and regional

managers alike engaged in interfirm communications with their competitors about a response, and none of the Big Three attended TDA's annual meeting. (CCFF ¶¶ 1109-1155).

1571. Complaint Counsel did not introduce any communications log or other evidence to corroborate the existence of such communications with "the directors of Schein and Patterson." (Complaint ¶ 71). There is no evidence that any person at Schein or Patterson with responsibility for or involvement in deciding whether to attend the TDA trade show had discussions with Mr. Fernandez, and there is no evidence concerning the substance of such communications, if they occurred. (RX 1126 (Fernandez, Dep. at 318 ("No" agreement with Schein or Patterson "take a stand together against them")))). Accordingly, the record evidence cannot establish that Respondents entered into an agreement to boycott the TDA trade show.

Response to Proposed Finding No. 1571

The Proposed Finding is inaccurate and contrary to the weight of the record evidence. The record evidence is clear—the Big Three viewed TDA's creation of a buying group as a threat, high-level executives and regional managers alike engaged in interfirm communications with their competitors about a response, and did not attend TDA's annual meeting. (CCFF ¶¶ 1109-1155).

iii. The January 2014 Misiak-Steck Call Is Not Evidence of an Agreement.

1572. Two months after Patterson made its decision not to attend the 2014 TDA show, Patterson Senior Vice President David Misiak called Schein's Vice President Dave Steck on January 6, 2014 to ask whether Schein intended to attend the TDA show in May 2014. (CX 6027-036; Steck, Tr. 3697, 3701; *see also* Misiak, Tr. 1410-11).

Response to Proposed Finding No. 1572

Complaint Counsel has no specific response.

1573. Mr. Misiak and Mr. Steck both testified about this communication. Mr. Steck denied reaching any agreement or understanding concerning whether to attend the TDA trade show, and Mr. Misiak had no recollection of the call. (Steck, Tr. 3715; Misiak, Tr. 1410-11).

Response to Proposed Finding No. 1573

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not communicate with Patterson or Benco

regarding a response to the TDA buying group because of one witness's lack of memory or because of another witness' denial of a conspiracy. The record evidence shows that TDA Perks is a buying group created by TDA, and that Schein viewed TDA Perks as a buying group. (CCFF ¶¶ 1110, 1112). The record evidence is clear—the Big Three viewed TDA's creation of a buying group as a threat, high-level executives and regional managers alike engaged in interfirm communications with their competitors about a response, and none of the Big Three attended TDA's annual meeting. (CCFF ¶¶ 1109-1155).

The record evidence shows that on January 6, 2014, Patterson's Misiak called Schein's Steck to inform him that Patterson was planning to pull out of the TDA meeting, and the two spoke for 14 minutes. (CCFF ¶¶ 1124-1126). That call was about TDA. (CX2801 at 015 (Schein's Response RFA ¶ 23 (at some point between December 2013 and January 2014, Patterson's Dave Misiak and Schein's Dave Steck communicated; one topic that was discussed concerned the TDA trade show); CX3113 at 007 (Answer of Patterson ¶ 71(c) (TDA was mentioned in January 2014 phone call))). Steck promised to get back to Misiak with Schein's final decision. (CCFF ¶ 1126). On January 7, 2014, the day after the phone call between Misiak and Steck, Misiak received information about the TDA Perks program from Clint Edens, a Patterson regional manager for the Texas. (CCFF ¶ 1127). Steck reported his conversation with Misiak to Sullivan and Cavaretta, and Steck informed Sullivan that he would follow up with Misiak regarding Schein's decision regarding the TDA buying group. (CCFF ¶ 1128). On January 21, 2014, Steck sent an internal email to three Schein managers, stating "Guys, I have to get back to PDCO on whether or not we are attending the TDA." (CCFF ¶1129 (citing CX0205 at 002)). On the same day, January 21, 2014, but after Steck had sent his internal email to Schein managers, Steck emailed Misiak at Patterson under the

subject matter “Texas,” saying, “Hi Dave, I’ll be calling you to let you know about our decision on the matter we recently discussed in the next couple days.” (CCFF ¶ 1130 (citing CX0112 at 001)). Misiak forward Steck’s email to his colleague, Tim Rogan, Patterson’s VP for Merchandise Marketing, stating, “[Steck] already told me they were out. Full blown!” (CCFF ¶ 1131 (quoting CX0112 at 001)). Misiak interpreted Steck’s email to mean that Schein had pulled out of the TDA Annual Meeting. (CCFF ¶ 1132).

The record evidence shows that Schein and Benco also communicated about the TDA buying group. On April 16, 2014, Cohen emailed Sullivan and Guggenheim on the same email chain about the TDA buying group, forwarded an article promoting the TDA Perks program, and wrote: “Tim & Paul. . . Thought you’d be interested in this ‘essay’ from our friends at the TDA.” (CCFF ¶ 1133). Sullivan initiated a phone call to Cohen and the two spoke on the phone on April 16, 2014 for nine minutes and 16 seconds. (CCFF ¶ 1135). Following these communications, Foley explained that the Big Three were on the same page: “The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott.” (CCFF ¶ 1138 (quoting CX2106 at 001)). The following day, on March 6, 2014, Foley wrote by email to Schein employees regarding Texas Dental Association: “We should join pdco and boycott.” (CCFF ¶ 1139 (quoting CX2668 at 002)). On a later email in the same email chain, dated March 7, 2014, Steck wrote to Foley regarding Texas Dental Association: “Pretty sure we are going to boycott as well.” (CCFF ¶ 1139 (quoting CX2668 at 001)). Schein withdrew from the TDA meeting in early April 2014 under Sullivan’s approval. (CCFF ¶ 1142). Schein’s former Director of Sales, Michael Porro believed Schein withdrawing along with

other distributors and vendors “sends a clear message.” (CCFF ¶ 1143 (quoting CX2049 at 001)).

1574. Mr. Misiak testified “I think we made our decision months before that ... I don't remember having a conversation about TDA or TDA Perks with Dave.” (CX 0316 (Misiak, IHT at 307); CX 8038 (Misiak, Dep. at 283 (“I do not recall talking to him about attendance at the TDA trade show.”)); Misiak, Tr. 1411 (“Q. What did you speak with Mr. Steck about on this call? A. I don't recall”)).

Response to Proposed Finding No. 1574

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not communicate with Patterson or Benco regarding a response to the TDA buying group. As set forth above in Response to Proposed Finding No. 1573, the record evidence shows that the Big Three viewed TDA's creation of a buying group as a threat, high-level executives and regional managers alike engaged in interfirm communications with their competitors about a response, Schein communicated with Benco and Patterson, and none attended TDA's annual meeting following those communications. (CCFF ¶¶ 1109-1155).

1575. Mr. Steck testified that he received an unsolicited call from Mr. Misiak, and that he informed Mr. Misiak that Schein had not yet made its decision about whether to attend. (Steck, Tr. 3701-02, 3710, 3822-23). Mr. Steck testified that he told Mr. Misiak as a matter of courtesy that he would let him know once Schein had made its decision. (Steck, Tr. 3702, 3704). Mr. Steck, however, never followed up with Mr. Misiak, and never informed Mr. Misiak of Schein's decision. (Steck, Tr. 3716).

Response to Proposed Finding No. 1575

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not communicate with Patterson or Benco regarding its anticipated response to the TDA buying group. The record evidence shows that TDA Perks is a buying group created by TDA, and that Schein viewed TDA Perks as a buying group. (CCFF ¶¶ 1110, 1112). The record evidence is clear—the Big Three viewed TDA's creation

of a buying group as a threat, high-level executives and regional managers alike engaged in interfirm communications with their competitors about a response, and none of the Big Three attended TDA's annual meeting following those communications. (CCFF ¶¶ 1109-1155). The record evidence shows that on January 6, 2014, Patterson's Misiak called Schein's Steck to inform him that Patterson was planning to pull out of the TDA meeting, and the two spoke for 14 minutes. (CCFF ¶¶ 1125-1126). That call was about TDA. (CX2801 at 015 (Schein's Response RFA ¶ 23 (at some point between December 2013 and January 2014, Patterson's Dave Misiak and Schein's Dave Steck communicated; one topic that was discussed concerned the TDA trade show); CX3113 at 007 (Answer of Patterson ¶ 71(c) (TDA was mentioned in January 2014 phone call))). Steck promised to get back to Misiak with Schein's final decision. (CCFF ¶ 1126). On January 7, 2014, the day after the phone call between Misiak and Steck, Misiak received information about the TDA Perks program from Clint Edens, a Patterson regional manager for the Texas. (CCFF ¶ 1127). Steck reported his conversation with Misiak to Sullivan and Cavaretta, and Steck informed Sullivan that he would follow up with Misiak with Schein's decision regarding the TDA buying group. On January 21, 2014, Steck sent an internal email to three Schein managers, stating "Guys, I have to get back to PDCO on whether or not we are attending the TDA." (CCFF ¶ 1129 (quoting CX0205 at 002))). On the same day, January 21, 2014, but after Steck had sent his internal email to Schein managers, Steck emailed Misiak at Patterson under the subject matter "Texas," saying, "Hi Dave, I'll be calling you to let you know about our decision on the matter we recently discussed in the next couple days." (CCFF ¶ 1130 (quoting CX0112 at 001))). Misiak forwarded Steck's email to his colleague, Tim Rogan, Patterson's VP for Merchandise Marketing, stating, "[Steck]

already told me they were out. Full blown!” (CCFF ¶ 1131). Misiak interpreted Steck’s email to mean that Schein had pulled out of the TDA Annual Meeting. (CCFF ¶ 1132).

1576. At the time Misiak called Steck, Schein had not, in fact, made a decision about whether to attend the TDA show. (Cavaretta, Tr. 5617 (Mr. Steck was not “involved in any way regarding whether or not Schein was going to attend the TDA trade show in 2014”); Steck, Tr. 3702). Steck testified, and internal Schein documents confirm, that Schein was planning to attend the TDA show in 2014, but that it would consider not going to the show in 2015 if the TDA continued to support SourceOne. (RX0195 (“I definitely think we will need to take another look @ this in May and decide whether we attend in 2015.”); CX0205 (“If they don't stop this will be our last year attending the TDA.”); Steck, Tr. 3711-12).

Response to Proposed Finding No. 1576

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not communicate with Patterson or Benco regarding its anticipated response to the TDA buying group. The record evidence shows that TDA Perks is a buying group created by TDA, and that Schein viewed TDA Perks as a buying group. (CCFF ¶¶ 1110, 1112). The record evidence is clear—the Big Three viewed TDA’s creation of a buying group as a threat, high-level executives and regional managers alike engaged in interfirm communications with their competitors about a response, and none of the Big Three attended TDA’s annual meeting following those communications. (CCFF ¶¶ 1109-1155). The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts or implies that Schein did not attend the 2014 TDA annual meeting. The record evidence is clear—the Big Three viewed TDA’s creation of a buying group as a threat, high-level executives and regional managers alike engaged in interfirm communications with their competitors about a response, and did not attend TDA’s annual meeting to send a strong message to TDA and other trade associations that they would lose distributor support if they continued to offer buying group programs. (CCFF ¶¶ 1109-1155). The record evidence shows that on January 6, 2014, Patterson’s Misiak called Schein’s Steck

to inform him that Patterson was planning to pull out of the TDA meeting, and the two spoke for 14 minutes. (CCFF ¶¶ 1125-1126). That call was about TDA. (CX2801 at 015 (Schein's Response RFA ¶ 23 (at some point between December 2013 and January 2014, Patterson's Dave Misiak and Schein's Dave Steck communicated; one topic that was discussed concerned the TDA trade show); CX3113 at 007 (Answer of Patterson ¶ 71(c) (TDA was mentioned in January 2014 phone call))). Steck promised to get back to Misiak with Schein's final decision. (CCFF ¶ 1126). On January 7, 2014, the day after the phone call between Misiak and Steck, Misiak received information about the TDA Perks program from Clint Edens, a Patterson regional manager for the Texas. (CCFF ¶ 1127). Steck reported his conversation with Misiak to Sullivan and Cavaretta, and Steck informed Sullivan that he would follow up with Misiak with Schein's decision regarding the TDA buying group. On January 21, 2014, Steck sent an internal email to three Schein managers, stating "Guys, I have to get back to PDCO on whether or not we are attending the TDA." (CCFF ¶ 1129 (citing CX0205 at 002)). On the same day, January 21, 2014, but after Steck had sent his internal email to Schein managers, Steck emailed Misiak at Patterson under the subject matter "Texas," saying, "Hi Dave, I'll be calling you to let you know about our decision on the matter we recently discussed in the next couple days." (CCFF ¶ 1130 (citing CX0112 at 001)). Misiak forward Steck's email to his colleague, Tim Rogan, Patterson's VP for Merchandise Marketing, stating, "[Steck] already told me they were out. Full blown!" (CCFF ¶ 1131). Misiak interpreted Steck's email to mean that Schein had pulled out of the TDA Annual Meeting. (CCFF ¶ 1132).

iv. Cohen's April 2014 Email is Not Evidence of an Agreement.

1577. Complaint Counsel introduced evidence of an April 16, 2014 email that Mr. Cohen sent to Mr. Sullivan and Mr. Guggenheim. This email is dated after Respondents had each

publicly announced their intentions not to attend the TDA show. (CX 1062). The email simply passes along an article that the TDA sent to its members approximately six months prior, in November 2013, discussing the TDA Perks Supplies program. It does not mention the TDA tradeshow or Respondents' plans concerning attendance at the show. The email reflects a lawful exchange of public information, and is not suggestive of a conspiracy to boycott the TDA. (Sullivan, Tr. 4245-46; Guggenheim, Tr. 1693-94; Cohen, Tr. 831).

Response to Proposed Finding No. 1577

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies or asserts that Schein did not communicate with Patterson or Benco regarding its anticipated response to the TDA buying group. The record evidence shows that TDA Perks is a buying group created by TDA, and that Schein viewed TDA Perks as a buying group. (CCFF ¶¶ 1110, 1112). The record evidence is clear—the Big Three viewed TDA's creation of a buying group as a threat, high-level executives and regional managers alike engaged in interfirm communications with their competitors about a response, and none of the Big Three attended TDA's annual meeting. (CCFF ¶¶ 1109-1155). CX1062, the April 16, 2014 email Cohen sent to Sullivan and Guggenheim is evidence of interfirm communication among executives of the Big Three regarding the TDA Perks, a buying group seeking to leverage joint buying power. (CX1063 at 003; CCFF ¶ 1134). Sullivan also initiated a telephone call with Cohen on the same day Cohen sent the email to both of his competitors, during which Cohen and Sullivan spoke for nine minutes. (CCFF ¶1135). Finally, it is irrelevant to the extent that it references a conspiracy to boycott the TDA, a boycott not alleged in the Complaint.

1578. Taken as a whole, Complaint Counsel has not introduced sufficient evidence to show that Respondents entered into an agreement to not attend the Texas Dental Association trade show.

Response to Proposed Finding No. 1578

The Proposed Finding is not supported by any citation to the record evidence and should be disregarded. The Proposed Finding is misleading, contrary to the weight of the evidence, and irrelevant to the extent that it implies that the series of communications between the Respondents (as well as internal communications corroborating each party's understanding of that they had learned from one another) is not evidence that Respondents had an understanding about not doing business with buying groups. (*See* CCFF ¶¶ 1109-1155). The Proposed Finding is also irrelevant to the extent suggest that it references a conspiracy to boycott the TDA, a boycott not alleged in the Complaint. The facts of the Respondents' actions regarding TDA and its TDA Perks buying group, referenced in CCFF ¶¶1109-1155, provide substantial evidence of Respondents' commitment to a common scheme to refuse to do business with buying groups.

2. *There Are No Communications Between Patterson and Schein Regarding Buying Groups.*

1579. Complaint Counsel alleges that Schein, Patterson, and Benco “entered into an agreement to refuse to provide discounts to or compete for the business of Buying Groups ... [and that] [t]hrough a series of inter-firm communications, top executives at Benco, Schein, and Patterson entered into, ensured compliance with, and monitored the agreement.” (Complaint ¶ 31). Yet Complaint Counsel fails to put forth any evidence whatsoever of communications between Patterson and Schein regarding buying groups.

Response to Proposed Finding No. 1579

Complaint Counsel has no specific response to the first sentence. The second sentence is not supported by any citation to the record evidence and should be disregarded. Nonetheless, it is also irrelevant and contrary to the weight of the record evidence. Complaint Counsel need not prove communications between Schein and Patterson to prove an overarching conspiracy. Nonetheless, the record evidence shows that Schein's Steck and Patterson's Misiak communicated about their responses to TDA for its endorsement of TDA Perks Supplies, a

buying group. Evidence in the record leads to the inevitable conclusion that Steck and Misiak were communicating about the TDA Perks Supply program, which is a buying group. (*See* Responses to Proposed Findings No. 1572-1578).

Moreover, the record evidence shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein's internal documents refer to the overarching conspiracy and an understanding that the Big Three would refuse buying groups. (CCFF ¶¶ 1183-1195). For example, on February 27, 2013, Misiak (Patterson) directed a Regional Manager to refuse a buying group, explaining that Patterson's largest competitors, Schein and Benco, refuse buying groups as well:

“Confidential and not for discussion . . . our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me.” (CX0093 at 001 (emphasis in original); *see also* CCFF ¶¶ 1187). Misiak was also concerned that Schein and Benco would submit bids for buying groups and deny doing so. On February 27, 2013, Misiak wrote to Guggenheim, “I’ve coached [Regional Manager Fruehauf] on how to stay out of this [buying group] with grace. I’m concerned that Schein and Benco sneak into these co-op bids and deny it. . . .” (CX0092 at 001; *see also* CCFF ¶¶ 1188-1189). Then on August 4, 2013, Rogan (Patterson) wrote to McFadden (Patterson): “Neal, we don’t need GPO’s in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry.” (CX0106 at 001; *see also* CCFF ¶ 1190). Schein’s documents similarly refer to an understanding that the Big Three would refuse buying groups. On March 5, 2014, Foley (Schein) wrote to Chad Thompson of Heartland: “The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott.” (CX2106

at 001; *see also* CCFF ¶ 1194). Then on October 28, 2015, Foley wrote to Schein employees, “Keep in mind that I and others have been in contact with Tralongo over the years. Schein, PDCO and Benco all refused to bid on their business when they entered the GPO/Buying Group world.” (CX2094 at 001; *see also* CCFF ¶ 1195). Benco’s documents similarly refer to an overarching conspiracy. (CCFF ¶¶ 1191-1193).

1580. Every Schein witness to testify at trial confirmed that they have never communicated with anyone at Patterson concerning buying groups nor that they have heard of anyone at Schein having any communications with anyone at Patterson concerning buying groups. (Sullivan, Tr. 4254 (“Q. Did you ever speak with Paul Guggenheim or anyone else at Patterson about buying groups? A. No.”); Meadows, Tr. 2467, 2623 (“Q. Have you ever communicated with anyone at Patterson or Benco about buying groups? A. Not at all.”); Steck, Tr. 3831 (“Q. And more generally, are you aware of any conversations that anyone at Schein, including yourself, had with Patterson concerning the subject of buying groups? A. I’m not aware.”); Cavaretta, Tr. 5567-68 (“Q. But while at Schein did you ever communicate with anyone at Patterson about buying groups or GPOs? A. Absolutely not. Q. Has anyone at Schein ever told you about a communication they had with someone at Patterson about buying groups or GPOs? A. No.”); Foley, Tr. 4731 (“Q. Have you ever had any communications whatsoever with anyone from Patterson about buying groups or GPOs? A. No.”); Titus, Tr. 5284 (“Q. And you’re not aware of any communications between anyone at Patterson and anyone at Schein regarding buying groups? A. None whatsoever.”)).

Response to Proposed Finding No. 1580

The Proposed Finding is irrelevant, as Complaint Counsel need not prove communications between Schein and Patterson to prove an overarching conspiracy. Nonetheless, the record evidence shows that Schein’s Steck and Patterson’s Misiak communicated about their responses to TDA for its endorsement of TDA Perks Supplies, a buying group. Evidence in the record leads to the inevitable conclusion that Steck and Misiak were communicating about the TDA Perks Supply program, which is a buying group. (*See* Responses to Proposed Findings No. 1572-1578).

Moreover, the record evidence shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein’s internal documents refer to the overarching conspiracy and an understanding that the Big Three

would refuse buying groups. (CCFF ¶¶ 1183-1195). For example, on February 27, 2013, Misiak (Patterson) directed a Regional Manager to refuse a buying group, explaining that Patterson's largest competitors, Schein and Benco, refuse buying groups as well:

“Confidential and not for discussion . . . our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me.” (CX0093 at 001 (emphasis in original); *see also* CCFF ¶¶ 1187). Misiak was also concerned that Schein and Benco would submit bids for buying groups and deny doing so. On February 27, 2013, Misiak wrote to Guggenheim, “I’ve coached [Regional Manager Fruehauf] on how to stay out of this [buying group] with grace. I’m concerned that Schein and Benco sneak into these co-op bids and deny it. . . .” (CX0092 at 001; *see also* CCFF ¶¶ 1188-1189). Then on August 4, 2013, Rogan (Patterson) wrote to McFadden (Patterson): “Neal, we don’t need GPO’s in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry.” (CX0106 at 001; *see also* CCFF ¶ 1190). Schein’s documents similarly refer to an understanding that the Big Three would refuse buying groups. On March 5, 2014, Foley (Schein) wrote to Chad Thompson of Heartland: “The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott.” (CX2106 at 001; *see also* CCFF ¶ 1194). Then on October 28, 2015, Foley wrote to Schein employees, “Keep in mind that I and others have been in contact with Tralongo over the years. Schein, PDCO and Benco all refused to bid on their business when they entered the GPO/Buying Group world.” (CX2094 at 001; *see also* CCFF ¶ 1195). Benco’s documents similarly refer to an overarching conspiracy. (CCFF ¶¶ 1191-1193).

1581. Every Patterson witness to testify at trial confirmed that they have never communicated with anyone at Schein concerning buying groups nor that they have heard of

anyone at Patterson having any communications with anyone at Schein concerning buying groups. (Guggenheim, Tr. 1708 (“Q. Have you ever talked to Mr. Sullivan of Schein about buying groups in any way? A. Never. Q. Just so we’re clear, have you ever e-mailed or texted or in any way communicated with Mr. Sullivan of Schein about buying groups? A. Absolutely not. Q. What about anyone else at Schein? A. Nope.”); McFadden, Tr. 2836 (“Q. Have you ever had a conversation with anyone at my client, Henry Schein, about buying groups? A. No.”); Misiak, Tr. 1504-05 (“Q. How about Henry Schein in general? Have you ever spoken with anyone at Henry Schein about buying groups? A. No.”); Rogan, Tr. 3571 (“Q. Any living, breathing human being who ever worked at Schein, have you ever talked to anyone, communicated in any fashion with anyone at Schein about buying groups? A. No.”).

Response to Proposed Finding No. 1581

The Proposed Finding is irrelevant, as Complaint Counsel need not prove communications between Schein and Patterson to prove an overarching conspiracy. Nonetheless, the record evidence shows that Schein’s Steck and Patterson’s Misiak communicated about their responses to TDA for its endorsement of TDA Perks Supplies, a buying group. Evidence in the record leads to the inevitable conclusion that Steck and Misiak were communicating about the TDA Perks Supply program, which is a buying group. (*See* Responses to Proposed Findings No. 1572-1578).

Moreover, the record evidence shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein’s internal documents refer to the overarching conspiracy and an understanding that the Big Three would refuse buying groups. (CCFF ¶¶ 1183-1195). For example, on February 27, 2013, Misiak (Patterson) directed a Regional Manager to refuse a buying group, explaining that Patterson’s largest competitors, Schein and Benco, refuse buying groups as well:

“Confidential and not for discussion . . . our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me.” (CX0093 at 001 (emphasis in original); *see also* CCFF ¶¶ 1187). Misiak was also concerned that Schein and Benco would submit bids for buying groups and deny doing so. On February 27, 2013,

Misiak wrote to Guggenheim, “I’ve coached [Regional Manager Fruehauf] on how to stay out of this [buying group] with grace. I’m concerned that Schein and Benco sneak into these co-op bids and deny it. . . .” (CX0092 at 001; *see also* CCFF ¶¶ 1188-1189). Then on August 4, 2013, Rogan (Patterson) wrote to McFadden (Patterson): “Neal, we don’t need GPO’s in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry.” (CX0106 at 001; *see also* CCFF ¶ 1190). Schein’s documents similarly refer to an understanding that the Big Three would refuse buying groups. On March 5, 2014, Foley (Schein) wrote to Chad Thompson of Heartland: “The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott.” (CX2106 at 001; *see also* CCFF ¶ 1194). Then on October 28, 2015, Foley wrote to Schein employees, “Keep in mind that I and others have been in contact with Tralongo over the years. Schein, PDCO and Benco all refused to bid on their business when they entered the GPO/Buying Group world.” (CX2094 at 001; *see also* CCFF ¶ 1195). Benco’s documents similarly refer to an overarching conspiracy. (CCFF ¶¶ 1191-1193).

1582. Patterson executives received competitive intelligence that Schein was working with buying groups, but none of them contacted anyone at Schein concerning this activity or about buying groups generally. (Guggenheim, Tr. 1855-56, 1862; McFadden, Tr. 2836, 2841, 2709, 2714-15; CX 0161; Misiak, Tr. 1327, 1505; Rogan, Tr. 3652-57, 3659-61).

Response to Proposed Finding No. 1582

The Proposed Finding is irrelevant, as Complaint Counsel need not prove communications between Schein and Patterson to prove an overarching conspiracy. Nonetheless, the record evidence shows that Schein’s Steck and Patterson’s Misiak communicated about their responses to TDA for its endorsement of TDA Perks Supplies, a buying group. Evidence in the record leads to the inevitable conclusion that Steck and Misiak were communicating

about the TDA Perks Supply program, which is a buying group. (*See* Responses to Proposed Findings No. 1572-1578).

Moreover, the record evidence shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein's internal documents refer to the overarching conspiracy and an understanding that the Big Three would refuse buying groups. (CCFF ¶¶ 1183-1195). For example, on February 27, 2013, Misiak (Patterson) directed a Regional Manager to refuse a buying group, explaining that Patterson's largest competitors, Schein and Benco, refuse buying groups as well:

“Confidential and not for discussion . . . our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me.” (CX0093 at 001 (emphasis in original); *see also* CCFF ¶¶ 1187). Misiak was also concerned that Schein and Benco would submit bids for buying groups and deny doing so. On February 27, 2013, Misiak wrote to Guggenheim, “I’ve coached [Regional Manager Fruehauf] on how to stay out of this [buying group] with grace. I’m concerned that Schein and Benco sneak into these co-op bids and deny it. . . .” (CX0092 at 001; *see also* CCFF ¶¶ 1188-1189). Then on August 4, 2013, Rogan (Patterson) wrote to McFadden (Patterson): “Neal, we don’t need GPO’s in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry.” (CX0106 at 001; *see also* CCFF ¶ 1190).

Schein's documents similarly refer to an understanding that the Big Three would refuse buying groups. On March 5, 2014, Foley (Schein) wrote to Chad Thompson of Heartland: “The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott.” (CX2106 at 001; *see also* CCFF ¶ 1194). Then on October 28, 2015, Foley wrote to Schein employees,

“Keep in mind that I and others have been in contact with Tralongo over the years. Schein, PDCO and Benco all refused to bid on their business when they entered the GPO/Buying Group world.” (CX2094 at 001; *see also* CCFF ¶ 1195). Benco’s documents similarly refer to an overarching conspiracy. (CCFF ¶¶ 1191-1193).

In addition, the Proposed Finding is misleading to the extent it asserts or implies that “Schein was working with buying groups” during the conspiracy period. The record evidence shows that it was not serving buying groups during the conspiracy period. (CCFF ¶¶ 661-954; Complaint Counsel’s Post-Trial Brief, at Attachment C).

1583. Complaint Counsel’s Interrogatory Response cites no communications between Patterson and Schein regarding buying groups. (RX 2958).

Response to Proposed Finding No. 1583

The Proposed Finding is also irrelevant, as Complaint Counsel need not prove communications between Schein and Patterson to prove an overarching conspiracy. Nonetheless, the record evidence shows that Schein’s Steck and Patterson’s Misiak communicated about their responses to TDA for its endorsement of TDA Perks Supplies, a buying group. Evidence in the record leads to the inevitable conclusion that Steck and Misiak were communicating about the TDA Perks Supply program, which is a buying group. (*See* Responses to Proposed Findings No. 1572-1578). Moreover, the record evidence shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein’s internal documents refer to the overarching conspiracy and an understanding that the Big Three would not discount to buying groups. (CCFF ¶¶ 1183-1195). For example, on February 27, 2013, Misiak (Patterson) directed a Regional Manager to refuse a buying group, explaining that Patterson’s largest competitors, Schein and Benco, refuse buying groups as well: “**Confidential and not for discussion . . . our 2 largest**

competitors stay out of these as well. If you hear differently and have specific proof please send that to me.” (CX0093 at 001 (emphasis in original); *see also* CCFF ¶¶ 1187).

Misiak was also concerned that Schein and Benco would submit bids for buying groups and deny doing so. On February 27, 2013, Misiak wrote to Guggenheim, “I’ve coached [Regional Manager Fruehauf] on how to stay out of this [buying group] with grace. I’m concerned that Schein and Benco sneak into these co-op bids and deny it. . . .” (CX0092 at 001; *see also* CCFF ¶¶ 1188-1189). Then on August 4, 2013, Rogan (Patterson) wrote to McFadden (Patterson): “Neal, we don’t need GPO’s in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry.” (CX0106 at 001; *see also* CCFF ¶ 1190). Schein’s documents similarly refer to an understanding that the Big Three would refuse buying groups. On March 5, 2014, Foley (Schein) wrote to Chad Thompson of Heartland: “The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott.” (CX2106 at 001; *see also* CCFF ¶ 1194). Then on October 28, 2015, Foley wrote to Schein employees, “Keep in mind that I and others have been in contact with Tralongo over the years. Schein, PDCO and Benco all refused to bid on their business when they entered the GPO/Buying Group world.” (CX2094 at 001; *see also* CCFF ¶ 1195). Benco’s documents similarly refer to an overarching conspiracy. (CCFF ¶¶ 1191-1193).

1584. Complaint Counsel’s sole example of interfirm communication between Patterson and Schein is a single phone call and subsequent email from January 2014. (CX 6027-036; CX 0112). This call and email relate solely to the 2014 Texas Dental Association meeting and in no way relate to buying groups. (CX 6027-036; CX 0112; Steck, Tr. 3703, 3712-13, 3822, 3829-31).

Response to Proposed Finding No. 1584

The Proposed Finding is irrelevant, as Complaint Counsel need not prove communications between Schein and Patterson to prove an overarching conspiracy. Nonetheless, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that the January 2014 interfirm communication between Schein's Steck and Patterson's Misiak is not about buying groups. The weight of the record evidence shows that the communication was about the Texas Dental Association's buying group. (*See Responses to Proposed Finding Nos. 1572-1578*). Moreover, the record evidence establishes that there was an overarching conspiracy among the Big Three to refuse to discount to buying groups. (CCFF ¶¶ 1178-1198; *see also Responses to Proposed Finding Nos. 1579-1583*).

B. Internal Communications at Patterson and Benco Are Not Evidence of a Conspiracy.

1585. Complaint Counsel claims that internal communications from certain executives at Patterson and Benco are evidence of the alleged conspiracy. (CC Pretrial Br. at 25-27). Specifically, Complaint Counsel claims that statements from Patterson and Benco executives that Schein purportedly was not competing for buying group customers is "direct evidence of a conspiracy." (CC Pretrial Br. at 25). As noted below, it is not, as there is no evidence showing that Patterson and Benco witnesses had any personal knowledge of Schein's dealings with buying groups, and Patterson and Benco were in fact mistaken as to Schein's strategies.

Response to Proposed Finding No. 1585

Complaint Counsel has no specific response to the first sentence of the Proposed Finding. The sentence of the Proposed Finding is incomplete and misleading, as the cited portion of Complaint Counsel's Pre-Trial Brief stated that internal emails of all three Respondents "expressed confidence that their top two rivals were not competing for buying groups customers." (Complaint Counsel's Pre-Trial Brief, at 25). Complaint Counsel does not assert that only statements from Patterson and Benco regarding Schein are direct evidence of a conspiracy; that is not only incomplete, it is a mischaracterization of Complaint Counsel's

statement. The third sentence of the Proposed Finding is not supported by any citation to the record evidence and should be disregarded.

1586. Every Benco and Patterson witness who has testified in this case denied ever speaking to anyone at Schein regarding Schein's policy relating to buying groups. (Guggenheim, Tr. 1855-56; Misiak, Tr. 1503-04; Rogan, Tr. 3571; McFadden, Tr. 2836-37; Cohen, Tr. 845, 848; Ryan, Tr. 1243; CX 8027 (Anderson, Dep. at 159-61); CX 8013 (Fruehauf, Dep. at 194-96); CX 8015 (Cohen, Dep. at 489-90); CX 8037 (Ryan, Dep. at 400-01); CX 8023 (Guggenheim, Dep. at 398-400); CX 8002 (Nease, Dep. at 133-35); CX 8028 (Lepley, Dep. at 110-11)).

Response to Proposed Finding No. 1586

The Proposed Finding is inaccurate, misleading, and contrary to the weight of the record evidence to the extent that it asserts any witness denials of "ever speaking to anyone at Schein regarding Schein's policy" disproves a conspiracy. The record evidence establishes that Benco orchestrated an agreement with Schein, an agreement with Patterson, and that the Big Three's internal documents confirm an overarching conspiracy. Indeed, documents reference the Big Three's common "position" regarding buying groups. (CCFF ¶ 1103 (quoting CX0023 at 001)). The record evidence establishes that Benco's Cohen informed Sullivan of Benco's position with regard to bidding on buying groups and reached an understanding that Schein would not align itself with buying groups. (CCFF ¶¶ 661-684). Schein, in turn, ensured compliance by instructing its sales force to reject buying groups. (CCFF ¶¶ 686-954). Benco confronted Schein when it suspected Schein was discounting to buying groups, and Schein and Benco communicated when they were uncertain whether a customer qualified as a buying group. (CCFF ¶¶ 955-1100).

Moreover, contemporaneous, internal documents of Benco, Patterson, and Schein refer to the overarching conspiracy among the Big Three. (CCFF ¶¶ 1178-1198). For example, Benco's Ryan stated: "CHUCK --- maybe what you should do is make sure you tell Tim [Sullivan] and Paul [Guggenheim] to hold their positions as we are." (CX0023 at 001 (emphasis in

original); *see also* CX1149 at 002 (buying groups do not catch on “because so far, all of the major dental companies have said, “NO”, and that’s the stance we will continue to take.”) (emphasis in original))). Patterson’s Misiak also stated: “Confidential and not for discussion . . . our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me.” (CX0093 at 001). And Schein’s Foley also stated the same: “The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott.” (CX2106 at 001; *see also* CX2094 at 001 (Schein, PDCO and Benco all refused to bid on their business when they entered the GPO/Buying Group world.”)).

1587. Complaint Counsel supports its allegations by citing internal correspondence sent by Dave Misiak (Patterson), Tim Rogan (Patterson), Pat Ryan (Benco), and Neal McFadden (Patterson). (CC Pre-Trial Br. at 25-27). Each testified that any statements regarding Schein’s alleged approach to buying groups were either based on normal-course market intelligence or pure speculation. (Misiak, Tr. 1364, 1504-05, 1507-08; Rogan, Tr. 3571, 3655, 3657; CX 8017 (Rogan, Dep. at 72-73); Ryan, Tr. 1209-10, 1212-13, 1239-40; 1255-56; McFadden, Tr. 2837; CX 8004 (McFadden, Dep. at 46-47)).

Response to Proposed Finding No. 1587

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts or implies that internal documents regarding Schein’s approach to buying groups was based on market intelligence or speculation. The record evidence shows that Patterson and Benco, and these individuals, both understood, regardless of market intelligence, that Schein would not discount to buying groups. (*See Responses to Proposed Finding Nos. 126-140*).

For example, on August 2013, in response to market intelligence that Schein might be working with a buying group called Western North Carolina Health Network, Rogan communicated to others at Patterson that the Big Three were saying “no” to buying groups. (CCFF ¶ 1190 (quoting CX0106 at 001 (“ . . . we don’t need GPO’s in the dental business.

Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry.”)); *see also* CCFF ¶ 603). Moreover, there is no record evidence that Schein ever did business with the Western North Carolina Health Network.

Misiak similarly believed Schein would reject buying groups during the conspiracy. The record shows that Cohen communicated Benco’s no buying group policy to Guggenheim on February 8, 2013 and that Guggenheim immediately forwarded Cohen’s email regarding its no buying group policy to Misiak. (CCFF ¶¶ 484, 491-495). The evidence shows that, a few hours after Guggenheim received Cohen’s email about Patterson’s involvement with NMDC and Benco’s no buying group policy, Guggenheim responded to Cohen: “Thanks for the heads up. I’ll investigate the situation. We feel the same way about these.” (CCFF ¶ 495 (quoting CX0090 at 001)). Shortly after this exchange, Misiak instructed his team not to bid for a group he believed was a buying group: “**Confidential and not for discussion . . . our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me.**” (CCFF ¶ 549 (quoting CX0093 at 001 (emphasis in original))); *see also* CCFF ¶ 1187).

Ryan, too, was well aware of the agreement between Schein and Benco not to do business with buying groups. For example, in July 2012, when Ryan learned that Schein might be doing business with Smile Source, Ryan wrote to Cohen, his boss, “Better tell your buddy Tim [Sullivan] to knock this shit off.” (CCFF ¶ 982 (quoting CX0018 at 001); Ryan, Tr. 1065). Ryan admitted under oath that he was referring to Schein working with Smile Source. (CCFF ¶ 985 (citing Ryan, Tr. 1065-66)). Then in June 2012, Ryan learned that Schein might be working with a buying group, this time Smile Source. (CCFF ¶¶ 978-983). This time, Ryan forwarded the information to Cohen with a note that says “Better tell your buddy Tim

to knock this shit off.” (CCFF ¶¶ 982 (quoting CX0018 at 001), 983-986). Ryan wanted Cohen to tell Sullivan to stop working with buying group Smile Source. (CCFF ¶¶ 984-986). Cohen testified that Ryan’s email to Cohen regarding Smile Source (CX0018) was the second time Ryan forwarded information regarding buying groups to Cohen for communication to Sullivan. (Cohen, Tr. 518; CCFF ¶ 987).

1588. Mr. Misiak, former Vice President of Sales for Patterson, confirmed that his statement that “[o]ur [two] largest competitors stay out of these as well” (*see* CX 0093) was merely his guess or speculation about what Schein was doing with respect to buying groups based on competitive market information. (Misiak, Tr. 1297-98, 1364, 1507-08). Mr. Misiak also confirmed that he has no personal knowledge of Schein’s practice or strategy relating to buying groups. (Misiak, 1504-05).

Response to Proposed Finding No. 1588

It bears noting that Schein and Patterson take contradictory positions regarding Misiak’s statement in CX0093. Schein asserts that Misiak’s statement reflect speculation about market information, implying it was information Misiak already *had*, while Patterson asserts that “The point of this statement was *to collect* market intelligence about competitors’ practice.” (*Compare* SF 1588 with Patterson’s Proposed Finding No. 414 (emphasis added)).

Regardless of which contradictory explanation is examined, the Proposed Finding is misleading and contrary to the weight of the evidence. The record evidence shows that Misiak’s statement in CX0093 reflect an understanding that Schein and Benco refused buying groups as well, and that he meant Schein and Benco stayed out of buying group just as Patterson stayed out of buying groups. (CCFF ¶¶ 549-552). The record shows that Cohen communicated Benco’s no buying group policy to Guggenheim on February 8, 2013 and that Guggenheim immediately forwarded Cohen’s email regarding its no buying group policy to Misiak. (CCFF ¶¶ 484, 491-495). The evidence shows that, a few hours after Guggenheim received Cohen’s email about Patterson’s involvement with NMDC and Benco’s no buying

group policy, Guggenheim responded to Cohen: “Thanks for the heads up. I’ll investigate the situation. We feel the same way about these.” (CCFF ¶ 495 (quoting CX0090 at 001)). Shortly after this exchange, Misiak instructed his team not to bid for a group he believed was a buying group: **“Confidential and not for discussion . . . our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me.”** (CCFF ¶ 549 (quoting CX0093 at 001 (emphasis in original)); *see also* CCFF ¶ 1187). As such, the assertion that Misiak “has no personal knowledge of Schein’s practice or strategy relating to buying groups” is misleading. Misiak understood that the Big Three would reject buying groups. Moreover, Misiak himself was involved in communications with his counterpart at Schein regarding distributors pulling out of the Texas Dental Association’s 2014 Annual Meeting because the TDA sponsored a buying group called TDA Perks. The contemporaneous documentary evidence shows that Misiak believed that he had an agreement with his Schein counterpart. (CX0112 at 001 (January 21, 2014 email from Misiak to Rogan, forwarding an email from Schein’s Dave Steck: “[Steck] already told me they were out. Full blown!”); Misiak, Tr. 1413-1414).

Finally, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it implies that the statement disproves Schein’s participation in a conspiracy.

The record evidence shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein’s internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195).

1589. Mr. Rogan, Vice President and General Manager for Patterson, confirmed that he had never spoken to anyone at Schein in any fashion about buying groups. (Rogan, Tr. 3420-21, 3571, 3655, 3657). Instead, any comment made by Mr. Rogan regarding Schein’s purported approach to buying groups was based on market intelligence and nothing else. (CX 8017 (Rogan, Dep. at 72-73)). However, Mr. Rogan testified that on several occasions that it was

reported to him that Schein was in fact working with buying groups. (Rogan, 3654-55; 3657; 3660-61).

Response to Proposed Finding No. 1589

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Schein was working with buying groups during the conspiracy or to the extent it asserts that Rogan's comments were based on market intelligence. (*See* Response to Proposed Finding No. 133). For example, on August 2013, in response to market intelligence that Schein might be working with a buying group called Western North Carolina Health Network, Rogan communicated to others at Patterson that the Big Three were saying "no" to buying groups. (CCFF ¶ 1190 (quoting CX0106 at 001 ("... we don't need GPO's in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry."))); *see also* CCFF ¶ 603). Moreover, there is no record evidence that Schein ever did business with the Western North Carolina Health Network. The record evidence shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Furthermore, Benco, Patterson, and Schein's internal documents, including documents containing statements of Rogan, refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195). Finally, the record evidence shows that Schein indiscriminately rejected buying groups during the conspiracy. The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

1590. Mr. Guggenheim, the former President and CEO for Patterson, testified that during his tenure it was reported to him that Schein worked with buying groups. (Guggenheim, Tr. 1856-57). In fact, Mr. Guggenheim testified that Schein was an "innovator" and that he always "believed ... that Henry Schein worked with buying groups." (Guggenheim, Tr. 1856).

Response to Proposed Finding No. 1590

The Proposed Finding as to the time-period of the assertions. Complaint Counsel does not object to an assertion that Schein worked with buying groups before the conspiracy period and that it competed for buying groups after the conspiracy. However, to the extent it asserts or implies that Schein entered into agreements with buying groups during the conspiracy period, or that Guggenheim believed Schein did, that is contrary to the weight of the record evidence.

The record evidence shows that internal Patterson documents, which were sent to Guggenheim, refer to an understanding at Patterson that its rivals, Schein and Benco, would refuse buying groups. (CCFF ¶¶ 534-551, 1187-1189; *see also* Response to Proposed Finding No. 126). The record also shows that Patterson understood that Schein and Benco would reject buying groups during the conspiracy. The record evidence shows that Cohen communicated Benco's no buying group policy to Guggenheim on February 8, 2013 and that Guggenheim immediately forwarded Cohen's email regarding its no buying group policy to Misiak and Rogan. (CCFF ¶¶ 484, 491-495). The evidence shows that, a few hours after Guggenheim received Cohen's email about Patterson's involvement with NMDC and Benco's no buying group policy, Guggenheim responded to Cohen: "Thanks for the heads up. I'll investigate the situation. We feel the same way about these." (CCFF ¶ 495 (quoting CX0090 at 001)). Shortly after this exchange, Misiak instructed his team not to bid for a group he believed was a buying group: **"Confidential and not for discussion . . . our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me."** (CCFF ¶ 549 (quoting CX0093 at 001 (emphasis in original))); *see also* CCFF ¶ 1187). Misiak was also concerned that Schein and Benco would

submit bids for buying groups and deny doing so. On February 27, 2013, Misiak wrote to Guggenheim, “I’ve coached [Regional Manager Fruehauf] on how to stay out of this [buying group] with grace. I’m concerned that Schein and Benco sneak into these co-op bids and deny it. . . .” (CCFF ¶ 1188 (quoting CX0092 at 001), 1189). Then on August 4, 2013, Rogan (Patterson) wrote to McFadden (Patterson): “Neal, we don’t need GPO’s in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry.” (CCFF ¶ 1190 (quoting CX0106 at 001)).

The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 1159-1166, 1316-1322, 1178-1198).

1591. Pat Ryan, Director of Benco’s Strategic Markets, testified that any comment he made regarding Schein’s approach to buying groups was based on market intelligence and was mere speculation. (Ryan, Tr. 1114-16, 1206, 1209-10, 1212-13, 1255-56). However, like other witnesses, Mr. Ryan testified that on several occasions it was reported to him that Schein was in

fact working with buying groups. (Ryan, Tr. 1245-48, 1250-53). Mr. Ryan confirmed that he did not, and does not, have any personal knowledge of Schein's position on buying groups. (Ryan, Tr. 1205-06, 1239-40, 1255-56).

Response to Proposed Finding No. 1591

The Proposed Finding is misleading and against the weight of the evidence. The Proposed Finding also omits that Ryan wrote on numerous occasions that Schein, Patterson, and Benco all said no to buying groups. On February 23, 2013, the final day of the February 2013 Chicago Midwinter Meeting, Ryan instructed Benco's sales team: "[Buying groups do not] catch on here, because so far, all of the major dental companies have said, 'NO', and that's the stance we will continue to take." (CCFF ¶ 527 (quoting CX1149 at 002) (emphasis in original)). The reference to "all of the major dental companies" included Benco, Schein and Patterson. (CCFF ¶ 528; Ryan, Tr. 1083). On May 19, 2015, Ryan wrote to Cohen: "The best part about calling these [buying groups] is I already KNOW that Patterson and Schein have said NO." (CCFF ¶ 1191; CX0012 at 001; Ryan, Tr. 1123-1124). While Ryan testified he wrote this particular email based on "experience" that Benco gets approached after Schein and Patterson, (Ryan, Tr. 1209-1210), the facts do not support that explanation. (*Compare* CX1240 at 001 (Kois reached out to Benco on October 21, 2014) *with* CX4310 at 010-011 (Kois and Schein communications reflecting discussions on October 23, 2014 and later; Mason, Tr. 2335 (testifying that NMDC approached all three distributors); CX8035 (Mason, Dep. at 78-79 (following meeting with Patterson in which Patterson declined to participate, NMDC knew that it did not have a distributor partner because Patterson and Schein had already turned down the NMDC))). Finally, on July 13, 2015, Ryan wrote to a sales representative: "We don't allow [volume discount] pricing unless there is common ownership. Neither Schein nor Patterson do either." (CCFF ¶ 1193; Ryan, Tr. 1126-1127; CX1185 at 002).

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Ryan does not have knowledge of any of the communications underlying the agreement. Indeed, Ryan spoke to his counterpart Foley at Schein for 18 minutes according to Foley; on that call, Ryan informed him that Benco would not bid on Smile Source and wanted to know if Schein would bid. (CCFF ¶¶ 1010-1013). Ryan reported the conversation to Cohen saying that he had “talked specifically about” Smile Source with Foley. (CCFF ¶ 1014). Ryan also forwarded two emails regarding Schein potentially working with buying groups to his boss, Cohen, for the stated purpose of a communication with Sullivan. (CCFF ¶¶ 958-959, 982-985). Finally, Ryan wrote to Cohen in response to concern that Burkhart was selling to buying groups: “CHUCK --- maybe what you should do is make sure you tell Tim [Sullivan] and Paul [Guggenheim] to hold their positions as we are[.]” (CCFF ¶¶ 1103-1105). The Proposed Finding is not supported by the weight of the evidence and should be disregarded.

1592. Based on information he received from local Patterson branches that Schein was participating with buying groups, Mr. McFadden’s “impression” was actually that Schein was in the buying group space. (McFadden, Tr. 2841; CX 8004 (McFadden, Dep. at 46-47); CX 0161). At trial, Mr. McFadden, former President of Patterson Strategic Accounts, testified that he has no personal knowledge of Schein’s strategy relating to buying groups. (McFadden, Tr. 2670, 2836-37).

Response to Proposed Finding No. 1592

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that McFadden believed Schein was working with buying groups during the conspiracy period or that Schein actually was entering into agreements with buying groups during the conspiracy period. Neither assertion is supported by the record evidence. (*See* Response to Proposed Finding No. 129). On June 12, 2014, McFadden expressly told a potential customer that Patterson has “signed an agreement that we won’t

work with GPO's." (CCFF ¶¶ 657 (quoting CX0164 at 002 (row 248), 658-660)). The record evidence also shows that in September 2013, McFadden had told a regional manager that Patterson was "choosing to forgo this route [joining with a GPO] as its [sic] both anti rep, manufacturer and distributor." (CCFF ¶ 606 (quoting CX3116 at 001)).

In addition, the record evidence shows that Schein was not serving buying groups during the conspiracy period. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to "KILL the buying group model," and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728-870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154). This is in stark contrast to the record evidence that shows Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322, 1178-1198).

1593. There is no evidence to support Complaint Counsel's allegation that internal communications at Patterson and Benco regarding Schein's purported approach to buying groups are evidence of the alleged conspiracy.

Response to Proposed Finding No. 1593

The Proposed Finding is not supported by any citation to the record evidence and should be disregarded. Nonetheless, as set forth in the Responses to Proposed Finding Nos. 1397-1592 above, the Proposed Finding is contrary to the weight of the record evidence.

VI. THE ECONOMIC EVIDENCE REFUTES ANY CONSPIRACY INFERENCE.**A. Summary of the Expert Opinion Evidence.**

1594. The economic evidence, taken as a whole and in conjunction with the factual evidence, does not support an inference that Respondents conspired to boycott buying groups. For reasons set forth below, most of the economic evidence presented by Complaint Counsel's expert, Dr. Marshall, is unreliable or inadmissible. To the extent such evidence is admissible, it is not persuasive evidence of a conspiracy.

Response to Proposed Finding No. 1594

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. Additionally, this Proposed Finding is inaccurate and misleading in suggesting that Dr. Marshall's opinions are unreliable or inadmissible. To the extent this Proposed Finding is propounded in an attempt to exclude Dr. Marshall's expert testimony from consideration, Respondents are time barred from such an argument, as the deadline to challenge Dr. Marshall under the strictures of *Daubert* has passed. Order Grant'g Joint Mot. to Extend Certain Expert Disc. Deadlines (Sept. 5, 2018) (setting an October 10, 2018 deadline for motions *in limine* as to expert discovery). Nor did Schein's counsel make any objections to Dr. Marshall's qualifications as an economic expert or the admissibility of his opinions at trial. (*See generally*, Marshall, Tr.).

Finally, this Proposed Finding is inaccurate and misleading in suggesting that Dr. Marshall did not provide reliable opinions supporting an inference that Respondents conspired to boycott buying groups – both Dr. Marshall's data and other economic analyses are other

factors in the totality of the evidence that points towards Respondents' conspiracy. (CCFF ¶¶ 1-2079; *see also* Responses to Proposed Finding Nos. 1604-1771 below).

1595. Four economists testified in this matter. Dr. Robert C. Marshall testified on behalf of Complaint Counsel. He opined that (i) the "economic evidence was inconsistent ... with respondents' unilateral behavior and consistent with coordinated action;" (ii) [REDACTED] (iii) the relevant product market consisted of full-service distribution services; and (iv) the relevant geographic markets were local. (Marshall, Tr. 2902-03, 2912, 2946, [REDACTED]).

Response to Proposed Finding No. 1595

This Proposed Finding is inaccurate and incomplete because it does not include Dr. Marshall's additional opinion that the market is conducive to collusion against buying groups. (Marshall, Tr. 2913-2916; *see also* (CX7100 at 011 (¶ 12) (Marshall Expert Report))). The Proposed Finding is inaccurate and incomplete in stating that Dr. Marshall's opinion is that the relevant product market consisted of "full-service distribution services" – rather, Dr. Marshall's opinion about the relevant product market is that it consisted of "the full line of dental products and services sold through full-service distributors to independent dentists." (CX7100 at 010 (¶ 10) (Marshall Expert Report))). The Proposed Finding is inaccurate and incomplete in stating that Dr. Marshall's opinion is that "the relevant geographic markets were local" – Dr. Marshall's opinion about the relevant geographic markets is that they are "no larger than the United States and local in nature." (CX7100 at 010 (¶ 11) (Marshall Expert Report))).

1596. The reliability of Dr. Marshall's opinions was challenged by each of Respondents' experts: Dr. Dennis W. Carlton, on behalf of Schein; Dr. Timothy Wu, on behalf of Patterson; and Dr. John Johnson, on behalf of Benco.

Response to Proposed Finding No. 1596

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. This Proposed Finding is also inaccurate because there is no "Dr.

Timothy Wu” who is an expert in this case. This Proposed Finding is also incomplete and misleading because it omits that Dr. Carlton, Dr. Wu, and Dr. Johnson’s opinions were also challenged by Dr. Marshall. (CX7101 (Marshall Rebuttal Expert Report)).

1597. Dr. Carlton concluded that that Dr. Marshall’s opinions were unreliable, and that Schein’s conduct was consistent with unilateral behavior. (Carlton, Tr. 5359-62; 5377-80; 5382-86). Dr. Carlton provided four primary reasons to support his conclusions.

Response to Proposed Finding No. 1597

This Proposed Finding is inaccurate, misleading, and incomplete because Dr. Carlton’s analyses are unreliable and flawed for reasons explained in Proposed Finding Nos. 1598-1752.

1598. One: Dr. Carlton found that the evidence demonstrated that Schein did business with buying groups, and thus, there was no evidence of parallel conduct among the Respondents to refuse to do business with such groups. (Carlton, Tr. 5359-60).

Response to Proposed Finding No. 1598

This Proposed Finding is inaccurate, misleading, and incomplete because Dr. Carlton’s analyses are unreliable and flawed for reasons explained in Proposed Finding Nos. 1604-1635 below. Complaint Counsel’s evidence of parallel conduct comes straight from the record of Respondents’ contemporaneous documents: Respondents’ executives instructed their sales forces not to deal with buying groups, and Respondents rejected buying groups as a result. (CCFF ¶¶ 733-870 (Schein), 630-652 (Patterson), 394-431 (Benco)). Dr. Carlton does not provide any analysis of this conduct, and he does not address the plethora of evidence in the factual record identified in Dr. Marshall’s expert report (CX7100 at 142-149 (¶¶ 342-346)) illustrating that Respondents, including Schein, instructed its sales forces to categorically reject buying groups. (*See generally* RX2832 (Carlton Expert Report) and Carlton Tr.).

1599. Two: Dr. Carlton concluded that Dr. Marshall's conclusion that the evidence reveals a "structural break" – or change in Schein's behavior – at the beginning and end of the alleged conspiracy was flawed. Instead, the evidence showed that Schein did business with buying groups, and had roughly similar sales to such groups, before, during, and after the alleged conspiracy. (Carlton, Tr. 5361, 5372-74, 5377). Dr. Carlton also demonstrated that the evidence did not support Dr. Marshall's claim that Schein induced Smile Source to terminate its relationship with Schein in January of 2012 by reducing discounts, since discount levels stayed constant throughout the two years leading up to the termination. (Carlton, Tr. 5379-82).

Response to Proposed Finding No. 1599

This Proposed Finding is inaccurate, misleading, and incomplete because Dr. Carlton's analyses are unreliable and flawed for reasons explained in Proposed Finding Nos. 1636-1656 and 1697-1701 below.

1600. Three: Dr. Carlton explained that Dr. Marshall's reliance on "industry characteristics," such as high concentration, does not support an inference of a conspiracy since such characteristics are incapable of distinguishing between oligopolistic interdependence and conspiracy. (Carlton, Tr. 5361-62, 5382-84).

Response to Proposed Finding No. 1600

This Proposed Finding is incomplete because it ignores that Dr. Carlton actually testified that he would "say no inference from industry characteristics alone." (Carlton, Tr. 5362). Dr. Marshall does not disagree with Dr. Carlton but also stated that "industry structure, standing alone, is not evidence of conspiratorial conduct, but disagree with any implication that it is irrelevant to an assessment of claimed conspiratorial conduct." (CX7101 at 027 (¶ 65) (Marshall Expert Rebuttal Report)). Indeed, Dr. Marshall's analyses supports his opinion that the market structure is conducive to collusion against buying groups. (CCFF ¶¶ 1601-1623). Moreover, Dr. Marshall's opinions are consistent with Patterson's expert, Dr. Wu, who described the industry structure in this case as having "the potential for strategic interaction." (RX2833 at 017 (¶ 27) (Wu Expert Report)). This Proposed Finding is also inaccurate, misleading, and incomplete and for reasons explained in Proposed Finding Nos. 1657-1659 below.

1601. Four: Dr. Carlton explained that Dr. Marshall's profitability analysis was not capable of reliably demonstrating that Schein acted contrary to its unilateral self-interest. (Carlton, Tr. 5362, 5384, 5386-90). Dr. Carlton explained that, in addition to relying on factual assumptions relating to Schein's dealings with Smile Source and the Kois Buyers Group that are contrary to the record evidence, Dr. Marshall's profitability analysis was flawed because [REDACTED]

[REDACTED] (ii) Dr. Marshall's analysis was conducted on an *ex post*, rather than *ex ante* basis, and thus, it assumes perfect foresight concerning how a buying group would perform, (RX2832 at 049, n. 142); and (iii) Dr. Marshall failed to analyze the but-for world, or "counterfactual" world, meaning that Dr. Marshall did not analyze either the discounts Schein would have needed to offer to win the buying group's business, or the degree of cannibalization that would have occurred, had Schein won. (Carlton, Tr. 5380-81, 5386-90, 5391, 5393-94, 5466).

Response to Proposed Finding No. 1601

This Proposed Finding is inaccurate, misleading, and incomplete because Dr. Carlton's analyses are unreliable and flawed for reasons explained in Proposed Finding Nos. 1604-1752 below.

1602. Dr. Carlton's criticisms of Dr. Marshall are well-founded, and Dr. Marshall's opinions are not entitled to significant weight.

Response to Proposed Finding No. 1602

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. The Proposed Finding is also argumentative and not appropriate for a factual finding. Nonetheless, this Proposed Finding should is also inaccurate and misleading because Dr. Carlton's analyses are unreliable and flawed for reasons explained in Proposed Finding Nos. 1604-1771 below. Additionally, Dr. Marshall's reliable data and other economic analyses are other factors in the totality of the evidence that points towards Respondents' conspiracy. (CCFF ¶¶ 1-2079).

1603. The economic evidence, considered as a whole, does not give rise to an inference that Schein participated in a conspiracy.

Response to Proposed Finding No. 1603

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. The Proposed Finding is also argumentative and not appropriate for a factual finding. Nonetheless, this Proposed Finding should be also inaccurate and misleading because Dr. Marshall's data and other economic analyses are other factors in the totality of the evidence that points towards Respondents' conspiracy. (CCFF ¶¶ 1-2079). Additionally, Dr. Carlton's analyses and criticisms of Dr. Marshall's analyses are unreliable and flawed for reasons explained in Proposed Finding Nos. 1604-1771 below.

B. The Economic Evidence Demonstrates a Lack of Parallel Conduct.

1604. In order to infer a conspiracy from economic evidence, there must be evidence of parallel conduct. As Dr. Marshall agreed, "[i]t's important when you're trying to determine whether there is a conspiracy first to have parallel conduct and then to determine whether that parallel conduct can be explained by unilateral behavior or whether it is a result of collusive behavior[.]" (Marshall, Tr. 2952-53).

Response to Proposed Finding No. 1604

This Proposed Finding is misleading to the extent it suggests that Dr. Marshall agreed that Respondents could have all instructed their employees not to bid on buying groups in parallel without collusive behavior, given the facts of this case. Instead, the record evidence, consistent of Respondents' contemporaneous business records and fact witness testimony, shows that all three Respondents turned down buying groups during the conspiracy period, all three of Respondents' executives, including Cohen, Guggenheim, and Sullivan, instructed their sales teams to turn down buying groups during the conspiracy period, and all three of Respondents' sales teams understood that the directive not to deal with buying groups came from the top of the company. (CCFF ¶¶ 398-399, 406-425, 527, 534-563, 630-650, 661-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). Additionally, this Proposed Finding is also contrary to the weight of the evidence showing that by contrast,

prior to the start of the conspiracy, Respondents did not engage in the same parallel conduct of instructing their employees to refuse to discount to buying groups. Instead, the facts show that Schein started discounting to buying groups before 2011. (CCFF ¶¶ 432-453). Dr. Marshall's expert report included many of the record evidence that shows this parallel conduct of Respondents instructing their sales forces to categorically turn down buying groups: explaining that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight." (CX7100 at 149 (¶ 346) (Marshall Expert Report)); *see also* Marshall, Tr. 3387-3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."; Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group' ...and it's passing on this as a matter of policy.'"))).

1605. To show parallel conduct, Complaint Counsel must show that all three Respondents acted in accordance with the alleged conspiracy – that is, failed to do business with, or offer discounts to, buying groups during the period of the alleged conspiracy. (CoL 10). Since it is undisputed that neither Patterson nor Benco did business with buying groups during the relevant period, the question of whether Respondents engaged in parallel or non-parallel behavior turns on whether Schein did business with buying groups.

Response to Proposed Finding No. 1605

This Proposed Finding improperly cites to a Conclusion of Law to be adopted as a Proposed Finding and should be disregarded. Nonetheless, the Proposed Finding is inaccurate and

misleading to the extent that it suggests that the parallel conduct at issue in this case is merely “failing to do business with, or offer discounts to, buying groups during the period of the alleged conspiracy.” This Proposed Finding is also contrary to the weight of the evidence showing that all three Respondents turned down buying groups during the conspiracy period, all three of Respondents’ executives, including Cohen, Guggenheim, and Sullivan, instructed their sales teams to turn down buying groups during the conspiracy period, and all three of Respondents’ sales teams understood that the directive not to deal with buying groups came from the top of the company. (CCFF ¶¶ 398-399, 406-425, 527, 534-563, 630-650, 661-954; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

1606. The totality of the evidence does not support the conclusion that Respondents engaged in parallel conduct. This conclusion is driven in large part by the extensive record evidence already discussed showing that Schein did business with or actively negotiated in good faith with many buying groups during the relevant period. (SF 377-1335).

Response to Proposed Finding No. 1606

The Proposed Finding is inaccurate and misleading to the extent that it suggests that the parallel conduct at issue in this case is merely failing to do business with, or offer discounts to, buying groups during the period of the alleged conspiracy. This Proposed Finding is also contrary to the weight of the evidence also showing that all three Respondents turned down buying groups during the conspiracy period, all three of Respondents’ executives, including Cohen, Guggenheim, and Sullivan, instructed their sales teams to turn down buying groups during the conspiracy period, and all three of Respondents’ sales teams understood that the directive not to deal with buying groups came from the top of the company. (CCFF ¶¶ 398-399, 406-425, 527, 534-563, 630-650, 661-954; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

The Proposed Finding is not supported by a citation to SF 377-1335 for the reasons set forth in Responses to Proposed Finding Nos. 377-1335.

1. *Complaint Counsel Failed to Present Evidence of Parallel Conduct.*

1607. Complaint Counsel did not present any economic evidence showing that Respondents engaged in parallel conduct. In contrast, Schein presented evidence affirmatively showing a lack of parallel conduct.

Response to Proposed Finding No. 1607

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. Additionally, the Proposed Finding is argumentative and not appropriate for a factual finding. Nonetheless, this Proposed Finding is also contrary to the weight of the evidence showing that all three Respondents turned down buying groups during the conspiracy period, all three of Respondents' executives, including Cohen, Guggenheim, and Sullivan, instructed their sales teams to turn down buying groups during the conspiracy period, and all three of Respondents' sales teams understood that the directive not to deal with buying groups came from the top of the company. (CCFF ¶¶ 398-399, 406-425, 527, 534-563, 630-650, 661-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). Additionally, this Proposed Finding should be also inaccurate and misleading because Dr. Marshall's data and other economic analyses are other factors in the totality of the evidence that points towards Respondents' conspiracy. (CCFF ¶¶ 1-2079). Finally, this Proposed Finding is inaccurate because Schein failed to present evidence affirmatively showing a lack of parallel conduct as explained in Responses to Proposed Finding Nos. 1608-1635 below and for reasons articulated in the Responses to Proposed Finding Nos. 377-1335.

1608. Dr. Marshall failed to make a specific finding, or render the specific opinion, that Schein, Patterson, and Benco engaged in parallel conduct. During his direct testimony, Dr.

Marshall did not mention the concept of parallel conduct.²¹ (Marshall, Tr. 2855-945). Nor did he conduct any quantitative or data-driven analysis to determine whether the Respondents engaged in parallel conduct. Rather, Dr. Marshall first *assumed* that Respondents each engaged in “parallel conduct with respect to buying groups,” and then, based on that assumption, addressed whether the assumed parallel conduct was “driven by something other than non-competitive oligopoly behavior.” (CX 7100-203).

Response to Proposed Finding No. 1608

This Proposed Finding is misleading and inaccurate because the testimony cited does not support the Proposed Finding – nowhere in the testimony and expert report cited indicated that Dr. Marshall “assumed that Respondents each engaged in ‘parallel conduct with respect to buying groups’” and that he failed to consider that Respondents could have all acted in parallel by instructing their employees not to bid on buying groups, without collusive behavior, , given the facts of this case. Instead, the record evidence, consistent of Respondents’ contemporaneous business records and fact witness testimony, shows that Respondents engaged in the parallel conduct of instructing their employees to refuse to do business with buying groups pursuant to the agreement. (CCFF ¶¶ 398-399, 406-425, 527, 534-563, 630-650, 661-954; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Dr. Marshall’s report included many of the record evidence that shows this parallel conduct, explaining that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.” (CX7100 at 149 (¶ 346) (Marshall Expert Report)).

²¹ In his report, Dr. Marshall stated that the “idea regarding parallel conduct in this matter would be the Respondents submitting seemingly high bids for the business of buying groups, say discounts of 1% or 2% relative to what they charged individual dentists.” (CX 7100-121). Dr. Marshall, however, did not find any such parallel conduct in his report, and he testified at trial that there was no “economic evidence of parallel conduct with respect to the submission of high bids.” (Marshall, Tr. 2953-54).

This Proposed Finding is also misleading to the extent that Dr. Marshall did not provide testimony at trial of evidence of Respondents' blanket statements that they "don't do business with buying groups." (Marshall, Tr. 3387-3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."; *see also* Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group'...and it's passing on this as a matter of policy.'")).

Indeed, the facts of this case show that, prior to the start of the conspiracy, Respondents did not engage in the same parallel conduct of instructing their employees to refuse to discount to buying groups. Instead, the facts show that Schein started discounting to buying groups before 2011. (CCFF ¶¶ 432-453). Moreover, This Proposed Finding is also contrary to the weight of the evidence showing that all three Respondents turned down buying groups during the conspiracy period, all three of Respondents' executives, including Cohen, Guggenheim, and Sullivan, instructed their sales teams to turn down buying groups during the conspiracy period, and all three of Respondents' sales teams understood that the directive not to deal with buying groups came from the top of the company. (CCFF ¶¶ 398-399, 406-425, 527, 534-563, 630-650, 661-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). Thus, the premise that Respondents could have engaged in the same parallel conduct of instructing their employees to reject buying groups, absent collusive behavior, is contrary to the facts of this case.

This Proposed Finding is misleading to the extent that it suggests that Dr. Marshall did not conduct any quantitative or data-driven analysis regarding Respondents' parallel conduct. To counter Dr. Carlton's claim that Respondents did not engage in parallel conduct just because Schein sales data shows sales to entities he claims to be "buying groups" during the relevant period, Dr. Marshall performed a data-driven quantitative analysis. Dr. Marshall did this by excluding entities that were shown through the record evidence to not be buying groups. (*See Responses to Proposed Finding Nos. 1611-1612*). As a result, Dr. Marshall quantitative analysis shows that Schein's business with buying groups decreased during the conspiracy. (*See Responses to Proposed Finding Nos. 1611-1612*). This is consistent with Respondents' collusive agreement to avoid doing business with buying groups. (CX7101 at 034, Figure 3 (¶ 82) (Marshall Expert Rebuttal Report)).

2. *Schein's Sales Data Affirmatively Shows Lack of Parallel Conduct.*

1609. The record evidence shows non-parallel conduct among the Respondents with respect to their dealings with buying groups.

Response to Proposed Finding No. 1609

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. Nonetheless, the Proposed Finding is inaccurate and misleading to the extent that it suggests that the parallel conduct at issue in this case is merely failing to do business with, or offer discounts to, buying groups during the period of the alleged conspiracy. This Proposed Finding is also contrary to the weight of the evidence showing that all three Respondents turned down buying groups during the conspiracy period, all three of Respondents' executives, including Cohen, Guggenheim, and Sullivan, instructed their sales teams to turn down buying groups during the conspiracy period, and all three of Respondents' sales teams understood that the directive not to deal with buying groups came

from the top of the company. (CCFF ¶¶ 398-399, 406-425, 527, 534-563, 630-650, 661-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

1610. Both Dr. Carlton and Dr. Marshall quantified Schein's annual sales to buying group members from 2010 through 2017. (Marshall, Tr. 2860 ("I'm using data that was provided by the distributors, the respondents in this matter.... [T]hese are volumes of data because it includes the transactions with every dentist in the country throughout a number of years."); Carlton, Tr. 5358-59, 5363 ("I had access to Schein's sales data, so I used that in my analysis.")).

Response to Proposed Finding No. 1610

This Proposed Finding is inaccurate, incomplete, and misleading. First, Dr. Marshall's testimony cited in this Proposed Finding relates to Dr. Marshall's *profitability analyses*, not his analysis of Schein's annual sales in response to Dr. Carlton's Table 1 expert report analysis. Second, Dr. Marshall's complete testimony about the data that Dr. Marshall analyzed in his profitability analyses, including data from other Respondents and other full-service and non-full-service distributors, as well as the specific buying group dentists studied is as follows:

A. Part of my analysis was to look at five natural experiments that presented to me by the data to make a determination in this regard.

Q. Let's talk about your data analysis. What kind of data analysis did you do?

A. So I'm using data that was provided by the distributors, the respondents in this matter as well as other distributors, Atlanta Dental, Burkhardt, Darby, to look at -- and these are volumes of data because it includes the transactions with every dentist in the country throughout a number of years. I'm looking to -- at the behavior with regard to specific episodes of doing business with or not doing business with buying groups.

(Marshall, Tr. 2860).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

1611. This analysis shows that Schein sold to buying groups “before the alleged conspiracy, during the alleged conspiracy, and after the alleged conspiracy.” (Carlton, Tr. 5368-69; CX 7101-140-41; RX 2832-022). Thus, Dr. Carlton found that Complaint Counsel’s allegation that Schein participated in a conspiracy not to do business with buying groups is “not consistent with [Schein’s] sales data.” (Carlton, Tr. 5364).

Response to Proposed Finding No. 1611

First, this Proposed Finding is vague as to what “This analysis” is referring to. To the extent that “This analysis” is referring to the analysis in Table 1 of Dr. Carlton’s Expert Report (RX2832 at 021-022 (¶ 29)), it is incomplete and misleading. First, throughout his expert report and analyses, Dr. Carlton employed a definition of “buying groups” that is different from the definition in this matter. (CCFF ¶ 2031; *see also* Carlton, Tr. at 5434-5435). Dr. Carlton admitted that the “buying groups” in his Appendix D (supporting the analysis in Table 1 of his expert report) include groups that are not comprised of independent dentists. (CCFF ¶ 2033). Thus, the analysis in Dr. Carlton’s Table 1 (“Schein Sales To Buying Groups”) is inflated and unreliable because it includes entities that are irrelevant to this matter due to Dr. Carlton use of an overly broad definition.

Second, this Proposed Finding is irrelevant and misleading to the extent that it suggests that it is necessary for Schein’s sales during the relevant period to be reduced to “zero” in order to find that Schein participated in the conspiracy not to bid on buying groups and changed its conduct with regards to buying groups during the relevant period. Some buying group relationships and sales that occurred during the relevant period were either pre-existing, legacy relationships formed prior the conspiracy or those that were entered into after the conspiracy became difficult to maintain and Schein began competing for buying groups. (CCFF ¶¶ 440-444). Schein executives did not even know that some of these “legacy”

buying groups were customers and referred to some as “inherited messes.” (CX2287 at 001; CX2286 at 001).

Third, this Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy because it bid on some buying groups between 2011 and 2015. Indeed, record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Dr. Marshall’s report included many of the record evidence that shows this parallel conduct, explaining that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.” (CX7100 at 142-149 (¶¶ 342-346) (Marshall Expert Report); *see also* CX7100 at 149 (¶ 346) (Marshall Expert Report); Marshall, Tr. 3384-3387 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental evaluation.”; Marshall, Tr. 3266

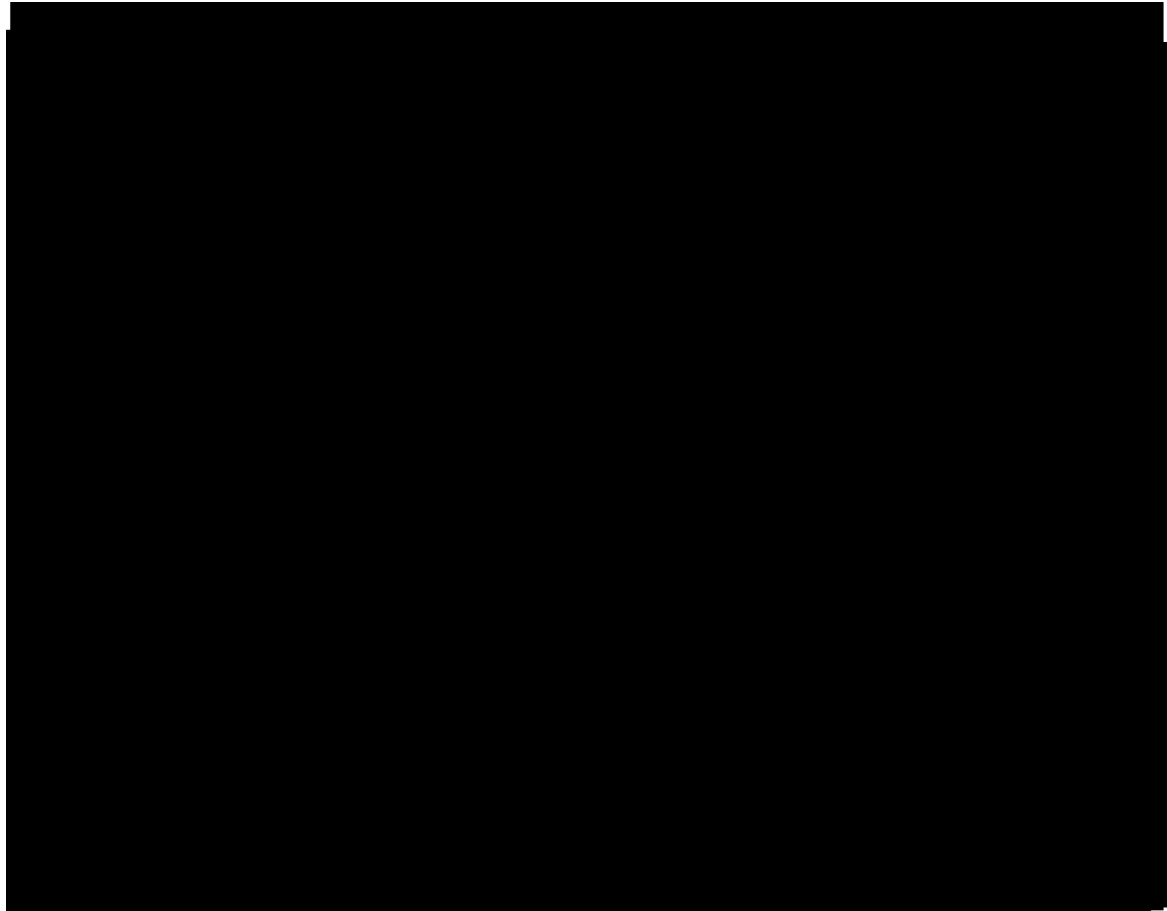
(“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’...and it’s passing on this as a matter of policy.’”)).

Fourth, this Proposed Finding is also unreliable, inaccurate, and misleading to the extent that it relies on Dr. Carlton’s testimony and his Table 1 analysis purporting to show lack of parallel conduct or structural break for Schein. (RX2832 at 021-022 (¶ 29) (Carlton Expert Report)). In response to Dr. Carlton’s Table 1, Dr. Marshall explained that if sales for admitted non-buying groups and contested groups are removed from Table 1, the total sales reported in that table would be reduced by more than 95 percent. (CCFF ¶ 2036). Dr. Marshall determined that, once sales for admitted non-buying groups and contested groups are removed from Dr. Carlton’s Table 1, the data show that Schein’s sales to dentists in buying groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017. (CCFF ¶ 2037). When Dr. Marshall removed Schein’s sales to the admitted non-buying groups and contested groups from Dr. Carlton’s Table 1, the pattern of Schein’s sales to buying groups is contrary to Schein’s representation that there was no change in its conduct during the conspiracy period and consistent with a collusive agreement to avoid doing business with buying groups, as illustrated by Figure 3 in Dr. Marshall’s Rebuttal Report. [REDACTED]

[REDACTED]. To summarize the results, Schein’s sales to dentists in buying groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017. [REDACTED]

[REDACTED]:

{



Each of Schein's buying group relationships represented in Figure 3 above is consistent with and explained by Schein's shift in behavior relating to buying groups around the start of the relevant period. (CX7101 at 035 (¶ 83) (Marshall Rebuttal Expert Report)).

1612. The data does not show any break in Schein's sales to buying groups at the start of the alleged conspiracy period in 2011 or 2012, or any reduction to zero. (Carlton, Tr. 5373-74; *see* RX 2832-022). Similarly, there is not a large increase in Schein's sales to buying groups at the end of the alleged conspiracy period in 2015 or 2016. (Carlton, Tr. 5376-79; *see* RX 2832-022 (explaining that the observed increase in 2017 is primarily due to Klear Impakt and Smile Source)).

Response to Proposed Finding No. 1612

First, this Proposed Finding is vague as to what “the data” is referring to. To the extent that “the data” refers to the results in Table 1 of Dr. Carlton’s Expert Report, this Proposed Finding is unreliable and misleading because it omits that Dr. Carlton employed a broader definition of “buying group” than the definition alleged in this matter throughout his expert report, including in his analysis of Schein’s sales data in his Table 1. (CCFF ¶ 2031). Dr. Carlton admitted that the “buying groups” in Appendix D of his expert report, which form the basis for his analysis in Table 1, include groups that are not comprised of independent dentists. (CCFF ¶ 2033). For these reasons, the analysis of Schein’s sales during the relevant period in Dr. Carlton’s Table 1 (“Schein Sales To Buying Groups”) is overly inflated and unreliable because it includes entities that are irrelevant to the allegations in this matter due to Dr. Carlton use of an overly broad “buying group” definition.

Second, this Proposed Finding is irrelevant and misleading to the extent that it suggests that it is necessary for Schein’s sales during the relevant period to be reduced to “zero” in order to find that Schein participated in the conspiracy not to bid on buying groups and changed its conduct with regards to buying groups during the relevant period. Some buying group relationships and sales that occurred during the relevant period were either pre-existing, legacy relationships formed prior the conspiracy or those that were entered into after the conspiracy became difficult to maintain and Schein began competing for buying groups. (CCFF ¶¶ 440-444). Schein executives did not even know that some of these “legacy” buying groups were customers and referred to some as “inherited messes.” (CX2287 at 001; CX2286 at 001).

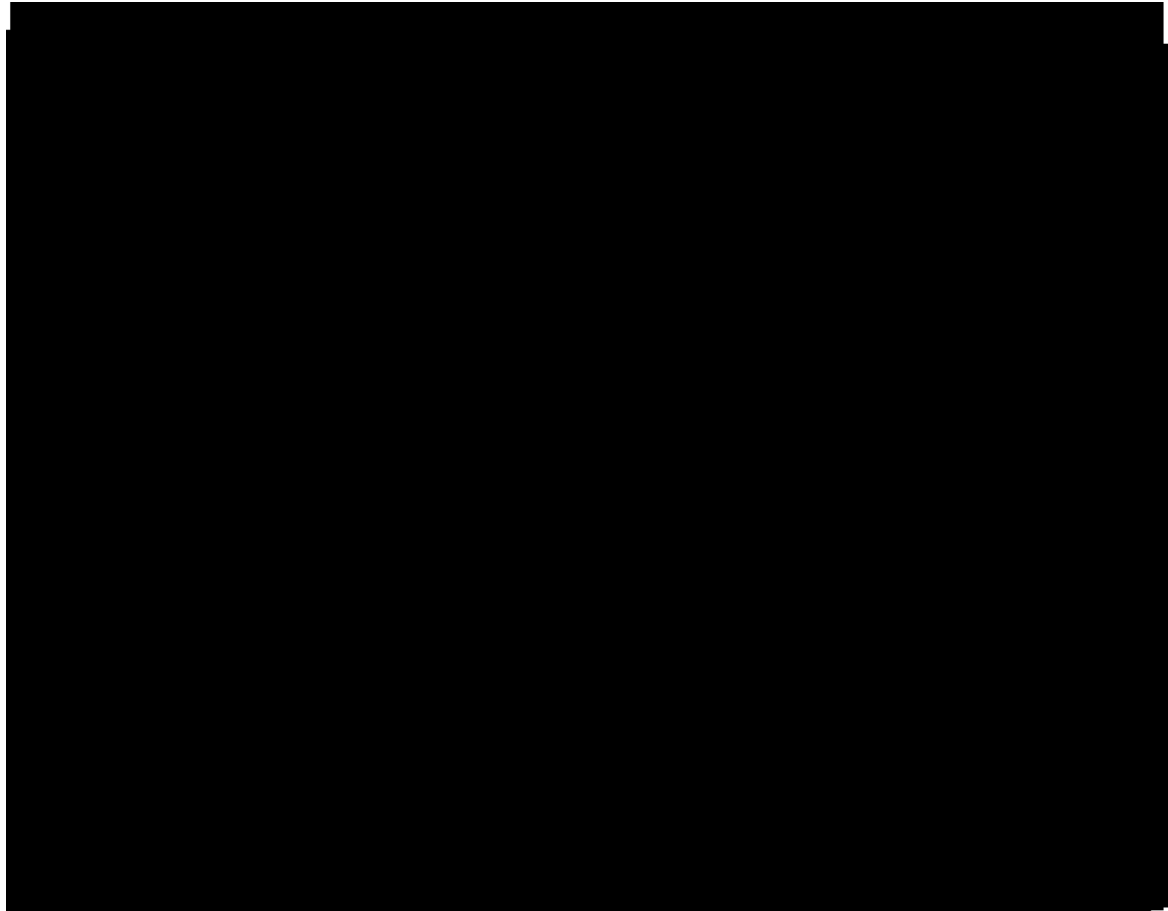
Third, this Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy because it bid on some buying groups between 2011 and 2015. Indeed, record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). Dr. Marshall's report included many of the record evidence that shows this parallel conduct, explaining that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight." (CX7100 at 142-149 (¶¶ 342-346) (Marshall Expert Report); *see also* CX7100 at 149 (¶ 346) (Marshall Expert Report); Marshall, Tr. 3387-3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."; Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group' ...and it's passing on this as a matter of policy.'")).

Fourth, this Proposed Finding is also unreliable, inaccurate, and misleading to the extent that it relies on Dr. Carlton's testimony and his Table 1 analysis purporting to show lack of parallel conduct or structural break for Schein. (RX2832 at 021-022 (¶ 29) (Carlton Expert Report)). In response to Dr. Carlton's Table 1, Dr. Marshall explained that if sales for admitted non-buying groups and contested groups are removed from Table 1 in Dr. Carlton's Expert Report, the total sales reported in that table would be reduced by more than 95 percent. (CCFF ¶ 2036). Dr. Marshall determined that, once sales for admitted non-buying groups and contested groups are removed from Dr. Carlton's Table 1, the data show that Schein's sales to dentists in buying groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017. (CCFF ¶ 2037). When Dr. Marshall removed Schein's sales to the admitted non-buying groups and contested groups from Dr. Carlton's Table 1, the pattern of Schein's sales to buying groups is contrary to Schein's representation that there was no change in its conduct during the conspiracy period and consistent with a collusive agreement to avoid doing business with buying groups, as illustrated by Figure 3 in Dr. Marshall's Rebuttal Report. [REDACTED]

[REDACTED]. To summarize the results, Schein's sales to dentists in buying groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017. [REDACTED]

[REDACTED]:

{



Each of Schein's buying group relationships represented in Figure 3 above is consistent with and explained by Schein's shift in behavior relating to buying groups around the start of the relevant period. (CX7101 at 035 (¶ 83) (Marshall Rebuttal Expert Report)).

1613. And because this analysis shows that Schein's conduct differed from that of Patterson's and Benco's, it constitutes evidence of non-parallel behavior.

Response to Proposed Finding No. 1613

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. Nonetheless, this Proposed Finding is vague as to what "this analysis" is referring to. To the extent that "this analysis" is referring to Dr. Carlton's Table

1, it is unreliable, misleading, and inaccurate for the reasons explained in more detail in Responses to Proposed Finding Nos. 1611-1612, including that it omits that Dr. Marshall's Rebuttal Report Figure 3 show that Schein's sales to dentists in buying groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017, showing a drastic change in Schein's buying group sales. (CCFF ¶ 2037). When Dr. Marshall removed Schein's sales to the admitted non-buying groups and contested groups from Dr. Carlton's Table 1, the pattern of Schein's sales to buying groups is contrary to Schein's representation in the Schein's Proposed Finding No. 1612 that the "data does not show any break in Schein's sales to buying groups at the start of the alleged conspiracy period in 2011 or 2012" and consistent with a collusive agreement to avoid doing business with buying groups, as illustrated by Figure 3 in Dr. Marshall's Rebuttal Report. [REDACTED]

[REDACTED].

The Proposed Finding is inaccurate and misleading to the extent that it suggests that the parallel conduct at issue in this case is merely failing to do business with, or offer discounts to, buying groups during the period of the alleged conspiracy. This Proposed Finding is also contrary to the weight of the evidence showing that all three Respondents turned down buying groups during the conspiracy period, all three of Respondents' executives, including Cohen, Guggenheim, and Sullivan, instructed their sales teams to turn down buying groups during the conspiracy period, and all three of Respondents' sales teams understood that the directive not to deal with buying groups came from the top of the company. (CCFF ¶¶ 398-399, 406-425, 527, 534-563, 630-650, 661-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

1614. Dr. Carlton analyzed Schein's sales data for a number of entities that, at the time he prepared his report, were under consideration as potentially subject to the agreement alleged by Complaint Counsel. (Carlton, Tr. 5366-69; RX 2832-022).

Response to Proposed Finding No. 1614

This Proposed Finding is vague as to what "sales data" is referring to and unintelligible as to the meaning of or reference to the entities that "were under consideration as potentially subject to the agreement alleged by Complaint Counsel." To the extent that the "sales data" refers to data used in Table 1 in Dr. Carlton's expert report, this Proposed Finding is unreliable and misleading because it omits that Dr. Carlton employed a broader definition of "buying group" than the definition alleged in this matter throughout his expert report, including in his analysis of Schein's sales data in his Table 1. (CCFF ¶ 2031). Dr. Carlton admitted that the "buying groups" in Appendix D of his expert report, which form the basis for his analysis in Table 1, include groups that are not comprised of independent dentists. (CCFF ¶ 2033). For these reasons, the analysis of Schein's sales during the relevant period in Dr. Carlton's Table 1 ("Schein Sales To Buying Groups") is overly inflated and unreliable because it includes entities that are irrelevant to the allegations in this matter due to Dr. Carlton use of an overly broad "buying group" definition.

1615. Dr. Carlton grouped these entities into four categories, depending on whether (i) Complaint Counsel had agreed that such entities were buying groups subject to the alleged agreement; (ii) Schein's witnesses had testified during deposition that such entities were buying groups of independent dentists; (iii) the entities' own website represented that its membership included independent dentists; and (iv) a select number of entities that did not fall within the prior three categories. (Carlton, Tr. 5366-67; RX 2832-020-21).

Response to Proposed Finding No. 1615

This Proposed Finding is vague as to what "these entities" is referring to. To the extent that these are references to Dr. Carlton's Appendix D (which provides information about the categorizations in Dr. Carlton's Table 1), this Proposed Finding is incomplete, misleading,

and inconsistent with the evidence in this case because each of Dr. Carlton's categories are based on flawed constructs and unreliable sources. In Appendix D, Dr. Carlton groups alleged buying groups into categories, but many of these groups are not buying groups as defined in this matter. As an initial matter, Dr. Carlton employed a broader definition of "buying group" than the definition alleged in this matter throughout his expert report, rendering his analysis in Appendix D and Table 1 overly broad, inflated, and unreliable. (CCFF ¶ 2031). Although Dr. Carlton employs a different definition of "buying groups" than what is alleged in this matter, he conceded at trial that he does not conclude anywhere in his report that the definition employed by the FTC's expert Dr. Marshall is unreasonable. (Carlton, Tr. 5437 ("Q. You don't conclude anywhere in your report that Dr. Marshall's definition of a buying group is unreasonable; correct? A. I -- I don't say that in -- in the report.")). Dr. Carlton also admitted that he did not personally investigate whether the entities that he lists in Appendix D are actually buying groups. (Carlton, Tr. at 5438 ("Q. Okay. And you didn't personally investigate whether any of these entities are actually buying groups; correct? A. Yes.")).

Dr. Carlton admitted that the "four categories" referenced in Appendix D of his expert report, include groups that are not comprised of independent dentists, rendering his analyses overly inflated and unreliable. (CCFF ¶ 2033; Carlton, Tr. at 5438 ("Q. And that's buying groups including but not limited to buying groups of independent dentists, as you discussed with Mr. Kass this morning; right? A. Exactly.")). In addition, Dr. Carlton's "four categories" groupings are also unreliable for the following reasons:

A. Group B "Buying Groups" In Carlton Report Appendix D

Dr. Carlton testified that buying groups in of Carlton Appendix D, Group B ("Group B") are buying groups that Schein has identified as comprised of independent dentists. (Carlton, Tr.

at 5439). To make the list of groups for Group B, Dr. Carlton was “provided testimony or interrogatories indicating that [these groups] are composed...of independent dentists” and that this was the only criteria he used in selecting these groups (Carlton, Tr. at 5439).

Dr. Carlton’s testimony about these groups debunk his opinion that these groups are relevant to show that Schein negotiated and offered discounts to buying groups during the relevant period – when in fact, it is not clear that these groups are actually buying groups within the definition alleged in this matter and/or Schein dealt with these groups either before or after the relevant period (2011-2015).

- **Ciraden**: Dr. Carlton claims that “Ciraden was a buying group comprised of independent dentists. Ciraden had a relationship with Schein from 2005 to 2010.” (RX 2382-123 at D-6 (Carlton Expert Report); Carlton, Tr. at 5439). This timeframe falls before the relevant time period and should not be included in Appendix D or Table 1. Dr. Carlton also acknowledged that he identified in his report that Ciraden’s management disbanded in approximately 2011 and that there was no more buying group after that time. (Carlton, Tr. 5440-5441).
- **Mastermind Group**: Dr. Carlton conceded that Schein’s relationship with the Mastermind Group began after the end of the alleged conspiracy period. (Carlton, Tr. at 5442).
- **Dental Smart**: Dr. Carlton states that “Schein contends that Dental Smart possibly falls within the FTC’s definition of a buying group.” (RX 2832-123 at D-6 (Carlton Expert Report); Carlton, Tr. 5444). Dr. Carlton testified that all he is saying in this sentence is that there is a possibility, according to Schein, that Dental Smart is a buying group.” (Carlton, Tr. 5444).

B. Group C “Buying Groups” In Carlton Report Appendix D

Dr. Carlton testified that buying groups in of Carlton Appendix D, Group C (“Group C”) are “Buying Groups That Describe Their Members As Independent Dentists.” (Carlton, Tr. at 5445; RX 2832-123 at D-6 (Carlton Expert Report)). Dr. Carlton made clear that DSOs are excluded from his definition of a buying group. (Carlton, Tr. at 5445). Dr. Carlton testified

that it was intention to exclude DSOs from his Table 1 because it is his understanding that DSOs are “not part of this case.” (Carlton, Tr. at 5445). However, some groups in Group C appear to be DSOs or undeterminable entities and, therefore, should be excluded from Dr. Carlton’s analysis. Others should be excluded because they fall outside of the relevant period, similar to some of the entities identified in Group B discussed above.

- **Comfort Dental**: Dr. Carlton admitted that he “might have seen documents” where Schein referred to Comfort Dental as an elite DSO. (Carlton, Tr. at 5446). He agreed that if Comfort Dental were a DSO, it would not be properly be included within his Group C. (Carlton, Tr. at 5446-5447). Dr. Carlton admitted that he included Comfort Dental in his Group C because “Schein identified this as one of the 44 groups that are buying groups.” (Carlton, Tr. at 5446).
- **Cordon Palmer**: Dr. Baytosh, an officer at Cordon Palmer. Dr. Carlton testified that he did not include Dr. Baytosh’s deposition in the list of depositions he relied on in preparing his report and that he did not rely on Dr. Baytosh’s testimony in his conclusion that Cordon Palmer should be included in Group C. (Carlton, Tr. at 5448-5449). Dr. Carlton further admitted that he had never even read Dr. Baytosh’s deposition. (Carlton, Tr. at 5449-5450).
- **Teeth Tomorrow**: Dr. Carlton agreed that the relationship between Teeth Tomorrow and Schein began after the conspiracy period alleged by the FTC. (Carlton, Tr. at 5451).
- **Klear Impakt**: Dr. Carlton agreed that it is fair to say that Schein’s agreement with Klear Impakt became effective no earlier than August 2015. (Carlton, Tr. at 5452).

Dr. Carlton admitted that he did not interview anybody at any of the entities that he lists in Group C. (Carlton, Tr. at 5445). Instead, Dr. Carlton explained that he relied on his staff’s “internet searches” that provided information on the dentists listed above in Group C. (Carlton, Tr. at 5445). Dr. Carlton testified that he did not consider whether the information his staff googled to determine whether Group C was accurate or inaccurate. (Carlton, Tr. at 5445).

Dr. Carlton also clarified that with the entities in Group C he is “taking the categorizations as a given” and “relying on other people’s characterizations” for his groupings. (Carlton, Tr. at

5445-5446). Accordingly, in addition to being irrelevant for the reasons previously described in this section, the entities in Group C should be excluded because for his opinions improperly rely on the interpretation of written or verbal statements by others.

C. Group A “Buying Groups” In Carlton Report Appendix D

Dr. Carlton testified that buying groups in of Carlton Appendix D, Group A (“Group A”) are “Buying Groups That The FTC Has Identified As Comprised Of Independent Dentists.” (Carlton, Tr. at 5454; RX 2832-118 at D-6 (Carlton Expert Report)). These should be excluded because Dr. Carlton’s analysis for these are, again, based on his inappropriate interpretation of facts, among other reasons:

- **Smile Source:** for Smile Source, Dr. Carlton again concedes that he did not do any economic analysis regarding the offer that Schein made to Smile Source in 2014 other than “noting it.” Again, Dr. Carlton stated that this analysis in his report is “reporting what I understand to be the facts.” (Carlton, Tr. 5452-5453).
- **Steadfast Medical:** Dr. Carlton’s representation that Steadfast Medical had agreements with Schein from 2011 to 2017 is also based on his understanding of the facts. (Carlton, Tr. 5453)]. When confronted with a Schein email, attaching a spreadsheet indicating sales to Steadfast in 2010, Dr. Carlton admitted that if the spreadsheet was accurate, then he agrees that Schein’s relationship with Steadfast actually began in 2010, not 2011. (Carlton, Tr. 5455 (“If this is accurate, the [Steadfast-Schein] relationship would have begun in 2010, yes.”)).

1616. Dr. Carlton then reported the following results based on this categorization. (See RX 2832-022 (highlighting added)):

Table 1
Schein Sales to Buying Groups (\$M)

Buying Group	2009	2010	2011	2012	2013	2014	2015	2016	2017
Groups that Schein/FTC Identify as Independent	\$14.0	\$14.8	\$13.6	\$14.2	\$13.2	\$12.1	\$11.4	\$11.0	\$15.6
Groups Website Identifies Independent	\$6.7	\$7.1	\$8.1	\$10.1	\$12.0	\$13.5	\$15.7	\$14.2	\$14.2
Total Buying Groups of Independent Dentists	\$20.7	\$21.9	\$21.7	\$24.4	\$25.2	\$25.5	\$27.1	\$25.2	\$29.8
Other Buying Groups	\$16.2	\$24.4	\$38.5	\$40.0	\$45.9	\$54.9	\$70.1	\$84.7	\$97.8
Total Buying Groups	\$36.9	\$46.3	\$60.2	\$64.3	\$71.2	\$80.4	\$97.2	\$109.9	\$127.6

Source: See Appendix E.

Response to Proposed Finding No. 1616

This Proposed Finding is inaccurate and misleading to the extent that Dr. Carlton uses his Table 1 to support his opinion that there was no parallel conduct or structural break for Schein in this case. Dr. Carlton used the information in Appendix D to create Table 1 of his expert report that purported to illustrate “Schein Sales To Buying Groups” during the relevant period. (RX2832 at 021-022 (Carlton Expert Report)). Dr. Carlton used Appendix D and Table 1 to support his opinion that Schein negotiated and offered discounts to buying groups during the relevant period. (RX2832 at 021-022 (Carlton Expert Report)). As explained in more detail in Response to Proposed Finding No. 1615, the categories in Dr. Carlton’s Appendix D are based on flawed constructs and unreliable sources, rendering these inputs into and results of Dr. Carlton’s Table 1 similarly flawed and unreliable. This Proposed Finding is also incomplete and misleading because it omits that Dr. Carlton employed a broader definition of “buying group” than the definition alleged in this matter throughout his expert report, including in his analysis of Schein’s sales data in his Table 1. (CCFF ¶ 2031). Dr. Carlton admitted that the “buying groups” in Appendix D of his expert report, which form the basis for his analysis in Table 1, include groups that are not comprised of independent dentists. (CCFF ¶ 2033). For these reasons, the analysis of Schein’s sales during the relevant period in Dr. Carlton’s Table 1 (“Schein Sales To Buying Groups”) is overly inflated and unreliable because it includes entities that are irrelevant to the allegations in this matter due to Dr. Carlton use of an overly broad “buying group” definition.

1617. Dr. Carlton made clear, in his report and during his testimony, that he was not making any factual finding concerning whether a listed entity was a buying group for purposes of the alleged conspiracy. (Carlton, Tr. 5366; 5430-31; RX 2832-020-22). Neither did he “offer[] an opinion about ... which entities are buying groups and which are not.” (Marshall, Tr. 2945, 2962-64). Rather, Dr. Carlton stated that he left that determination to the fact-finder, and instead simply reported results derived from the sales data.

Response to Proposed Finding No. 1617

This Proposed Finding is misleading to the extent that Schein relies on Dr. Carlton's analysis in Table 1 to support a claim that there was no parallel conduct or structural break because Dr. Carlton's opinion and analyses in Appendix D and Table 1 are flawed and unreliable for reasons explained above in Responses to Proposed Finding Nos. 1611-1616 above.

1618. Dr. Carlton also made clear that his analysis of the sales data was conservative for two reasons. *First*, it is not possible to search Schein's data in a way that would identify all sales to all buying groups with whom Schein did business. (Carlton, Tr. 5371; RX 2832-021, n.65). *Second*, Dr. Carlton noted he included entities in the "other" category that, based on the record evidence at trial or otherwise, may fit the definition of a buying group of independent dentists. (Carlton, Tr. 5369-70, 5372).

Response to Proposed Finding No. 1618

This Proposed Finding is misleading to the extent that Schein relies on Dr. Carlton's analysis in Table 1 to support a claim that there was no parallel conduct or structural break because Dr. Carlton's opinion and analyses in Appendix D and Table 1 are flawed and unreliable for reasons explained above in Responses to Proposed Finding Nos. 1611-1616 above.

Additionally, this Proposed Finding is inaccurate, misleading, and outside the scope of Dr. Carlton's expert report to the extent that it suggests that entities in Dr. Carlton's "Other Buying Group" category should be considered in the definition of a buying group of independent dentists and included in Dr. Carlton's analyses. Rather, in his expert report, Dr. Carlton identified "Other Buying Group" that should not be considered in the calculus of Schein sales to buying group related to this case. (RX2832 at 021 (¶¶ 28-29) (Carlton Expert Report) (explaining that "Other Buying Groups" were separated out from his Table 1 calculation of Schein sales to "Buying Groups of Independent Dentists" because these "Other Buying Groups" are "buying groups other than buying groups of independent dentists.")).

Moreover, during Dr. Carlton's testimony during trial, the Court sustained an objection indicating that any further testimony on "Other Buying Groups" based on trial testimony was inadmissible as outside the scope of Dr. Carlton's expert report:

Q. Now, you also have this line below the highlighted one that says "Other Buying Groups," and if I understand that right, those are buying groups that you couldn't fit within the other three categories of the FTC at the time said what was a buying group, Schein testimony at the time referenced it as a FTC buying group, and your website search didn't identify it as a buying group; is that right?

A. That's correct.

Q. Okay. And this was all done during the discovery phase, during when your report was due; is that right?

A. Yes.

Q. And there's been testimony in this courtroom about various buying groups; is that right?

A. That's my understanding.

Q. Okay. And now, sitting here today, what will you say about the other buying group categories?

MR. DILLICKRATH: Your Honor, I'm going to object. This is calling for testimony outside the scope of Dr. Carlton's report.

MR. KASS: Your Honor, all I'm doing at this point is asking whether, sitting here today, that his -- he would make any revisions to his report in light of the testimony that has come out in this courtroom. He could not have provided that testimony or put it into his report at the time his report was due because the testimony had not yet been presented.

JUDGE CHAPPELL: Any testimony that was presented that was not in the report of the testifying expert is not going to be considered in this case, so unless the answer to this question is no, the objection is sustained.

MR. KASS: Okay. Then I will move on.

(Carlton, Tr. 5369-5371).

1619. At trial, Complaint Counsel questioned whether certain entities should have been included in this analysis. Complaint Counsel, however, failed to demonstrate that any of the buying groups Dr. Carlton included in his analysis should have been excluded from the analysis.

Response to Proposed Finding No. 1619

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. Nonetheless, this Proposed Finding is vague as to what “this analysis” is referring to. This Proposed Finding is inaccurate to the extent that “this analysis” refers to Dr. Carlton’s Table 1 and Appendix D and suggests that entities including Alpha Omega, Ciraden, Dental Associates of Virginia, OrthoSynetics, Comfort Dental, Corydon Palmer, or Dental Partners of Georgia are properly included as buying groups in Dr. Carlton’s analyses for reasons explained in Response to Finding Nos. 375-1335. Additionally, this Proposed Finding is inaccurate, misleading, and outside the scope of Dr. Carlton’s expert report to the extent that it suggests that entities in Dr. Carlton’s “Other Buying Group” category should be considered in the definition of a buying group of independent dentists and included in Dr. Carlton’s analyses. Rather, in his expert report, Dr. Carlton identified “Other Buying Group” that should not be considered in the calculus of Schein sales to buying group related to this case. (RX2832 at 021 (¶¶ 28-29) (Carlton Expert Report) (explaining that “Other Buying Groups” were separated out from his Table 1 calculation of Schein sales to “Buying Groups of Independent Dentists” because these “Other Buying Groups” are “buying groups other than buying groups of independent dentists.”); *see also* Response to Proposed Finding No. 1615).

1620. Specifically, at trial, Complaint Counsel asked Dr. Carlton about a number of buying groups. *First*, Complaint Counsel asked about Ciraden. Complaint Counsel asked whether Ciraden should be included because “Ciraden’s management disbanded in approximately 2011.” (Carlton, Tr. 5440). This, however, is consistent with Dr. Carlton’s sales analysis, which attributes [REDACTED]. (See CX 7101-140-41 (Marshall’s “Corrected” Dr. Carlton Table 1)).

Response to Proposed Finding No. 1620

This Proposed Finding is inaccurate and misleading to the extent that it suggests that Ciraden is properly included as a buying group in Dr. Carlton's Table 1 analysis. Dr. Carlton claims that "Ciraden was a buying group comprised of independent dentists. Ciraden had a relationship with Schein from 2005 to 2010." (RX 2382-123 at D-6 (Carlton Expert Report); Carlton, Tr. 5439). However, this timeframe falls before the relevant time period and, thus, Ciraden should not be included in Dr. Carlton's Appendix D or Table 1. Dr. Carlton also acknowledged that he identified in his report that Ciraden's management disbanded in approximately 2011 and that there was no more buying group after that time. (Carlton, Tr. 5440-5441).

1621. *Second*, Complaint Counsel questioned whether Mastermind, Teeth Tomorrow, and Klear Impakt should be included, since the contracts were entered into after the end of the alleged conspiracy. (Carlton, Tr. 5442, 5451). But Dr. Carlton's analysis does not attribute any sales to these entities prior to the start of the buying group relationship, and thus, it does not call into question Dr. Carlton's sales analysis. (See CX 7101-140-41 (Marshall's "Corrected" Dr. Carlton Table 1)).

Response to Proposed Finding No. 1621

This Proposed Finding is inaccurate and misleading to the extent that it suggests that Mastermind, Teeth Tomorrow, and Klear Impakt are properly included as buying groups in Dr. Carlton's Table 1 analysis. Dr. Carlton conceded that Schein's relationship with the Mastermind Group began after the end of the alleged conspiracy period, (Carlton, Tr. at 5442), and thus it should not be included in Dr. Carlton's Appendix D or Table 1. Dr. Carlton agreed that the relationship between Teeth Tomorrow and Schein began after the conspiracy period alleged by the FTC. (Carlton, Tr. at 5451). Dr. Carlton agreed that it is fair to say that Schein's agreement with Klear Impakt became effective no earlier than August 2015. (Carlton, Tr. at 5452). Klear Impakt, Mastermind, and Teeth Tomorrow are

also not properly included as buying groups in Dr. Carlton's Table 1 analysis for reasons set forth in Responses to Proposed Finding Nos. 802-838, 950-962, 1250-1262.

1622. *Third*, Complaint Counsel questioned whether Comfort Dental should be included if "indeed Comfort Dental were a DSO." (Carlton, Tr. 5446). As discussed above, Comfort Dental is a franchise, like Smile Source, whose members consist of independent dentists, and therefore, it was properly considered a buying group. (*See* SF 43-46, 54-56 493-97).

Response to Proposed Finding No. 1622

This Proposed Finding is inaccurate and misleading to the extent that it suggests that Comfort Dental is properly included as a buying group in Dr. Carlton's Table 1 analysis. First, Dr. Carlton admitted that he "might have seen documents" where Schein referred to Comfort Dental as an elite DSO. (Carlton, Tr. at 5446). He agreed that if Comfort Dental were a DSO, it would not be properly be included within his Group C in Appendix D (which forms the basis for Dr. Carlton's Table 1). (Carlton, Tr. at 5446-5447). Dr. Carlton also admitted that he just included Comfort Dental in his Group C because "Schein identified this as one of the 44 groups that are buying groups." (Carlton, Tr. at 5446). Second, this Proposed Finding is inaccurate and misleading in its assertion that Comfort Dental is a DSO. The record evidence shows establishes that Schein and Sullivan considered Comfort Dental to be an "Elite DSO," not a buying group. (CCFF ¶¶ 1098-1099; Sullivan, Tr. 3903 (Sullivan testified that Schein used the term "Elite DSO" to refer to Schein's largest DSO customers); CCFF ¶¶ 72-76 (distinguishing DSOs from Buying Groups); *see also* Responses to Proposed Finding Nos. 43-46, 54-56, 493-511)).

1623. *Fourth*, Complaint Counsel claimed that Dr. Carlton's analysis was flawed as to Steadfast Medical because Dr. Carlton's analysis showed that Steadfast sales started in 2011, even though a single, ordinary course business document suggested that there may have been about \$5,000 of sales in 2010. (Carlton, Tr. 5453; CX 2667; *see also* CXD 0054). Complaint Counsel did not introduce any evidence to corroborate CX 2667, or to demonstrate its reliability. Moreover, Complaint Counsel did not show that Dr. Carlton failed to accurately report results from the sales data. In any event, the \$5,000 in sales is *de minimis*, and would not change any of Dr. Carlton's conclusion (Carlton, Tr. 5457-58).

Response to Proposed Finding No. 1623

This Proposed Finding is inaccurate and misleading to the extent that it suggests that Steadfast is properly included as a buying group in Dr. Carlton's Table 1 analysis. Dr. Carlton testified that his representation that Steadfast Medical had agreements with Schein from 2011 to 2017 is based on his understanding of the facts. (Carlton, Tr. 5453). When confronted with a Schein email, attaching a spreadsheet indicating sales to Steadfast in 2010, Dr. Carlton admitted that if the spreadsheet was accurate, then he agreed that Schein's relationship with Steadfast actually began in 2010, not 2011. (Carlton, Tr. 5455 ("If this is accurate, the [Steadfast-Schein] relationship would have begun in 2010, yes.")). Because Steadfast's relationship with Schein began prior to the conspiracy period, it is not appropriately included in Dr. Carlton's Table 1 analysis.

This Proposed Finding is misleading in stating that "Complaint Counsel did not introduce any evidence to corroborate CX2667, or to demonstrate its reliability" – this document is on the Parties Joint Exhibit List JX002a which identifies Complaint Counsel's Exhibits that are admitted into evidence. Steadfast is also not properly included as buying groups in Dr. Carlton's Table 1 analysis for reasons set forth in Responses to Proposed Finding Nos. 1199-1242.

1624. More generally, as Dr. Carlton testified, Complaint Counsel has not shown that the addition or removal of any buying groups would alter the conclusion that Schein did business with buying groups before, during, and after the alleged conspiracy period. (Carlton, Tr. 5457-58; RX 2966 (Carlton, Dep. at 159-70)).

Response to Proposed Finding No. 1624

For reasons explained in Responses to Proposed Finding Nos. 1611-1612, this Proposed Finding is inaccurate and misleading in suggesting that it is necessary for Schein's sales during the relevant period to be reduced to "zero" in order to find that Schein participated in

the conspiracy not to bid on buying groups and changed its conduct with regards to buying groups during the relevant period. As explained in Response to Proposed Finding No. 1611-1612, some buying group relationships and sales that occurred during the relevant period were either pre-existing, legacy relationships formed prior the conspiracy or those that were entered into after the conspiracy became difficult to maintain and Schein began competing for buying groups. (CCFF ¶¶ 440-444). Schein executives did not even know that some of these “legacy” buying groups were customers and referred to some as “inherited messes.” (CX2287 at 001; CX2286 at 001).

The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy because it bid on some buying groups between 2011 and 2015. Indeed, record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Dr. Marshall’s report included many of the record evidence that shows this parallel conduct, explaining that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.” (CX7100 at 142-149 (¶¶ 342-346) (Marshall Expert Report); *see also* CX7100 at 149 (¶ 346) (Marshall Expert Report); Marshall, Tr. 3387-3384 (“I’m noting, though, that again that they’re making a blanket

statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."; Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group' ...and it's passing on this as a matter of policy.'")).

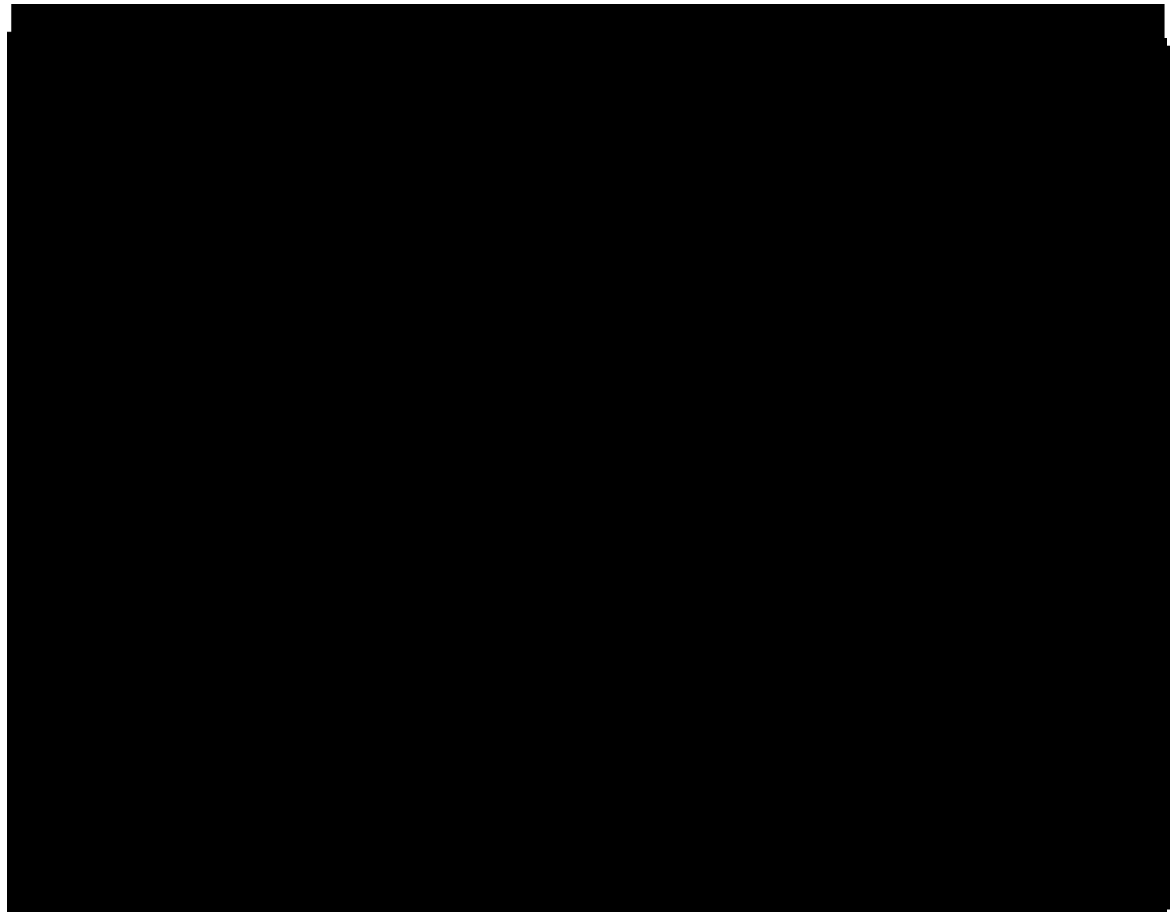
This Proposed Finding is also incomplete, inaccurate, and misleading because t Complaint Counsel has shown that the addition or removal of buying groups from Dr. Carlton's Table 1 shows that Schein changed its conduct with regards to buying groups during the relevant period. In response to Dr. Carlton's Table 1, Dr. Marshall explained that if sales for admitted non-buying groups and contested groups are removed from Table 1 in Dr. Carlton's Expert Report, the total sales reported in that table would be reduced by more than 95 percent. (CCFF ¶ 2036). Dr. Marshall determined that, once sales for admitted non-buying groups and contested groups are removed from Dr. Carlton's Table 1, the data show that Schein's sales to dentists in buying groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017. (CCFF ¶ 2037). When Dr. Marshall removed Schein's sales to the admitted non-buying groups and contested groups from Dr. Carlton's Table 1, the pattern of Schein's sales to buying groups is contrary to Schein's representation that there was no change in its conduct during the conspiracy period and consistent with a collusive agreement to avoid doing business with buying groups, as illustrated by Figure 3 in Dr. Marshall's Rebuttal Report. [REDACTED]

[REDACTED]. To summarize the results, Schein's sales to dentists in

buying groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017. [REDACTED]

[REDACTED]:

{



[REDACTED]

Each of Schein's buying group relationships represented in Figure 3 above is consistent with and explained by Schein's shift in behavior relating to buying groups around the start of the relevant period. (CX7101 at 035 (¶ 83) (Marshall Rebuttal Expert Report)).

1625. As Dr. Carlton testified, "however you describe it, there's no question Schein is selling to these FTC buying groups." (Carlton, Tr. 5364-65, 5372 ("[T]he numbers are different, but they make exactly the same point. Schein is discounting before the alleged conspiracy period, during the alleged conspiracy period, and after the alleged conspiracy period....")).

Response to Proposed Finding No. 1625

For reasons explained in Responses to Proposed Finding Nos. 1611-1612, this Proposed Finding is irrelevant and misleading to the extent that it suggests that it is necessary for Schein's sales during the relevant period to be reduced to "zero" in order to find that Schein participated in the conspiracy not to bid on buying groups and changed its conduct with regards to buying groups during the relevant period. Some buying group relationships and sales that occurred during the relevant period were either pre-existing, legacy relationships formed prior the conspiracy or those that were entered into after the conspiracy became difficult to maintain and Schein began competing for buying groups. (CCFF ¶¶ 440-444). Schein executives did not even know that some of these "legacy" buying groups were customers and referred to some as "inherited messes." (CX2287 at 001; CX2286 at 001). The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy because it bid on some buying groups between 2011 and 2015. Indeed, record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

1626. Dr. Carlton further noted that, during his deposition, Complaint Counsel introduced a revised version of his sales analysis that excluded groups the FTC did not consider relevant. (*See* RX 3091). Dr. Carlton explained in his deposition and at trial that this revised chart confirms that, even under Complaint Counsel's view of which entities should be counted, Schein did do business with buying groups during the relevant period, and that there was no structural

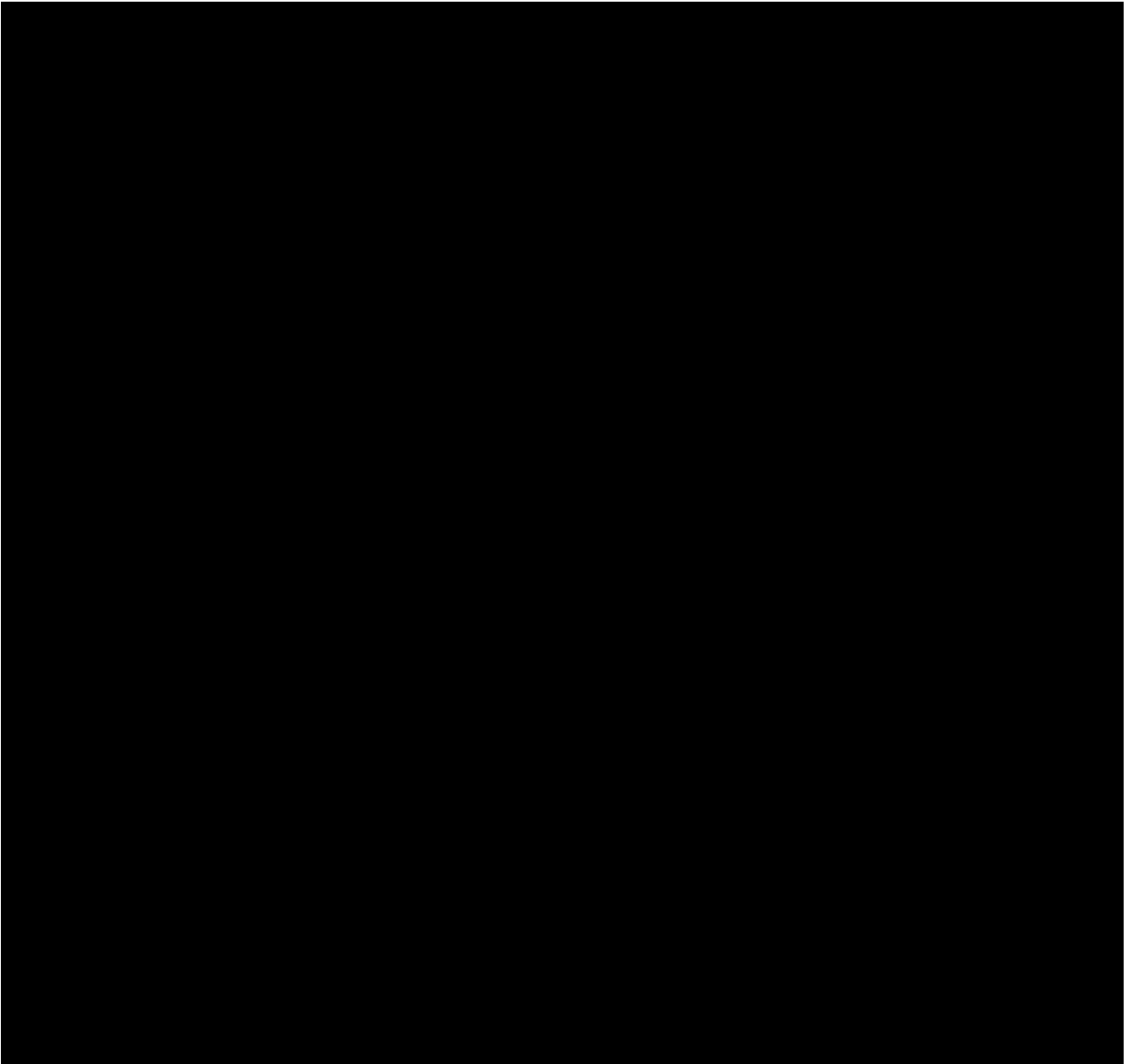
break before or after the alleged conspiracy. (Carlton, Tr. 5457-58; RX 2966 (Carlton, Dep. at 159-70)).

Response to Proposed Finding No. 1626

For reasons explained in Responses to Proposed Finding Nos. 1611-1612, this Proposed Finding is irrelevant and misleading to the extent that it suggests that it is necessary for Schein's sales during the relevant period to be reduced to "zero" in order to find that Schein participated in the conspiracy not to bid on buying groups and changed its conduct with regards to buying groups during the relevant period. Some buying group relationships and sales that occurred during the relevant period were either pre-existing, legacy relationships formed prior the conspiracy or those that were entered into after the conspiracy became difficult to maintain and Schein began competing for buying groups. (CCFF ¶¶ 440-444). Schein executives did not even know that some of these "legacy" buying groups were customers and referred to some as "inherited messes." (CX2287 at 001; CX2286 at 001). The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy because it bid on some buying groups between 2011 and 2015. Indeed, record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

1627. Regardless of Dr. Carlton's categorization, Dr. Marshall also calculated Schein's sales separately for each buying group reflected in Dr. Carlton's report. (CX 7101-140-41). This chart enables the calculation of Schein's sales to any of the entities referenced (though it is limited to the groups Dr. Carlton included in his analysis and does not include Schein's sales to a

number of buying groups, such as the Schulman Group or MeritDent). Based on Dr. Marshall's chart, Schein's sales to the referenced buying groups were as follows:{



[REDACTED]

Response to Proposed Finding No. 1627

The chart in this Proposed Finding is manipulated, unreliable, misleading, and untrustworthy. Schein misrepresents that this chart is from Dr. Marshall's report – however, the chart in this Proposed Finding is a chart that Schein manipulated and doctored for its own ends: the chart in this Proposed Finding is not supported by or anywhere to be found in any of Dr. Marshall's expert reports submitted in this matter.

[REDACTED]

[REDACTED]

[REDACTED]

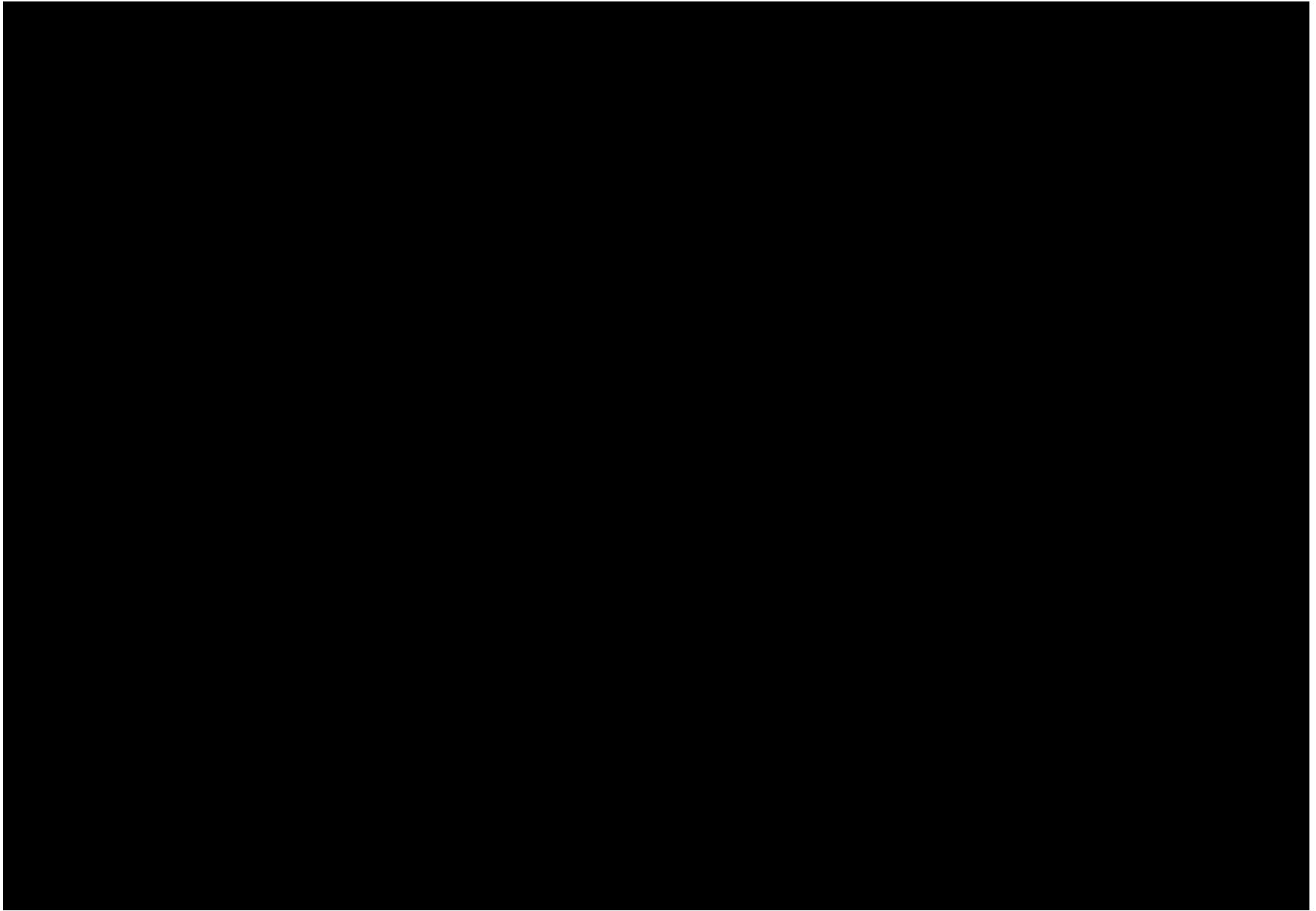
[REDACTED]

[REDACTED]. Dr. Marshall created this chart (and Marshall Expert Rebuttal Report Figure 3) based on the Schein sales data from Dr. Carlton's Table 1, which Dr. Carlton himself admitted was likely flawed and imperfect. [REDACTED]

[REDACTED]; *see also* Carlton, Tr. 5371 ("The sales data aren't always perfect, so there are instances in which...I can't always identify sales to a buying group.").

The chart in this Proposed Finding is based on Schein's own doctoring of the data: the numbers in this chart are overly inflated because they include groups that Dr. Carlton included in Table 1 based on Dr. Carlton's overly broad definition of a buying group. *See* Responses to Proposed Finding Nos. 1611-1612, 1615. In fact, the numbers in Schein's doctored chart in this Proposed Finding are *even more inflated* than the numbers that Schein highlighted in Dr. Carlton's Table 1 (*see* Proposed Finding No. 1616) because Schein tries to sneak in sales for the following additional groups that even Dr. Carlton excluded from his

Table 1 in a separate “Other Buying Group” category: Advantage Dental, Breakaway, Intermountain Dental Associates, Pugh Dental Alliance, Stark County Dental, and Trolongo. (RX2832 at 021 (¶ 28) (Carlton Expert Report)(describing the groups in his “Other Buying Group” category as “buying groups other than buying groups of independent dentists.”)). For all these reasons, any analysis based on the chart in this Proposed Finding should be disregarded as overly inflated, inaccurate, and unreliable. {



[REDACTED]

[REDACTED]

1628. As this chart shows, Schein made over [REDACTED] in sales to buying groups during the relevant period, averaging almost [REDACTED] per year. Between 2009 and 2016, sales increased at a relatively stable rate of about [REDACTED] per year. (CX 7101-140-41).²²

Response to Proposed Finding No. 1628

The numbers in this Proposed Finding should be disregarded as overly inflated, inaccurate, and unreliable because the “chart” referenced in this Proposed Finding is based on Schein’s own manipulation and doctoring of the data as explained in more detail in Response to Proposed Finding No. 1627. Specifically, Schein manipulated the data from Dr. Carlton’s own Table 1 (which were already inflated due to Dr. Carlton’s overly broad definition of a buying group) to inflate them even further to include groups that even Dr. Carlton excluded from his Table 1 in the “Other Buying Group” category: Advantage Dental, Breakaway, Intermountain Dental Associates, Pugh Dental Alliance, Stark County Dental, and Tralongo. (RX2832 at 021 (¶ 28) (Carlton Expert Report) (describing the groups in his “Other Buying Group” category as “buying groups other than buying groups of independent dentists.”)). For all these reasons, any numerical manipulation or analysis based on the chart in Proposed Finding No. 1627, such as the numbers in this Proposed Finding, should be disregarded as overly inflated, inaccurate, and unreliable.

Additionally, for reasons explained in Responses to Proposed Finding Nos. 1611-1612, this Proposed Finding is irrelevant and misleading to the extent that it suggests that it is necessary for Schein’s sales during the relevant period to be reduced to “zero” in order to find that Schein participated in the conspiracy not to bid on buying groups and changed its conduct

²² As discussed below, much of the increase in 2017 (and to a lesser extent in 2016) is attributable to three buying groups: Breakaway Dental, Klear Impakt, and Smile Source. The sales data for Breakaway Dental is inaccurate, as it reflects that Schein began doing business with Breakaway in 2015, when it actually began as a Special Markets customer prior to 2014. (SF 412). Similarly, while the Klear Impakt sales began in late 2015, negotiations started in late 2014. (SF 807). And, while Schein entered into an agreement with Smile Source in 2017, Schein remained willing to work with Smile Source since 2012, including making a specific proposal in 2014. (SF 1106-45, 1156- 86).

with regards to buying groups during the relevant period. As explained in Responses to Proposed Finding Nos. 1611-1612, this Proposed Finding is irrelevant and misleading to the extent that it suggests that it is necessary for Schein's sales during the relevant period to be reduced to "zero" in order to find that Schein participated in the conspiracy not to bid on buying groups and changed its conduct with regards to buying groups during the relevant period. Some buying group relationships and sales that occurred during the relevant period were either pre-existing, legacy relationships formed prior the conspiracy or those that were entered into after the conspiracy became difficult to maintain and Schein began competing for buying groups. (CCFF ¶¶ 440-444). Schein executives did not even know that some of these "legacy" buying groups were customers and referred to some as "inherited messes." (CX2287 at 001; CX2286 at 001). The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy because it bid on some buying groups between 2011 and 2015. Indeed, record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

1629. As the foregoing shows, Schein did do business with buying groups during the alleged conspiracy period. Such evidence reflects non-parallel conduct on Schein's part, and is inconsistent with the allegation that "Benco, Schein, and Patterson conspired to refuse to offer discounted prices or otherwise negotiate with buying groups seeking to obtain supply agreements on behalf of groups of solo practitioners or small group dental practices ('independent dentists')." (Complaint ¶ 1).

Response to Proposed Finding No. 1629

This Proposed Finding is inaccurate, misleading, and unreliable to the extent that it relies on findings based on or numbers from Schein's doctored chart in Proposed Finding No. 1627 for the reasons explained in Responses to Proposed Finding Nos. 1627-1628. Additionally, for reasons explained in Responses to Proposed Finding Nos. 1611-1612, this Proposed Finding is inaccurate and misleading in suggesting that it is necessary for Schein's sales during the relevant period to be reduced to "zero" in order to find that Schein participated in the conspiracy not to bid on buying groups and changed its conduct with regards to buying groups during the relevant period. Some buying group relationships and sales that occurred during the relevant period were either pre-existing, legacy relationships formed prior the conspiracy or those that were entered into after the conspiracy became difficult to maintain and Schein began competing for buying groups. (CCFF ¶¶ 440-444). Schein executives did not even know that some of these "legacy" buying groups were customers and referred to some as "inherited messes." (CX2287 at 001; CX2286 at 001). The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy because it bid on some buying groups between 2011 and 2015. Indeed, record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

3. *Complaint Counsel Cannot Ignore Non-Parallel Conduct by Restricting the Alleged Boycott to “New” Buying Groups.*

1630. Despite the lack of parallel conduct with respect to buying groups generally, Complaint Counsel appears to argue that the alleged conspiracy was limited to “new” buying groups. (*See* Complaint ¶ 34 (“As a result [of the alleged conspiracy], Schein refused to provide discounts to or compete for the business of new Buying Groups.”), ¶ 40 (“As a result [of the alleged conspiracy], Patterson refused to provide discounts to or compete for the business of new Buying Groups.”)).

Response to Proposed Finding No. 1630

This Proposed Finding is inaccurate because Complaint Counsel does not limit the agreement to new buying groups. Instead, the record evidence has shown a broad agreement amongst Respondents against doing business with buying groups broadly, and that Schein complied. (CCFF ¶¶ 196-1158). Additionally, the record evidence has shown that Schein targeted legacy buying groups for termination, and terminated them when they discovered them, including Dental Co-Op of Utah and Steadfast. (CCFF ¶¶ 874-894; *see also* Responses to Proposed Finding Nos. 493-511 (Comfort Dental), 1199-1242 (Steadfast)). Schein categorically rejected buying groups based on Sullivan’s instruction throughout the conspiracy. (CCFF ¶¶ 733-954). Prior to 2011, Schein worked with buying groups but it stopped pursuing new buying groups and directed its sales force to reject buying groups following Sullivan’s communications with Cohen in 2011. (CCFF ¶¶ 441-452, 717-727).

1631. As an initial matter, Complaint Counsel did not introduce any evidence to show that Respondents’ alleged agreement excluded legacy or existing buying groups. Complaint Counsel has not identified any communication drawing this distinction. Rather, the distinction between legacy and new buying groups appears to be a *post-hoc* effort to fit the facts to the data. Moreover, this attempt to limit the alleged agreement to “new” buying groups creates additional logical and factual inconsistencies. For example, Complaint Counsel also alleges that Schein terminated Steadfast and the Dental Co-Op during the alleged conspiracy, but such termination would be unnecessary if the alleged agreement grandfathered legacy buying groups. (CC Pretrial Br. at 20). Complaint Counsel also specifically claims that Smile Source, an existing, legacy buying group, was subject to the alleged conspiracy. (RX 3087-004).

Response to Proposed Finding No. 1631

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded – specifically, the first four statements in this Proposed Finding lack citation to any support in the record. Nonetheless, this Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence. The record evidence has shown that Schein targeted legacy buying groups for termination, and terminated them when they discovered them, including Dental Co-Op of Utah and Steadfast. (CCFF ¶¶ 874-894; *see also* Responses to Proposed Finding Nos. 493-511 (Comfort Dental), 1199-1242 (Steadfast)). Schein categorically rejected buying groups based on Sullivan’s instruction throughout the conspiracy. (CCFF ¶¶ 733-954). Prior to 2011, Schein worked with buying groups but it stopped pursuing new buying groups and directed its sales force to reject buying groups following Sullivan’s communications with Cohen in 2011. (CCFF ¶¶ 441-452, 717-727).

1632. But even if Complaint Counsel limited the scope of the alleged conspiracy to “new” buying groups, the evidence still shows a lack of parallel conduct. The sales date reflected above (SF 1627) shows that Schein *started* doing business with Universal Dental Alliance, Steadfast, Dental Partners of Georgia, Dental Gator, and Corydon Palmer during the alleged conspiracy period. (CX 7101-140-41; *see also* SF 512-47, 634-90, 676-89, 1199-242, 1309-35). In addition, record evidence shows that Schein also started doing business with MeritDent, the Schulman Group, and Floss Dental during the alleged conspiracy period. (SF 757-64, 969-81, 1093-104). The evidence also shows that Schein started negotiations with Klear Impakt and Smile Source during the alleged conspiracy period, even though the ultimate agreements were executed later.

Response to Proposed Finding No. 1632

This Proposed Finding should be disregarded as inaccurate, misleading, and unreliable because the “chart” referenced in this Proposed Finding is based on Schein’s own manipulation and doctoring of the data as explained in Response to Proposed Finding No. 1627. Specifically, Schein manipulated the data from Dr. Carlton’s own Table 1 (which were already inflated due to Dr. Carlton’s overly broad definition of a buying group) to

inflate them even further to include groups that even Dr. Carlton excluded from his Table 1 in the “Other Buying Group” category: Advantage Dental, Breakaway, Intermountain Dental Associates, Pugh Dental Alliance, Stark County Dental, and Tralongo. (RX2832 at 021 (¶ 28) (Carlton Expert Report)(describing the groups in his “Other Buying Group” category as “buying groups other than buying groups of independent dentists.”)). For all these reasons, any numerical manipulation or analysis based on the chart in Proposed Finding No. 1627 should be disregarded as overly inflated, inaccurate, and unreliable.

For reasons explained in Responses to Proposed Finding Nos. 1611-1612, this Proposed Finding is irrelevant and misleading to the extent that it suggests that it is necessary for Schein’s sales during the relevant period to be reduced to “zero” in order to find that Schein participated in the conspiracy not to bid on buying groups and changed its conduct with regards to buying groups during the relevant period. As explained in Responses to Proposed Finding Nos. 1611-1612, this Proposed Finding is irrelevant and misleading to the extent that it suggests that it is necessary for Schein’s sales during the relevant period to be reduced to “zero” in order to find that Schein participated in the conspiracy not to bid on buying groups and changed its conduct with regards to buying groups during the relevant period. Some buying group relationships and sales that occurred during the relevant period were either pre-existing, legacy relationships formed prior the conspiracy or those that were entered into after the conspiracy became difficult to maintain and Schein began competing for buying groups. (CCFF ¶¶ 440-444). Schein executives did not even know that some of these “legacy” buying groups were customers and referred to some as “inherited messes.” (CX2287 at 001; CX2286 at 001). The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy

because it bid on some buying groups between 2011 and 2015. Indeed, record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

The Proposed Finding is not supported by a citation to SF 512-547, 634-690, 676-689, 1199-1242, 1309-1335, 757-764, 969-981, 1093-1104 for the reasons set forth in Responses to Proposed Finding Nos. 512-547, 634-690, 676-689, 1199-1242, 1309-1335, 757-764, 969-981, 1093-1104.

For example, the record evidence shows that Corydon Palmer and Dental Partners of Georgia are not buying groups. (*See* Responses to Proposed Finding Nos. 512-547, 676-689).

Moreover, there is no evidence that that Schein worked with Floss Dental at any time. (*See* Responses to Proposed Finding Nos. 757-764).

1633. Such evidence refutes Complaint Counsel's contention that Respondents engaged in parallel conduct with respect to new buying groups, and is therefore inconsistent with an inference that Schein conspired to refuse to do business with "new" buying groups.

Response to Proposed Finding No. 1633

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. Nonetheless, this Proposed Finding is inaccurate, misleading and contrary to the weight of the evidence for the reasons explained in Responses to Proposed Finding Nos. 1630-1632 above.

4. Complaint Counsel Cannot Explain Away Non-Parallel Conduct by Characterizing It as “Cheating.”

1634. During cross-examination, Dr. Marshall conceded that there was evidence of non-parallel conduct. (Marshall, Tr. 2954-55, [REDACTED], [REDACTED]. While Dr. Marshall claimed that such evidence could be explained away as “cheating,” he conceded that such an explanation would require him to first *assume* the existence of a conspiracy. This assumption was made clear in testimony:

- “Q. If Schein submitted a serious bid [to Smile Source in 2014] and you don’t assume the existence of a conspiracy, then it’s just nonparallel conduct; right?
- A. If I assume the nonexistence of the conspiracy, that, I think is fair.
- Q. ... And only if you assume the existence of a conspiracy, then it’s cheating; right?
- A. That’s – that would be – yes....
- Q. So when Schein does business with a buying group, it’s either cheating if you assume the existence of a conspiracy, or nonparallel conduct ... [i]f you don’t assume the existence of a conspiracy.
- A. Well, again, what I’m saying is that as I read things, it was an insincere attempt to win the business....
- Q. [But] obviously, complaint counsel didn’t agree with you.
- A. I see that.
- Q. ... So if complaint counsel is right, that Schein actually did intend to win the Smile Source business in 2014, then you would have nonparallel conduct if you don’t assume the existence of a conspiracy; fair?
- A. Well, again, you’re saying if you don’t assume the existence of a conspiracy. ***Within the assumption of the existence of a conspiracy***[,] it’s a legitimate interpretation of cheating....”

(Marshall, Tr. 2958-60 (emphasis added)).

Response to Proposed Finding No. 1634

This Proposed Finding is inaccurate and misleading because Dr. Marshall did not concede that there was evidence of non-parallel conduct. Instead, Schein’s counsel omits the portion of Dr. Marshall’s testimony before and after the portion it excerpted in this Proposed Finding that makes clear that Dr. Marshall is not assuming a conspiracy – he is providing responses to Schein’s counsel’s questions which include within it incomplete hypotheticals asking Dr. Marshall to either assume a conspiracy or to assume nonparallel conduct:

Q. And if it's a sincere effort to get the business, it's either nonparallel conduct if there's no conspiracy or it's cheating if there is; fair?

A. Yeah, it would be cheating then.

Q. *Or nonparallel conduct if you don't assume a conspiracy in the first place; right?*

A. Well, not within -- if the assumption of the -- I'm sorry. You're saying -- what am I to assume?

Q. *If Schein submitted a serious bid and you don't assume the existence of a conspiracy, then it's just nonparallel conduct; right?*

A. If I assume the nonexistence of the conspiracy, that, I think is fair.

Q. Okay. *And only if you assume the existence of a conspiracy then it's cheating; right?*

A. That's -- that would be -- yes. Within the context of a conspiracy, it would -- that would be the -- you would view it as cheating, yes.

Q. *So when Schein does business with a buying group, it's either cheating if you assume the existence of a conspiracy or nonparallel conduct; is that right? If you don't assume the existence of a conspiracy.*

A. Well, again, what I'm saying is that as I read things, it was an insincere attempt to win the business. It was essentially the equivalent of not bidding...

Q. Okay. So if complaint counsel is right, that Schein actually did intend to win the Smile Source business in 2014, then you would have nonparallel conduct if you don't assume the existence of a conspiracy; fair?

A. *Well, again, you're saying if you don't assume the existence of a conspiracy.* Within the assumption of the existence of a conspiracy it's a legitimate interpretation of cheating, which happens all the time in conspiracies.

(Marshall, Tr. 2958-2959).

This Proposed Finding is incomplete and misleading because within this exact same line of questioning, Schein's counsel himself acknowledges that Dr. Marshall does not assume the existence of a conspiracy:

Q. Okay. But you're providing testimony where you're saying the economic evidence shows the existence of a conspiracy; right? You're not assuming – the court asked you are you assuming the existence of the conspiracy and you said no.

A. That's correct.

(Marshall, Tr. 2959). Schein's counsel is referring to previous testimony that Dr. Marshall provided making clear that he was not assuming a conspiracy:

JUDGE CHAPPELL: You just said "for the conspiracy." Did you begin with an assumption of a conspiracy in this case?

THE WITNESS: Oh, no, sir.

JUDGE CHAPPELL: Because I just heard you say a "date for the conspiracy."

THE WITNESS: I did not begin with a presumption of conspiracy, Your Honor.

(Marshall, Tr. 2889-2890).

1635. Because Dr. Marshall assumed the existence of a conspiracy, and because there is no evidence that Schein sought to keep its buying group business secret, Dr. Marshall's opinion that the evidence of non-parallel conduct can be explained away as "cheating" is not reliable.

Response to Proposed Finding No. 1635

This Proposed Finding is incomplete, inaccurate, and misleading because Dr. Marshall did not assume the existence of a conspiracy – in the context of the testimony identified and cited in Response to Proposed Finding No. 1634 above, it is clear that Dr. Marshall was responding to incomplete hypotheticals posed by Schein's counsel asking him to assume a conspiracy. Dr. Marshall's testimony is clear that within the assumption of a conspiracy that Schein's counsel asked him to assume in his questioning, as illustrated in the complete testimony cited in Response to Proposed Finding No. 1634 above.

C. Complaint Counsel Failed to Present Reliable Economic Evidence of a Structural Break.

1636. Complaint Counsel asserts that an inference of a conspiracy is appropriate because the evidence reflects so-called structural breaks, or changes in Respondents' conduct that coincide

with the alleged conspiracy period. (Marshall, Tr. 2888-91; CX 7100-190-93, 196). As discussed, the record evidence does not support that contention. (SF 1336-1395, 1627-29).

Response to Proposed Finding No. 1636

This Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence because ample evidence in the record support findings of structural breaks or changes in Respondents conduct during the relevant period. (CCFF ¶¶ 1316-1387). The Proposed Finding is not supported by a citation to SF 1336-1395, 1627-1629 for the reasons set forth in Responses to Proposed Finding Nos. 1336-1395, 1627-1629.

1. *The Sales Data Refute the Existence of a Structural Break.*

1637. Dr. Marshall did not conduct any analysis of the sales data to determine whether a change, if any, in Respondents' sales to buying groups coincided with the start or end of the alleged conspiracy. (Marshall, Tr. 2947-48).

Response to Proposed Finding No. 1637

This Proposed Finding is misleading to the extent that it suggests that Dr. Marshall did not conduct any quantitative or data-driven analysis regarding Respondents' parallel or change of conduct. Rather, to counter Dr. Carlton's claim that Respondents engaged in parallel conduct because Schein sales data shows sales to entities he claimed to be "buying groups" during the relevant period, Dr. Marshall performed a data-driven quantitative analysis. Dr. Marshall did this by excluding entities that were shown through the record evidence to not be buying groups. As a result, Dr. Marshall quantitative analysis shows that Schein's business with buying groups decreased during the conspiracy. (See Responses to Proposed Finding Nos. 1611-1612). Dr. Marshall's quantitative analysis is consistent with a structural change or change of conduct during the relevant period as well as Respondents' collusive agreement to avoid doing business with buying groups. (See Responses to Proposed Finding Nos. 1611-1612); [REDACTED]

██████. Additionally, this Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence to the extent that it suggests no structural breaks exist because ample evidence in the record support findings of structural breaks or changes in Respondents conduct during the relevant period. (CCFF ¶¶ 1316-1387).

1638. Such an analysis is necessary for an *economist* (as opposed to the fact-finder) to render an opinion about the existence or non-existence of a structural break. As Benco’s expert witness Dr. Johnson testified, to determine whether there is a structural break, an economist would analyze the data to determine whether there was a statistically significant difference in the magnitude of sales to buying groups during the conspiracy relative to before or after the alleged conspiracy. (J. Johnson, Tr. 4858-59).

Response to Proposed Finding No. 1638

The Proposed Finding that an analysis of sales data is “necessary for an economist to render an opinion about the existence or non-existence of a structural break” is not supported by any citation to the evidence in the record and should be disregarded. To the extent that Schein relies on Dr. Johnson’s testimony regarding what is a structural break, it should be disregarded as an opinion outside of the scope of Dr. Johnson’s expert report. In his Expert Report, Dr. Johnson wrote that in his opinion, “the concept of a structural break comes from econometrics – the discipline of economics that involves empirical testing of data based on statistics.” (RX2834 at 050 (¶ 81) (Johnson Expert Report)). But Dr. Johnson did not opine in his Expert Report about how he would have analyzed the data in this case “to determine whether there was a statistically significant difference in the magnitude of sales to buying groups during the conspiracy relative to before or after the alleged conspiracy.” Additionally, the Proposed Finding is misleading, incomplete, and inaccurate, and unsupported insofar as it suggests the term “structural break” must be accompanied by econometric analysis. Dr. Marshall used the term “structural break” to describe a change in behavior. (CX7101 at 068-069 (¶177, n. 321)). Nonetheless, this Proposed Finding is misleading to the extent that it

suggests that Dr. Marshall did not conduct any quantitative or data-driven analysis regarding Respondents' parallel or change of conduct. To counter Dr. Carlton's claim that Respondents engaged in parallel conduct just because Schein sales data shows sales to entities he claimed to be "buying groups" during the relevant period, Dr. Marshall performed a data-driven quantitative analysis. Dr. Marshall did this by excluding entities that were shown through the record evidence to not be buying groups. (*See Responses to Proposed Finding Nos. 1611-1612*). As a result, Dr. Marshall quantitative analysis shows that Schein's business with buying groups decreased during the conspiracy. This is consistent with a structural change or change of conduct during the relevant period as well as Respondents' collusive agreement to avoid doing business with buying groups. (*See Responses to Proposed Finding Nos. 1611-1612*); [REDACTED]

[REDACTED]. Additionally, this Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence to the extent that it suggests no structural breaks exist because ample evidence in the record support findings of structural breaks or changes in Respondents conduct during the relevant period. (CCFF ¶¶ 1316-1387).

1639. Dr. Marshall did not do this analysis. Dr. Marshall conceded that he was not "offering an opinion about a start date or an end date for the conspiracy," but rather was merely evaluating whether the "date range of 2011 to 2015" that Complaint Counsel "gave [him]" was a "reasonable date range." (Marshall, Tr. 2889).

Response to Proposed Finding No. 1639

This Proposed Finding is misleading to the extent that it suggests that Dr. Marshall did not conduct any quantitative or data-driven analysis regarding Respondents' parallel or change of conduct. To counter Dr. Carlton's claim that Respondents engaged in parallel conduct just because Schein sales data shows sales to entities he claimed to be "buying groups" during the relevant period, Dr. Marshall performed a data-driven quantitative analysis. Dr. Marshall did

this by excluding entities that were shown through the record evidence to not be buying groups. As a result, Dr. Marshall quantitative analysis shows that Schein's business with buying groups decreased during the conspiracy. (*See Responses to Proposed Finding Nos. 1611-1612*). This is consistent with a structural change or change of conduct during the relevant period as well as Respondents' collusive agreement to avoid doing business with buying groups. (*See Responses to Proposed Finding Nos. 1611-1612*); [REDACTED]. Additionally, this Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence to the extent that it suggests no structural breaks exist because ample evidence in the record support findings of structural breaks or changes in Respondents conduct during the relevant period. (CCFF ¶¶ 1316-1387).

1640. To the contrary, Dr. Marshall's structural break analysis is entirely based on his interpretation of emails and testimony, and again assumes the existence of a conspiracy. Though Dr. Marshall claimed that this approach did not "begin with an assumption of a conspiracy in this case" and that he "did not begin with a presumption of conspiracy," (*see Marshall, Tr. 2889-90*), by taking the start and end dates of the conspiracy from Complaint Counsel as given, he did in fact start out with an assumption of a conspiracy and then proceed to *interpret* the evidence in light of that assumption.

Response to Proposed Finding No. 1640

This Proposed Finding is inaccurate, incomplete, and misleading in suggesting that Dr. Marshall "assumes the existence of a conspiracy" – as Schein acknowledges, the very testimony that Schein cites in this Proposed Finding to is contrary to this representation. (*See also Response to Proposed Finding No. 1634*). Moreover, the Proposed Finding that Dr. Marshall took "the start and end dates of the conspiracy from Complaint Counsel as a given...and then proceeded to interpret the evidence in light of that assumption" is not supported by any citation to the evidence in the record and should be disregarded. Nonetheless, this Proposed Finding is inaccurate, incomplete, and misleading because Dr.

Marshall testified that he examined structural breaks as a “reasonableness check” to determine whether the date range of 2011-2015 was a “reasonable date range.” (Marshall, Tr. 2889-2890). Dr. Marshall also looked at structural breaks as an indicator supporting collusive behavior rather than oligopolistic interdependence. (CX7100 at 190 (¶ 427) (Marshall Expert Report)).

Additionally, this Proposed Finding is misleading to the extent that it suggests that Dr. Marshall did not conduct any quantitative or data-driven analysis regarding Respondents’ parallel or change of conduct. To counter Dr. Carlton’s claim that Respondents engaged in parallel conduct just because Schein sales data shows sales to entities he claimed to be “buying groups” during the relevant period, Dr. Marshall performed a data-driven quantitative analysis. Dr. Marshall did this by excluding entities that were shown through the record evidence to not be buying groups. As a result, Dr. Marshall quantitative analysis shows that Schein’s business with buying groups decreased during the conspiracy. *See* Responses to Proposed Finding Nos. 1611-1612. This is consistent with a structural change or change of conduct during the relevant period as well as Respondents’ collusive agreement to avoid doing business with buying groups. [REDACTED]

[REDACTED]. Additionally, this Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence to the extent that it suggests no structural breaks exist because ample evidence in the record support findings of structural breaks or changes in Respondents conduct during the relevant period. (CCFF ¶¶ 1316-1387).

1641. Because Dr. Marshall’s approach presupposes the existence of a conspiracy, it is not reliable evidence of whether there was, in fact, a conspiracy. It might be proper for an expert witness to take a hypothesis – that the conspiracy dates are as alleged – and *test* whether the evidence is inconsistent with that hypothesis. If the evidence is inconsistent with the hypothesis, then logic dictates that the hypothesis is false. But the opposite is not true. If the evidence is consistent with the hypothesis, then logic can only go as far as dictating that the hypothesis *may*

or *may not* be true. As such, a structural break analysis that – like Dr. Marshall’s – *assumes* the start and end date of the conspiracy can only disprove the existence of a conspiracy; it cannot prove it.

Response to Proposed Finding No. 1641

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. Additionally, this Proposed Finding is inaccurate, misleading, and incomplete for reasons explained in Responses to Proposed Finding Nos. 1636-1640 above.

1642. Dr. Carlton’s quantitative analysis demonstrated that the evidence is, in fact, inconsistent with the hypothesis of a structural break at the start or end of the alleged conspiracy. Dr. Carlton analyzed the sales data and concluded that it was inconsistent with any structural break. Dr. Carlton testified that he analyzed Schein’s sales data and that, regardless of how entities are categorized, Schein did business with buying groups before, during, and after the alleged conspiracy. (Carlton, Tr. 5368-69, 5373-76; *see also* RX 2832-022 (Table 1); SF 183-88, 1625-29). Dr. Carlton also found that there was no material difference in the amount of Schein’s sales between these periods. (Carlton, Tr. 5373-74; 5376-79; RX 2832-022). To the extent there was some difference, Dr. Carlton noted that sales increased after the start of the alleged conspiracy, refuting the notion of a structural break or a conspiracy not to do business with buying groups. (Carlton, Tr. 5368-69, 5373-74).

Response to Proposed Finding No. 1642

This Proposed Finding is irrelevant, inaccurate, incomplete, misleading, and unreliable because throughout his expert report and analyses, Dr. Carlton employed a definition of “buying groups” that is different from the definition alleged in this matter. (CCFF ¶ 2031; *see also* Carlton, Tr. 5434-5435). Dr. Carlton admitted that the “buying groups” in his Appendix D (supporting the analysis in Table 1 of his expert report) include groups that are not comprised of independent dentists. (CCFF ¶ 2033). Thus, the analysis in Dr. Carlton’s Table 1 (“Schein Sales To Buying Groups”) is inflated and unreliable because it includes entities that are irrelevant to the allegations in this matter due to Dr. Carlton use of an overly broad definition.

This Proposed Finding is also incomplete, inaccurate, and misleading because it omits that in response to Dr. Carlton’s analysis of Schein’s sales to buying groups, Dr. Marshall explained

that if sales for admitted non-buying groups and contested groups are removed from Table 1 in Dr. Carlton's Expert Report, the total sales reported in that table would be reduced by more than 95 percent. (CCFF ¶ 2036). Dr. Marshall determined that, once sales for admitted non-buying groups and contested groups are removed from Dr. Carlton's Table 1, the data show that Schein's sales to dentists in buying groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017, showing a drastic change in Schein's buying group sales. (CCFF ¶ 2037). [REDACTED]

[REDACTED]

[REDACTED]

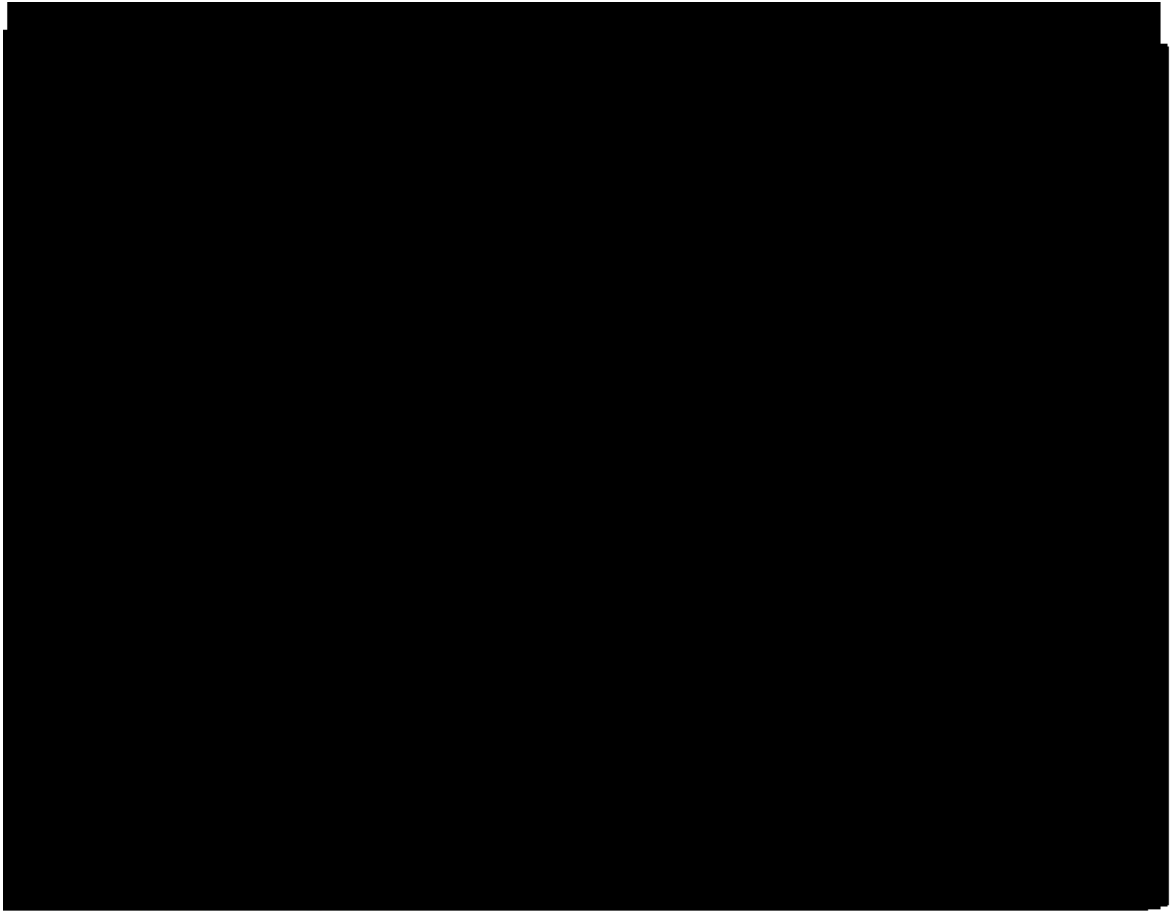
[REDACTED]

[REDACTED]

[REDACTED]. To summarize the results, Schein's

sales to dentists in buying groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017. [REDACTED]

[REDACTED]:



[REDACTED]

Each of Schein's buying group relationships represented in Dr. Marshall's Rebuttal Report Figure 3 above is consistent with and explained by Schein's shift in behavior relating to buying groups around the start of the relevant period. (CX7101 at 035 (¶ 83) (Marshall Expert Rebuttal Report)). This is consistent with a structural change or change of conduct during the relevant period as well as Respondents' collusive agreement to avoid doing business with buying groups. [REDACTED]

[REDACTED]. This Proposed Finding is irrelevant and misleading to the extent that it suggests that it is necessary for Schein's sales during the relevant period to be reduced to "zero" in order to find that Schein participated in the conspiracy not to bid on

buying groups and changed its conduct with regards to buying groups during the relevant period. Some buying group relationships and sales that occurred during the relevant period were either pre-existing, legacy relationships formed prior the conspiracy or those that were entered into after the conspiracy became difficult to maintain and Schein began competing for buying groups. (CCFF ¶¶ 440-444). Schein executives did not even know that some of these “legacy” buying groups were customers and referred to some as “inherited messes.” (CX2287 at 001; CX2286 at 001).

The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy because it bid on some buying groups between 2011 and 2015. Indeed, record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

Additionally, this Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence to the extent that it suggests no structural breaks exist because ample evidence in the record support findings of structural breaks or changes in Respondents conduct during the relevant period. (CCFF ¶¶ 1316-1387).

Finally, The Proposed Finding is not supported by a citation to SF 183-88, 1625-1629 for the reasons set forth in Responses to Proposed Finding Nos. 183-188, 1625-1629.

2. *Dr. Marshall's Three Schein Anecdotes Are Not Structural Breaks.*

1643. To support his structural break opinion, Dr. Marshall relied on three anecdotes involving Schein, namely, (i) Schein's rejection of Unified Smiles on December 21, 2011, (ii) the termination of the Schein-Smile Source relationship in January 2012, and (iii) Schein's agreement with Smile Source in 2017. (Marshall, Tr. 2890-91).

Response to Proposed Finding No. 1643

This Proposed Finding is incomplete and misleading because it excludes Dr. Marshall's analyses of structural breaks with regards to Patterson and Benco in Section V.E. in Dr. Marshall's expert report as well as Dr. Marshall's data analysis in Section IV.A in Dr. Marshall's expert rebuttal report that refutes Dr. Carlton's data analysis regarding parallel conduct and structural breaks. [REDACTED]

[REDACTED].

1644. As noted, the evidence surrounding these anecdotes does not indicate any drastic change in behavior by Schein that could support the finding of a structural break. (SF 1336-95). Dr. Marshall's attempt to review selected portions of the documentary and testimonial record in order to draw conclusions about changes in Schein's behavior usurps the fact-finder's role, and is not a reliable economic opinion.

Response to Proposed Finding No. 1644

This Proposed Finding that "Dr. Marshall's attempt to review selected portions of the documentary and testimonial record in order to draw conclusions about changes in Schein's behavior usurps the fact-finder's role, and is not a reliable economic opinion" is not supported by any citation to the evidence in the record and should be disregarded.

Nonetheless, this Proposed Finding is inaccurate, incomplete, and misleading with regards to Dr. Marshall's findings and opinions on structural breaks for the reasons explained in Responses to Proposed Finding Nos. 1636-1643 above and Responses to Proposed Finding Nos. 1645-1656 below.

Additionally, this Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence to the extent that it suggests no structural breaks exist because ample evidence in the record support findings of structural breaks or changes in Respondents conduct during the relevant period. (CCFF ¶¶ 1316-1387). Finally, this Proposed Finding is not supported by a citation to SF 1336-1395 for the reasons set forth in Responses to Proposed Finding Nos. 1336-1395. As set forth in those responses, the record evidence shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel's Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

1645. As an initial matter, Dr. Marshall did not examine whether there was a change in the *frequency* with which Schein agreed or declined to do business with a buying group around the start or end dates of the alleged conspiracy. Dr. Marshall did not evaluate all the instances prior to the start of the alleged conspiracy, or after the end of the alleged conspiracy, where Schein declined to do business with a buying group. (Marshall, Tr. 2949-50 (agreeing that he "[does not] know one way or the other whether Schein said no to buying groups prior to Unified Smiles")).

Response to Proposed Finding No. 1645

The first sentence of this Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded – Schein provides no support for the notion that (a) the frequency with which Schein agreed or declined to do business with a buying group around

the start or end dates of the alleged conspiracy and/or (b) an evaluation of all of the instances that Schein declined to do business with a buying group prior to the start and after the end of the alleged conspiracy are required for a structural break analysis. Moreover, this Proposed Finding is irrelevant because Dr. Marshall's findings and opinions on structural breaks are sound for the reasons explained in Responses to Proposed Finding Nos. 1636-1644 above and Responses to Proposed Finding Nos. 1646-1656 below. [REDACTED]

[REDACTED].

1646. Similarly, Dr. Marshall did not evaluate the instances in which Schein agreed to do business with a buying group during the alleged conspiracy. (*See, e.g.*, Marshall, Tr. 2966-67, 2969). Without consideration of Schein's approaches to *all* buying groups during the three periods under consideration (before, during, and after the alleged conspiracy), it is not possible for Dr. Marshall to draw reliable conclusions about whether Schein changed its behavior during these time periods.

Response to Proposed Finding No. 1646

This second sentence of this Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. Additionally, this Proposed Finding is also inaccurate and misleading – the testimony cited does not support the Proposed Finding that “Dr. Marshall did not evaluate the instances in which Schein agreed to do business with a buying group during the alleged conspiracy.” [REDACTED]

[REDACTED]. Moreover, this Proposed Finding is inaccurate and misleading because Dr. Marshall's findings and opinions on structural breaks are sound for the reasons explained in Responses to Proposed Finding Nos. 1636-1645 above

and Responses to Proposed Finding Nos. 1647-1656 below. [REDACTED]

[REDACTED].

1647. In addition, Dr. Marshall's assumptions concerning the facts relating to the three structural break anecdotes is not consistent with the record evidence. (*See* SF 1286-308 (Unified Smiles), 1105-186 (Smile Source)).

Response to Proposed Finding No. 1647

The Proposed Finding is not supported by a citation to SF 1286-1308, 1105-1186 for the reasons set forth in Responses to Proposed Finding Nos. 1286-1308, 1105-1186. Moreover, this Proposed Finding is inaccurate and misleading because Dr. Marshall's findings and opinions on structural breaks are sound for the reasons explained in Responses to Proposed Finding Nos. 1636-1646 above and Responses to Proposed Finding Nos. 1648-1656 below.

[REDACTED].

Additionally, this Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence to the extent that it suggests no structural breaks exist because ample evidence in the record support findings of structural breaks or changes in Respondents conduct during the relevant period. (CCFF ¶¶ 1316-1387).

1648. With respect to Unified Smiles, the evidence establishes that Schein's Mr. Foley informed Unified Smiles on December 21, 2011 that Schein was unwilling to enter into an agreement in the form Unified Smiles proposed. (CX 2062; Foley, Tr. 4687-88, 4692). As discussed above, the evidence demonstrates that this decision was made unilaterally by Mr. Foley, and was not the result of any alleged agreement or communication between Schein and Benco. (SF 1286-308). While Dr. Marshall claims that the email's use of the phrase "no longer" implies a change (at some unspecified time), such an opinion falls outside the scope of Dr. Marshall's expertise. (CX 7100-190). Moreover, the isolated use of the phrase "no longer" in a single email is insufficient, by itself, to deem Schein's dealings with Unified Smiles a "structural break."

Response to Proposed Finding No. 1648

The Proposed Finding "the isolated use of the phrase 'no longer' in a single email is insufficient, by itself, to deem Schein's dealings with Unified Smiles a "structural break" is

not supported by any citation to the evidence in the record and should be disregarded. This Proposed Finding is inaccurate, incomplete, and misleading for reasons explained in Responses to Proposed Finding Nos. 1286-1308. As set forth in those responses, the record evidence shows that the December 2011 rejection of Unified Smile followed Sullivan's change in position regarding buying groups after communications with Benco that year, and that the rejection was a corporate decision. (CCFF ¶¶ 661-732). The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and "no longer participate[d] in Buying Groups." (CX2062 at 001; *see also* CCFF ¶¶ 661-732). Foley rejected Unified Smiles in December 2011, pursuant to Schein's then-existing policy against buying groups, as he was aware of Sullivan's instructions on buying groups at the time. Indeed, in February 2012, Foley instructed his direct report, referring to his conversation with Sullivan about buying groups, that "this is a corporate decision, not to participate in these." (CCFF ¶ 756 (quoting CX0238 at 001; Foley, Tr. 4554-4556)).

Moreover, this Proposed Finding is irrelevant because Dr. Marshall's findings and opinions on structural breaks are sound for the reasons explained in Responses to Proposed Finding Nos. 1636-1647 above and Responses to Proposed Finding Nos. 1649-1656 below. [REDACTED]

[REDACTED].

Additionally, this Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence to the extent that it suggests no structural breaks exist because ample evidence in the record support findings of structural breaks or changes in Respondents conduct during the relevant period. (CCFF ¶¶ 1316-1387).

1649. With respect to Smile Source's decision in 2012 to terminate Schein, the evidence does not support Dr. Marshall's factual assumption that Schein tried to induce Smile Source to

terminate the relationship. Moreover, the evidence shows that any change in Schein's dealings with Smile Source occurred in January 2011 (following the decision made in 2010 to transfer the Smile Source account from Special Markets to HSD (*see* SF 223-36), and thus, any such change on Schein's part occurred prior to the start of the alleged conspiracy.

Response to Proposed Finding No. 1649

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. This Proposed Finding is inaccurate and misleading because Dr. Marshall's findings and opinions on structural breaks are sound for the reasons explained in Responses to Proposed Finding Nos. 1636-1648 above and Responses to Proposed Finding Nos. 1650-1656 below. [REDACTED]

[REDACTED]. Additionally, this Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence to the extent that it suggests no structural breaks exist because ample evidence in the record support findings of structural breaks or changes in Respondents conduct during the relevant period. (CCFF ¶¶ 1316-1387). To the extent that this Proposed Finding suggests that Schein did not act against its self-interest based on facts related to the end of Schein's relationship with Smile Source in 2012, it is inaccurate and misleading because Dr. Marshall explained that his five natural experiments (profitability studies) show that buying groups drive purchasing volume and are profitable for full-service distributors to serve, and that "Even if Carlton's assessment of the facts were correct, that would not affect the conclusions I draw below from these profitability studies...[t]hese facts are in the data of the studies, and they follow regardless of whether Schein terminated its discussions with Smile Source and Kois or visa versa." (CX7101 at 049 (¶¶ 119) (Marshall Expert Rebuttal Report); *see also* Responses to Proposed Finding Nos. 1697-1701).

1650. Dr. Marshall relies on his Fisher price index for his claim that [REDACTED] [REDACTED]. (CX 7100-181-82 (Figure 84)). But a Fisher price index does not show that Schein decreased its discounts or otherwise changed its pricing behavior towards Smile Source in 2011. (Marshall, Tr. 3143-48 [REDACTED])

Response to Proposed Finding No. 1650

This Proposed Finding is incomplete and misleading in suggesting that Dr. Marshall only relied on his Fischer price index in his assessment of the end of Schein's partnership with Smile Source in 2012 – Dr. Marshall also testified that [REDACTED]

[REDACTED]. To the extent that this Proposed Finding is suggesting that Schein did not act against its self-interest based on facts related to the end of Schein's relationship with Smile Source in 2012 it is inaccurate and misleading because Dr. Marshall has explained that his five natural experiments (profitability studies) show that buying groups drive purchasing volume and are profitable for full-service distributors to serve, and that "Even if Carlton's assessment of the facts were correct, that would not affect the conclusions I draw below from these profitability studies...these facts are in the data of the studies, and they follow regardless of whether Schein terminated its discussions with Smile Source and Kois or visa versa." (CX7101 at 049 (¶¶119) (Marshall Expert Rebuttal Report); *see also* Responses to Proposed Finding Nos. 1697-1701).

1651. Dr. Marshall's Fisher price index fails to account for changes in cost of goods. Dr. Marshall's Fisher price index also fails to account for general changes in market prices. (Marshall Tr. 3144). [REDACTED]

[REDACTED] (*Compare* CX 7100-168 with CX 7100-182; *see also* Marshall, Tr. 3143-46).

Response to Proposed Finding No. 1651

This Proposed Finding is inaccurate and misleading because the testimony cited does not support the Proposed Finding – there is no testimony indicating that “Dr. Marshall’s Fisher price index fails to account for changes in cost of goods. Dr. Marshall’s Fisher price index also fails to account for general changes in market prices.” To the extent that this Proposed Finding is suggesting that Schein did not act against its self-interest based on facts related to the end of Schein’s relationship with Smile Source in 2012, it is inaccurate and misleading because Dr. Marshall has explained that his five natural experiments (profitability studies) show that buying groups drive purchasing volume and are profitable for full-service distributors to serve, and that “Even if Carlton’s assessment of the facts were correct, that would not affect the conclusions I draw below from these profitability studies...[t]hese facts are in the data of the studies, and they follow regardless of whether Schein terminated its discussions with Smile Source and Kois or visa versa.” (CX7101 at 049 (¶¶ 119) (Marshall Expert Rebuttal Report)).

1652. Dr. Carlton showed that the discounts Schein offered to Smile Source remained constant between 2010 and Smile Source’s termination of Schein in 2012. (RX 2382-058 (Table 3); Carlton Tr. 5379-80). Dr. Marshall did not claim that Dr. Carlton’s analysis was incorrect. (Marshall, Tr. 3149; *see also* Marshall, Tr. 3149 [REDACTED])

Response to Proposed Finding No. 1652

To the extent that this Proposed Finding is suggesting that Schein did not act against its self-interest based on facts related to the end of Schein’s relationship with Smile Source in 2012, it is inaccurate and misleading because Dr. Marshall has explained that his five natural experiments (profitability studies) show that buying groups drive purchasing volume and are profitable for full-service distributors to serve, and that “Even if Carlton’s assessment of the

facts were correct, that would not affect the conclusions I draw below from these profitability studies...[t]hese facts are in the data of the studies, and they follow regardless of whether Schein terminated its discussions with Smile Source and Kois or visa versa.” (CX7101 at 049 (¶¶ 119) (Marshall Expert Rebuttal Report)).

1653. As such, Dr. Marshall’s Fisher price index cannot support a finding that Schein increased prices, or reduced discounts, in an effort to induce Smile Source to terminate its relationship with Schein. Similarly, Dr. Marshall failed to provide any economic evidence demonstrating that Schein changed its behavior with respect to Smile Source at the start of the alleged conspiracy. (SF 1129-37).

Response to Proposed Finding No. 1653

The first sentence of this Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. Nonetheless, this Proposed Finding is incomplete and misleading in suggesting that Dr. Marshall only relied on his Fischer price index in his assessment of the end of Schein’s partnership with Smile Source in 2012 – Dr. Marshall also testified that [REDACTED]

[REDACTED]. To the extent that this Proposed Finding suggests that Schein did not act against its self-interest based on facts related to the end of Schein’s relationship with Smile Source in 2012, it is inaccurate and misleading because Dr. Marshall explained that his five natural experiments (profitability studies) show that buying groups drive purchasing volume and are profitable for full-service distributors to serve, and that “Even if Carlton’s assessment of the facts were correct, that would not affect the conclusions I draw below from these profitability studies...[t]hese facts are in the data of the studies, and they follow regardless of whether Schein terminated its discussions with Smile Source and Kois or visa versa.” (CX7101 at 049 (¶¶ 119) (Marshall Expert Rebuttal Report)).

Moreover, this Proposed Finding is irrelevant because Dr. Marshall's findings and opinions on structural breaks are sound for the reasons explained in Responses to Proposed Finding Nos. 1636-1648 above and Responses to Proposed Finding Nos. 1650-1656 below. [REDACTED]

[REDACTED].

Additionally, this Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence to the extent that it suggests no structural breaks exist because ample evidence in the record support findings of structural breaks or changes in Respondents conduct during the relevant period. (CCFF ¶¶ 1316-1387). Finally, this Proposed Finding is not supported by a citation to SF 1129-1137 for the reasons set forth in Responses to Proposed Finding Nos. 1129-1137.

1654. With respect to Smile Source's decision in 2017 to re-engage Schein as a designated distributor, the evidence shows that Schein had offered to supply Smile Source in 2014, and that Schein was consistently willing to do business with Smile Source throughout the relevant period. (SF 1156-86).

Response to Proposed Finding No. 1654

This Proposed Finding is misleading and contrary to the weight of the evidence to the extent it asserts that "Schein was consistently willing to do business with Smile Source throughout the relevant period." Complaint Counsel contends that Schein's 2014 proposal to Smile Source was an attempt at cheating on the agreement. (Kahn, Tr. 61). The record evidence shows that Schein's interactions with Smile Source in 2014 was an attempt at cheating—Schein knew Benco and Patterson would not be bidding, offered Smile Source a low, non-competitive bid, instructed its team not to do business with buying groups at the time it was allegedly working on that bid, and Sullivan continued instructing against buying groups after the bid. First, the record evidence shows that by 2014, the Big Three already knew that they would not discount to buying groups. (CCFF ¶¶ 674-676, 700, 1178-1198; *see also*

Responses to Proposed Finding Nos. 120, 1156-1186). Moreover, this Proposed Finding is irrelevant because Dr. Marshall's findings and opinions on structural breaks are sound for the reasons explained in Responses to Proposed Finding Nos. 1636-1655 above. [REDACTED]

[REDACTED]. Additionally, this Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence to the extent that it suggests no structural breaks exist because ample evidence in the record support findings of structural breaks or changes in Respondents conduct during the relevant period. (CCFF ¶¶ 1316-1387).

1655. Following Smile Source's decision to reject Schein's partnership proposal in 2014, Smile Source did not seek to re-start negotiations until late 2015, which ultimately resulted in reaching an agreement in 2017. (SF 1156-86).

Response to Proposed Finding No. 1655

As set forth above in Response to Proposed Finding No. 1654, this Proposed Finding is misleading and contrary to the weight of the record evidence. (*See* Responses to Proposed Finding Nos. 1156-1186). Moreover, this Proposed Finding is irrelevant because Dr. Marshall's findings and opinions on structural breaks are sound for the reasons explained in Responses to Proposed Finding Nos. 1636-1655 above. [REDACTED]

[REDACTED]. Additionally, this Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence to the extent that it suggests no structural breaks exist because ample evidence in the record support findings of structural breaks or changes in Respondents conduct during the relevant period. (CCFF ¶¶ 1316-1387).

1656. Because Schein was always willing to do business with Smile Source, there is no basis for concluding that Schein changed its behavior in 2017. (SF 1106-21, 1156-86).

Response to Proposed Finding No. 1656

As set forth above in Response to Proposed Finding No. 1654, this Proposed Finding is inaccurate, incomplete, and misleading. The record evidence does not establish that “Schein was always willing to do business with Smile Source. (See Responses to Proposed Finding Nos. 1354, 1106-1121, 1156-1186). Moreover, this Proposed Finding is inaccurate and misleading because Dr. Marshall’s findings and opinions on structural breaks are sound for the reasons explained in Responses to Proposed Finding Nos. 1636-1655 above. [REDACTED] [REDACTED]. Additionally, this Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence to the extent that it suggests no structural breaks exist because ample evidence in the record support findings of structural breaks or changes in Respondents conduct during the relevant period. (CCFF ¶¶ 1316-1387).

D. Basic Industry Characteristics Do Not Justify a Conspiracy Inference.

1657. Dr. Marshall testified that the “market structure” is “conducive to collusion.” (Marshall, Tr. 2913-16). Specifically, he asserted that factors such as market shares or concentration, barriers to entry, and bargaining power of customers and suppliers provides a “sensible framework to use ... when trying to understand collusive behavior.” (Marshall, Tr. 2913-14).

Response to Proposed Finding No. 1657

Complaint Counsel does not disagree that Dr. Marshall testified that the market structure is “conducive to collusion” (*see also* (CX7100 at 011 (¶12) (Marshall Expert Report)) but adds that Dr. Marshall also stated that “industry structure, standing alone, is not evidence of conspiratorial conduct, but disagree with any implication that it is irrelevant to an assessment of claimed conspiratorial conduct.” (CX7101 at 027 (¶ 65) (Marshall Expert Rebuttal Report)). Additionally, Dr. Marshall’s opinions are consistent with Patterson’s expert, Dr.

Wu, who described the industry structure in this case as having “the potential for strategic interaction.” (RX2833 at 017 (¶ 27) (Wu Expert Report)).

1658. However, Dr. Marshall’s opinion is incapable of distinguishing between lawful oligopolistic coordination and unlawful agreement. As Dr. Carlton testified, the same factors that Dr. Marshall believes makes the market conducive to collusion also makes the market conducive to lawful oligopolistic behavior. (Carlton, Tr. 5363-64).

Response to Proposed Finding No. 1658

This Proposed Finding is inaccurate, incomplete, and misleading to the extent that it suggests that the facts of the case at hand constitute lawful oligopolistic coordination. Dr. Marshall disagreed with Dr. Carlton’s opinion that Respondents’ parallel conduct could be the result of oligopolistic conscious parallelism given the inter-firm communications in this case.

(CX7101 at 026-028, 038-039 (¶¶ 63-66, 88-90) (Marshall Expert Rebuttal Report); *see also* Marshall, Tr. 2877-2888). Dr. Carlton’s conclusion that oligopolistic interdependence could explain Respondents’ parallel conduct is also based on a false premise as applied to this case. While Dr. Carlton opined that it is possible that Respondents each decided not to discount to buying groups in parallel, taking a “wait and see” approach (RX2832 at 066 ¶ 99), it is undisputed that Schein began discounting to buying groups before the conspiracy. (CCFF ¶¶ 432-453.). In other words, contrary to Dr. Carlton’s opinion, Schein never took a “wait and see” approach, it affirmatively changed its conduct from working with buying groups to instructing its sales team to refuse buying groups. (CX7101 at 026-027 ¶¶ 63-65; ¶ 63 (“Dr. Carlton does not explain how his client, Schein, came to its own spontaneous unilateral understanding to not bid.”); *see also* CX7100 at 203 (¶ 475) (Marshall Expert Report) (“I describe how Respondents behaved toward customers other than buying groups and how Benco entered Southern California. The behavior underlying both these episodes contrasts with Respondents’ non-competitive behavior toward dental buying groups. This contrast

suggests that the Respondents’ non-competitive behavior toward buying groups is not the result of the Respondents acting as they typically do. In other words, this contrast in conduct is an indicator that Respondents’ parallel conduct with respect to buying groups is driven by something other than non-competitive oligopoly behavior.”)).

1659. Dr. Marshall has failed to present any economic evidence that shows that Respondents conduct cannot be explained by lawful oligopolistic interdependence.

Response to Proposed Finding No. 1659

This Proposed Finding is inaccurate, incomplete, and misleading to the extent that it suggests that the facts of the case at hand constitute lawful oligopolistic coordination and that Dr. Marshall has “failed to present any economic evidence” of it. Dr. Marshall disagreed with Dr. Carlton’s opinion that Respondents’ parallel conduct could be the result of oligopolistic conscious parallelism given the inter-firm communications in this case. (CX7101 at 026-028, 038-039 (¶¶ 63-66, 88-90) (Marshall Expert Rebuttal Report); *see also* Marshall, Tr. 2877-2888). Dr. Carlton’s conclusion that oligopolistic interdependence could explain Respondents’ parallel conduct is also based on a false premise as applied to this case. While Dr. Carlton opined that it is possible that Respondents each decided not to discount to buying groups in parallel, taking a “wait and see” approach (RX2832 at 066 ¶ 99), it is undisputed that Schein began discounting to buying groups before the conspiracy. (CCFF ¶¶ 432-453.). In other words, Dr. Marshall explained that contrary to Dr. Carlton’s opinion, Schein never took a “wait and see” approach, it affirmatively changed its conduct from working with buying groups to instructing its sales team to refuse buying groups. (CX7101 ¶¶ 63-65; ¶ 63 (“Dr. Carlton does not explain how his client, Schein, came to its own spontaneous unilateral understanding to not bid.”); *see also* CX7100 at 203 (¶ 475) (Marshall Expert Report) (“I describe how Respondents behaved toward customers other than buying groups and how

Benco entered Southern California. The behavior underlying both these episodes contrasts with Respondents' non-competitive behavior toward dental buying groups. This contrast suggests that the Respondents' non-competitive behavior toward buying groups is not the result of the Respondents acting as they typically do. In other words, this contrast in conduct is an indicator that Respondents' parallel conduct with respect to buying groups is driven by something other than non-competitive oligopoly behavior.”)).

E. Complaint Counsel Failed to Show that Schein Acted Against Self-Interest.

1660. Complaint Counsel asserts that a conspiracy can be inferred based on Dr. Marshall's opinion that Respondents acted contrary to their unilateral self-interest. (CC Pretrial Br. 52-53). Dr. Marshall bases his self-interest opinion on his profitability analyses of Smile Source and the Kois Buyers Group. (Marshall, Tr. 2986-87). Dr. Marshall's profitability analyses are not reliable or persuasive.

Response to Proposed Finding No. 1660

This Proposed Finding is inaccurate, incomplete, and contrary to the weight of the evidence in suggesting that Complaint Counsel's evidence that Respondents acted contrary to their unilateral self-interest is limited to Dr. Marshall's opinion. Instead, the record evidence, including Dr. Marshall's analyses and opinions, demonstrate that Respondents acted contrary to their unilateral self-interest. (CCFF ¶¶ 1254-1390, 1637-1684). That is: Dr. Marshall's data and other economic analyses are other factors that support the totality of the evidence that points towards Respondents' conspiracy. (CCFF ¶¶ 1-2079).

1661. In sum, Dr. Marshall's opinion that Respondents acted contrary to their unilateral self-interest is flawed for at least the following reasons:

- ***Dr. Marshall's Profitability Analysis Is Infected by False Positives, Incorrectly Finding Acts Against Self-Interest Outside of the Alleged Conspiracy Period.*** Dr. Marshall's profitability analysis is incapable of distinguishing between unilateral and conspiratorial conduct, since his analysis shows that Patterson acted contrary to its self-interest prior to its alleged participation in the conspiracy, and that Benco acted contrary to its self-interest after the end of the alleged conspiracy. Such false positives render Dr. Marshall's analysis unreliable.
- ***The Profitability Analysis Is Incapable of Distinguishing Between Oligopolistic Interdependence and Conspiracy.*** Dr. Marshall's analysis fails to show that

Respondents' respective approaches to buying groups could not arise naturally, as a result of oligopolistic interdependence. Rather, his model *assumes* that all interdependence strategies – such as “wait-and-see” – would fail, even though he admits that it is possible that such strategies could explain Respondents' reluctance to bid on certain buying groups.

- ***The Profitability Analysis Shows that the Alleged Conspiracy Is Ineffective and Irrational.*** Dr. Marshall's profitability analysis shows that the alleged conspiracy would be irrational for the Respondents because they collectively lose money in any region in which there is a competing distributor. Since Dr. Marshall's own analysis shows that there are other distributors in virtually all regions, the alleged conspiracy would not be in any Respondents' interest. The inability to identify situations where the alleged conspiracy would make economic sense and where it wouldn't renders the analysis unreliable.
- ***The Profitability Analysis Is Limited to Just Two Non-Representative Buying Groups.*** Dr. Marshall's analysis is limited to the Kois Buyers Group and Smile Source. But the evidence shows that there are significant differences among buying groups. As such, Dr. Marshall's analysis cannot be relied on to draw inferences about other buying groups. Nor is it reasonable to rely on this analysis to draw inferences about whether each Respondent's buying group policies or practices were contrary to its unilateral self-interest.
- ***The Profitability Analysis Is Premised on Incorrect Factual Assumptions Concerning Schein's Dealings with the Kois Buyers Group and Smile Source.*** Dr. Marshall's conclusions that Schein acted contrary to its self-interest in its dealings with the Kois Buyers Group and Smile Source are premised on the incorrect factual assumptions that: (i) Schein did not engage in good-faith negotiations with Kois to supply the Kois Buyers Group; (ii) Schein terminated Smile Source, or induced Smile Source to terminate Schein, in 2012; and (iii) Schein submitted a sham bid to Smile Source in 2014. Since none of these assertions are factually accurate, the assumption that Schein acted contrary to its self-interest is unreliable.
- ***The Profitability Analysis Fails to Account for Factors Relevant to the Decision to Partner with Buying Groups.*** Dr. Marshall's profitability analysis only accounts for the sales and margins among customers that actually purchased from Burkhart or Atlanta Dental. It does not account for other factors that would be relevant to Respondents' decisions about whether to partner with a buying group, such as the many conflicts that buying group relationships create, including conflicts involving (i) HSD and Special Markets, (ii) FSCs, (iii) non-member dentists, (iv) DSOs, and (v) manufacturers.
- ***The Profitability Analysis Fails to Analyze the But-For World.*** Dr. Marshall does not analyze the sales or profits that Respondents would have earned had they entered into contracts with Smile Source or the Kois Buyers Group during the alleged relevant period. The failure to analyze the but-for world renders his analysis unreliable.
- ***The Profitability Analysis Fails to Show that Schein's Decisions Were Unprofitable.*** The Kois and Smile Source analyses do not show that Schein lost money by not winning those contracts. The analyses are based on 20-20

hindsight, including material changes in the buying group's businesses that could not be reasonably anticipated at the time of contracting. The analyses also show that Schein's dealings with Smile Source in 2012 and 2017 were *not* profitable, and were not likely to be profitable despite Smile Source's growth. The 2013 Atlanta Dental Smile Source analysis is unreliable because Dr. Marshall used gerrymandered numbers for Schein's 2012 pre-contract margins.

Response to Proposed Finding No. 1661

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. Nonetheless, this Proposed Finding is inaccurate, incomplete, and contrary to the weight of the evidence in suggesting that Complaint Counsel's evidence that Respondents acted contrary to their unilateral self-interest is limited to Dr. Marshall's opinion. Instead, the record evidence, including Dr. Marshall's analyses and opinions, demonstrate that Respondents acted contrary to their unilateral self-interest. (CCFF ¶¶ 1254-1390, 1637-1684). That is: Dr. Marshall's data and other economic analyses are other factors that support the totality of the evidence that points towards Respondents' conspiracy. (CCFF ¶¶ 1-2079). This Proposed Finding is also inaccurate, incomplete, and misleading for reasons explained in Responses to Proposed Finding Nos. 1662-1752 below.

1. Dr. Marshall's Profitability Analysis Is Unreliable Because It Finds Acts Against Self-Interest Outside the Alleged Conspiracy Period.

1662. Dr. Marshall's profitability analysis is not reliable or persuasive because it is incapable of distinguishing between conspiratorial and non-conspiratorial conduct. Specifically, his analysis, if believed, would imply that Respondents acted contrary to their self-interest during periods outside the alleged conspiracy.

Response to Proposed Finding No. 1662

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. This Proposed Finding is also inaccurate, incomplete and misleading for reasons explained in Responses to Proposed Finding Nos. 1624-1669 below.

1663. Dr. Marshall's profitability analysis of Smile Source in 2012 reflects a period prior to Patterson's participation in the alleged conspiracy. (CX 7100-165; Complaint ¶ 6; CC Pretrial Br. at 21).

Response to Proposed Finding No. 1663

This Proposed Finding is inaccurate and misleading in suggesting that Dr. Marshall's testimony and profitability analyses do not show that Patterson was acting against its self interest by having a no buying group policy during the relevant period for Patterson. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED])

[REDACTED]. Accordingly, consistent with Dr. Marshall's analyses, it was against Patterson's unilateral self-interest to have a no-buying group policy after 2013 whereby it instructed its employees to categorically reject all buying groups. (CCFF ¶¶ 630-652). Prior to 2013, Patterson did not have a no buying group policy and, thus, was not acting against its self-interest. (CCFF ¶¶ 627-628).

1664. Dr. Marshall's profitability analysis, however, shows that [REDACTED] by allowing Burkhardt to win the contract, plus some uncalculated amount it would have earned had it won the Smile Source contract. (CX 7100-165; Marshall, Tr. 3100). From this, Dr. Marshall concludes that [REDACTED] (CX 7100-165-66; Marshall, Tr. 3101-02).

Response to Proposed Finding No. 1664

This Proposed Finding is inaccurate and misleading in suggesting that Dr. Marshall's testimony and profitability analyses do not show that Patterson was acting against its self interest by having a no buying group policy during the relevant period for Patterson. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall

Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED]). Accordingly, consistent with Dr. Marshall's analyses, it was against Patterson's unilateral self-interest to have a no-buying group policy after 2013 whereby it instructed its employees to categorically reject all buying groups. (CCFF ¶¶ 630-652). Prior to 2013, Patterson did not have a no buying group policy and, thus, was not acting against its self-interest. (CCFF ¶¶ 627-628).

1665. Because Dr. Marshall purports to show that Patterson acted contrary to its self-interest prior to its participation in the alleged conspiracy, the profitability analysis is unreliable and incapable of distinguishing between conspiratorial conduct and non-conspiratorial conduct. Specifically, Dr. Marshall's analysis generates false positives.

Response to Proposed Finding No. 1665

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. This Proposed Finding is inaccurate and misleading in suggesting that Dr. Marshall's testimony and profitability analyses do not show that Patterson was acting against its self interest by having a no buying group policy during the relevant period for Patterson. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED]). Accordingly, consistent with Dr. Marshall's analyses, it was against Patterson's unilateral self-interest to have a no-buying group policy after 2013 whereby it instructed its employees to categorically reject all buying groups. (CCFF ¶¶ 630-652). Prior to 2013, Patterson did not have a no buying group policy and, thus, was not acting against its self-interest. (CCFF ¶¶ 627-628). For all these reasons, this

Proposed Finding is inaccurate and misleading in suggesting that “the profitability analysis is unreliable and incapable of distinguishing between conspiratorial conduct and non-conspiratorial conduct” or that “Dr. Marshall’s analysis generates false positives.”

1666. At trial, Dr. Marshall sought to rehabilitate his analysis by claiming that he assumed a conspiracy start date of 2011 for the “three respondents.” (Marshall, Tr. 2947). But because this is not the actual start date Complaint Counsel alleges, his model is not probative. More importantly, Dr. Marshall cannot cure the failings in his model simply by assuming a different start date.

Response to Proposed Finding No. 1666

This Proposed Finding is inaccurate, misleading, and incomplete in representing that Dr.

Marshall “assumed a conspiracy start date of 2011 for the ‘three respondents.’” Dr.

Marshall’s complete testimony is that he did a reasonableness check for the date range 2011 to 2015, is not offering any economic opinion as to the precise date to the start of the alleged conspiracy, and is considering the actions of all three Respondents within the 2011 to 2015 date range:

Q. Now, with respect to the start dates of the alleged conspiracy, you took those dates from the complaint counsel; is that right?

A. They gave me a date range of 2011 to 2015, and I did a reasonableness check.

Q. You're not offering any economic opinion to pin a precise date as to the start of the alleged conspiracy?

A. That's correct. That was not part of my charge.

Q. And for the alleged Patterson-Benco conspiracy, you also took the start date from the complaint or the complaint counsel?

A. Well, I think of the -- I don't know what you mean by “Patterson-Benco.” It's the three respondents that I'm considering here, and I'm looking at the date range of 2011 to 2015.

(Marshall, Tr. 2947).

This Proposed Finding that “[b]ut because this is not the actual start date Complaint Counsel alleges, his model is not probative” is unintelligible, vague as to what “actual start date,” “his

model,” and “probative” are referring to, and it is also unsupported by any citation to evidence in the record and should be disregarded.

This Proposed Finding that “Dr. Marshall cannot cure the failings in his model simply by assuming a different start date” is unintelligible, vague as to what “cure” and “failings” and “his model” and “start date” are referring to, and is also unsupported by any citation to evidence in the record and should be disregarded. To the extent this is a reference to Dr. Marshall’s five profitability analyses in relation to Patterson, it is inaccurate and misleading for the reasons explained above Responses to Proposed Finding Nos. 1663-1665.

1667. Putting aside Dr. Marshall’s attempt to assume a 2011 start date for Patterson’s participation in the alleged conspiracy, Dr. Marshall cannot explain why his analysis would show that Patterson acted contrary to its self-interest prior to its participation in the alleged conspiracy. (Marshall, Tr. 3102). For example, Dr. Marshall testified as follows:

[REDACTED]

(Marshall, Tr. 3102).²³

Response to Proposed Finding No. 1667

This Proposed Finding of “Putting aside Dr. Marshall’s attempt to assume a 2011 start date for Patterson’s participation in the alleged conspiracy” is misleading, inaccurate, and

²³ While Dr. Marshall claimed at trial that he used a common date range of 2011 through 2015 for all Respondents, his own report quotes the Complaint’s allegation that “Patterson joined the agreement to refuse to provide discounts to or otherwise compete for Buying Groups no later than February 2013.” (CX 7100-009-10, n.2).

incomplete for reasons and testimony identified in Response to Schein Proposed Finding Nos. 1663-1666.

To the extent that this Proposed Finding is suggesting that Dr. Marshall's testimony and profitability analyses do not show that Patterson was acting against its self interest by having a no buying group policy during the relevant period for Patterson, it is misleading and inaccurate. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, consistent with Dr. Marshall's analyses, it was against Patterson's unilateral self-interest to have a no-buying group policy after 2013 whereby it instructed its employees to categorically reject all buying groups. (CCFF ¶¶ 630-652). Prior to 2013, Patterson did not have a no buying group policy and, thus, was not acting against its self-interest. (CCFF ¶¶ 627-628).

1668. Dr. Marshall's analysis also shows false positives at the end of the alleged conspiracy period. Dr. Marshall performed a single, post-conspiracy analysis, involving Smile Source's decision to contract with Schein in 2017. (CX 7100-182-86). Dr. Marshall, however, found that [REDACTED] (CX 7100-184, (Figure 87)). Benco, however, did not bid for the contract. From this, Dr. Marshall concluded that Benco acted contrary to its self-interest, even after the alleged conspiracy ended. (CX 7100-186).

Response to Proposed Finding No. 1668

This Proposed Finding is inaccurate, misleading, and incomplete in stating that Dr.

Marshall's analysis "shows false positives at the end of the conspiracy period." [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Dr. Marshall's analyses do no more than corroborate that buying groups provide opportunities for incremental sales to the distributor partnered with the buying group. (CCFF ¶¶ 1647-1684; [REDACTED])

[REDACTED]. Benco may have adopted a no buying group policy pursuant to its self-interest before the conspiracy, but knew that it could not maintain the policy if its largest rivals began working with buying groups, which became a reality and prompted the conspiracy. (CCFF ¶¶ 394-431).

1669. At trial, Dr. Marshall tried to explain away this apparent inconsistency by pointing to Benco's agreement with Elite Dental as a reason why Benco did not bid for the Smile Source business in 2017. (Marshall, Tr. 3119-21). But Dr. Marshall's explanation demonstrates that his profitability analysis cannot distinguish between acts contrary to a firm's self-interest and acts consistent with a firm's self-interest.

Response to Proposed Finding No. 1669

This Proposed Finding is inaccurate, misleading, and inaccurate to the extent that this Proposed Finding is suggesting that Dr. Marshall's testimony and profitability analyses do not show that Benco was acting against its self-interest by not bidding on Smile Source in 2017 when it was prohibited from doing so based on exclusive relationship with Elite Dental Alliance. *See* Response to Proposed Finding No. 1668. Dr. Marshall's analyses do no more than corroborate that buying groups provide opportunities for incremental sales to the distributor partnered with the buying group. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]. Benco may have adopted a no buying group policy pursuant to its self-interest before the conspiracy, but knew that it could not maintain the policy if its largest rivals began working with buying groups, which became a reality and prompted the conspiracy. (CCFF ¶¶ 394-431).

2. *Dr. Marshall's Profitability Analysis Fails to Distinguish Between Oligopolistic Interdependence and Conspiracy.*

1670. Dr. Marshall concedes that his profitability analysis cannot explain why a Respondent "did or did not bid on buying groups." (Marshall, Tr. 2877).

Response to Proposed Finding No. 1670

This Proposed Finding is inaccurate, incomplete, and misleading to the extent that it suggests that the facts of this case constitute lawful oligopolistic coordination. Dr. Marshall disagreed with Dr. Carlton's opinion that Respondents' parallel conduct could be the result of oligopolistic conscious parallelism given the inter-firm communications in this case. (CX7101 at 026-028, 038-039 (¶¶ 63-66, 88-90) (Marshall Expert Rebuttal Report); *see also* Marshall, Tr. 2877-2888). Dr. Carlton's conclusion that oligopolistic interdependence could explain Respondents' parallel conduct is also based on a false premise as applied to this case. While Dr. Carlton opined that it is possible that Respondents each decided not to discount to

buying groups in parallel, taking a “wait and see” approach (RX2832 ¶ 99), it is undisputed that Schein began discounting to buying groups before the conspiracy. (CCFF ¶¶ 432-453). In other words, Dr. Marshall explained that contrary to Dr. Carlton’s opinion, Schein never took a “wait and see” approach, it affirmatively changed its conduct from working with buying groups to instructing its sales team to refuse buying groups. (CX7101 at 026-027 (¶¶ 63-65) (Marshall Expert Rebuttal Report) (“Dr. Carlton does not explain how his client, Schein, came to its own spontaneous unilateral understanding to not bid.”); *see also* CX7100 at 203 (¶ 475) (Marshall Expert Report) (“I describe how Respondents behaved toward customers other than buying groups and how Benco entered Southern California. The behavior underlying both these episodes contrasts with Respondents’ non-competitive behavior toward dental buying groups. This contrast suggests that the Respondents’ non-competitive behavior toward buying groups is not the result of the Respondents acting as they typically do. In other words, this contrast in conduct is an indicator that Respondents’ parallel conduct with respect to buying groups is driven by something other than non-competitive oligopoly behavior.”)).

1671. As Dr. Marshall explained, “[m]utually recognized interdependence is well-known in our business as to reasons that there may be parallel conduct.” (Marshall, Tr. 2951).

Response to Proposed Finding No. 1671

This Proposed Finding is inaccurate, incomplete, and misleading to the extent that it suggests that the facts of this case constitute lawful oligopolistic coordination. Dr. Marshall disagreed with Dr. Carlton’s opinion that Respondents’ parallel conduct could be the result of oligopolistic conscious parallelism given the inter-firm communications in this case. (CX7101 at 026-028, 038-039 (¶¶ 63-66, 88-90) (Marshall Expert Rebuttal Report); *see also* Marshall, Tr. 2877-2888). Dr. Carlton’s conclusion that oligopolistic interdependence could

explain Respondents' parallel conduct is also based on a false premise as applied to this case. While Dr. Carlton opined that it is possible that Respondents each decided not to discount to buying groups in parallel, taking a "wait and see" approach (RX2832 ¶ 99), it is undisputed that Schein began discounting to buying groups before the conspiracy. (CCFF ¶¶ 432-453). In other words, Dr. Marshall explained that contrary to Dr. Carlton's opinion, Schein never took a "wait and see" approach, it affirmatively changed its conduct from working with buying groups to instructing its sales team to refuse buying groups. (CX7101 at 026-027 (¶¶ 63-65) (Marshall Expert Rebuttal Report) ("Dr. Carlton does not explain how his client, Schein, came to its own spontaneous unilateral understanding to not bid."); *see also* CX7100 at 203 (¶ 475) (Marshall Expert Report) ("I describe how Respondents behaved toward customers other than buying groups and how Benco entered Southern California. The behavior underlying both these episodes contrasts with Respondents' non-competitive behavior toward dental buying groups. This contrast suggests that the Respondents' non-competitive behavior toward buying groups is not the result of the Respondents acting as they typically do. In other words, this contrast in conduct is an indicator that Respondents' parallel conduct with respect to buying groups is driven by something other than non-competitive oligopoly behavior.")).

1672. As Dr. Carlton explained, however, Dr. Marshall's profitability analysis is incapable of distinguishing between parallel conduct that arises as a result of lawful oligopolistic interdependence and collusion. (Carlton, Tr. 5383-84).

Response to Proposed Finding No. 1672

This Proposed Finding is inaccurate, incomplete, and misleading to the extent that it suggests that the facts of this case constitute lawful oligopolistic coordination. Dr. Marshall disagreed with Dr. Carlton's opinion that Respondents' parallel conduct could be the result of oligopolistic conscious parallelism given the inter-firm communications in this case.

(CX7101 at 026-028, 038-039 (¶¶ 63-66, 88-90) (Marshall Expert Rebuttal Report); *see also* Marshall, Tr. 2877-2888). Dr. Carlton's conclusion that oligopolistic interdependence could explain Respondents' parallel conduct is also based on a false premise as applied to this case. While Dr. Carlton opined that it is possible that Respondents each decided not to discount to buying groups in parallel, taking a "wait and see" approach (RX2832 ¶ 99), it is undisputed that Schein began discounting to buying groups before the conspiracy. (CCFF ¶¶ 432-453.). In other words, Dr. Marshall explained that contrary to Dr. Carlton's opinion, Schein never took a "wait and see" approach, it affirmatively changed its conduct from working with buying groups to instructing its sales team to refuse buying groups. (CX7101 at 026-027 (¶¶ 63-65) (Marshall Expert Rebuttal Report) ("Dr. Carlton does not explain how his client, Schein, came to its own spontaneous unilateral understanding to not bid."); *see also* CX7100 at 203 (¶ 475) (Marshall Expert Report) ("I describe how Respondents behaved toward customers other than buying groups and how Benco entered Southern California. The behavior underlying both these episodes contrasts with Respondents' non-competitive behavior toward dental buying groups. This contrast suggests that the Respondents' non-competitive behavior toward buying groups is not the result of the Respondents acting as they typically do. In other words, this contrast in conduct is an indicator that Respondents' parallel conduct with respect to buying groups is driven by something other than non-competitive oligopoly behavior.")).

1673. Dr. Marshall similarly admitted that there is a "possibility, that ... the respondents in this matter would have ... reasoned their way to not bidding for buying groups." (Marshall, Tr. 2878, 2952; *see also* Marshall, Tr. 2883 ("Q: Could respondents have reached the outcome of not bidding on buying groups through strategic interdependence rather than collusion? A. Well, it's a possibility that that could occur...."))).

Response to Proposed Finding No. 1673

This Proposed Finding is inaccurate, incomplete, and misleading to the extent that it suggests that the facts of this case constitute lawful oligopolistic coordination. Dr. Marshall disagreed with Dr. Carlton's opinion that Respondents' parallel conduct could be the result of oligopolistic conscious parallelism given the inter-firm communications in this case.

(CX7101 at 026-028, 038-039 (¶¶ 63-66, 88-90) (Marshall Expert Rebuttal Report); *see also* Marshall, Tr. 2877-2888). Dr. Carlton's conclusion that oligopolistic interdependence could explain Respondents' parallel conduct is also based on a false premise as applied to this case. While Dr. Carlton opined that it is possible that Respondents each decided not to discount to buying groups in parallel, taking a "wait and see" approach (RX2832 ¶ 99), it is undisputed that Schein began discounting to buying groups before the conspiracy. (CCFF ¶¶ 432-453.). In other words, Dr. Marshall explained that contrary to Dr. Carlton's opinion, Schein never took a "wait and see" approach, it affirmatively changed its conduct from working with buying groups to instructing its sales team to refuse buying groups. (CX7101 at 026-027 (¶¶ 63-65) (Marshall Expert Rebuttal Report) ("Dr. Carlton does not explain how his client, Schein, came to its own spontaneous unilateral understanding to not bid."); *see also* CX7100 at 203 (¶ 475) (Marshall Expert Report) ("I describe how Respondents behaved toward customers other than buying groups and how Benco entered Southern California. The behavior underlying both these episodes contrasts with Respondents' non-competitive behavior toward dental buying groups. This contrast suggests that the Respondents' non-competitive behavior toward buying groups is not the result of the Respondents acting as they typically do. In other words, this contrast in conduct is an indicator that Respondents'

parallel conduct with respect to buying groups is driven by something other than non-competitive oligopoly behavior.”)).

1674. One of the common strategies used in industries characterized by oligopolistic interdependence is “wait-and-see,” in which each firm waits for another firm to be the first mover. Such a strategy is especially effective if (i) there is sufficient market transparency to detect when a rival has engaged in the conduct, and (ii) there are limited “first mover advantages” from the conduct such that second mover remains able to compete.

Response to Proposed Finding No. 1674

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. Nonetheless, this Proposed Finding is incomplete and misleading to the extent that it suggests that the facts of this case constitute lawful oligopolistic coordination. Dr. Marshall disagreed with Dr. Carlton’s opinion that Respondents’ parallel conduct could be the result of oligopolistic conscious parallelism given the inter-firm communications in this case. (CX7101 at 026-028, 038-039 (¶¶ 63-66, 88-90) (Marshall Expert Rebuttal Report); *see also* Marshall, Tr. 2877-2888). Dr. Carlton’s conclusion that oligopolistic interdependence could explain Respondents’ parallel conduct is also based on a false premise as applied to this case. While Dr. Carlton opined that it is possible that Respondents each decided not to discount to buying groups in parallel, taking a “wait and see” approach (RX2832 ¶ 99), it is undisputed that Schein began discounting to buying groups before the conspiracy. (CCFF ¶¶ 432-453.). In other words, Dr. Marshall explained that contrary to Dr. Carlton’s opinion, Schein never took a “wait and see” approach, it affirmatively changed its conduct from working with buying groups to instructing its sales team to refuse buying groups. (CX7101 at 026-027 (¶¶ 63-65) (Marshall Expert Rebuttal Report) (“Dr. Carlton does not explain how his client, Schein, came to its own spontaneous unilateral understanding to not bid.”); *see also* CX7100 at 203 (¶ 475) (Marshall Expert Report) (“I describe how Respondents behaved toward customers other than buying groups

and how Benco entered Southern California. The behavior underlying both these episodes contrasts with Respondents' non-competitive behavior toward dental buying groups. This contrast suggests that the Respondents' non-competitive behavior toward buying groups is not the result of the Respondents acting as they typically do. In other words, this contrast in conduct is an indicator that Respondents' parallel conduct with respect to buying groups is driven by something other than non-competitive oligopoly behavior.”)).

1675. The record evidence shows that Schein considered such factors in deciding whether to actively court buying group business. (SF 159-82; *see also* CX 2113 (“the risk to overall HSI (due to having 40% share in market) for margin erosion, image, as well as other competitors then following suit and huge price war breaks out.”); CX 0189-002 (“HS should not be first to cooperate with GPOs, but also don’t want to be last.”)). Such documents reflect a recognition of oligopolistic interdependence, and provide a compelling non-collusive explanation for Schein’s decisions about how to engage with various buying groups.

Response to Proposed Finding No. 1675

This Proposed Finding is inaccurate, incomplete, and misleading to the extent that it suggests that the facts of this case and/or the facts cited support a finding that Schein’s conduct constitutes lawful oligopolistic coordination. Dr. Marshall disagreed with Dr. Carlton’s opinion that Respondents’ parallel conduct could be the result of oligopolistic conscious parallelism given the inter-firm communications in this case. (CX7101 at 026-028, 038-039 (¶¶ 63-66, 88-90) (Marshall Expert Rebuttal Report); *see also* Marshall, Tr. 2877-2888). Dr. Carlton’s conclusion that oligopolistic interdependence could explain Respondents’ parallel conduct is also based on a false premise as applied to this case. While Dr. Carlton opined that it is possible that Respondents each decided not to discount to buying groups in parallel, taking a “wait and see” approach (RX2832 ¶ 99), it is undisputed that Schein began discounting to buying groups before the conspiracy. (CCFF ¶¶ 432-453). In other words, Dr. Marshall explained that contrary to Dr. Carlton’s opinion, Schein never took a “wait and see” approach, it affirmatively changed its conduct from working with buying groups to

instructing its sales team to refuse buying groups. (CX7101 at 026-027 (¶¶ 63-65) (Marshall Expert Rebuttal Report) (“Dr. Carlton does not explain how his client, Schein, came to its own spontaneous unilateral understanding to not bid.”); *see also* CX7100 at 203 (¶ 475) (Marshall Expert Report) (“I describe how Respondents behaved toward customers other than buying groups and how Benco entered Southern California. The behavior underlying both these episodes contrasts with Respondents’ non-competitive behavior toward dental buying groups. This contrast suggests that the Respondents’ non-competitive behavior toward buying groups is not the result of the Respondents acting as they typically do. In other words, this contrast in conduct is an indicator that Respondents’ parallel conduct with respect to buying groups is driven by something other than non-competitive oligopoly behavior.”)).

The Proposed Finding is vague as to the time-period at issue, misleading, and contrary to the weight of the evidence in asserting that Schein “considered such factors in deciding whether to actively court buying group business.” The record evidence shows that Schein did not evaluate buying groups in any way during the conspiracy period. In fact, the record evidence shows that Schein instructed its sales force to reject buying groups pursuant to Sullivan’s directives and that it complied with that instruction during the conspiracy. (CCFF ¶¶ 661-954). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154, 159-182). Indeed, the cited evidence does not support the assertion. CX2113 is an email from September 2010, which does not reflect Schein’s conduct *during* the conspiracy. (CX2113 at 001). CX0189 is

a document from November 2015, which also does not reflect Schein's conduct *during* the conspiracy. In fact, these documents are consistent with the record evidence that shows Schein worked with buying groups during the conspiracy and competed for buying groups after the conspiracy became difficult to maintain. (CCFF ¶¶ 432-454, 1316-1322, 1159-1166). They do not show that Schein served buying groups, or evaluated them in any way, during the conspiracy period.

3. *Dr. Marshall's Profitability Analysis Implies that the Alleged Conspiracy Is Irrational and Ineffective.*

1676. Dr. Marshall's profitability analyses are further flawed because they do not show that Respondents had an incentive to conspire.

Response to Proposed Finding No. 1676

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. Additionally, the Proposed Finding is argumentative and not appropriate for a factual finding. Nonetheless, this Proposed Finding is inaccurate and misleading to the extent that it suggests that Dr. Marshall failed to analyze economic principles, the factual record, and other factors that indicate that it was in Respondents' collective interest to prevent the formation and growth of dental buying groups which would have increased independent dentists' bargaining power – Dr. Marshall discusses his analysis in Section V.B. of his expert report. [REDACTED]

[REDACTED]. Moreover, the record evidence demonstrates that Respondents viewed buying groups as a threat and feared competition for buying group would lead to a "price war" and a "race to the bottom" for the industry. (CCFF ¶¶ 196-268).

1677. In his report, Dr. Marshall states that "[i]t was in each Respondent's unilateral economic self-interest to discount to buying groups.... However, it was in Respondents' collective interest to prevent the formation and growth of buying groups." (CX 7100-011). Dr. Marshall however, did no analysis to show that it was in Respondents' collective interest to prevent the formation and growth of buying groups.

Response to Proposed Finding No. 1677

This Proposed Finding is inaccurate and misleading in suggesting that Dr. Marshall failed to analyze economic principle and factors that indicate that it was in Respondents' collective interest to prevent the formation and growth of dental buying groups which would have increased independent dentists' bargaining power, as well as consideration of the factual record – Dr. Marshall discusses his analysis in Section V.B. of his expert report. [REDACTED]

[REDACTED]. Moreover, the record evidence demonstrates that Respondents viewed buying groups as a threat and feared competition for buying group would lead to a “price war” and a “race to the bottom” for the industry. (CCFF ¶¶ 196-268).

1678. In fact, Dr. Marshall's profitability analysis shows that the alleged conspiracy was *not* in Respondents' collective interest, at least where there were one or more other distributors that the buying group could choose to supply its members. (Marshall, Tr. 3131-33 (the alleged conspiracy is [REDACTED] (emphasis added))).

Response to Proposed Finding No. 1678

This Proposed Finding is misleading, inaccurate, and incomplete. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; *see also* CX7100 at

150 (¶ 349) (Marshall Expert Report)(explaining that “the business of a buying group is incrementally profitable for the winner of the buying group business relative to the non-existence of the buying group. Using the non-existence of the buying group as a benchmark is the most favorable benchmark from the viewpoint of the Respondents. A more appropriate benchmark is the loss from not winning the buying group contract given that the buying group exists, which will always result in a decrease in profits. The incentive for unilaterally pursuing the business of a buying group becomes even stronger when evaluated against the more appropriate benchmark.”).

To the extent that Schein claims that this Proposed Finding supports arguments about Schein’s lack of motive to conspire, this is inaccurate and misleading because Schein is simply proposing a finding that it would have been more profitable for 100% of the market place to conspire, rather than just Respondents. This is irrelevant and does not bear on the motive of Respondents to conspire.

To the extent that Schein claims that this Proposed Finding supports arguments that regional or fringe distributors are adequate substitutes for national full-service distributors supplying a buying group, Dr. Marshall explained [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Indeed, a plethora of evidence in the record demonstrates that regional distributors, such as Burkhart, are not adequate substitutes for national full-service distributors such as Schein, Patterson, and Benco because of their lack of national infrastructure and limited geographic footprint:

- Despite difficulty in finding willing full-service distributors, dentists remain interested in joining buying groups. (Reece, Tr. 4416). Benco recognized that Burkhart would be limited in servicing buying groups because Burkhart was regional, not a national, company. (CX0303 (McElaney, IHT at 30)).
- To date, Burkhart is not able to offer full-service distribution to buying groups with members outside its regional footprint. (Reece, Tr. 4454).
- [REDACTED]
- [REDACTED] CX4255 at 001).
- Benco 2014 document notes: “Minimal Impact [of Kois Buyers Group] - [M]any of the tribal members will not be able to participate due to Burkhart’s limited geographic distribution capabilities.” (CX1231).

- Benco’s Patrick Ryan testified that a buying group supplied by a national dealer would pose more of a threat than a buying group supplied by a small regional dealer. (CX0304 (Ryan, IHT at 186-188)).
- A 2015 Benco document found in Chuck Cohen’s files stated that “Currently, only two significant distributors recognize GPOs: Darby...and Burkhart.... Darby’s problem is that they don’t have sales reps or service techs, and customers have consistently said that they want both; Burkhart’s problem is their lack of a national infrastructure.” (CX1084 at 002).
- Dentists have expressed that buying groups supplied by distributors with limited full-service areas are not sufficient: “One reason that I am leaving [Kois] is because I don’t think Burkhart, in Southern California at least, has the infrastructure to service my office.” (CX4044 at 002).
- Dentists involved in the Kois Buyers Group outside of Burkhart’s full-service coverage footprint have quit the Kois Buyers Group. One reason given for quitting was “I still question its full benefit for those outside of your normal geographical service area.” (CX4055). An additional reason provided was “the distance issue came up for us a few times. An example is shipping times...orders took several days up to a week to receive, whereas our local supplier was typically next day delivery.” (CX4055).
- Other Kois members outside of the reach of Burkhart’s West Coast reps have left the Kois Buyers Group. (CX0321 (Kois IH) at 30:8-16 (“They don’t have a rep that comes to their practice, and they have to wait for their products to be shipped. That is not the most popular option for a lot of dentists...Inventory management is a big piece. A lot of the reps of these companies will come in and manage the inventory for the dentist and tell them when products are low, when they need to order”); 116:20-24 (identifying that “they don’t have a full-service rep in their area” and “shipping is long” as Kois customer complaints.)).
- As one Benco employee stated, “The major distributors are still saying no to buying groups, so when you sign up for one as a customer, you have to accept slow and inconsistent service. That is why they don’t usually last.” (CX1171).

1679. Dr. Marshall’s Kois profitability analysis shows that [REDACTED]

[REDACTED] (See CX 7100-156 (Figure 60)). This shows the alleged conspiracy was contrary to the Respondents’ collective interests as to the Kois Buyers Group.

Response to Proposed Finding No. 1679

This Proposed Finding is inaccurate, misleading, and incomplete for reasons explained in

Response to Proposed Finding No. 1678. To the extent that Schein claims that this Proposed

Finding supports arguments about Schein's lack of motive to conspire, this is inaccurate and misleading because Schein is simply proposing a finding that it would have been more profitable for 100% of the market place to conspiracy, rather than just Respondents. This is irrelevant and does not bear on the motive of Respondents to conspire.

To the extent that Schein claims that this Proposed Finding supports arguments that regional or fringe distributors are adequate substitutes for national full-service distributors supplying a buying group, it is inaccurate and misleading for reasons explained in Response to Proposed Finding No. 1678.

1680. Dr. Marshall's 2012 Smile Source profitability analysis shows [REDACTED] (CX 7100-166). The Respondents collective [REDACTED] (See CX 7100-165-66 (Figure 69)). This shows the alleged conspiracy was contrary to the Respondents' collective interests as to Smile Source in 2012.

Response to Proposed Finding No. 1680

To the extent that Schein claims that this Proposed Finding supports arguments about Schein's lack of motive to conspire, it is inaccurate and misleading because Schein is simply proposing a Finding that it would have been more profitable for 100% of the market place to conspiracy, rather than just Respondents. This is irrelevant and does not bear on the motive of Respondents to conspire. This Proposed Finding is also misleading, inaccurate, and incomplete for other reasons explained in more detail in Response to Proposed Finding No. 1678.

1681. Dr. Marshall's 2014 Smile Source profitability analysis shows that [REDACTED] (See CX 7100-173 (Figure 76)). This shows the alleged conspiracy was contrary to the Respondents' collective interests as to Smile Source in 2014.

Response to Proposed Finding No. 1681

To the extent that Schein claims that this Proposed Finding supports arguments about Schein's lack of motive to conspire, it is inaccurate and misleading because Schein is simply proposing a Finding that it would have been more profitable for 100% of the market place to conspire, rather than just Respondents. This is irrelevant and does not bear on the motive of Respondents to conspire. This Proposed Finding is also misleading, inaccurate, and incomplete for other reasons explained in more detail in Response to Proposed Finding No. 1678.

1682. Dr. Marshall also demonstrated that there *are* full-service dealers other than the Respondents in every local market in which Respondents did business. (CX 7101-142-43 (Figure 16 (showing full-service distributor shares by state))). Indeed, in [REDACTED] of the 50 states, full-service distributors other than Respondents have [REDACTED]. (CX 7101-142-43). [REDACTED] (CX 7101-142-43).

Response to Proposed Finding No. 1682

To the extent that Schein claims that this Proposed Finding supports arguments about Schein's lack of motive to conspire, it is inaccurate and misleading because Schein is simply proposing a Finding that it would have been more profitable for 100% of the market place to conspire, rather than just Respondents. This is irrelevant and does not bear on the motive of Respondents to conspire. This Proposed Finding is also misleading, inaccurate, and incomplete for other reasons explained in more detail in Response to Proposed Finding No. 1678.

To the extent that Schein claims that this Proposed Finding supports arguments that regional or fringe distributors are adequate substitutes for national full-service distributors supplying a buying group, it is inaccurate and misleading for reasons explained in Response to Proposed Finding No. 1678.

1683. Neither Dr. Marshall nor Complaint Counsel showed that regional full-service distributors were insufficient to meet the needs of all or most buying groups.

Response to Proposed Finding No. 1683

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. Nonetheless, to the extent that Schein claims that this Proposed Finding supports arguments about Schein's lack of motive to conspire, it is inaccurate and misleading because Schein is simply proposing a Finding that it would have been more profitable for 100% of the market place to conspire, rather than just Respondents. This is irrelevant and does not bear on the motive of Respondents to conspire. This Proposed Finding is also misleading, inaccurate, and incomplete for other reasons explained in more detail in Response to Proposed Finding No. 1678.

Indeed, a plethora of evidence in the record demonstrates that regional distributors, such as Burkhart, are not adequate substitutes for national full-service distributors such as Schein, Patterson, and Benco because of their lack of national infrastructure and limited geographic footprint:

- Despite difficulty in finding willing full-service distributors, dentists remain interested in joining buying groups. (Reece, Tr. 4416). Benco recognized that Burkhart would be limited in servicing buying groups because Burkhart was regional, not a national, company. (CX0303 (McElaney, IHT at 30)).
- To date, Burkhart is not able to offer full-service distribution to buying groups with members outside its regional footprint. (Reece, Tr. 4454).
- [REDACTED]
- [REDACTED] CX4255 at 001).
- Benco 2014 document notes: "Minimal Impact [of Kois Buyers Group] - [M]any of the tribal members will not be able to participate due to Burkhart's limited geographic distribution capabilities." (CX1231).

- Benco's Patrick Ryan testified that a buying group supplied by a national dealer would pose more of a threat than a buying group supplied by a small regional dealer. (CX0304 (Ryan, IHT at 186-188)).
- A 2015 Benco document found in Chuck Cohen's files stated that "Currently, only two significant distributors recognize GPOs: Darby...and Burkhart.... Darby's problem is that they don't have sales reps or service techs, and customers have consistently said that they want both; Burkhart's problem is their lack of a national infrastructure." (CX1084 at 002).
- Dentists have expressed that buying groups supplied by distributors with limited full-service areas are not sufficient: "One reason that I am leaving [Kois] is because I don't think Burkhart, in Southern California at least, has the infrastructure to service my office." (CX4044 at 002).
- Dentists involved in the Kojs Buyers Group outside of Burkhart's full-service coverage footprint have quit the Kojs Buyers Group. One reason given for quitting was "I still question its full benefit for those outside of your normal geographical service area." (CX4055). An additional reason provided was "the distance issue came up for us a few times. An example is shipping times...orders took several days up to a week to receive, whereas our local supplier was typically next day delivery." (CX4055).
- Other Kojs members outside of the reach of Burkhart's West Coast reps have left the Kojs Buyers Group. (CX0321 (Kojs IH) at 30:8-16 ("They don't have a rep that comes to their practice, and they have to wait for their products to be shipped. That is not the most popular option for a lot of dentists...Inventory management is a big piece. A lot of the reps of these companies will come in and manage the inventory for the dentist and tell them when products are low, when they need to order"); 116:20-24 (identifying that "they don't have a full-service rep in their area" and "shipping is long" as Kojs customer complaints.)).
- As one Benco employee stated, "The major distributors are still saying no to buying groups, so when you sign up for one as a customer, you have to accept slow and inconsistent service. That is why they don't usually last." (CX1171).

1684. Dr. Marshall and Complaint Counsel's claim that offering an across-the-board discount to all of a buying group's members delivers incremental volume *assumes* that the FSC-driven process is not working efficiently. (*See* Wu, Tr. 5185-86). Yet Complaint Counsel offers no evidence to show the FSC-driven pricing process was working inefficiently.

Response to Proposed Finding No. 1684

The Proposed Finding is incorrect and not supported by the evidence cited. Patterson’s hired expert, Dr. Wu, did not consider and did not offer any opinions or testimony about Schein’s “FSC-driven pricing process” or its supposed efficiency. (*See generally* RX2833 (Wu Expert Report); Wu, Tr.).

1685. Dr. Marshall has also failed to include the effects on Respondents in instances where non-full-service distributors, such as Darby, either could or did contract with the buying group. In that regard, Dr. Marshall conceded that Darby was a competitor for buying group contracts during the alleged conspiracy period. (*See* CX 8040 (Marshall, Dep. at 52-53)). Despite this fact, Dr. Marshall did not do a profitability analysis for any buying group that chose to use Darby. (CX 8040 (Marshall, Dep. at 53)).

Response to Proposed Finding No. 1685

This Proposed Finding is inaccurate and misleading to the extent that it suggests that Dr. Marshall did not properly analyze the product market in this matter to determine whether or not non-full-service distributors such as Darby are in the relevant product market. Dr. Marshall based his product market findings on both the qualitative evidence identified in CCFF Section XIX.B.1 (CCFF ¶¶ 1525-1552), as well as the analytical framework in the U.S. Department of Justice & Federal Trade Commission Horizontal Merger Guidelines (2010) (“Merger Guidelines”). (CCFF ¶¶ 1553-1566). Based on these analyses (which included two types of hypothetical monopolists tests as well as an additional empirical analysis), Dr. Marshall concluded that the appropriate relevant market in this matter is the full line of dental products and services sold through full-service distributors to independent dentists and that Darby was not in the relevant market. (CCFF ¶¶ 1553-1566).

1686. Because Dr. Marshall has not shown that other sources of supply were not available to buying groups, Dr. Marshall has not shown that Respondents collectively profited by not competing for a particular buying group.

Response to Proposed Finding No. 1686

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. To the extent that Schein claims that this Proposed Finding supports arguments about Schein's lack of motive to conspire, it is inaccurate and misleading because Schein is simply proposing a finding that it would have been more profitable for 100% of the market place to conspire, rather than just Respondents. This is irrelevant and does not bear on the motive of Respondents to conspire. This Proposed Finding is also misleading, inaccurate, and incomplete for other reasons explained in more detail in Responses to Proposed Finding Nos. 1678-1685.

1687. As such, Dr. Marshall does not provide any economic support for the claim that Respondents had a motive to conspire.

Response to Proposed Finding No. 1687

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. This Proposed Finding is also inaccurate, irrelevant, and misleading for reasons explained in Responses to Proposed Finding Nos. 1676-1686 above.

1688. In addition, because Dr. Marshall's profitability analysis suggests that the alleged conspiracy was irrational, the model does not comport with Complaint Counsel's claims. This casts doubt on the credibility and persuasiveness of Dr. Marshall's analysis.

Response to Proposed Finding No. 1688

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. To the extent that Schein claims that this Proposed Finding supports arguments about Schein's lack of motive to conspire, it is inaccurate and misleading because Schein is simply proposing a finding that it would have been more profitable for 100% of the market place to conspire, rather than just Respondents. This is irrelevant and does not bear on the motive of Respondents to conspire. This Proposed Finding is also misleading,

inaccurate, and incomplete for other reasons explained in more detail in Responses to Proposed Finding Nos. 1678-1687.

4. *Dr. Marshall's Profitability Analysis Is Limited to Smile Source and Kois, and Has No Bearing on Other Buying Group Conduct.*

1689. Dr. Marshall empirically studied only two buying groups: Smile Source and the Kois Buyers Group. He did not do any analysis of any other buying group. (Marshall, Tr. 2973

[REDACTED]

Response to Proposed Finding No. 1689

This Proposed Finding is inaccurate, incomplete, and misleading to the extent that it suggests that Dr. Marshall only offered an opinion with respect to two buying groups. Rather, based in part on his review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387-3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this

quotation and it says ‘Typical approach of an upstart buying group’...and it’s passing on this as a matter of policy.’’’)).

Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED]

[REDACTED].

To the extent the Proposed Finding suggests that Dr. Marshall’s five profitability studies involving Kois and Smile Source are not representative of other buying groups, it is inaccurate, incomplete, and misleading because the buying groups in Dr. Marshall studied in his five profitability studies are representative [REDACTED]

[REDACTED]; *see also* CX8040 (Marshall, Dep. at 212) (explaining that Kois and Smile Source are “the same in the sense of the definition I offer in paragraph 139.”)). Additionally, Dr. Marshall explained that for buying groups generally “[a]ll these groups will have different management and they’ll be issues that are different between them. But, again, these fall within what’s identified in paragraph 139 of my report.” (CX8040 (Marshall, Dep. at 212)). Regarding why Smile Source and Kois Buyers Group were good case studies for his profitability analysis, Dr. Marshall explained that “Smile Source and Kois had characteristics associated with them that suggested that they were good candidates for investigating the profitability as done in section 5 of my original report.” (CX8040 (Marshall, Dep. at 148)).

Regarding the additional characteristics that made Smile Source and Kois Buyers Group good case studies, Dr. Marshall elaborated:

Q: Why did you choose to study Kois and Smile Source?

A: *So these are highly representative of what's going on in this following sense. It covers a broad geography of the country. It covered a broad time span going from 2012 through 2017. And in addition to that, there were different sizes of the buying groups at the times I looked at them. For Kois it was at the inception of the buying group. And then in the other studies, we had small size to the buying group, medium size to the buying group, large size to the buying group, so I was able to get a good look at what was going on with buying groups in that diversity.*

(Marshall, Tr. 2863 (emphasis added); Marshall, Tr. 3244 (“What I had said is the following, that the Kois and the five studies cover a geography of the United States. And in addition to that, we have buying groups at different stages. We had -- in terms of size. We have -- when they're at their inception, when they're small, when they're medium and when they're large in size, that this is the nature of the representativeness that I had spoken about with – in my direct testimony.”); *see also* CX8041 (Marshall, Dep. at 382) (“I felt that the data that was available for Kois and Smile Source spoke to a broad range of the issues in this matter; and therefore, I felt comfortable with the analysis being conducted in Section 5 [of the Marshall Expert Report].”)).

Finally, Dr. Marshall's profitability analysis is, at bottom, an examination of dentists' behavior upon joining a buying group. Respondents have not argued that the dentists who joined Kois and Smile Source are unrepresentative of other dentists across the country.

Additionally, Dr. Marshall studied Kois Buyers Group and Smile Source because in addition to having gotten off the ground, these buying groups operate in geographies (Seattle and Atlanta) in which Schein, Patterson, and Benco are likely to have their lowest collective share of sales and another distributor was likely to have a high share of sales. (CX7101 at 045-046, 064 (¶¶ 107-112, 165) (Marshall Rebuttal Expert Report)). These facts addressed

potential concerns that the relative sizes of Schein and Patterson make it more costly for them to supply buying groups, both because (1) Schein and Patterson are likely to find itself more profitable to discount when they have a lower share of sales and (2) where Burkhart and Atlanta Dental are large, it illuminates whether a full-service distributor found it profitable to supply a buying group so in a geographic area in which its share of sales was relatively large. (CX7101 at 064 (¶ 165) (Marshall Rebuttal Expert Report)). Differences between the Kois Buyers Group, with its single regional full-service distributor, and Smile Source, with its changing network of distributors over time, provide further reasons to believe that the experiences of distributors with these two groups provides some information about likely outcomes with other potential buying groups that went nowhere as a result of being rejected by Schein, Patterson, and/or Benco. (CX7101 at 064 (¶ 166) (Marshall Rebuttal Expert Report)).

Like all buying groups, Kois and [REDACTED] do not force members to purchase from contracted distributors—in other words, they do not *require* compliance. (CCFF ¶¶ 1685-1687, 1689-1695; [REDACTED]; CX8040 (Marshall, Dep. 212); *see also* Kois, Sr., Tr. at 181 (“[T]hey’re free to purchase from whoever they want to.”); [REDACTED]

[REDACTED]

[REDACTED].

This Proposed Finding is irrelevant, misleading, and incomplete to the extent that it suggests that Dr. Marshall should have studied a broader group of dentists than he did. For the buying group member dentists that Dr. Marshall studied in his profitability analyses, Dr. Marshall explained:

The purpose of Dr. Marshall's five profitability studies was to examine different episodes of dentist purchasing pattern before and after a distributor starts to (or stops) supply a buying group. (Marshall, Tr. 2861-2862).

In the Kois-Burkhart (and his other) profitability studies, Dr. Marshall looked at which distributors buying group member dentists' purchased from *before* the distributor started supplying the buying group and which distributors buying group member dentists' purchased from *after* the distributor started supplying the buying group. (Marshall, Tr. 2865).

Specifically explaining why he studied the Kois Buyers Group member dentists, Dr. Marshall explained that “[w]ell, the [REDACTED] dentists are the only ones to study for that study. They’re the only ones who are making these decisions about who to buy from, the only ones who bought anything from Burkhart, who was the supplier, so they’re the relevant ones to look at in this case, but they -- they are – that’s – that’s who should be studied in that case.” (Marshall, Tr. 3222).

By performing the five profitability analyses, Dr. Marshall was able to assess the substitution behavior patterns of buying group member dentists before and after a distributor begins to (or stops) supplying a buying group. (Marshall, Tr. 2861). Accordingly, studying purchasing patterns of dentists, including dentists who were not a part of buying groups would not have made sense because including non-buying-group dentists in the case studies would not have

yielded results relevant to product purchasing pattern switching after a dentist joins a buying group.

Dr. Marshall's profitability studies analyzed the purchasing behavior of *all* dentists who were members of Smile Source and Kois at different points in time. [REDACTED]

[REDACTED]. This entailed the analysis of hundreds of dentists across the country— [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Finally, Dr. Marshall's profitability analysis is, at bottom, an examination of dentists' behavior upon joining a buying group. Respondents have not argued that the dentists who joined Kois and Smile Source are unrepresentative of other dentists across the country.

1690. For example, Dr. Marshall did not do a profitability analysis of Steadfast or the Dental Co-Op, both of which Schein terminated after they refused to agree to exclusivity with Schein. (Marshall, Tr. 2971, 2970, 2980; SF 603-24, 1220-36). Dr. Marshall also did no analysis of any of the buying groups (other than Smile Source and the Kois Buyers Group) listed in paragraph 491 of his initial report, which purports to list his understanding of buying groups with whom at least one Respondent declined to do business. (Marshall, Tr. 2986; CX 7100-209-13 (¶ 491))

Response to Proposed Finding No. 1690

This Proposed Finding is irrelevant and misleading. First, the Proposed Finding is misleading because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

Second, the Proposed Finding is irrelevant and incomplete because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; *see also* CX8040 Marshall, Dep. at 212

(explaining that Kois and Smile Source are “the same in the sense of the definition I offer in paragraph 139.”); *see also* Response to Proposed Finding No. 1689. Additionally, Dr. Marshall explained that for buying groups generally “[a]ll these groups will have different management and they’ll be issues that are different between them. But, again, these fall within what’s identified in paragraph 139 of my report.” CX8040 (Marshall, Dep. at 212). Regarding why Smile Source and Kois Buyers Group were good case studies for his profitability analysis, Dr. Marshall explained that “Smile Source and Kois had characteristics associated with them that suggested that they were good candidates for investigating the profitability as done in section 5 of my original report.” CX8040 (Marshall, Dep. at 148). Like all buying groups, Kois and [REDACTED] do not force members to purchase from contracted distributors—in other words, they do not *require* compliance. (CCFF ¶¶ 1685-1687, 1689-1695; [REDACTED]; CX8040 (Marshall, Dep. 212); Kois, Sr., Tr. at 181 (“[T]hey’re free to purchase from whoever they want to.”);

[REDACTED]

[REDACTED]

[REDACTED].

Third, this Proposed Finding is inaccurate, incomplete, and misleading to the extent that it suggests that Dr. Marshall only offered an opinion with respect to two buying groups.

Rather, based in part on his review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report)). (Marshall Expert Report) (explaining that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387-3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group' ...and it's passing on this as a matter of policy.'"))).

Fourth, this Proposed Finding is misleading in stating that Schein terminated Steadfast or the Dental Co-Op of Utah "after they refused to agree to exclusivity with Schein." The record evidence shows that Schein terminated those relationships pursuant to its participation in a conspiracy, as explained in the Responses to Proposed Finding Nos. 581-633, 1199-1242).

1691. The record evidence shows buying groups differ from each other in many material respects, including: (i) the number of members the buying group has; (ii) the commitments that the buying group makes to the distributor; (iii) the commitments that the members make to the buying group; (iv) the shares of each distributor prior to the formation of the buying group, in the relevant market and among actual or potential buying group members; (v) the ability of the buying group to influence or change its members purchasing practices; (vi) the margins that the distributor earns before and after entering into a contract with the buying group; (vii) the nature of the services that the buying group provides in addition to offering discounted supplies; and (viii) the ability of the buying group to credibly demonstrate that it will provide enough incremental sales to offset any cannibalization or reduced margins that the distributor may earn on existing customers. (*See, e.g.*, SF 35-119, JF 56-62).

Response to Proposed Finding No. 1691

Complaint Counsel has no specific response to the statement that buying groups differ from each other. However, the Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein considered any characteristics of buying groups in rejecting them during the conspiracy period. It did not. The record evidence shows that Schein worked with some buying groups prior to 2011, but by December 2011, it had changed course and “no longer participate[d] in Buying Groups.” (CX2062 at 001; *see also* CCFF ¶¶ 661-732). In February 2012, Sullivan informed employees that he wanted to “KILL the buying group model,” and Schein executives directed the sales force to refuse to sell to buying groups. (CCFF ¶¶ 728- 870). The record evidence contains dozens of documents that confirm that Schein enforced a policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy pursuant to that policy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

1692. As Dr. Carlton testified, because each buying group is different, conclusions about the profitability of dealing with one buying group cannot apply to any other buying group. (Carlton, Tr. 5387-90).

Response to Proposed Finding No. 1692

This Proposed Finding should be disregarded by the Court to the extent that Dr. Carlton is being relied upon for factual propositions about buying groups that should be established by fact witnesses or documents, not through expert testimony. (*See* February 21, 2019 Order on Post-Trial Briefs).

Additionally, this Proposed Finding is unreliable and unsupported because Dr. Carlton failed to do any quantitative analysis to support this assertion. While Dr. Carlton identified a formula in paragraph 75 of his expert report purporting to show opportunity and profitability costs related to Schein working with or not working with Kois Buyers Group, (RX2832 at 051 (¶ 75) (Carlton Expert Report)), Dr. Carlton never actually applied the formula to any data to support his assertion about Schein's opportunity costs in dealing with different buying groups. (RX2966 (Carlton, Dep. at 269-270 ("Q. Now, in the scope of your report, or in the four corners of your report have you attempted to perform this calculation? A. I don't perform this calculation."))). The support and foundation for this purported "formula" is unreliable because it is solely based on Dr. Carlton's memory and interpretation of facts conveyed to him by Schein executives where he did not even bother to keep his notes. (Carlton, Tr. at 5427-5428, 5458- 5466). He describes that the formula is "based on his understanding of speaking to Schein executives." (Carlton, Tr. 5460-5461). In Dr. Carlton's own words, the formula is "basically, my summary of what [Schein executives are] telling me." (Carlton, Tr. 5460-5461). Dr. Carlton admitted that he never showed this equation to anybody at Schein or even asked if Schein uses this equation to make business decisions. (Carlton, Tr. 5464; *see also* RX2966 (Carlton, Dep. at 270, 281 ("Q. Are there any examples in this report that would show that Schein performed these, this calculation that you set forth

in paragraph 75?...A. I don't know that there was such a, that Schein had enough time to do such a calculation. I'm not aware of such a calculation...Q. Okay. But you didn't ask specific questions that would explain how Schein would carry out the, understanding the values for the inputs into your equation. Correct?...A. I didn't go over each element and ask them how they form expectations of each element.”)). He further admitted that he solely relied on the interviews and does not cite any other evidence. (Carlton, Tr. 5465-5466).

1693. Dr. Marshall conceded that he was [REDACTED]
[REDACTED] (Marshall, Tr. 3002-03).

Response to Proposed Finding No. 1693

This Proposed Finding is misleading to the extent that it is suggesting that or that Dr. Marshall's testimony and profitability analyses do not show that Respondents were acting against their self interests by having a no buying group policy during the relevant period. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED]
[REDACTED]). Accordingly, consistent with Dr. Marshall's analyses, it was against Respondents' unilateral self-interest to have a no-buying group whereby it instructed its employees to categorically reject all buying groups. (CCFF ¶¶ 630-652). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took

jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387-3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental evaluation.”); Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’...and it’s passing on this as a matter of policy.’”)).

1694. Indeed, Dr. Marshall conceded that the [REDACTED] (Marshall, Tr. 3003 (emphasis added)).

Response to Proposed Finding No. 1694

This Proposed Finding is incomplete and misleading to the extent that it suggests that Dr. Marshall did not specifically study the effects of cannibalization in relation to Respondents, including Benco, in this matter and conclude that it was still profitable for Respondents to do business with buying groups – he did. Specifically, Dr. Marshall examined the effects of potential cannibalization in his five profitability studies and found that the distributor-buying groups relationships were profitable for the distributor despite the potential for cannibalization. (CCFF ¶¶ 1637-1684). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In addition to analyzing Burkhart's profitability in Washington State, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Dr. Marshall testified that buying group opportunities were profitable even for a larger full-service distributor and describes that in the state of Washington, Burkhart, Patterson, and Schein have roughly equivalent market share, so by analogy, “what is profitable in that case for Burkhart would be profitable in that case for Burkhart would be profitable for Schein or Patterson to engage in.” (Marshall, Tr. 2874-2875). While Schein’s share of sales nationwide is somewhat higher than Patterson and Benco [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. This study demonstrates that it was profitable for Schein to supply Smile Source members, despite Schein having the largest nationwide share of any full-service distributor. (CX7101 at 053 (¶ 134) (Marshall Expert Rebuttal Report)).

1695. As such, if there were any reliable conclusions or inferences available from Dr. Marshall's profitability analysis (which, as explained, there are not), they would be exclusively limited to Smile Source and the Kois Buyers Group. Dr. Marshall's profitability analysis is neither reliable nor probative evidence concerning whether Schein acted contrary to its self-interest with respect to buying groups generally, or with respect to any specific buying group other than Smile Source and the Kois Buyers Group.

Response to Proposed Finding No. 1695

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. This Proposed Finding is misleading to the extent that it suggests that Dr. Marshall's profitability analysis findings should be limited to Smile Source and Kois or that Dr. Marshall's testimony and profitability analyses do not show that Respondents were acting against its self interest by having a no buying group policy during the relevant period. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, consistent with Dr. Marshall's analyses, it was against Respondents' unilateral self-interest, including Schein's, to have a no-buying group whereby it instructed its employees to categorically reject all buying groups. (CCFF ¶¶ 630-652). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that

also carries much weight.”); *see also* Marshall, Tr. 3387-3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental evaluation.”); Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’...and it’s passing on this as a matter of policy.’”).

5. *Dr. Marshall’s Profitability Analysis Is Based on Incorrect Factual Assumptions about Schein’s Dealings with Smile Source and the Kois Buyers Group.*

1696. Dr. Marshall concluded that Schein acted contrary to its self-interest with respect to its dealings with Smile Source and the Kois Buyers Group. Dr. Marshall’s analysis is flawed, however, because the evidence does not establish that Schein failed to compete for, or otherwise acted irrationally or contrary to its self-interest, with respect to Smile Source or the Kois Buyers Group. (SF 839-936, 1106-86).

Response to Proposed Finding No. 1696

This Proposed Finding is inaccurate, incomplete, and contrary to the weight of the evidence in suggesting that Complaint Counsel’s evidence that Respondents acted contrary to their unilateral self-interest is limited to Dr. Marshall’s opinion. Instead, the record evidence, including Dr. Marshall’s analyses and opinions, demonstrate that Respondents acted contrary to their unilateral self-interest. (CCFF ¶¶ 1254-1390, 1637-1684). That is: Dr. Marshall’s data and other economic analyses are other factors that support the totality of the evidence that points towards Respondents’ conspiracy. (CCFF ¶¶ 1-2079). This Proposed Finding is also inaccurate, incomplete, and misleading for reasons explained in Responses to Proposed Finding Nos. 1660-1752. This Proposed Finding is also not supported by a citation to SF

839-936, 1106-86 for the reasons set forth in Responses to Proposed Finding Nos. 839-936, 1106-86.

a. *The Evidence Does Not Support Dr. Marshall's Assumption that Schein Induced Smile Source to Terminate Schein in 2012.*

1697. Dr. Marshall testified that he “looked at the Schein termination of the Smile Source relationship in 2012” and “the question there was, was it profitable for Schein to terminate that relationship in 2012....” (Marshall, Tr. 2873; *see also* Marshall, Tr. 2869 (“As a matter of fact ... Schein had terminated their relationship with Smile Source.”)).

Response to Proposed Finding No. 1697

The Proposed Finding should be disregarded by the Court to the extent that Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (*See* February 21, 2019 Order on Post-Trial Briefs). To the extent that this Proposed Finding suggests that Schein did not act against its self-interest based on facts related to the end of Schein’s relationship with Smile Source in 2012, it is inaccurate and misleading because Dr. Marshall explained that his five natural experiments (profitability studies) show that buying groups drive purchasing volume and are profitable for full-service distributors to serve, and that “Even if Carlton’s assessment of the facts were correct, that would not affect the conclusions I draw below from these profitability studies...[t]hese facts are in the data of the studies, and they follow regardless of whether Schein terminated its discussions with Smile Source and Kois or visa versa.” (CX7101 at 049 (¶¶ 119) (Marshall Expert Rebuttal Report)).

1698. As discussed above, however, the evidence shows that Smile Source terminated Schein in 2012, not the other way around. (SF 1106-20).

Response to Proposed Finding No. 1698

This Proposed Finding is misleading. The record shows that after Smile Source was transferred to Special Markets from HSD in 2011, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] the relationship ended at the beginning of 2012. (CCFF ¶¶ 899-913). Regardless of who terminated whom, the record evidence shows that Schein did not work with Smile Source during the conspiracy and that Sullivan was pleased when the relationship ended at the beginning of 2012. (CCFF ¶¶ 914-924). To the extent that this Proposed Finding suggests that Schein did not act against its self-interest based on facts related to the end of Schein's relationship with Smile Source in 2012, it is inaccurate and misleading because Dr. Marshall explained that his five natural experiments (profitability studies) show that buying groups drive purchasing volume and are profitable for full-service distributors to serve, and that "Even if Carlton's assessment of the facts were correct, that would not affect the conclusions I draw below from these profitability studies...[t]hese facts are in the data of the studies, and they follow regardless of whether Schein terminated its discussions with Smile Source and Kois or visa versa." (CX7101 at 049 (¶¶ 119) (Marshall Expert Rebuttal Report)). This Proposed Finding is not supported by a citation to SF 1106-1186 for the reasons set forth in Responses to Proposed Finding Nos. 839-936, 1106-1186.

1699. On cross-examination, Dr. Marshall attempted to rehabilitate his 2012 Smile Source analysis by claiming that [REDACTED] with Schein. (Marshall, Tr. 3140-41). But as discussed above, the evidence refutes this too. (See SF 1122-86).

Response to Proposed Finding No. 1699

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or

documents, not through expert testimony. (See February 21, 2019 Order on Post-Trial Briefs). This Proposed Finding is also misleading as set forth in Response to Proposed Finding No. 1698. To the extent that this Proposed Finding suggests that Schein did not act against its self-interest based on facts related to the end of Schein’s relationship with Smile Source in 2012, it is inaccurate and misleading because Dr. Marshall explained that his five natural experiments (profitability studies) show that buying groups drive purchasing volume and are profitable for full-service distributors to serve, and that “Even if Carlton’s assessment of the facts were correct, that would not affect the conclusions I draw below from these profitability studies...[t]hese facts are in the data of the studies, and they follow regardless of whether Schein terminated its discussions with Smile Source and Kois or visa versa.”

(CX7101 at 049 (¶¶ 119) (Marshall Expert Rebuttal Report)).

1700. Notably, when asked whether his analysis of acts against self-interest would still hold if he was “wrong” about his factual assumptions concerning the reasons for the termination of the Smile Source contract, Dr. Marshall refused to answer the question, but rather simply insisted that, as an economist, he can never be wrong:

[illegible]

Response to Proposed Finding No. 1700

This Proposed Finding is misleading and inaccurate because the testimony cited does not support the Proposed Finding – the testimony cited does not indicate that “Dr. Marshall refused to answer the question, but rather simply insisted that, as an economist, he can never

be wrong.” [REDACTED]

[REDACTED] To the extent that this Proposed Finding suggests that Schein did not act against its self-interest based on facts related to the end of Schein’s relationship with Smile Source in 2012, it is inaccurate and misleading because Dr. Marshall explained that his five natural experiments (profitability studies) show that buying groups drive purchasing volume and are profitable for full-service distributors to serve, and that “Even if Carlton’s assessment of the facts were correct, that would not affect the conclusions I draw below from these profitability studies...[t]hese facts are in the data of the studies, and they follow regardless of whether Schein terminated its discussions with Smile Source and Kois or visa versa.” (CX7101 at 049 (¶¶ 119) (Marshall Expert Rebuttal Report)).

1701. Because Dr. Marshall’s 2012 Smile Source analysis is based on unsupported factual assumptions that are inconsistent with the record evidence, his analysis does not show that Schein acted contrary to its self-interest.

Response to Proposed Finding No. 1701

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. Additionally, this Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (*See* February 21, 2019 Order on Post-Trial Briefs). To the extent that this Proposed Finding suggests that Schein did not act against its self-interest based on facts related to the end of Schein’s relationship with Smile Source in 2012, it is inaccurate and misleading because Dr. Marshall explained that his five natural experiments (profitability studies) show that buying groups drive purchasing volume and are profitable for full-service distributors to serve, and that “Even if Carlton’s assessment of the facts were correct, that would not affect the conclusions

I draw below from these profitability studies...[t]hese facts are in the data of the studies, and they follow regardless of whether Schein terminated its discussions with Smile Source and Kois or visa versa.” (CX7101 at 049 (¶¶ 119) (Marshall Expert Rebuttal Report)). This Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence in representing that Dr. Marshall’s analysis is “based on unsupported factual assumptions that are inconsistent with the record evidence” for reasons explained in Responses to Proposed Finding Nos. 1122-1186.

b. *The Evidence Does Not Support Dr. Marshall’s Assumption that Schein Submitted a Fake Bid to Smile Source in 2014.*

1702. Dr. Marshall testified that his 2014 Smile Source profitability analysis shows that Schein acted against self-interest by allegedly submitting “an insincere attempt to win the business.” (Marshall, Tr. 2959).

Response to Proposed Finding No. 1702

This Proposed Finding is vague as to what Dr. Marshall’s “2014 Smile Source profitability analysis” is referring to. The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (See February 21, 2019 Order on Post-Trial Briefs). This Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence regarding Schein’s 2014 Smile Source bid for reasons explained in Responses to Proposed Finding Nos. 1156-1167.

1703. For reasons previously explained, however, Dr. Marshall’s assumption that Schein submitted an insincere, fake, or sham bid is inconsistent with the evidence in the record. (SF 1156-67). Moreover, Complaint Counsel does not cite any evidence suggesting a conspiracy where Schein alone would submit fake bids. (Marshall, Tr. 2957-59).

Response to Proposed Finding No. 1703

The Proposed Finding should be disregarded by the Court to the extent that Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or

documents, not through expert testimony. (*See* February 21, 2019 Order on Post-Trial Briefs). Additionally, this Proposed Finding is misleading and inaccurate in stating that that “Dr. Marshall’s assumption that Schein submitted an insincere, fake, or sham bid is inconsistent with the evidence in the record.” Dr. Marshall did not make an assumption – instead, in response to Schein’s counsel’s questions at trial, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

This Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence for reasons explained in Responses to Proposed Finding Nos. 1156-1167.

1704. As such, Dr. Marshall’s 2014 Smile Source analysis does not show that Schein acted contrary to its self-interest. There is no basis to find – in the record or in Dr. Marshall’s opinions – that Schein desired (or would desire) to submit a fake bid.

Response to Proposed Finding No. 1704

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. Additionally, The Proposed Finding should be disregarded by the Court to the extent that Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (*See* February 21, 2019 Order on Post-Trial Briefs). This Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence for reasons explained in Responses to Proposed Finding Nos. 1156-1167.

c. *The Evidence Does Not Support Dr. Marshall's Assumption that Schein Boycotted Smile Source Prior to 2017.*

1705. Dr. Marshall also claims that his profitability analysis of Schein's contract with Smile Source in 2017 demonstrates that Schein acted contrary to its self-interest during the relevant period. In making this inference, Dr. Marshall assumes that Schein was not interested in doing business with, and did not compete for, Smile Source's business during the relevant period. This assumption is unsupported by the evidence. (SF 1156-1186).

Response to Proposed Finding No. 1705

The second sentence in this Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. This Proposed Finding is inaccurate and misleading to the extent that it suggests that Schein did not act contrary to its self-interest during the relevant period. Dr. Marshall's profitability analysis, based only on data, demonstrated that the end of Schein's relationship with Smile Source was unprofitable for Schein and that it was in Schein's interest to win Smile Source's business again in 2017, even when taking administrative and other fees that Schein raises into account. (CCFF ¶¶ 1681-1684; *see also*

[REDACTED]

[REDACTED]

[REDACTED]

To the extent that this Proposed Finding suggests that the facts that Dr. Marshall considered in the context of his profitability analyses shows that Schein was interested in doing business with Smile Source during the relevant period, this Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence for reasons explained in Responses to Proposed Finding Nos. 1156-1186.

1706. As support for this assumption, Dr. Marshall again relies on his (incorrect) understanding that Schein terminated the relationship with Smile Source in 2012, and that it submitted an insincere bid for the Smile Source business in 2014. As just discussed, however, Dr. Marshall's factual assumptions concerning Smile Source in 2012 and 2014 conflict with the weight of the record evidence. As such, these episodes do not support Dr. Marshall's assumption that Schein was not interested in doing business with Smile Source during the relevant period.

Response to Proposed Finding No. 1706

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. Nonetheless, to the extent that this Proposed Finding suggests that Schein did not act against its self-interest based on facts related to the end of Schein's relationship with Smile Source in 2012, it is inaccurate and misleading because Dr. Marshall explained that his five natural experiments (profitability studies) show that buying groups drive purchasing volume and are profitable for full-service distributors to serve, and that "Even if Carlton's assessment of the facts were correct, that would not affect the conclusions I draw below from these profitability studies...[t]hese facts are in the data of the studies, and they follow regardless of whether Schein terminated its discussions with Smile Source and Kois or visa versa." (CX7101 at 049 (¶¶ 119) (Marshall Expert Rebuttal Report)).

Additionally, this Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence for reasons explained in Responses to Proposed Finding Nos. 1156-1186, 1697-1704.

1707. Dr. Marshall also claims that he can infer that Schein was not interested in doing business with Smile Source during the relevant period because [REDACTED] (CX 7100-198, -208). However, the fact that Schein and Smile Source ultimately reached a different deal in 2017 than what Schein initially offered in 2014 does not suggest that Schein refused to do business with, or was not interested in doing business with, Smile Source during the relevant period.

Response to Proposed Finding No. 1707

The Proposed Finding in the second sentence is not supported by any citation to the evidence in the record and should be disregarded. The Proposed Finding that "Dr. Marshall also claims that he can infer that Schein was not interested in doing business with Smile Source during the relevant period because [REDACTED]

[REDACTED]" is not supported by the citation CX 7100 at 198, 208 because

these pages do not reference any “inference” but merely list the discounts that Schein offered in 2014 and 2017 respectively.

This Proposed Finding is inaccurate and misleading to the extent that it suggests that it was not profitable for Schein to win Smile Source’s business in 2017 or that Schein acted against its self-interest when its relationship with Smile Source ended in 2012. Dr. Marshall’s profitability analysis, based only on data, demonstrated that the end of Schein’s relationship with Smile Source was unprofitable for Schein and that it was in Schein’s interest to win Smile Source’s business again in 2017, even when taking administrative and other fees that Schein raises into account. (CCFF ¶¶ 1681-1684; *see also* [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]

1708. Because Dr. Marshall’s 2017 profitability analysis is premised on the unsupported assumption that Schein refused to do business with Smile Source during the relevant period, that analysis is not probative of the question of whether Schein acted contrary to its self-interest during the relevant period.

Response to Proposed Finding No. 1708

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. Schein cites to nothing in the record in this Proposed Finding or any other of the preceding Proposed Findings on this topic that support that “Dr. Marshall’s 2017 profitability analysis is premised on the unsupported assumption that Schein refused to do business with Smile Source during the relevant period.” *See* Responses to Proposed Finding Nos. 1701-1708. Moreover, this Proposed Finding is inaccurate and misleading to the extent that it suggests that Schein did not act contrary to its self-interest during the relevant period. Dr. Marshall’s profitability analysis, based only on data, demonstrated that the end of

Schein's relationship with Smile Source was unprofitable for Schein and that it was in Schein's interest to win Smile Source's business again in 2017, even when taking administrative and other fees that Schein raises into account. (CCFF ¶¶ 1681-1684; *see also*

[REDACTED]

[REDACTED]

[REDACTED]

d. *The Evidence Does Not Support Dr. Marshall's Assumption that Schein Boycotted the Kois Buyers Group.*

1709. Dr. Marshall testified that Schein acted contrary to its self-interest by not competing for the Kois Buyers Group contract in late 2014.

Response to Proposed Finding No. 1709

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. This Proposed Finding is vague as to what "Schein acted contrary to its self-interest by not competing for the Kois Buyers Group contract in late 2014" is referring to. To the extent that the Proposed Finding is referring to Dr. Marshall's Kois-Burkhart 2014 profitability study and his finding that it was profitable for Burkhart to do business with Kois Buyers Group and unprofitable for Schein not to do business with Kois Buyers Group (CCFF ¶¶ 1647-1661), Complaint Counsel has no specific response.

1710. The evidence, however, shows that Schein actively engaged in discussions with the Kois buying group. (SF 893-919). The evidence further shows that Schein acted reasonably during the negotiation process. Because Schein acted reasonably in its dealings with the Kois Buyers Group, it did not act contrary to its self-interest. (SF 893-919).

Response to Proposed Finding No. 1710

This Proposed Finding in its assertion that "Schein acted reasonably," is not supported by a citation to SF 893-919. (*See* Responses to Proposed Finding Nos. 893-919). This Proposed Finding is also inaccurate, incomplete, and misleading because Dr. Marshall's Kois-Burkhart

2014 profitability study demonstrated that it was profitable for Burkhart to do business with Kois Buyers Group and unprofitable for Schein not to do business with Kois Buyers Group (CCFF ¶¶ 1647-1661), and, thus, that Schein acted contrary to its self-interest by not bidding on Kois Buyers Group.

1711. The finding that Schein acted reasonably – and not contrary to its self-interest – is not undermined by Dr. Marshall’s *post-hoc* profitability analysis of the Kois buying group. While that analysis purports to show that Burkhart made money (and Schein lost money) as a result of Dr. Kois awarding the contract to Burkhart, it does not show that Schein failed to act in good faith in negotiating with Kois to supply the Kois buying group. Under Dr. Marshall’s logic, every time a firm loses a potentially profitable bid, the firm acted against self-interest. That cannot be the case.

Response to Proposed Finding No. 1711

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. Nonetheless, this Proposed Finding is also irrelevant because whether or not Schein failed to act in good faith in negotiating with Kois to supply the Kois buying group is irrelevant to Dr. Marshall’s profitability studies – as Dr. Marshall explained, “Even if Carlton’s assessment of the facts were correct, that would not affect the conclusions I draw below from these profitability studies...[t]hese facts are in the data of the studies, and they follow regardless of whether Schein terminated its discussions with Smile Source and Kois or visa versa.” (CX7101 at 049 (¶¶ 119) (Marshall Expert Rebuttal Report)). This Proposed Finding is also inaccurate, incomplete, and misleading because Dr. Marshall’s Kois-Burkhart 2014 profitability study demonstrated that it was profitable for Burkhart to do business with Kois Buyers Group and unprofitable for Schein not to do business with Kois Buyers Group (CCFF ¶¶ 1647-1661), and, thus, that Schein acted contrary to its self-interest by not bidding on Kois Buyers Group. To the extent that this Proposed Finding suggests that Schein did not act against its self-interest during the relevant period, it is inaccurate and misleading because Dr. Marshall’s five natural experiments (profitability studies) show that buying groups drive

purchasing volume and are profitable for full-service distributors to serve. (CCFF ¶¶ 1651-1656, 1664-1666, 1672-1673, 1678); *see also* [REDACTED]

1712. As such, Dr. Marshall's 2014 Kois profitability analysis is not probative of the question of whether Schein acted contrary to its self-interest during the relevant period.

Response to Proposed Finding No. 1712

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. Additionally, the Proposed Finding is argumentative and not appropriate for a factual finding. Nonetheless, this Proposed Finding is inaccurate, incomplete, and misleading for reasons explained in Responses to Proposed Finding Nos. 1709-1711 above. This Proposed Finding is also inaccurate, incomplete, misleading, and contrary to evidence that Dr. Marshall's Kois-Burkhart 2014 profitability study demonstrated that it was profitable for Burkhart to do business with Kois Buyers Group and unprofitable for Schein not to do business with Kois Buyers Group (CCFF ¶¶ 1647-1661), and, thus, that Schein acted contrary to its self-interest by not bidding on Kois Buyers Group.

6. *Dr. Marshall's Profitability Analysis Fails to Account for Salient Factors Affecting Whether to Partner with Buying Groups.*

1713. Dr. Marshall's profitability analysis depends primarily on the margins and market shares (among certain buying group members) of the Respondents, Burkhart, and/or Atlanta Dental before and after select contracting events by the Kois Buyers Group or Smile Source. From this analysis, Dr. Marshall concludes that Respondents acted contrary to their self-interest between 2011 and 2015.

Response to Proposed Finding No. 1713

This Proposed Finding is inaccurate and incomplete in suggesting that Dr. Marshall's profitability analysis is limited to "margins and market shares (among certain buying group members)." Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150

(¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]. Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest, including Schein's, to have a no-buying group whereby it instructed its employees to categorically reject all buying groups. (CCFF ¶¶ 630-652). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387-3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."; Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group'...and it's passing on this as a matter of policy.'").

1714. Dr. Marshall's analysis, however, fails to account for other factors that a distributor would reasonably consider in deciding whether to do business with a buying group. As described above, Schein considered numerous factors, such as a buying group's membership base (and impact of cannibalization), risk of conflicts between Schein's FSCs or between divisions, ability to commit purchasing volume, ability to influence the purchasing behavior of its members, willingness to sign an exclusive contract, value-added services that could lend

stickiness and complement Schein's brand, and others. (SF 159-82, 189-341). These factors are not captured by Dr. Marshall's analysis.

Response to Proposed Finding No. 1714

This Proposed Finding is incomplete because it ignores that the factors identified in this Proposed Finding are irrelevant to any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest, including Schein's, to have a no-buying group whereby it instructed its employees to categorically reject all buying groups. (CCFF ¶¶ 630-652). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387-3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement

Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation.”; Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’...and it’s passing on this as a matter of policy.’”).

This Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence for reasons explained in Responses to Proposed Finding Nos. 159-82, 189-341. As explained in those responses, the record shows that Schein worked with buying groups before the conspiracy and also competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 1159-1166, 1316-1322). During the conspiracy period, however, the record evidence shows that Schein instructed its sales force to reject buying groups pursuant to Sullivan’s directives and that it complied with that instruction. (CCFF ¶¶ 661-954). The record evidence contains dozens of documents that confirm that Schein enforced a blanket policy against buying groups and shows that Schein rejected numerous buying groups during the conspiracy. (Complaint Counsel’s Post-Trial Brief, at Attachment C; *see also* Responses to Proposed Finding Nos. 142, 148, 150, 152, 154).

7. *Dr. Marshall Failed to Analyze the But-For World.*

1715. In determining whether a firm acted contrary to its self-interest as a result of a conspiracy, it is necessary to compare the profits the firm actually earned with the profits it would have earned in the absence of the conspiracy. (Carlton, Tr. 5390-91; RX 2832-051). That is, it is necessary to compare profits earned in the actual world to the profits the firm would earn in the but-for world. (Carlton, Tr. 5390-91; RX 2832-051).

Response to Proposed Finding No. 1715

This Proposed Finding is irrelevant to the extent that Schein asserts that it supports that a but-for world analysis is necessary: this Proposed Finding is irrelevant to an analysis of a blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five

natural experiment profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report); Marshall, Tr. 2860)).

These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED])

[REDACTED]. Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest, including Schein's, to have a no-buying group whereby it instructed its employees to categorically reject all buying groups. (CCFF ¶¶ 630-652). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387-3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group' ...and it's passing on this as a matter of policy.'")). Dr. Marshall's five profitability studies examined real-world

examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups. (CX7101 at 051 (¶ 129) (Marshall Expert Rebuttal Report)). They inform whether the Respondents would have found it profitable to supply such buying groups, leading to Dr. Marshall's conclusion that Respondents acted against their unilateral self-interest. (CX7101 at 051 (¶ 129) (Marshall Expert Rebuttal Report)). The fact that the studies do not directly estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents' anticompetitive conduct is irrelevant as a response to what the studies show. (CX7101 at 051 (¶ 129) (Marshall Expert Rebuttal Report)).

This Proposed Finding is also irrelevant and unreliable because it relies on a flawed and unsupported "formula" that Dr. Carlton presented in his expert report. (RX2832 at 051 (¶ 75) (Carlton Expert Report)). Dr. Carlton failed to do any quantitative analysis to support the assertions in this Proposed Finding. While Dr. Carlton identified a formula in paragraph 75 of his expert report purporting to show opportunity and profitability costs related to Schein working with or not working with Kois Buyers Group, (RX2832 at 051 (¶ 75) (Carlton Expert Report)), Dr. Carlton never actually applied the formula to any data to support his assertion about Schein's opportunity costs in dealing with different buying groups. (RX2966 (Carlton, Dep. at 269-270 ("Q. Now, in the scope of your report, or in the four corners of your report have you attempted to perform this calculation? A. I don't perform this calculation."))). The support and foundation for this purported "formula" is unreliable because it is solely based on Dr. Carlton's memory and interpretation of facts conveyed to him by Schein executives where he did not even bother to keep his notes. (Carlton, Tr. 5427-5428, 5458-5466). He describes that the formula is "based on his understanding of speaking to Schein executives." (Carlton, Tr. 5460-5461). In Dr. Carlton's own words, the formula is

“basically, my summary of what [Schein executives are] telling me.” (Carlton, Tr. 5460-5461). Dr. Carlton admitted that he never showed this equation to anybody at Schein or even asked if Schein uses this equation to make business decisions. (Carlton, Tr. 5464; *see also* RX2966 (Carlton, Dep. at 270, 281 (“Q. Are there any examples in this report that would show that Schein performed these, this calculation that you set forth in paragraph 75?...A. I don’t know that there was such a, that Schein had enough time to do such a calculation. I’m not aware of such a calculation...Q. Okay. But you didn’t ask specific questions that would explain how Schein would carry out the, understanding the values for the inputs into your equation. Correct?...A. I didn’t go over each element and ask them how they form expectations of each element.”))). He further admitted that he solely relied on the interviews, and he does not cite any other evidence to support his assertions. (Carlton, Tr. 5465-5466).

1716. In this case, to properly analyze the but-for world, it is necessary to compare the profits that a Respondent would have earned by doing business with a buying group to the profits it would have earned by not doing business with a buying group. (Carlton, Tr. 5390-91).

Response to Proposed Finding No. 1716

This Proposed Finding is irrelevant and unreliable because it relies on a flawed and unsupported “formula” that Dr. Carlton presented in his expert report. (RX2832 at 051 (¶ 75) (Carlton Expert Report); *see also* Response to Proposed Finding No. 1715). This Proposed Finding is also irrelevant and misleading for additional reasons explained detail in Response to Proposed Finding No. 1715. Specifically, Dr. Marshall conducted five natural experiment profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report); Marshall, Tr. 2860)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED]

[REDACTED]. Accordingly, Dr. Marshall opined that it was against

Respondents' unilateral self-interest, including Schein's, to have a no-buying group whereby it instructed its employees to categorically reject all buying groups. (CCFF ¶¶ 630-652)

1717. Dr. Marshall did not analyze the but-for world, or what he calls the "counterfactual." (*See, e.g.*, Marshall, Tr. 3026, 3056 [REDACTED]; Carlton, Tr. 5394-95).

Response to Proposed Finding No. 1717

This Proposed Finding is irrelevant, inaccurate, incomplete, and misleading to the extent that it suggests that a "counterfactual" or "but-for world" analysis is necessary to determine whether or not Schein was acting against its self-interest by having a no buying group policy. First, this Proposed Finding is irrelevant and unreliable because it relies on a flawed and unsupported "formula" that Dr. Carlton presented in his expert report. (RX2832 at 051 (¶ 75) (Carlton Expert Report)). Dr. Carlton failed to do any quantitative analysis to support the assertions in this Proposed Finding. While Dr. Carlton identified a formula in paragraph 75 of his expert report purporting to show opportunity and profitability costs related to Schein working with or not working with Kois Buyers Group, (RX2832 at 051 (¶ 75) (Carlton Expert Report)), Dr. Carlton never actually applied the formula to any data to support his assertion about Schein's opportunity costs in dealing with different buying groups. (RX2966 (Carlton, Dep. at 269-270 ("Q. Now, in the scope of your report, or in the four corners of your report have you attempted to perform this calculation? A. I don't perform this calculation."))). The support and foundation for this purported "formula" is unreliable because it is solely based on Dr. Carlton's memory and interpretation of facts conveyed to him by Schein executives where he did not even bother to keep his notes. (Carlton, Tr. 5427-5428, 5458-5466). He describes that the formula is "based on his understanding of speaking to Schein executives." (Carlton, Tr. 5460-5461). In Dr. Carlton's own words, the formula is "basically, my summary of what [Schein executives are] telling me." (Carlton, Tr. 5460-

5461). Dr. Carlton admitted that he never showed this equation to anybody at Schein or even asked if Schein uses this equation to make business decisions. (Carlton, Tr. 5464; *see also* RX2966 (Carlton, Dep. at 270, 281 (“Q. Are there any examples in this report that would show that Schein performed these, this calculation that you set forth in paragraph 75?...A. I don’t know that there was such a, that Schein had enough time to do such a calculation. I’m not aware of such a calculation...Q. Okay. But you didn’t ask specific questions that would explain how Schein would carry out the, understanding the values for the inputs into your equation. Correct?...A. I didn’t go over each element and ask them how they form expectations of each element.”)). He further admitted that he solely relied on the interviews and does not cite any other evidence. (Carlton, Tr. 5465-5466).

Second, in addition to Schein failing to do this analysis itself, this Proposed Finding is irrelevant to the extent that Schein asserts that it supports that a but-for world analysis is necessary: this Proposed Finding is irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five natural experiment profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report); Marshall, Tr. 2860). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED])

[REDACTED]. Accordingly, Dr. Marshall opined that it was against Respondents’ unilateral self-interest, including Schein’s, to have a no-buying group whereby it instructed its employees to categorically reject all buying groups. (CCFF ¶¶ 630-652). As such, based in part on Dr. Marshall’s review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents’ self-interest to have a

categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387-3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental evaluation.”); Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’ ...and it’s passing on this as a matter of policy.”)). Dr. Marshall’s five studies examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups. (CX7101 at 051 (¶ 129) (Marshall Expert Rebuttal Report)). They inform whether the Respondents would have found it profitable to supply such buying groups, leading to Dr. Marshall’s conclusion that Respondents acted against their unilateral self-interest. (CX7101 at 051 (¶ 129) (Marshall Expert Rebuttal Report)). The fact that the studies do not directly estimate lost profits in particular counterfactual scenarios that would have existed but-for Respondents’ anticompetitive conduct is irrelevant as a response to what the studies show. (CX7101 at 051 (¶ 129) (Marshall Expert Rebuttal Report)).

Third, this Proposed Finding is incomplete and misleading because it omits that Dr. Marshall did do profitability analyses assessing Schein's profits and losses in doing business with a buying group in relation to the end of Schein's relationship with Smile Source in 2012 as well as in 2017 when Schein again bid for Smile Source's business. (CX7100 at 186 (¶ 413) ("As I noted at the start of this section..., supplying buying groups, all else equal, is likely to be less profitable for a larger distributor. Because Schein is larger than Patterson and Benco, and hence has a higher national share (see Figure 25), given that it was profitable for Schein to start a new relationship with Smile Source in 2017, it should have been profitable for Patterson or Benco to do so as well.")).

1718. The inability of Dr. Marshall's approach to illuminate the but-for world was illustrated by RXD 0014-029: {

} (Marshall, Tr. 3055-56).

Response to Proposed Finding No. 1718

First, this Proposed Finding is irrelevant and should be disregarded because it relies on demonstrative RXD0014-029 for support, in violation of the Court's Order On Post-Trial Briefs at 3 ("Do not cite to demonstrative exhibits as substantive evidence.").

Second, this Proposed Finding is also irrelevant and misleading because instead of relying on data or any analysis put forth by its own expert Dr. Carlton or any of Respondents' other economic experts in this matter, Schein attempts to rely on testimony based on made up numbers in an incomplete and incomprehensible hypothetical from demonstratives full of assumptions that are not in evidence. [REDACTED]

[REDACTED]. Schein's counsel himself admitted that the hypothetical that he presented in an attempt to counter Dr. Marshall's

profitability analyses during trial based on the information in Schein's demonstratives is a

[REDACTED]

Third, this Proposed Finding is also irrelevant and unreliable because it is not grounded in any actual facts or data and is overridden with unexplained internal inconsistencies, as Dr.

Marshall pointed out during his testimony – for example:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Fourth, this Proposed Finding is irrelevant and misleading because Schein's but-for world criticisms are misplaced. The hypothetical presented in the demonstrative in this Proposed Finding is irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five natural experiments (profitability analyses) to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report); Marshall, Tr. 2660 ("Part of my analysis was to look at five natural experiments that presented to me by the data to make a determination [about whether Respondents were acting against their own unilateral economic self-interest.]).). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]. Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest, including Schein's, to have a no-buying group

whereby it instructed its employees to categorically reject all buying groups. (CCFF ¶¶ 630-652). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387-3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group' ...and it's passing on this as a matter of policy.'"))). Dr. Marshall's five studies examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups. (CX7101 at 051 (¶ 129) (Marshall Expert Rebuttal Report)). They inform whether the Respondents would have found it profitable to supply such buying groups, leading to Dr. Marshall's conclusion that Respondents acted against their unilateral self-interest. (CX7101 at 051 (¶ 129) (Marshall Expert Rebuttal Report)). The fact that the studies do not directly estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents'

anticompetitive conduct is irrelevant as a response to what the studies show. (CX7101 at 051 (¶ 129) (Marshall Expert Rebuttal Report)).

1719. Dr. Marshall's trial testimony also showed that differences in market share, cannibalization rates, and compliance can have a significant impact on the analysis, and failure to perform a but-for analysis that takes these factors into account can present a misleading picture. (Marshall, Tr. 2926-27, 2986-87, 3003, 3034, 3136-37).

Response to Proposed Finding No. 1719

First, this Proposed Finding is misleading and inaccurate because the testimony cited does not support the Proposed Finding – there is nothing in Dr. Marshall's testimony that suggests that a “failure to perform a but-for analysis that takes these factors into account can present a misleading picture.” Second, this Proposed Finding is irrelevant and unreliable because instead of relying on data or any analysis put forth by its own expert Dr. Carlton or any of Respondents' other economic experts in this matter, Schein improperly attempts to rely on testimony about a fake “but-for world” based on made up numbers in an incomplete and incomprehensible hypotheticals full of assumptions from demonstratives that are not in evidence, as illustrated and explained in full detail in Response to Proposed Finding No. 1718. Schein's counsel himself admitted that the hypothetical that he presented to attempt to counter Dr. Marshall's profitability analyses during trial based on Schein's hypothetical demonstratives is a [REDACTED]

[REDACTED]

[REDACTED]

Third, this Proposed Finding is also irrelevant and unreliable because it is not grounded in any actual facts or data and overridden with unexplained internal inconsistencies, as Dr. Marshall pointed out during his testimony, and as illustrated and explained in full detail in Response to Proposed Finding No. 1718.

Fourth, this Proposed Finding is also irrelevant and misleading because Schein's but-for world criticisms are misplaced. The hypotheticals that Schein's counsel presented at trial and which serve as the basis for the testimony cited in this Proposed Finding are all irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups, as explained in full detail in Response to Proposed Finding No. 1718.

1720. For example, at trial, Dr. Marshall was presented with a hypothetical in which

[REDACTED]

(Marshall, Tr. 3031-68). This was illustrated in RXD 0014-037. {

[REDACTED]

} (RXD 0014-037).

Response to Proposed Finding No. 1720

First, This Proposed Finding is irrelevant and should be disregarded because it relies on demonstrative RXD 0014-029 for support, in violation of the Court's Order On Post-Trial Briefs at 3 ("Do not cite to demonstrative exhibits as substantive evidence.").

Second, as illustrated and explained in full detail in Response to Proposed Finding No. 1718, this Proposed Finding is irrelevant and unreliable because instead of relying on data or any analysis put forth by its own expert Dr. Carlton or any of Respondents' other economic experts in this matter, Schein improperly attempts to rely on testimony about a fake "but-for world" based on made up numbers in an incomplete and incomprehensible hypotheticals full of assumptions from demonstratives that are not in evidence. (*See* Response to Proposed Finding No. 1718). Schein's counsel himself admitted that the hypothetical that he presented to attempt to counter Dr. Marshall's profitability analyses during trial based on Schein's hypothetical demonstratives is a [REDACTED] [REDACTED].

Third, as illustrated and explained in full detail in Response to Proposed Finding No. 1718, this Proposed Finding is also irrelevant and unreliable because it is not grounded in any actual facts or data and overridden with unexplained internal inconsistencies, as Dr. Marshall pointed out during his testimony. (*See* Response to Proposed Finding No. 1718).

Fourth, as explained in full detail in Response to Proposed Finding No. 1718, this Proposed Finding is also irrelevant and misleading because Schein's but-for world criticisms are misplaced. The hypotheticals that Schein's counsel presented at trial and which serve as the basis for the testimony cited in this Proposed Finding are all irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups. (*See* Response to Proposed Finding No. 1718).

1721. As described below, the flaw in Dr. Marshall's approach was also demonstrated by Dr. Marshall's own analysis.

Response to Proposed Finding No. 1721

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. Nevertheless, this Proposed Finding is also vague as to what “flaw” or “approach” or “Dr. Marshall’s own analysis” refers to and is inaccurate, misleading, and incomplete to the extent that they refer to and for reasons explained in Responses to Proposed Finding Nos. 1722-1741 below.

8. *Dr. Marshall’s Profitability Analysis Shows that Schein Did Not Profit by Doing Business with Smile Source.*

a. *Dr. Marshall’s Profitability Analysis Shows that Schein Benefited from Smile Source’s Termination in 2012.*

1722. Dr. Marshall claims that Schein acted against its self-interest because Schein would have earned more had it not been terminated by Smile Source in 2012. Dr. Marshall’s own analysis, however, shows that Schein’s profits increased for existing Smile Source members at the time of termination.

Response to Proposed Finding No. 1722

First, this Proposed Finding is misleading and inaccurate in suggesting that Schein did not profit by doing business with Smile Source – Dr. Marshall’s profitability analyses demonstrate that it was in Schein’s self-interest to do business with Smile Source. (CCFF ¶¶ 1675-1684).

Second, this Proposed Finding is incomplete and misleading to the extent that it is referring to a slight increase in Schein’s profits after its relationship with Smile Source ended in 2012 because it omits Dr. Marshall’s explanation that Schein over time lost profits due to business flowing away from Schein towards Burkhart and Atlanta Dental due to their later partnerships with Smile Source, which off-sets the initial incremental profit for Schein when its relationship with Smile Source ended in 2012: “And so that’s a source of incremental profit as those dentists stayed with Schein after the termination of the agreement with Smile

Source, but as Smile Source obtains contracts with Burkhart and Atlanta Dental, there's a commensurate loss associated with the business that flows away from Schein towards Burkhart and Atlanta Dental. I took those factors into account in this fourth analysis."

(Marshall, Tr. 2873). In response to questions from Schein's counsel regarding the initial incremental profit that Schein earned after its relationship with Smile Source ended in 2012, Dr. Marshall explained why looking at this fact in isolation is not the complete analysis:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Third, to the extent that this Proposed Finding suggests that Schein did not act against its self-interest based on facts related to the end of Schein's relationship with Smile Source in

2012, it is inaccurate and misleading because Dr. Marshall explained that his five natural experiments (profitability studies) show that buying groups drive purchasing volume and are profitable for full-service distributors to serve, and that “Even if Carlton’s assessment of the facts were correct, that would not affect the conclusions I draw below from these profitability studies...[t]hese facts are in the data of the studies, and they follow regardless of whether Schein terminated its discussions with Smile Source and Kois or visa versa.” (CX7101 at 049 (¶¶ 119) (Marshall Expert Rebuttal Report)).

1723. [REDACTED]
(Goldsmith, Tr. 2088-89; *see also* CX 7100-067).

Response to Proposed Finding No. 1723

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (*See* February 21, 2019 Order on Post-Trial Briefs). To the extent that this Proposed Finding suggests that Schein did not act against its self-interest based on facts related to the end of Schein’s relationship with Smile Source in 2012, it is inaccurate and misleading because Dr. Marshall explained that his five natural experiments (profitability studies) show that buying groups drive purchasing volume and are profitable for full-service distributors to serve, and that “Even if Carlton’s assessment of the facts were correct, that would not affect the conclusions I draw below from these profitability studies...[t]hese facts are in the data of the studies, and they follow regardless of whether Schein terminated its discussions with Smile Source and Kois or visa versa.” (CX7101 at 049 (¶¶ 119) (Marshall Expert Rebuttal Report)).

1724. Dr. Marshall performed an analysis of Schein’s sales and profits to these [REDACTED] before and after termination. That analysis, which Dr. Marshall prepared and included in his back-up materials, shows that Schein retained most of the [REDACTED]

██████████ and ██████████ after it was terminated by Smile Source. (RX 3058; Marshall, Tr. 3073, 3076; *see also* RXD 0014-039).

Response to Proposed Finding No. 1724

First, this Proposed Finding is irrelevant and should be disregarded to the extent that it relies on demonstrative RXD 0014-039 for support, in violation of the Court's Order On Post-Trial Briefs at 3 ("Do not cite to demonstrative exhibits as substantive evidence."). (*See* February 21, 2019 Order on Post-Trial Briefs).

Second, for reasons explained in more details in Response to Proposed Finding No. 1723, this Proposed Finding is incomplete and misleading to the extent that it is referring to a slight increase in Schein's profits after its relationship with Smile Source ended in 2012 because it omits Dr. Marshall's explanation that Schein over time lost profits due to business flowing away from Schein towards Burkhardt and Atlanta Dental due to their later partnerships with Smile Source, which off-sets the initial incremental profit for Schein when its relationship with Smile Source ended in 2012: "And so that's a source of incremental profit as those dentists stayed with Schein after the termination of the agreement with Smile Source, but as Smile Source obtains contracts with Burkhardt and Atlanta Dental, there's a commensurate loss associated with the business that flows away from Schein towards Burkhardt and Atlanta Dental. I took those factors into account in this fourth analysis." (Marshall, Tr. 2873). In response to questions from Schein's counsel regarding the initial incremental profit that Schein earned after its relationship with Smile Source ended in 2012, Dr. Marshall explained why looking at this fact in isolation is not the complete analysis:

██
██
██

██
██

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1725. Dr. Marshall contends that, despite this analysis, Schein lost profits as a result of the termination because Smile Source experienced substantial growth after termination. (Marshall, Tr. 3076-78 [REDACTED]

[REDACTED] 3079-80). But the conclusion that Schein made more money without a Smile Source contract holds even if one assumes that Smile Source continued to grow, and that Schein's shares and margins would have remained at pre-termination levels. Dr. Marshall's conclusion is flawed for three reasons.

Response to Proposed Finding No. 1725

First, the second and third sentences in this Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. Additionally, these sentences in this Proposed Finding are argumentative and not appropriate for a factual finding.

Second, this Proposed Finding is irrelevant and misleading because this extension of Schein's but-for world criticisms (i.e. that Dr. Marshall failed to perform a counterfactual regarding Schein's anticipated profits and loss with and without Smile Source growth) is

misplaced: this Proposed Finding is irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five natural experiments (profitability analyses) to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report); Marshall, Tr. 2660 (“Part of my analysis was to look at five natural experiments that presented to me by the data to make a determination [about whether Respondents were acting against their own unilateral economic self-interest.”]). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED])

Accordingly, Dr. Marshall opined that it was against Respondents’ unilateral self-interest, including Schein’s, to have a no-buying group whereby it instructed its employees to categorically reject all buying groups. (CCFF ¶¶ 630-652). As such, based in part on Dr. Marshall’s review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents’ self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387-3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just

a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group'...and it's passing on this as a matter of policy.'"). Dr. Marshall's five studies examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups. (CX7101 at 051 (¶ 129) (Marshall Expert Rebuttal Report)). They inform whether the Respondents would have found it profitable to supply such buying groups, leading to Dr. Marshall's conclusion that Respondents acted against their unilateral self-interest. (CX7101 at 051 (¶ 129) (Marshall Expert Rebuttal Report)). The fact that the studies do not directly estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents' anticompetitive conduct is irrelevant as a response to what the studies show. (CX7101 at 051 (¶ 129) (Marshall Expert Rebuttal Report)).

Third, for reasons explained in more detail in Response to Proposed Finding No. 1722, this Proposed Finding that "Schein made more money without a Smile Source contract" is incomplete and misleading to the extent that it is referring to a slight increase in Schein's profits after its relationship with Smile Source ended in 2012 because it omits Dr. Marshall's explanation that Schein over time lost profits due to business flowing away from Schein towards Burkhardt and Atlanta Dental due to their later partnerships with Smile Source, which off-sets the initial incremental profit for Schein when its relationship with Smile Source ended in 2012: "And so that's a source of incremental profit as those dentists stayed with Schein after the termination of the agreement with Smile Source, but as Smile Source obtains contracts with Burkhardt and Atlanta Dental, there's a commensurate loss associated with the

business that flows away from Schein towards Burkhardt and Atlanta Dental. I took those factors into account in this fourth analysis.” (Marshall, Tr. 2873).

1726. *First*, Dr. Marshall’s does not present any analysis to show what Schein’s sales or margins would have been had it *continued* to supply Smile Source. Without an estimate of Schein’s sales and margins had it continued to serve Smile Source, Dr. Marshall’s conclusion – that continuing to serve Smile Source would have been incrementally profitable – is not reliable.

Response to Proposed Finding No. 1726

First, this Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. Second, this Proposed Finding is irrelevant and misleading because this extension of Schein’s but-for world criticisms (i.e. that Dr. Marshall failed to perform a counterfactual regarding Schein’s anticipated profits and loss with and without Smile Source growth) is misplaced. For reasons explained in Response to Proposed Finding No. 1725, this Proposed Finding is irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups as well as to what Dr. Marshall’s profitability studies show. (See Response to Proposed Finding No. 1725).

1727. *Second*, the fact that Smile Source was poised to grow does not mean that Schein would have earned additional profits. [REDACTED]

[REDACTED] (Marshall, Tr. 3096-98; RXD 0014-40).

Response to Proposed Finding No. 1727

First, this Proposed Finding is irrelevant and should be disregarded because it relies on demonstrative RXD 0014-40 for support, in violation of the Court’s Order On Post-Trial Briefs at 3 (“Do not cite to demonstrative exhibits as substantive evidence.”). (See February 21, 2019 Order on Post-Trial Briefs). Second, this Proposed Finding is irrelevant and unreliable because Schein attempts to rely on testimony based on made up numbers in an incomplete and incomprehensible hypothetical from demonstratives full of assumptions that are not in evidence, as demonstrated in the full trial testimony cited below where Dr.

Marshall testified as to why the assumptions in this particular hypothetical from Schein's counsel did not make sense, grounding his response in results from his own data-analysis:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Third, this Proposed Finding is irrelevant and misleading because this extension of Schein's but-for world criticisms (i.e. that Dr. Marshall failed to perform a counterfactual regarding Schein's anticipated profits and loss with and without Smile Source growth) is misplaced. This Proposed Finding is irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five natural experiments (profitability analyses) to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report); Marshall, Tr. 2660 ("Part of my analysis was to look at five natural experiments that presented to me by the data to make a determination [about whether Respondents were acting against their own unilateral economic self-interest."]). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest, including Schein's, to have a no-buying group whereby it instructed its employees to categorically reject all buying groups. (CCFF ¶¶ 630-652). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report)

(explaining that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387-3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental evaluation.”); Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’ ...and it’s passing on this as a matter of policy.’”)). Dr. Marshall’s five studies examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups. (CX7101 at 051 (¶ 129) (Marshall Expert Rebuttal Report)). They inform whether the Respondents would have found it profitable to supply such buying groups, leading to Dr. Marshall’s conclusion that Respondents acted against their unilateral self-interest. (CX7101 at 051 (¶ 129) (Marshall Expert Rebuttal Report)). The fact that the studies do not directly estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents’ anticompetitive conduct is irrelevant as a response to what the studies show. (CX7101 at 051 (¶ 129) (Marshall Expert Rebuttal Report)).

1728. *Third*, Dr. Marshall improperly relies on Smile Source’s *ex post* experience, rather than Schein’s *ex ante* expectations. Thus, even if Smile Source’s growth could have reversed the unprofitability of Schein’s relationship with Smile Source, Dr. Marshall would need to show that, prior to termination, Schein should have reasonably expected Smile Source to experience the kind of growth that it actually did in subsequent years. Dr. Marshall has made no such showing. Dr. Goldsmith testified that such an assumption would not have been reasonable at the

time. (Goldsmith, Tr. 1995 [REDACTED] Marshall, Tr. 3076-80). Schein had been serving Smile Source for approximately four years prior to termination, and yet Smile Source had only attracted [REDACTED]. (Goldsmith, Tr. 2088-89). There is no evidence in the record that Schein expected Smile Source to grow to over [REDACTED] members by [REDACTED], as reflected in Dr. Marshall's analysis. (CX 7100-067; *see also* Marshall, Tr. 3076-80).

Response to Proposed Finding No. 1728

First, the first three sentences of this finding are not supported by any citation to the evidence in the record and should be disregarded – for example, there is no support for the statement in the Proposed Finding that “Dr. Marshall would need to show that, prior to termination, Schein should have reasonably expected Smile Source to experience the kind of growth that it actually did in subsequent years.” Second, the Proposed Finding should be disregarded by the Court to the extent that Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (*See* February 21, 2019 Order on Post-Trial Briefs).

Third, this Proposed Finding is irrelevant and misleading because this extension of Schein's but-for world criticisms (i.e. that Dr. Marshall failed to perform a counterfactual regarding Schein's anticipated profits and loss with and without Smile Source growth) is misplaced. For reasons explained in Response to Proposed Finding No. 1725, this Proposed Finding is irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups as well as to what Dr. Marshall's profitability studies show. (*See* Response to Proposed Finding No. 1725).

1729. Dr. Marshall attempts to save his analysis by looking at the profits Schein “lost” as a result of Burkhart winning the Smile Source contract. Specifically, he looks at a different set of customers than the [REDACTED] members when Schein had the contract: the [REDACTED] customers that ultimately purchased from Burkhart at some point between [REDACTED] (CX 7100-162). Dr. Marshall notes that [REDACTED] (CX 7100-165). But this analysis does not account for Schein's reasonable *ex ante* expectations as to the [REDACTED] members it was serving at the time, the reduced margins that Schein would have had to offer, or

the cannibalization that Schein would have experienced among future potential Smile Source members, had it continued to serve Smile Source. It is thus not reliable.

Response to Proposed Finding No. 1729

As explained in more detail in Response to Proposed Finding No. 1722, this Proposed Finding that is incomplete and misleading because it omits Dr. Marshall's explanation that Schein over time lost profits due to business flowing away from Schein towards Burkhardt and Atlanta Dental due to their later partnerships with Smile Source, which off-sets the initial incremental profit for Schein when its relationship with Smile Source ended in 2012: "And so that's a source of incremental profit as those dentists stayed with Schein after the termination of the agreement with Smile Source, but as Smile Source obtains contracts with Burkhardt and Atlanta Dental, there's a commensurate loss associated with the business that flows away from Schein towards Burkhardt and Atlanta Dental. I took those factors into account in this fourth analysis." (Marshall, Tr. 2873; see also Response to Proposed Finding No. 1722).

b. *Dr. Marshall's Profitability Analysis Shows that Schein Did Not Profit from the 2017 Smile Source Contract.*

1730. Dr. Marshall also claims that Schein acted against self-interest during the alleged conspiracy period because Schein entered into a contract with Smile Source after the alleged conspiracy period, and that the relationship was profitable for Schein. (CX 7100-184-85). That analysis is flawed for at least three reasons.

Response to Proposed Finding No. 1730

This Proposed Finding is incomplete and misleading for reasons explained below in Schein Responses to Proposed Finding Nos. 1731-1735.

1731. *First*, as noted above, the analysis depends on the assumption that Schein was not interested in contracting with Smile Source prior to 2017. This Proposed Finding is also contrary to the weight of the evidence showing the opposite. (SF 1105-14, 1156-85).

Response to Proposed Finding No. 1731

This Proposed Finding is irrelevant, incomplete, inaccurate, and misleading for reasons explained in Responses to Proposed Finding Nos. 1705-1708 (“The Evidence Does Not Support Dr. Marshall’s Assumption that Schein Boycotted Smile Source Prior to 2017”).

This Proposed Finding is also inaccurate, misleading, and contrary to the weight of the evidence for reasons explained in Responses to Proposed Finding Nos. 1105-1114, 1156-1185.

1732. *Second*, as Dr. Marshall admitted on cross-examination, his 2017 analysis failed to include rebates and administrative fees, which should have been included. (Marshall, Tr. 3121-22). If fees and rebates are included, the analysis shows that Schein lost over [REDACTED] in 2017 as a result of supplying Smile Source. (Marshall, Tr. 3121-22 [REDACTED]) As such, the 2017 Smile Source contract was not incrementally profitable for Schein.

Response to Proposed Finding No. 1732

This Proposed Finding is inaccurate and misleading to the extent that it suggests that Schein did not act against it self-interest during the relevant period. Dr. Marshall’s profitability analysis, based only on data, demonstrated that the end of Schein’s relationship with Smile Source was unprofitable for Schein and that it was in Schein’s interest to win Smile Source’s business again in 2017, even when taking administrative and other fees that Schein raises into account. (CCFF ¶¶ 1681-1684; *see also* [REDACTED])

[REDACTED] As Dr. Marshall explained at trial when responding to the fact that Schein “lost money” when taking the rebates and admin fees into account, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

1733. [REDACTED]

[REDACTED] (Marshall, Tr. 3121-22). But this assumes that Patterson or Benco would have won the Smile Source contract during the relevant period. Schein was the only Respondent actively engaged in discussions with Smile Source, as both Patterson and Benco repeatedly turned Smile Source down. (SF 1147-55). As such, there is no basis for the assumption that Schein would have expected Patterson or Benco to win the Smile Source business in 2017.

Response to Proposed Finding No. 1733

This Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence in suggesting that Patterson did not bid on Smile Source in 2017 – Patterson bid on Smile Source in 2017 concurrent with Schein bidding on Smile Source. (CCFF ¶¶ 1347-1357).

This Proposed Finding is also incomplete because it omits that Dr. Marshall explained at trial when responding to the fact that Schein “lost money” when taking the rebates and admin fees into account, [REDACTED]

[REDACTED]

The Proposed Finding is not supported by a citation to SF 1147-1155 for the reasons set forth in Responses to Proposed Finding Nos. 1147-1155.

1734. *Third*, Dr. Marshall errs by assuming that the circumstances in 2017 were the same as the circumstances during the alleged conspiracy period. It is undisputed, however, that Smile Source continued to grow, and was significantly larger by 2017 than it had been in prior years. (Maurer, Tr. 4981-82). There is thus no reliable basis to draw inferences from Dr. Marshall's 2017 analysis applicable to the alleged conspiracy period.

Response to Proposed Finding No. 1734

First the first and last sentences in this Proposed Finding are not supported by any citation to the evidence in the record and should be disregarded. Additionally, these sentences in this Proposed Finding are argumentative and not appropriate for a factual finding.

This Proposed Finding is irrelevant and misleading because this extension of Schein's but-for world criticisms (i.e. that Dr. Marshall failed to perform a counterfactual regarding Schein's anticipated profits and loss with and without Smile Source growth) is misplaced. This Proposed Finding is irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five natural experiments (profitability analyses) to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report); Marshall, Tr. 2660 ("Part of my analysis was to look at five natural experiments that presented to me by the data to make a determination [about whether Respondents were acting against their own unilateral economic self-interest.']). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED])

[REDACTED] Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest, including Schein's, to have a no-buying group

whereby it instructed its employees to categorically reject all buying groups. (CCFF ¶¶ 630-652). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387-3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group' ...and it's passing on this as a matter of policy.'"))). Dr. Marshall's five studies examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups. (CX7101 at 051 (¶ 129) (Marshall Expert Rebuttal Report)). They inform whether the Respondents would have found it profitable to supply such buying groups, leading to Dr. Marshall's conclusion that Respondents acted against their unilateral self-interest. (CX7101 at 051 (¶ 129) (Marshall Expert Rebuttal Report)). The fact that the studies do not directly estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents'

anticompetitive conduct is irrelevant as a response to what the studies show. (CX7101 at 051 (¶ 129) (Marshall Expert Rebuttal Report)).

1735. For these reasons, Dr. Marshall's 2017 Smile Source analysis is not reliable or persuasive evidence that Schein acted contrary to its self-interest during the alleged conspiracy period.

Response to Proposed Finding No. 1735

This Proposed Finding is incomplete and misleading for reasons explained above in

Responses to Proposed Finding Nos. 1731-1734.

c. Dr. Marshall's 2013 Profitability Analysis Is Flawed Because It Uses Gerrymandered Numbers for the Atlantic Dental Analysis.

1736. Dr. Marshall also claims that Schein acted contrary to its self-interest in 2014 because it lost sales to Atlanta Dental in Atlanta among the [REDACTED] Smile Source customers that purchased from Atlanta Dental. (CX 7100-169-75). Dr. Marshall's analysis, however, does not show that Schein acted contrary to its self-interest for at least three reasons.

Response to Proposed Finding No. 1736

The second sentence in this Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. Nonetheless, this Proposed Finding is also inaccurate, incomplete, and misleading for reasons explained in Responses to Proposed Finding Nos. 1737-1741 below.

1737. *First*, Smile Source did not issue an RFP or otherwise seek to have Schein supply customers in the Atlanta, Georgia region. As such, any analysis of that region is incapable of demonstrating whether a nationwide contract with Smile Source would have been profitable for Schein in 2014.

Response to Proposed Finding No. 1737

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. This Proposed Finding is irrelevant to Dr. Marshall's five profitability studies which analyzed whether it was profitable for Respondents and other distributors to bid for and obtain buying group business and whether it was unprofitable for

them not to bid for the business of buying groups. (Marshall, Tr. 2861). Specifically, in his five profitability studies, Dr. Marshall examines what Respondents (who were not bidding for the buying group business) was foregoing in profits by not pursuing buying group business as their dentists customers substitute away from them towards the lower-priced buying group distributor supplier. (Marshall, Tr. 2867; *see also* CCFF ¶¶ 1647-1672).

1738. *Second*, the 2014 Atlanta Dental analysis only reflects [REDACTED] customers, and thus, it is plagued by a small sample size. Extrapolating from these [REDACTED] customers to all Smile Source customers nationwide is pure speculation. (CX 7100-170).

Response to Proposed Finding No. 1738

First, the first sentence in this Proposed Finding is not supported by any citation provided and should be disregarded. Second, this Proposed Finding is irrelevant, misleading, and incomplete to the extent that it suggests that Dr. Marshall should have studied a broader group of dentists than he did. For the buying group member dentists that Dr. Marshall studied in his profitability analyses, Dr. Marshall explained:

[REDACTED]

[REDACTED]

[REDACTED]

The purpose of Dr. Marshall's five profitability studies was to examine different episodes of dentist purchasing pattern before and after a distributor starts to (or stops) supply a buying group. (Marshall, Tr. 2861-2862). In the Kois-Burkhart (and his other) profitability studies, Dr. Marshall looked at which distributors buying group member dentists' purchased from *before* the distributor started supplying the buying group and which distributors buying group

member dentists' purchased from *after* the distributor started supplying the buying group.

(Marshall, Tr. 2865). Specifically explaining why he studied the Kois Buyers Group member dentists, Dr. Marshall explained that "[w]ell, the [REDACTED] dentists are the only ones to study for that study. They're the only ones who are making these decisions about who to buy from, the only ones who bought anything from Burkhart, who was the supplier, so they're the relevant ones to look at in this case, but they -- they are -- that's -- that's who should be studied in that case." (Marshall, Tr. 3222).

By performing the five profitability analyses, Dr. Marshall was able to assess the substitution behavior patterns of buying group member dentists before and after a distributor begins to (or stops) supplying a buying group. (Marshall, Tr. 2861). Accordingly, studying purchasing patterns of dentists, including dentists who were not a part of buying groups would not have made sense because including non-buying-group dentists in the case studies would not have yielded results relevant to product purchasing pattern switching after a dentist joins a buying group.

Third, this Proposed Finding are irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684;

[REDACTED] Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest, including Schein's, to have a no-buying group whereby it instructed its employees to categorically reject all buying groups. (CCFF ¶¶ 630-652). As such, based in part on Dr. Marshall's

review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387-3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group'...and it's passing on this as a matter of policy.'"))).

1739. *Third*, Dr. Marshall's analysis is flawed because he uses gerrymandered numbers. Specifically, Dr. Marshall's Atlanta Dental analysis purports to compare shares and margins from [REDACTED] to the sales and margins between [REDACTED] (CX 7100-173). In fact, however, rather than use Schein's 2012 margins in his analysis, he replaced it with Schein's 2011 margins. (CX 7100-172, n. 662, -173; Marshall, Tr. 3112-13). And he used 2012 margins for all other distributors. (CX 7100-172, n.662, -173); Marshall, Tr. 3113-14). Dr. Marshall in effect compares apples and oranges, further rendering his analysis unreliable.

Response to Proposed Finding No. 1739

The first sentence in this Proposed Finding is not supported by any citation provided and should be disregarded. Additionally, that sentence in this Proposed Finding is argumentative and not appropriate for a factual finding. Nonetheless, this Proposed Finding is incomplete

and misleading because it omits that Dr. Marshall explained that he used Schein's 2011 margins in his Atlanta Dental analysis since Schein's 2012 margin was an aberration based on Schein's average margins from surrounding years. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1740. Had Dr. Marshall used Schein's actual 2012 margins, Schein *earned* [REDACTED] rather than *lost* [REDACTED], as a result of Smile Source's decision to contract with Atlanta Dental. (Marshall, Tr. 3114-15; *see also* RXD 0014-42). {

[REDACTED]

}

Response to Proposed Finding No. 1740

This Proposed Finding is also irrelevant and should be disregarded because it relies on demonstrative RXD 0014-42 for support, in violation of the Court's Order On Post-Trial Briefs at 3 ("Do not cite to demonstrative exhibits as substantive evidence."). (*See* February 21, 2019 Order on Post-Trial Briefs). This Proposed Finding is incomplete and misleading because it omits that Dr. Marshall explained that he used Schein's 2011 margins since Schein's 2012 margin was an aberration based on Schein's average margins from surrounding years. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1741. While Dr. Marshall claims that the 2012 margins are an "outlier," he did no investigation as to the reason for Schein's 2012 margins. The data, for example, shows that Schein had substantially higher sales in 2012 than in 2011, as would be expected from a large reduction in price. (*See* RXD 0014-042; Marshall, Tr. 3113-15). Mix-and-matching the higher sales figures in 2012 with the higher prices for 2011 is plainly improper.

Response to Proposed Finding No. 1741

None of the sentences in this Proposed Finding is supported by any citation to evidence in the record and should be disregarded. This Proposed Finding is also irrelevant and should be disregarded because it relies on demonstrative RXD 0014-42 for support, in violation of the Court's Order On Post-Trial Briefs at 3 ("Do not cite to demonstrative exhibits as substantive evidence."). (*See* February 21, 2019 Order on Post-Trial Briefs). This Proposed Finding is

incomplete and misleading because it omits that Dr. Marshall explained that he used Schein's 2011 margins since Schein's 2012 margin was an aberration based on Schein's average margins from surrounding years. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

9. *Dr. Marshall's 2014 Kois Analysis Is Not Reliable Evidence of Acts Against Self-Interest.*

a. *Dr. Marshall's Kois Analysis Fails to Analyze the Offer the Kois Buyers Group Actually Presented.*

1742. In his initial report, Dr. Marshall presented an analysis of the Kois Buyers Group, concluding that Respondents acted contrary to their self-interest by not bidding for the Kois Buyers Group. Dr. Marshall, however, did not analyze the offer that the Kois group actually presented to Patterson and Schein, and testified that he "would have to spend some time" to evaluate it. (CX 8040 (Marshall, Dep. at 209-10, 222-23)).

Response to Proposed Finding No. 1742

This Proposed Finding is incomplete and misleading in representing that Dr. Marshall "did not analyze" the offer that the Kois Buyers Group actually presented to Patterson and Schein because Dr. Marshall testified that he had "seen this document before" and just that he "would have to review this document which could take a while" regarding the proposal that Kois made to Schein in October 2014 (RX2197) referenced in this Proposed Finding. (CX8040 (Marshall, Dep. at 209-10)).

1743. As Dr. Marshall did not analyze the actual offer that Schein and Patterson evaluated at the time, his opinions as to the Kois Buyers Group are unreliable.

Response to Proposed Finding No. 1743

First, this Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. Additionally, the Proposed Finding is argumentative and not appropriate for a factual finding.

Second, to the extent that this Proposed Finding suggests that Schein did not act against its self-interest by not bidding on Kois Buyers Group, it is inaccurate and misleading because Dr. Marshall explained that his five natural experiments (profitability studies) show that buying groups drive purchasing volume and are profitable for full-service distributors to serve, and that “Even if Carlton’s assessment of the facts were correct, that would not affect the conclusions I draw below from these profitability studies...[t]hese facts are in the data of the studies, and they follow regardless of whether Schein terminated its discussions with Smile Source and Kois or visa versa.” (CX7101 at 049 (¶¶ 119) (Marshall Expert Rebuttal Report)).

Third, this Proposed Finding is also irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED])

Accordingly, Dr. Marshall opined that it was against Respondents’ unilateral self-interest, including Schein’s, to have a no-buying group whereby it instructed its employees to categorically reject all buying groups. (CCFF ¶¶ 630-652). As such, based in part on Dr.

Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387-3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group'...and it's passing on this as a matter of policy.'")).

b. *Dr. Marshall's Washington State Kois Analysis Is Meaningless Because the Kois RFP Was National, and Burkhart's Share in Washington Is Far Below Schein's National Share.*

1744. In his reply report, Dr. Marshall presented a new analysis of distributors' profits among Kois members in Washington State. (CX 7101-052-53, 142 (Figure 14)). As an initial matter, that analysis is inadmissible because it was not presented in Dr. Marshall's initial report, and Respondents' experts did not have a chance to testify in response to it. (CX 7101-001; *see also* March 14, 2018 Scheduling Order).

Response to Proposed Finding No. 1744

This Proposed Finding is inaccurate and misleading in representing that the analysis in Dr. Marshall's Rebuttal Expert Report is "inadmissible" – Dr. Marshall submitted his Rebuttal Report on September 25, 2018 pursuant to the Court's March 14, 2018 Scheduling Order,

and all of Respondents experts had ample time to testify in response to it in all of their depositions and trial testimony – all of which took place in October and November 2018 well *after* Dr. Marshall’s Rebuttal Report was submitted on September 25, 2018. Moreover, Dr. Marshall’s Rebuttal Report (CX7101) is admitted into evidence on the Parties Joint Exhibit List JX002a.

1745. Even if it were considered, however, the analysis does not show that Schein acted contrary to its self-interest for at least five reasons.

Response to Proposed Finding No. 1745

This Proposed Finding is vague and unintelligible as to what “the analysis” and “reasons” refer to. This Proposed Finding is also irrelevant, inaccurate, incomplete, and misleading for the reasons explained in Responses to Proposed Finding Nos. 1746-1752 below.

1746. *First*, as a factual matter, the evidence does not support Dr. Marshall’s assumption that Schein did not enter into good-faith negotiations with the Kois Buyers Group to supply Kois members, or that it acted unreasonably during such negotiations. (*See* SF 893-919).

Response to Proposed Finding No. 1746

First, this Proposed Finding is irrelevant, inaccurate, misleading and provides no support for the suggestion that Dr. Marshall assumed “that Schein did not enter into good-faith negotiations with Kois Buyers Group to supply Kois members, or that it acted unreasonably during such negotiations. The Proposed Finding is not supported by a citation to SF 893-919 for the reasons set forth in Responses to Proposed Finding Nos. 893-919.

Second, to the extent that this Proposed Finding suggests that Schein did not act against its self-interest by not bidding on Kois Buyers Group, it is inaccurate and misleading because Dr. Marshall explained that his five natural experiments (profitability studies) show that buying groups drive purchasing volume and are profitable for full-service distributors to serve, and that “Even if Carlton’s assessment of the facts were correct, that would not affect

the conclusions I draw below from these profitability studies...[t]hese facts are in the data of the studies, and they follow regardless of whether Schein terminated its discussions with Smile Source and Kois or visa versa.” (CX7101 at 049 (¶ 119) (Marshall Expert Rebuttal Report)).

1747. *Second*, the Kois Buyers Group did not seek a contract limited to Washington State members; rather, the Kois Buyers Group was seeking a nationwide contract. (*See* RX 2197-007 (Kois proposal to Schein)). Since the contracting decision was nationwide, any profitability analysis must also be nationwide.

Response to Proposed Finding No. 1747

The second sentence in this Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded.

1748. *Third*, Dr. Marshall did not do any analysis of *Schein’s* profitability had it won the Kois contract. Rather, as with Dr. Marshall’s nationwide analysis, Dr. Marshall only looked at Schein’s losses among customers that switched to Burkhart, failing to account for both the cannibalization rate and reduced margins that Schein would have experienced had it won the contract. (Marshall, Tr. 3024-27).

Response to Proposed Finding No. 1748

First, this Proposed Finding is incomplete and misleading because it omits Dr. Marshall’s full explanation regarding his examined the effects of potential cannibalization by studying Kois Buyers Group members in an area where the buying group supplier Burkhart had a high degree of penetration: Washington State. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] that it was significant to examine the impact of Burkhart supplying Washington State Kois Buyers Group dentists because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In his Kois-Burkhart Washington State profitability study (illustrated in Figure 14 of his Expert Rebuttal Report), Dr. Marshall found that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Dr. Marshall testified that buying group opportunities were profitable even for a larger full-service distributor and describes that in the state of Washington, Burkhart, Patterson, and Schein have roughly equivalent market share, so by analogy, “what is profitable in that case for Burkhart would be profitable in that case for Burkhart would be profitable for Schein or Patterson to engage in.” (Marshall, Tr. 2874-2875).

Second, this Proposed Finding is also irrelevant to the extent that it suggests that Dr. Marshall should have done a “counter-factual” or “but-for” analysis for reasons explained in Responses to Proposed Finding Nos. 1715-1721. Dr. Marshall’s five studies examined real-world examples of profits gained and lost in actual circumstances involving full-service

distributors and buying groups. (CX7101 at 051 (¶ 129) (Marshall Expert Rebuttal Report)). They inform whether the Respondents would have found it profitable to supply such buying groups, leading to Dr. Marshall's conclusion that Respondents acted against their unilateral self-interest. (CX7101 at 051 (¶ 129) (Marshall Expert Rebuttal Report)). The fact that the studies do not directly estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents' anticompetitive conduct is irrelevant as a response to what the studies show. (CX7101 at 051 (¶ 129) (Marshall Expert Rebuttal Report)).

Third, this Proposed Finding is inaccurate and misleading to the extent that it suggests that Dr. Marshall's profitability studies results do not apply to a larger national full-service distributor, such as Schein. Dr. Marshall performed two different data-driven studies of incentives and losses of the largest national full-service distributor: the Schein-Smile Source 2012 profitability study, and the Schein-Smile-Source 2017 profitability study. (CCFF ¶¶ 1675-1884). In these two different instances, Dr. Marshall found that it was in Schein's interest to do business with buying groups. (CCFF ¶¶ 1675-1884). While Schein's share of sales nationwide is somewhat higher than Patterson and Benco [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Dr. Marshall testified that buying group opportunities were profitable even for a larger full-service distributor and describes that in the state of Washington, Burkhardt, Patterson, and

Schein have roughly equivalent market share, so by analogy, “what is profitable in that case for Burkhart would be profitable in that case for Burkhart would be profitable for Schein or Patterson to engage in.” (Marshall, Tr. 2874-2875).

1749. *Fourth*, Schein had substantially higher market shares nationwide than Burkhart had, even in Washington State. Increased market share typically implies that there is less benefit, or a greater loss, associated with supplying a buying group. (Marshall, Tr. 3028-29 [REDACTED])

[REDACTED]). As such, the Burkhart Washington State analysis is not probative of Schein’s profits in supplying the Kois Buyers Group or any other buying group.

Response to Proposed Finding No. 1749

For reasons explained in more detail in Response to Proposed Finding No. 1748, this Proposed Finding is inaccurate and misleading to the extent that it suggests that “the Burkhart Washington State analysis is not probative of Schein’s profits in supplying the Kois Buyers Group or any other buying group.” Additionally, while Dr. Marshall acknowledges that supplying buying groups is likely to be less profitable for a larger distributor than a smaller distributor due to higher risk for the larger distributor for cannibalizing its existing customer base, he explains why [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

This Proposed Finding is inaccurate and misleading to the extent that it suggests that Dr. Marshall’s profitability studies results do not apply to a larger national full-service

distributor, such as Schein. Dr. Marshall performed two different data-driven studies of incentives and losses of the largest national full-service distributor: the Schein-Smile Source 2012 profitability study, and the Schein-Smile-Source 2017 profitability study. (CCFF ¶¶ 1675-1884). In these two different instances, Dr. Marshall found that it was in Schein's interest to do business with buying groups. (CCFF ¶¶ 1675-1884). While Schein's share of sales nationwide is somewhat higher than Patterson and Benco [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Dr. Marshall testified that buying group opportunities were profitable even for a larger full-service distributor and describes that in the state of Washington, Burkhart, Patterson, and Schein have roughly equivalent market share, so by analogy, "what is profitable in that case for Burkhart would be profitable in that case for Burkhart would be profitable for Schein or Patterson to engage in." (Marshall, Tr. 2874-2875).

1750. In response, Dr. Marshall argued his analysis was probative because Burkhart and Schein "have essentially equivalent shares" in Washington. (Marshall, Tr. 2874). While Schein and Burkhart each had about [REDACTED] share in Washington State, that analysis is misleading. Schein's share nationwide was [REDACTED]. (CX 7101-142-43 (Figure 16)). Dr. Marshall's Washington State analysis assumes that Schein would act like a regional distributor with [REDACTED] market share in Washington only, when in reality Schein was a nationwide distributor with [REDACTED] market share. Dr. Marshall's Washington State analysis does not speak to the profitability of a distributor with nationwide shares similar to Schein's. (CX 7101-142-43 (Figure 16)).

Response to Proposed Finding No. 1750

First, this Proposed Finding is inaccurate and misleading to the extent that it suggests that Dr. Marshall should have applied Schein's national market share to a regional study because this statement is not supported by any citation or evidence in the record. Second, Dr. Marshall explained that it was significant to examine the impact of Burkhardt supplying Washington State Kois Buyers Group dentists because [REDACTED]

Third, in his Kois-Burkhart Washington State profitability study (illustrated in Figure 14 of his Expert Rebuttal Report), Dr. Marshall found that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] While Schein's share of sales nationwide is somewhat higher than Patterson and Benco [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Dr. Marshall testified that buying group opportunities were profitable even for a larger full-service distributor and describes that in the state of Washington, Burkhardt, Patterson, and

Schein have roughly equivalent market share, so by analogy, “what is profitable in that case for Burkhart would be profitable in that case for Burkhart would be profitable for Schein or Patterson to engage in.” (Marshall, Tr. 2874-2875).

Dr. Marshall acknowledges that supplying buying groups is likely to be less profitable for a larger distributor than a smaller distributor due to higher risk for the larger distributor for cannibalizing its existing customer base [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

This Proposed Finding is inaccurate and misleading to the extent that it suggests that Dr. Marshall’s profitability studies results do not apply to a larger national full-service distributor, such as Schein. Dr. Marshall performed two different data-driven studies of incentives and losses of the largest national full-service distributor: Schein – the Schein-Smile Source 2011 profitability study, and the Schein-Smile-Source 2017 profitability study. (CCFF ¶¶ 1675-1884). In these two different instances, Dr. Marshall found that it was in Schein’s interest to do business with buying groups. (CCFF ¶¶ 1675-1884).

While Schein’s share of sales nationwide is somewhat higher than Patterson and Benco

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Dr. Marshall testified that buying group opportunities were profitable even for a larger full-service distributor and describes that in the state of Washington, Burkhart, Patterson, and Schein have roughly equivalent market share, so by analogy, “what is profitable in that case for Burkhart would be profitable in that case for Burkhart would be profitable for Schein or Patterson to engage in.” (Marshall, Tr. 2874-2875).

1751. Similarly, while Dr. Marshall’s Washington State profitability analysis states that Burkhart had a pre-contract share among Kois members of [REDACTED] (see CX 7101-142 (Figure 14)), that number is *not* Burkhart’s share in the relevant market or the share Burkhart had among all potential Kois members. Rather, Dr. Marshall only looks at the subset of potential Kois members that actually purchased from Burkhart, thus inflating the pre-contract market shares. (Marshall, Tr. 3024). As such, the fact that Burkhart’s [REDACTED] in the Washington State profitability analysis is [REDACTED] is not indicative of the profitability that a firm with an approximately 40% market share nationwide would experience. (CX 7101-142 (Figure 14); see also Marshall, Tr. 3030).

Response to Proposed Finding No. 1751

This Proposed Finding is inaccurate and misleading to the extent that it suggests that Dr. Marshall should have applied Schein’s national market share to a regional study because this statement is not supported by any citation or evidence in the record and should be disregarded. This Proposed Finding is irrelevant and unintelligible as to what “pre-contract share” Kois members refer to. To the extent this Proposed Finding inartfully attempts to assert that the group of dentists to study were Kois Tribe members instead of Kois Buyers Group members, it is incomplete and misleading to the extent that it suggests that Dr. Marshall should have studied a different or broader set of dentists in general for his analysis – for the buying group member dentists that Dr. Marshall studied in his profitability analyses, Dr. Marshall explained:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This Proposed Finding is also incomplete and misleading to the extent that it suggests that Dr. Marshall's Washington State profitability analysis should have included a broader group of Kois Tribe Members, not just Kois Buyer Group Members, as Dr. Marshall explained:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1752. *Fifth*, Dr. Marshall's Washington State profitability analysis, even if credited, only shows that it *may* be profitable to do business with a buying group, depending on a distributors' sales and shares. As such, the analysis is fully consistent with Schein's approach to buying groups, which is to evaluate them on a case-by-case basis.

Response to Proposed Finding No. 1752

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. This Proposed Finding is also irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five

profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED])

Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest, including Schein's, to have a no-buying group whereby it instructed its employees to categorically reject all buying groups. (CCFF ¶¶ 630-652). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387-3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group'...and it's passing on this as a matter of policy.'")). Dr. Marshall's five studies examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups. (CX7101

at 051 (¶ 129) (Marshall Expert Rebuttal Report)). They inform whether the Respondents would have found it profitable to supply such buying groups, leading to Dr. Marshall's conclusion that Respondents acted against their unilateral self-interest. (CX7101 at 051 (¶ 129) (Marshall Expert Rebuttal Report)). The fact that the studies do not directly estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents' anticompetitive conduct is irrelevant as a response to what the studies show. (CX7101 at 051 (¶ 129) (Marshall Expert Rebuttal Report)).

F. Dr. Marshall Has Not Shown Anticompetitive Effects.

1753. Because the evidence does not establish that Respondents engaged in a conspiracy, there is no need to address anticompetitive effects. (*See* CoL 96).

Response to Proposed Finding No. 1753

This Proposed Finding improperly cites to a Conclusion of Law to be adopted as a Proposed Finding and should be disregarded.

1754. Nonetheless, Complaint Counsel has failed to establish that the alleged conduct had anticompetitive effects. Complaint Counsel relies on the testimony of its expert, Dr. Marshall for the conclusion that Respondents' conduct caused anticompetitive effects. (CC Pretrial Br. at 58).

Response to Proposed Finding No. 1754

This Proposed Finding is incomplete, misleading, inaccurate, and unsupported by any citation to the record evidence and should be disregarded. Nonetheless, as stated in Complaint Counsel's Pretrial Brief, "Dr. Marshall will offer evidence corroborating the harm resulting from Respondents' conspiracy." (CC Pretrial Br. at 59). The record evidence, including Dr. Marshall's analyses, demonstrates that Respondents' agreement harmed competition. Respondents' conspiracy eliminated competition between the three largest dental distributors—together controlling approximately 78%-84% of the market—for discounts to buying groups. (CCFF ¶¶ 1458, 1455, 1456, 1457, 1450). Before the

conspiracy, Respondents each decided independently whether to discount to buying groups. In fact, competition before the conspiracy drove Schein to discount to a few buying groups, and Patterson to near-completion of a buying group arrangement. (CCFF ¶¶ 432-453 (Schein sold to buying groups before 2011); CCFF ¶¶ 454-473 (Patterson was negotiating with the New Mexico Dental Cooperative)). During the conspiracy, however, Respondents systematically instructed their respective sales forces to reject buying groups. (CCFF ¶¶ 398-399, 406-425, 527, 534-563, 630-650, 661-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). As a result, Respondents refused to discount to at least 29 buying groups, including:

1. Academy of General Dentistry Buying Group
2. American Academy of Cosmetic Dentistry
3. Business Intelligence Group
4. Catapult Group
5. Dental Purchasing Group
6. Dental Visits LLC
7. Dentistry Unchained
8. DDS Group
9. Dr. David Carter
10. Erie Family Dental Equipment
11. Florida Dental Association
12. IDA
13. Insight Sourcing Group
14. Kois Buyers Group

15. Dr. Nardduci Buying Group
16. New Mexico Dental Cooperative
17. Nexus Dental
18. Pacific Group Management Services
19. Pearl Network Buying Group
20. Unified Smiles
21. UOBG
22. Smile Source
23. Dr. Stephen Sebastian
24. Save Dentists, Inc.
25. Schulman Group
26. Synergy Dental Partners
27. Tralongo
28. WheelSpoke LLC
29. XYZ Dental

(CCFF ¶¶ 1-2079). After the collapse of the conspiracy, all three Respondents started doing business with buying groups. [REDACTED]

[REDACTED] (CCFF ¶¶ 1366, 1406-1408); Schein began discounting to the buying groups Klear Impakt (CCFF ¶¶ 1318, 1398-1399), Smile Source (CCFF ¶¶ 1319, 1393-1395), Teeth Tomorrow (CCFF ¶¶ 1400-1402), and Mastermind Group (CCFF ¶¶ 1403-1405); and Patterson [REDACTED] [REDACTED]. (CCFF ¶¶ 1410-1411).

As evidenced by Respondents' buying group arrangements before and after the conspiracy, dentists who were members of buying groups benefit by receiving discounts

off catalog price (CCFF Section IV.D (“Buying Groups Save Dentists Money and Help Preserve Independent Dentistry”), the price that many dentists paid during the conspiracy period. (CCFF ¶ 1415). For example, buying group members had access to the following discounts from Respondents before and after the conspiracy:

- Schein/Smile Source: [REDACTED] (CCFF ¶¶ 1391-1392 (prior to 2011), 1393-1395 (2017 and current agreements))
- Benco/EDA: [REDACTED] (CCFF ¶¶ 1406-1408)
- Schein/Klear Impakt: [REDACTED] (CCFF ¶¶ 1398, 1399)
- Schein/Mastermind: blended discount of [REDACTED] (CCFF ¶¶ 1403-1405)
- Schein/Teeth Tomorrow: [REDACTED] (CCFF ¶¶ 1400-1402)
- Patterson’s [REDACTED] (CCFF ¶ 1410; *see also* CCFF ¶ 1411 [REDACTED])

Dr. Marshall also conducted empirical analyses indicating that because Schein, Patterson, and Benco are the three largest, and only nationwide, full-service distributors, their refusal to supply dental buying groups likely slowed the formation of such groups. (CCFF ¶¶ 1442-1445).

1755. Dr. Marshall offers two bases for his opinion that Respondents conduct resulted in anticompetitive effects. *First*, Dr. Marshall cites to his pricing and profitability analyses of the Smile Source and Kois buying groups. *Second*, he identifies a list of 36 additional buying groups (or 38 including Smile Source and the Kois Buyers Group) that “approached Schein, Patterson, and/or Benco” and were “turned down” by at least one Respondent. (CX 7100-209-13 (emphasis added)).

Response to Proposed Finding No. 1755

This Proposed Finding is inaccurate, incomplete, and misleading because it omits that to support his opinion that Respondents conduct resulted in anticompetitive effects, Dr.

Marshall also (1) identifies economic principles that indicate that an agreement to refuse to

provide discounts to or otherwise compete for buying groups is anticompetitive and likely to elevate prices, (2) the fact that executives of Schein, Patterson, and Benco have not testified to any procompetitive justification for the challenged restraint (and, thus, there are no proffered efficiencies), (3) that Benco, Patterson, and Schein all instructed their sales force to not do business with buying groups, and (4) anecdotal and empirical evidence reflecting that independent dentists were interested in buying groups and that Respondents refusal to supply dental buying groups likely slowed the formation and growth of such groups. [REDACTED]

1756. Neither the analysis of the Kois Buyers Group and Smile Source, nor the analysis of remaining 36 buying groups, supports a finding of anticompetitive effects in any relevant market.

Response to Proposed Finding No. 1756

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. This Proposed Finding is also inaccurate, incomplete, and misleading for reasons explained below in Responses to Proposed Finding Nos. 1757-1771.

1. *Dr. Marshall's Pricing and Profitability Analysis for Smile Source and the Kois Buyers Group Does Not Constitute Reliable Evidence of Anticompetitive Effects.*

1757. Dr. Marshall relies on his analysis of the Smile Source and Kois buying groups for his opinion that the Respondents' alleged conduct was "anticompetitive." (CX 7100-208). Specifically, he cites to (i) Smile Source's termination of Schein in 2012; (ii) Smile Source's decision to contract with Atlanta Dental in 2013; (iii) Smile Source's decision to contract with Schein in 2017; and (iv) Dr. Kois' decision to contract with Burkhart in 2014. None of these four pricing and profitability analyses establish anticompetitive effects, for at least the following three reasons.

Response to Proposed Finding No. 1757

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. Nonetheless, this Proposed Finding is incomplete for reasons explained in Response to Proposed Finding No. 1754-1755. Moreover, this Proposed

Finding is incomplete and misleading because it omits one of Dr. Marshall's fifth profitability analysis: his Burkhardt-Smile Source 2012 profitability analysis. (CCFF ¶¶ 1662-1674). Finally, this Proposed Finding is incomplete, inaccurate, and misleading for reasons explained in Responses to Proposed Finding Nos. 1758-1771 below.

1758. *First*, none of the pricing or profitability analyses account for the fees that buying group members must pay to the buying group. With respect to Smile Source, Dr. Marshall made no attempt to account for any portion of the royalties that Smile Source members pay to Smile Source that could be avoided if they chose to purchase from Schein outside of a buying group. (CX 7100-208).

Response to Proposed Finding No. 1758

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. This Proposed Finding is misleading, incomplete, inaccurate to the extent that it suggests that Dr. Marshall did not identify harm to competition from the Respondents conspiracy not to do business with buying groups. The record evidence establishes that Respondents' conspiracy harmed competition. (CCFF ¶¶ 1412-1445). Additionally, in his expert report, Dr. Marshall did identify harm to competition or the competitive impact of Respondents' conduct (i.e., the conduct was anticompetitive).

[REDACTED]

The Proposed Finding is inaccurate and misleading to the extent that it suggests that it was not profitable for Schein to win Smile Source's business in 2017. Dr. Marshall's profitability analysis, based only on data, demonstrated that it was profitable for Schein to win Smile Source's business again in 2017, even when taking administrative and other fees that Schein raises into account. (CCFF ¶¶ 1681-1684; *see also* [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1759. With respect to the Kois Buyers Group, Dr. Marshall's profitability analyses similarly report prices and profits without regard to the fee that Kois members must pay to the Kois group. (CX 7100-208). While Dr. Marshall states that Kois members saved money if they purchased through Burkhart, Dr. Marshall only included the fees after Mr. Kois reduced the membership fee from approximately \$6,000 per year to \$299 in October 2015. (CX 7100-062, 158; SF 924-29). Dr. Marshall did not find that Kois members would have benefited from joining the Kois Buyers Group based on the membership terms of the buying group at the time Dr. Kois chose to contract with Burkhart instead of Schein. (Marshall, Tr. 3025-27).

Response to Proposed Finding No. 1759

This Proposed Finding is inaccurate and misleading because the trial testimony cited does not indicate that Dr. Marshall found that Kois members would not have benefited from joining the Kois Buyers Group based on the membership terms of the buying group at the time Dr. Kois chose to contract with Burkhart instead of Schein – instead, the testimony cited

[REDACTED]

[REDACTED]

[REDACTED] This Proposed Finding is misleading, incomplete, inaccurate to the extent that it suggests that Dr. Marshall did not identify harm to competition from the Respondents conspiracy not to do business with

buying groups. The record evidence establishes that Respondents' conspiracy harmed competition. (CCFF ¶¶ 1412-1445). And in his Expert Report, Dr. Marshall did identify harm to competition or the competitive impact of Respondents' conduct (i.e., the conduct was anticompetitive). [REDACTED]

[REDACTED] The Proposed Finding is also not supported by a citation to SF 924-29 for the reasons set forth in Responses to Proposed Finding Nos. 924-29.

1760. *Second*, none of the pricing and profitability analyses show how prices or profitability were affected *in the relevant market* or even among all buying group members. Each analysis simply compares prices or profits for a single distributor before and after the buying group made a vendor selection. (Marshall, Tr. 3002-03; 3243-44). Such an analysis does not show how net prices to a single dentist may have changed (since dentists may purchase from more than one supplier), let alone how average prices among all relevant dentists within a specific geography or group have changed. (Marshall, Tr. 3136-37).

Response to Proposed Finding No. 1760

The Proposed Finding is misleading, incomplete, inaccurate, and vague insofar as it suggests that Dr. Marshall did not identify harm to competition from the Respondents conspiracy not to do business with buying groups. The record evidence establishes that Respondents' conspiracy harmed competition. (CCFF ¶¶ 1412-1445). And in his Expert Report, Dr. Marshall did identify harm to competition or the competitive impact of Respondents' conduct (i.e., the conduct was anticompetitive). [REDACTED]

[REDACTED]

This Proposed Finding is incomplete and misleading because it omits that Dr. Marshall offered quantitative analyses that validates the economic principle that aggregation of purchasing power through buying groups leads to lower prices for dentists and lower margins for distributors based on price analyses that were a part of his five profitability analyses case studies. (CCFF ¶¶ 1416-1441). For example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Further, when Schein resumed its contract with Smile Source in March 2017, the prices that Smile Source members paid to Schein declined, as did the margins that Schein charged those dentists. (CCFF ¶ 1432). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Proposed Finding is misleading, incomplete, and vague to the extent that it suggests that Dr. Marshall did not properly define the relevant geographic market. Dr. Marshall opined in his Expert Report in this matter that “the relevant geographic markets are no larger than the United States, and local in nature.” (CX7100 at 010-011, 090-110 (¶¶11, 227-280) (Marshall Expert Report)). Moreover, Dr. Marshall illustrates two of these local relevant geographic markets (Atlanta and Seattle) in his expert report. (CX7100 at 092-109 (¶¶233-277) (Marshall Expert Report)). In Dr. Marshall’s opinion, these geographic markets are “representative of similar analyses that could be performed throughout the United States” and that “Atlanta and Seattle are local markets in which [the Respondents] are least likely to have collective market power.” (CX7100 at 109 (¶ 278) (Marshall Expert Report); CCFF ¶¶ 1567-1600). Dr. Marshall continued that “delineating the bounds of many separate local geographic markets is neither relevant to nor necessary for my subsequent analysis of Respondents’ conduct and its effects.” (CX7100 at 109 (¶ 278) (Marshall Expert Report)). This Proposed Finding is also misleading, incomplete, and vague to the extent that it suggests that Dr. Marshall did not properly define the relevant product market: Dr. Marshall concluded that the appropriate relevant market in this matter is the full line of dental products and services sold through full-service distributors to independent dentists. (CX7100 at 010, 072-073 (¶¶10, 176-179) (Marshall Expert Report); *see also* CCFF ¶¶ 1153-1566).

1761. *Third*, Dr. Marshall's pricing analysis does not control for other factors that may affect changes in his price indices, such as changes in mix of goods (to the extent not accounted for in his indices) or changes in the cost of goods sold.

Response to Proposed Finding No. 1761

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. This Proposed Finding is misleading, incomplete, inaccurate to the extent that it suggests that Dr. Marshall did not identify harm to competition from the Respondents conspiracy not to do business with buying groups. The record evidence establishes that Respondents' conspiracy harmed competition. (CCFF ¶¶ 1412-1445). And in his Expert Report, Dr. Marshall did identify harm to competition or the competitive impact of Respondents' conduct (i.e., the conduct was anticompetitive). { [REDACTED]

[REDACTED]

2. Dr. Marshall's Listing of 36 Additional "Turned Down" Buying Groups Does Not Constitute Reliable Evidence of Anticompetitive Effects.

1762. Dr. Marshall has not shown any anticompetitive effect as to the remaining 36 entities (other than the Kois Buyers Group and Smile Source) listed in paragraph 491 of his initial report. Dr. Marshall claimed that for each group, one or more of the Respondents considered it to be a buying group of independent dentists, and the group may have "approached Schein, Patterson, and/or Benco, and were turned down" between 2011 and 2015. (CX 7100-209-13; Marshall, Tr. 2974-75, 2986, 2894-95, 2902). According to Dr. Marshall, this "almost certainly implies that buying groups were encumbered in terms of being able to get a supplier, and if they did, it would come at an elevated price from lack of bidding pressure." (CX 7100-209-13; Marshall, Tr. 2895). This listing of buying groups in paragraph 491 is irrelevant, inadmissible, and unpersuasive.

Response to Proposed Finding No. 1762

The first and last sentences in this Proposed Finding are not supported by any citation to the evidence in the record and should be disregarded. Additionally, these sentences in this Proposed Finding are argumentative and not appropriate for a factual finding. Moreover, the list of buying groups in paragraph 491 of Dr. Marshall's report is contained in a document is on JX002a which identifies Complaint Counsel's Exhibits that are admitted into evidence.

Further, none of Respondents' counsel objected that the list or Dr. Marshall's opinion was "inadmissible" during trial.

Nonetheless, this Proposed Finding is misleading, incomplete, inaccurate to the extent that it suggests that Dr. Marshall did not identify harm to competition from the Respondents conspiracy not to do business with buying groups. The record evidence establishes that Respondents' conspiracy harmed competition. (CCFF ¶¶ 1412-1445). And in his Expert Report, Dr. Marshall did identify harm to competition or the competitive impact of Respondents' conduct (i.e., the conduct was anticompetitive). [REDACTED]

This Proposed Finding is incomplete and misleading because it omits Dr. Marshall's explanation as to why he included this list of buying groups in the anticompetitive effects section of his expert report: "...in paragraph 491, they're buying groups that are recognized as buying groups by at least one of the respondents where at least one of the respondents is not bidding for the business of these buying groups. *And the implication here is that there is diminished competition for those buying groups, and the implication is that some of them are not going to get supplied, or if they are going to get supplied, they're getting supplied at higher prices.*" (Marshall, Tr. 2901-2902) (emphasis added); [REDACTED]

3385 ("[T]he list is just a measure of anticompetitive harm associated with the conspiracy... [a]gain, it's just a – it's just a measure of 38 buying groups that the respondents are recognizing as such and then somebody is not bidding for the business, which implies an anticompetitive harm" and "It's just an illustration of the anticompetitive harm that goes on when respondents don't do business with buying clubs.").

1763. As an initial matter, Complaint Counsel may not use an expert to establish facts. As such, Dr. Marshall's testimony does not establish that the entities listed in paragraph 491 are buying groups, that Respondents declined to do business with such entities, or that any refusals to do business with such entities were the result of a conspiracy. Without such evidence, there is no basis for concluding that Respondents conduct caused any anticompetitive effects with respect to these groups.²⁴

Response to Proposed Finding No.1763

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. This Proposed Finding is inaccurate and misleading to the extent that it suggests that Complaint Counsel is using an expert to establish facts - Dr. Marshall was clear that he was not finding facts when he explained why he included this list of buying groups in the anticompetitive effects section of his expert report – instead, he explained that:

So there's -- these are buying groups that are recognized -- in paragraph 491, they're buying groups that are recognized as buying groups by at least one of the respondents where at least one of the respondents is not bidding for the business of these buying groups. *And the implication here is that there is diminished competition for those buying groups, and the implication is that some of them are not going to get supplied, or if they are going to get supplied, they're getting supplied at higher prices.*"

(Marshall, Tr. 2901-2902) (emphasis added); Marshall, Tr. [REDACTED] 3385

("[T]he list is just a measure of anticompetitive harm associated with the conspiracy...

[a]gain, it's just a – it's just a measure of 38 buying groups that the respondents are

recognizing as such and then somebody is not bidding for the business, which implies an

anticompetitive harm" and "It's just an illustration of the anticompetitive harm that goes on

when respondents don't do business with buying clubs.")).

1764. At least 23 groups out of Dr. Marshall's list of "38 buying groups" that were "turned down" by one or more Respondents are listed without a single Schein-related piece of evidence cited in support. (CX 7100-203-06, n.834, 837-850, 853-861, 866-869; Marshall, Tr. 3007).

²⁴ Dr. Marshall cites this list solely for the purpose of demonstrating anticompetitive effects, and not to prove (i) the existence of a conspiracy; (ii) the existence of parallel conduct; (iii) any act against self-interest; or (iv) causation between the alleged agreement and impact on any buying group. The Court declines to consider Dr. Marshall's opinion for such purposes, as it goes beyond Dr. Marshall's expert report, and would require Dr. Marshall to impermissibly make factual findings concerning Respondents' conduct or dealings with such groups.

Response to Proposed Finding No. 1764

Complaint Counsel has no specific response.

1765. Indeed, eight groups on Dr. Marshall's list are not even buying groups at all according to Complaint Counsel. (*Compare* RX 2956-004 and RX 3087, with CX 7100-209-13).

Response to Proposed Finding No. 1765

The citation should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (*See* February 21, 2019 Order on Post-Trial Briefs). Additionally, this Proposed Finding is vague and unintelligible as to what "eight groups" it is referring to, and no specific groups are identified anywhere in the Proposed Finding.

1766. In the end, Dr. Marshall's competitive effects opinion assumes the conclusion. With respect to the 36 remaining groups allegedly turned down, Dr. Marshall assumes, but does not establish, that the groups' members suffered anticompetitive harm. He conducted no quantitative analysis for these groups; instead, he merely equated the act of turning down a buying group with an anticompetitive effect. (Marshall, Tr. 2987).

Response to Proposed Finding No. 1766

This Proposed Finding is not supported by any citation to the evidence in the record, is argumentative and not appropriate for a factual finding, and should be disregarded.

Additionally, Dr. Marshall's testimony cited does not support the Proposed Fact – Dr.

Marshall did not assume a conclusion or provide any testimony indicating that he "merely equated the act of turning down a buying group with an anticompetitive effect." Instead, Dr. Marshall explained that "...in paragraph 491, they're buying groups that are recognized as buying groups by at least one of the respondents where at least one of the respondents is not bidding for the business of these buying groups. *And the implication here is that there is diminished competition for those buying groups, and the implication is that some of them are not going to get supplied, or if they are going to get supplied, they're getting supplied at*

higher prices.” (Marshall, Tr. 2901-2902) (emphasis added); Marshall, Tr. [REDACTED], 3385 (“[T]he list is just a measure of anticompetitive harm associated with the conspiracy... [a]gain, it's just a – it's just a measure of 38 buying groups that the respondents are recognizing as such and then somebody is not bidding for the business, which implies an anticompetitive harm” and “It's just an illustration of the anticompetitive harm that goes on when respondents don't do business with buying clubs.”).

This Proposed Finding is misleading, incomplete, inaccurate to the extent that it suggests that Dr. Marshall did not identify harm to competition from the Respondents conspiracy not to do business with buying groups. The record evidence establishes that Respondents' conspiracy harmed competition. (CCFF ¶¶ 1412-1445). And in his Expert Report, Dr. Marshall did identify harm to competition or the competitive impact of Respondents' conduct (i.e., the conduct was anticompetitive). [REDACTED]

1767. Dr. Marshall's assumption that each of the “turned down” buying groups suffered anticompetitive effects is flawed for four reasons.

Response to Proposed Finding No. 1767

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. This Proposed Finding is also inaccurate and misleading for reasons explained in Responses to Proposed Finding Nos. 1768-1771.

1768. *First*, Dr. Marshall assumes that, in the but-for world, the buying group would not have been turned down. But neither Dr. Marshall nor Complaint Counsel established that any of these 36 buying groups presented an attractive or profitable business opportunity for any Respondent. (Marshall, Tr. 2987 [REDACTED])

Response to Proposed Finding No. 1768

This Proposed Finding is irrelevant, misleading, incomplete, inaccurate to the extent that it suggests that Dr. Marshall did not identify harm to competition from the Respondents conspiracy not to do business with buying groups. The record evidence establishes that Respondents' conspiracy harmed competition. (CCFF ¶¶ 1412-1445). And in his Expert Report, Dr. Marshall did identify harm to competition or the competitive impact of Respondents' conduct (i.e., the conduct was anticompetitive). [REDACTED]

[REDACTED] Additionally, the Proposed Finding is incomplete and misleading because many of the groups in Dr. Marshall's list were never fully formed because they could not secure supply discounts from Respondents, precluding any data analysis. (CX 7101 at 64 (¶ 163) (Marshall Expert Rebuttal Report) ("Many of these 38 buying groups may simply not have gotten off the ground due to their inability to secure supply from Schein, Patterson, or Benco, and so there would be no data to analyze in the first place.")).

1769. *Second*, Dr. Marshall has not shown that each of the 36 buying groups was unable to contract with another full-service or on-line distributor. Indeed, both Smile Source and the Kois Buyers Group – the only two buying groups Dr. Marshall analyzed – were able to negotiate contracts with at least one alternative supplier. To the extent that a buying group is able to contract with another distributor, the likelihood of anticompetitive effects would be eliminated.

Response to Proposed Finding No. 1769

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded. This Proposed Finding is irrelevant, misleading, incomplete, inaccurate to the extent that it suggests that Dr. Marshall did not identify harm to competition from the Respondents conspiracy not to do business with buying groups. The record evidence establishes that Respondents' conspiracy harmed competition. (CCFF ¶¶ 1412-1445). And in his Expert Report, Dr. Marshall did identify harm to competition or the

competitive impact of Respondents' conduct (i.e., the conduct was anticompetitive).

[REDACTED]

1770. *Third*, because Dr. Marshall did no quantitative analysis with respect to any of these 36 groups, he has not shown that their *members* paid higher prices than they otherwise would have but for the alleged conspiracy. (Marshall, Tr. 3388 ("I haven't done a specific data analysis with regard to the other 36.")).

Response to Proposed Finding No. 1770

This Proposed Finding is irrelevant, misleading, incomplete, inaccurate to the extent that it suggests that Dr. Marshall did not identify harm to competition from the Respondents conspiracy not to do business with buying groups. The record evidence establishes that Respondents' conspiracy harmed competition. (CCFF ¶¶ 1412-1445). And in his Expert Report, Dr. Marshall did identify harm to competition or the competitive impact of Respondents' conduct (i.e., the conduct was anticompetitive).

[REDACTED]

[REDACTED]

1771. *Fourth*, even if one were to assume that some members may not have received the same discounts as they would have had at least one Respondent contracted with the buying group, Dr. Marshall did no analysis to show that prices generally within any relevant market were higher than they would have been but for the alleged conduct.

Response to Proposed Finding No. 1771

This Proposed Finding is not supported by any citation to the evidence in the record and should be disregarded.

Nonetheless, this Proposed Finding is irrelevant, misleading, incomplete, inaccurate to the extent that it suggests that Dr. Marshall did not identify harm to competition from the Respondents conspiracy not to do business with buying groups. The record evidence establishes that Respondents' conspiracy harmed competition. (CCFF ¶¶ 1412-1445). And in his Expert Report, Dr. Marshall did identify harm to competition or the competitive impact

of Respondents' conduct (i.e., the conduct was anticompetitive). [REDACTED]

[REDACTED]

Respectfully submitted,

/s/ Lin W. Kahn

Lin W. Kahn

Federal Trade Commission

Bureau of Competition – Western Region

901 Market Street, Suite 570

San Francisco, CA 94103

Telephone: (415) 848-5100

Facsimile: (415) 848-5184

Electronic Mail: lkahn@ftc.gov

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2019, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
Acting Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

Geoffrey D. Oliver, Esq.
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
T: 202.879.3939
F: 202.626.1700
gdoliver@jonesday.com

Howard Scher, Esq.
Kenneth L. Racowski, Esq.
Carrie Amezcua, Esq.
Thomas Manning, Esq.
Buchanan Ingersoll & Rooney PC
Two Liberty Place
50 S. 16th Street, Suite 3200
Philadelphia, PA 19102-2555
T: 215 665 8700
F: 215 665 8760
howard.scher@bipc.com;
kenneth.racowski@bipc.com;
carrie.amezcua@bipc.com;
thomas.manning@bipc.com

Counsel For Respondent Benco Dental Supply Company

John P. McDonald, Esq.
Locke Lord LLP
2200 Ross Avenue
Suite 2800
Dallas, TX 75201
T: 214.740.8000
F: 214.740.8800
jpmcdonald@lockelord.com

RespondentScheinCounsel@lockelord.com

Lauren Fincher, Esq.
Sarah Lancaster
Locke Lord LLP
600 Congress Ave.
Ste. 2200
Austin, TX 78701
T: 512.305.4700
F: 512.305.4800
lfincher@lockelord.com;
slancaster@lockelord.com

Colin Kass, Esq.
Owen Masters
Stephen Chuck
Proskauer Rose LLP
1001 Pennsylvania Ave, N.W.
Suite 600 South
Washington, DC 20004-2533
T: 202.416.6800
F: 202.416.6899
ckass@proskauer.com;
omasters@proskauer.com;
schuck@proskauer.com

Rucha Desai
David Munkittrick
David Heck
Proskauer Rose LLP
Eleven Times Square
New York, NY 10036
T: 212-969-3628
rdesai@proskauer.com;
dmunkittrick@proskauer.com;
dheck@proskauer.com

Counsel For Respondent Henry Schein, Inc.

Joseph Ostoyich
William Lavery
Andrew George
Jana Seidl
Kristen Lloyd
Baker Botts L.L.P.
1299 Pennsylvania Ave NW
Washington, DC 20004
T: 202.639.7905
joseph.ostoyich@bakerbotts.com;
william.lavery@bakerbotts.com;
andrew.george@bakerbotts.com;
jana.seidl@bakerbotts.com;
kristen.lloyd@bakerbotts.com

James J. Long, Esq.
Jay Schlosser, Esq.
Scott Flaherty, Esq.
Ruvn Jayasuriya, Esq.
William Fitzsimmons, Esq.
Briggs and Morgan
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
T: 612.977.8400
F: 612.977.8650
jlong@briggs.com
jschlosser@briggs.com
sflaherty@briggs.com
rjayasuriya@briggs.com
wfitzsimmons@briggs.com

Counsel For Respondent Patterson Companies, Inc.

June 13, 2019

By: /s/ Lin W. Kahn
Attorney

CERTIFICATE OF ELECTRONIC FILING

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

June 13, 2019

By: /s/ Lin W. Kahn
Attorney