PUBLIC

ORIGINAL

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

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

COMPLAINT COUNSEL'S POST-TRIAL REPLY TO RESPONDENTS' JOINT PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND EXHIBIT INDEX

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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

JFFL – Respondents' Joint Proposed Findings of Fact and Conclusions of Law

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

CCFF ¶ x – Complaint Counsel's Proposed Findings of Fact

CCRF (Name of Respondent) ¶ x – Complaint Counsel's Reply to Respondent's Proposed Finding

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

CC Post-Trial Br. at x – Complaint Counsel's Post-Trial Brief

{ bold } - *In Camera* Material

RESPONSES TO PROPOSED "FINDINGS OF FACT."

A. Responses to Proposed Findings Regarding "Overview of the Dental Supplies Industry."

1. *Dental Supplies and Equipment.*

1. Dental supplies, or "consumables," include all the supplies in a dentist's office such as filling materials, instruments, gloves, burs, anesthetics, and the like. (Cohen, Tr. 403-04, 601; Kois Sr., Tr. 167-68). "Disposables" are products that are only used once per patient, such as gauze, saliva ejectors, and gloves. (Kois Sr., Tr. 168).

Response to Proposed Finding No. 1

Complaint Counsel has no specific response.

2. On average, a dentist will spend approximately [redacted] of the office's annual receipts on dental supplies. (Goldsmith, Tr. 2061; Misiak, Tr. 1455; Cavaretta, Tr. 5544-45; Sullivan, Tr. 4060; RX 0435-004).

Response to Proposed Finding No. 2

Complaint Counsel has no specific response.

3. Dental equipment includes items that are more permanent fixtures in a dental office, like the chairs, lights, x-ray and imaging machines, lasers, compressors, vacuums, handpieces, cabinets, and the like. (Cohen, Tr. 403-04, 601; McFadden, Tr. 2751-52; Sullivan, Tr. 3869-70, 4049).

Response to Proposed Finding No. 3

Complaint Counsel has no specific response.

2. *Manufacturers.*

4. Manufacturers produce the dental supplies and equipment sold to dentists. Some of the largest manufacturers include Danaher, Dentsply, Sirona, and A-Dec. (CX 3285-024). The largest manufacturers make up less than 50% of the total dental supplies market. (CX 3285-024). Other manufacturers include Hu-Friedy, Kavo-Kerr, 3M, Brasseler, Procter & Gamble, Ivoclar, Ultradent, Centrix, GC America, Butler Sunstar, Premier Dental and Coltene. (CX 4045-001 (listing 31 manufacturers selling through Burkhart); Sullivan, Tr. 4261-62; Kois Jr., Tr. 367-69; Cohen, Tr. 602).

Response to Proposed Finding No. 4

The proposed finding is misleading and not supported by the evidence cited with respect to the statement that "[t]he largest manufacturers make up less than 50% of the total dental

supplies market." The document shows that the collective market share of the four listed manufacturers (Danaher, Dentsply, Sirona, and A-Dec) make up less than 50% of the market, but does not provide any information about the shares for other manufacturers. There is also no evidence in the record (in either the testimony or the documents) about which manufacturers are defined as "large." Consequently, the statement is not supported by the evidence cited. Complaint Counsel has no specific response to the other statements in the proposed finding.

5. Some manufacturers sell directly to dentists in addition to selling through distributors. (Cohen, Tr. 602). An estimated 10 to 25 percent of dentists' supplies are purchased directly from manufacturers. (CX 0301 (Cohen, IHT at 47); CX 0082-008 ("The competitive landscape of the US dental business is comprised of: … Handful of significant direct-to-dentist companies"); CX 3285-004, 008, 024; Kois Jr., Tr. 322-23 ("[W]e also have … manufacturers that sell direct to the dental practice, so they do not go through a dental supply company.")).

Response to Proposed Finding No. 5

The proposed finding is incomplete and therefore misleading. The evidence in the record shows that manufacturers who sell direct to dentists typically sell niche and specialty products, and do not sell the whole range of supplies that dentists normally need. (CX8030 (Baytosh, Dep. at 57-58) ("Q. Okay. And then just going back to the direct selling manufacturers, have you ever gone to the direct selling manufacturers and asked whether you could purchase, you know, every supply that you need from them? Have you ever investigated that? A. Most of the companies that I have dealt with deal with specific -- like, whether it's endodontic supplies, orthodontic supplies. They are not full-service companies. They just have a limited scope of what they're -- the materials that I'm buying from them. Q. Okay. So the direct selling manufacturers that you've dealt with before sell specific products? A. Correct. Q. They don't sell, you know, the whole gamut of supplies that a dentist needs to run its practice? A. Correct.")); *see also* Ryan, Tr. 1140-1141; Kois Sr., Tr. 176; [redacted]; (CX0304 (Ryan, IHT at 27-28)); Misiak, Tr. 1293 (Young Innovations does not offer all the products a dentist's office would require); CCFF ¶¶ 1510-1515. The proposed finding is also misleading and incomplete to

the extent that is implies that dental products needed by a dental office are all available directly from manufacturers. On the contrary, the record evidence shows many dental supply products are only available through distributors. (CX0321 (Kois Jr., IHT at 84)); Ryan, Tr. 1141 (direct selling manufacturers do not carry a full line of products); CCFF ¶ 1512. Finally, the proposed finding is misleading to the extent that it suggests that any particular dental office purchases or is able to purchase 10 to 25% of its supplies directly from a manufacturer. The evidence only supports a finding that 15 to 25% of dental supplies are sold by direct selling manufacturers.

6. Some manufacturers sell exclusively through only one distributor. (Cohen, Tr. 667).

Response to Proposed Finding No. 6

The proposed finding is misleading, vague and irrelevant. Although it may well be true that some manufacturers sell exclusively through one distributor, the proposed finding is vague and provides no specificity as to number or percentage of manufacturers referenced, the number or type of products offered or supplied, or the importance of those products to a dental practice. The proposed finding is no more useful than one that declares that "some manufacturers" do not sell exclusively through one distributor. Finally, whether exclusive arrangements exist between distributors and manufacturers is irrelevant to the question of whether Schein, Patterson and Benco entered into agreements not to do business with buying groups.

7. Some manufacturers, like Ultradent, had "a policy of not working with buying groups." (Kois Jr., Tr. 369).

Response to Proposed Finding No. 7

The proposed finding is misleading and contrary to the weight of the evidence to the extent that it implies that manufacturers generally had policies of not doing business with buying groups. The evidence in the record does not support this general statement and in fact shows that some manufacturers were giving discounts to buying groups. For example, in September 2013, Benco's Ryan received market intelligence from Brian Evans (Benco's Director of Sales-West) that manufacturers were giving discounts to Smile Source. (CX1158 at 002 ("Apparently our

vendor partners (mostly eq) giving discounts to members of this group when making purchases."); CX8037 (Ryan, Dep. at 255)); CCFF ¶ 1007. Similarly, a Dentsply regional sales manager wrote to Patterson's Rogan in August 2013 that it worked with buying groups on the same basis it worked with other groups. (CX3054 at 001 ("We treat Smile Source in the same fashion as our other regional and national key account groups and/or buying groups . . . I know there are numerous other manufacturers that participate with them as well that you work with.")); Rogan, Tr. 3549-3552.

8. Other manufacturers have expressed "concerns about working with buying groups," citing potential problems with "compliance and participation." (Reece, Tr. 4406).

Response to Proposed Finding No. 8

The proposed finding is misleading to the extent that it implies that weight of the evidence shows that manufacturers generally had policies of not doing business with buying groups. The evidence in the record shows manufacturers were actually giving discounts to buying groups. For example, in September 2013, Benco's Ryan received market intelligence from Brian Evans (Benco's Director of Sales-West) that manufacturers were giving discounts to Smile Source. (CX1158 at 002 ("Apparently our vendor partners (mostly eq) giving discounts to members of this group when making purchases."); CX8037 (Ryan, Dep. at 255)); CCFF ¶ 1007. Similarly, a Dentsply regional sales manager wrote to Patterson's Rogan in August 2013 that it worked with buying groups on the same basis it worked with other groups. (CX3054 at 001 ("We treat Smile Source in the same fashion as our other regional and national key account groups and/or buying groups . . . I know there are numerous other manufacturers that participate with them as well that you work with.")); Rogan Tr., 3549-3552. [redacted]

[redacted]

[redacted]

[redacted]; CCFF ¶¶ 1314-1315.

3. *Distributors.*

9. Dental distribution is highly concentrated, yet diverse. Schein, Patterson, and Benco are the only national full-service distributors, but the dental supply market is "extremely fragmented" with at least 15 regional full-service distributors, as well as non-full-service, mail-order, phone-order, and internet distributors that compete with Respondents. (CX 5033-018; CX 2742; CX 0319 (Reece, IHT at 28-29); CX 8023 (Guggenheim, Dep. at 324-25); CX 0305 (Cavaretta, IHT at 48)).

Response to Proposed Finding No. 9

Complaint Counsel has no specific response to the statement in the proposed finding that the dental distribution industry is highly concentrated. However, the remainder of the proposed finding is misleading, vague, and contrary to the weight of the evidence. To the extent that the proposed finding asserts that the dental distribution industry is "diverse," there is no evidence in the record as to what that term means or in what way the industry is "diverse." Moreover, that statement lacks a citation for support.

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it implies that non-full-service, mail order, phone-order, and internet distributors compete directly with Respondents or are a substitute for full-service distributors. *See, e.g.*, CCFF ¶¶ 1495-1499, 1507-1508, 1525, 1536, 1537, 1540-1543. The record evidence shows that non-full-service distributors are based on a fundamentally different business model than full-service distributors. CCFF ¶¶ 1494 (quoting CX0311 (Sullivan, IHT at 69-70 ("[T]here's the full-service dealers and then the non-full-service dealers. We're all [] approaching the same customer, but our go-to-market strategies are different . . ."))), 1492-1493.

Indeed, Respondents were not threatened by buying groups forming relationships with non-full-service distributors, but felt differently if full-service distributors began partnering with buying groups. *See, e.g.*, CCFF ¶ 1508 (quoting CX0015 ("Shit. I know Burkhart got Nashville

and Atlanta involved [with Smile Source]. If it's just Darby, I don't care as much…but when full service guys get in….")).

10. Approximately "75% of dental products go through distributors," including Schein, Patterson, Benco, Burkhart, and others. (CX 3285-024).

Response to Proposed Finding No. 10

Complaint Counsel has no specific response.

11. "Full-service" distributor means that a distributor sells supplies, installs and services equipment, and provides training as needed for the equipment the distributor sells to dental offices. (Kois Jr., Tr. at 170; Sullivan, Tr. 3869-70).

Response to Proposed Finding No. 11

Complaint Counsel has no specific response.

a. Henry Schein

12. Schein began in 1932 as a local pharmacy in Queens, NY, and it grew as a dealer of dental products, first through the use of a mail-order catalog, and later through multiple acquisitions and its use of field sales consultants ("FSCs") to serve dental practitioners. (CX 5023-003). Today, Schein is a full-service distributor of dental products, technologies, equipment, and services. (CX 5023). Today, Schein sells virtually anything and everything needed by a dental office, including, but not limited to: thousands of different dental supplies; small and large dental equipment; dental technology; practice management software; and business solutions. (CX 5023; CX 5021-016).

Response to Proposed Finding No. 12

Complaint Counsel has no specific response, but notes that the cited documents do not provide support for the finding that "[t]oday, Schein sells virtually anything and everything needed by a dental office." That statement is not contained in any of the cited material.

b. Patterson

13. Patterson Dental ("Patterson") has been in the dental business for more than 140 years. (CX 5035-002). Patterson is a full-service distributor of dental supplies and equipment, a developer and manufacturer of software, and a provider of technical services and training. (Guggenheim, Tr. 1532; CX 0314 (Guggenheim, IHT at 10); CX 8027 (Anderson, Dep. at 55)). Patterson carries more than 100,000 individual SKUs for dental products, selling

consumable products like x-ray film, impression materials, and gloves, along with dental equipment like x-ray machines, dental chairs, and diagnostic equipment. (CX 5033-011, 014-15). Patterson also offers a full range of related services, such as equipment installation, maintenance and repair, dental office design, and equipment financing. (CX 5033-011).

Response to Proposed Finding No. 13

Complaint Counsel has no specific response.

c. Benco

14. Benco, a privately-owned full-service distributor headquartered in Pittston, Pennsylvania, was founded in 1924. (RX 1099-003; Cohen, Tr. 400, 406, 618-19). Benco sells all of the supplies, equipment and services that are essential to running a dental practice. (Cohen, Tr. 600). Benco has over 50 showrooms and 5 distribution centers located across the United States. (Cohen, Tr. 408). Benco's transactional sales data reveals that, in 2016, Benco sold over [redacted] distinct dental products. (RX 1140-010). Benco also offers services that include dental office design, practice consulting, financing and real estate planning, wealth management, equipment repairs, and computer hardware, software, and systems for dentists. (Cohen, Tr. 405-06, 606-07).

Response to Proposed Finding No. 14

The proposed finding lacks evidentiary support to the extent that it relies upon an expert report (RX1140) to establish a fact. Reliance on expert witness reports or testimony to establish substantive facts is in direct contravention of this Court's February 21, 2019 Order on Post-Trial Briefs at 3, prohibiting citation to expert witness testimony to support a factual proposition that "should be established by fact witnesses or documents." Complaint Counsel has no specific response to statements in this Proposed Finding that do not rely on an expert report.

d. Burkhart

15. Burkhart Dental Supply ("Burkhart") is a regional full-service distributor of dental merchandise, dental equipment and technical service. (Reece, Tr. 4357; Sullivan, Tr. 3936). Burkhart has been in the dental supply business for 130 years and is headquartered in Tacoma, Washington. (Reece, Tr. 4357). Burkhart does not cover the entire United States and instead only operates west of the Mississippi, with a few exceptions. (Reece, Tr. 4365 ("[I]t is west of the Mississippi.")

Response to Proposed Finding No. 15

The proposed finding is misleading and contrary to the weight of the evidence to the extent that it implies that regional full-service distributors are a substitute for national, full service distributors for buying groups. 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. For example, to date, Burkhart is not able to offer full-service distribution to buying groups with members outside its regional footprint. (Reece, Tr. 4454-4455). In addition, [redacted]; CX4255 at 001.)

The parties' documents and testimony also recognize that regional distributors cannot serve all of the needs of buying groups. (CX1231 at 002 (Benco 2014 document noting: "Minimal Impact [of Kois Buyers Group] - . . . many of the tribal members will not be able to participate due to Burkhart's limited geographic distribution capabilities."); CX0303 (McElaney, IHT at 29-30) (Benco recognized that Burkhart would be limited in servicing buying groups because Burkhart was regional and not a national, company.))

Finally, the proposed finding is incomplete and therefore misleading with respect to the statement about the geographic areas in which Burkhart operates. [redacted]

Complaint Counsel has no specific response to the remainder of the proposed finding.

e. Atlanta Dental

16. Atlanta Dental Supply ("Atlanta Dental") is a regional, full-service distributor of dental products serving parts of the Southeastern United States. (Goldsmith, Tr. 1946). It has ten offices throughout Georgia, North Carolina, South Carolina, Alabama and Florida. (CX 7100-040, -043).

Response to Proposed Finding No. 16

The proposed finding is misleading and contrary to the weight of the evidence to the extent that it implies that regional, full-service distributors such as Atlanta Dental can be a substitute for national distributors. This implication is contrary to the weight of the record evidence. *See* Complaint Counsel's Response to Joint Proposed Finding No. 15.

In addition, the proposed finding lacks evidentiary support to the extent that it relies upon an expert report (CX7100) to establish a fact. Reliance on expert witness reports or testimony to establish substantive facts is in direct contravention of this Court's February 21, 2019 Order on Post-Trial Briefs at 3, prohibiting citation to expert witness testimony to support a factual proposition that "should be established by fact witnesses or documents."

Complaint Counsel has no specific objection to the first sentence about Atlanta Dental Supply, which does not rely on expert testimony.

f. Nashville Dental

17. Nashville Dental is a regional, full-service distributor of dental products that serves Tennessee, Kentucky, Alabama, and West Virginia. (Ryan, Tr. 1046).

Response to Proposed Finding No. 17

The proposed finding is misleading and contrary to the weight of the evidence to the extent that it implies that regional, full-service distributors can be a substitute for national distributors. This implication is contrary to the weight of the record evidence. *See* Complaint Counsel's Response to Joint Proposed Finding No. 15. Complaint counsel has no other specific response.

g. Pearson Dental Supplies

18. Pearson Dental Supplies ("Pearson") is a distributor of dental supplies and equipment with headquarters in Sylmar, California. (CX 7100-043). It carries over 130,000 items produced by over 200 manufacturers, and also sells Pearson-branded merchandise. (CX 7100-043). It serves California, Arizona, Texas, Nevada, Washington and Hawaii. (CX 7100-044).

Response to Proposed Finding No. 18

The proposed finding is misleading, contrary to the weight of the evidence, and unsupported by record evidence. It is misleading and contrary to the weight of the evidence to the extent that it implies that regional, full-service distributors can be a substitute for national distributors. This implication is contrary to the weight of the record evidence. *See* Complaint Counsel's Response to Joint Proposed Finding No. 15.

The proposed finding also lacks evidentiary support to the extent that the only citations for substantive evidence are to an expert report. Reliance on expert witness reports or testimony to establish substantive facts is in direct contravention of this Court's February 21, 2019 Order on Post-Trial Briefs at 3, prohibiting citation to expert witness testimony to support a factual proposition that "should be established by fact witnesses or documents."

h. Midway Dental Supply

19. Midway Dental Supply is a dental distributor based in Indiana. (Reece, Tr. 4455; RX 1140-023; CX 7100-045).

Response to Proposed Finding No. 19

The proposed finding is misleading to the extent that it suggests that Midway Dental Supply is national full service dental distributor. The record evidence shows that Schein, Patterson, and Benco are the only full-service distributors of dental supplies and equipment with a national footprint. (CCFF ¶ 1449).

The proposed finding is further misleading and contrary to the weight of the evidence to the extent that it implies that regional, full-service distributors can be a substitute for national distributors. This implication is contrary to the weight of the record evidence. *See* Complaint Counsel's Response to Joint Proposed Finding No. 15.

Finally, the proposed finding should be disregarded to the extent that it relies expert reports (RX1140 and CX7100), for substantive evidentiary findings. RX1140 is particularly suspect because it is the expert report from Benco's expert, Dr. John Johnson, from a separate, private litigation (*SourceOne, Inc. v. Patterson Cos., Inc.,* No. 2:15-CV-05440 (E.D.N.Y.)).

Reliance on expert witness testimony or reports to establish substantive facts is in direct contravention of this Court's February 21, 2019 Order on Post-Trial Briefs at 3, prohibiting citation to expert witness testimony to support factual proposition that "should be established by fact witnesses or documents."

i. Midwest Dental Equipment & Supply

20. Midwest Dental Equipment & Supply is a dental distributor based in Texas. (Reece, Tr. 4455; RX 1140-023; CX 7100-045).

Response to Proposed Finding No. 20

The proposed finding is misleading to the extent that it suggests that Midway Dental Supply is national full service dental distributor. The record evidence shows that Schein, Patterson, and Benco are the only full-service distributors of dental supplies and equipment with a national footprint. (CCFF ¶ 1449).

The proposed finding is further misleading and contrary to the weight of the evidence to the extent that it implies that regional, full-service distributors can be a substitute for national distributors. *See* Complaint Counsel's Response to Joint Proposed Finding No. 15.

Finally, the proposed finding should be disregarded to the extent that it relies expert reports (RX1140 and CX7100) for substantive evidentiary findings. Reliance on RX1140 is particularly egregious because the document is the expert report from Benco's expert, Dr. Johnson, from a separate, private litigation (*SourceOne, Inc. v. Patterson Cos., Inc.,* No. 2:15-CV-05440 (E.D.N.Y.). Reliance on expert witness testimony or reports to establish substantive facts is in direct contravention of this Court's February 21, 2019 Order on Post-Trial Briefs at 3, prohibiting citation to expert witness testimony to support factual proposition that "should be established by fact witnesses or documents."

j. Other Full-Service Distributors

21. The distribution channel includes many other regional full-service distributors of dental supplies, dental equipment and technical service. Patterson witnesses included Atlanta Dental Supply, Nashville Dental Supply, Pearson Dental, Goetze, and Johnson & Lund among Patterson's competitors. (Guggenheim, Tr. 1735-36; Misiak, Tr. 1295).

Response to Proposed Finding No. 21

The proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that regional distributors such as Atlanta Dental Supply, Nashville Dental Supply, Pearson Dental, Goetze, and Johnson & Lund are substitutes buying groups seeking national full service distributors. *See* Complaint Counsel's Response to Joint Proposed Finding No. 15.

22. Dr. Johnson listed the locations and product lines of a partial list of 46 regional distributors, and Dr. Marshall indicated office locations for 26 regional distributors. (RX 1140-023; CX 7100-046). Regional distributors only cover certain areas of the United States. (Goldsmith, Tr. 2005; Rogan, Tr. 3437). For example, both Nashville Dental and Atlanta Dental operate in the Southeast while Burkhart primarily operates in the Pacific Northwest. (Maurer, Tr. 4980).

Response to Proposed Finding No. 22

To the extent that the proposed finding relies on expert testimony or expert reports for substantive facts, it should be disregarded. For example, the only citations for the first sentence are to facts recited in the expert reports (RX1140 and CX7100). Reliance on expert witness testimony or reports to establish substantive facts that should be established by fact witnesses or documents contravenes this Court's February 21, 2019 Order on Post-Trial Briefs at 3, prohibiting citation to expert witness testimony for this purpose.

The proposed finding is, moreover, misleading and contrary to the weight of the evidence, to the extent that it implies that buying groups can use regional distributors as substitutes for national full service distributors. *See* Complaint Counsel's Response to Joint Proposed Finding No. 15.

Complaint Counsel has no other specific response to the statements that regional distributors only cover certain areas of the United States or to the statement that "both Nashville Dental and Atlanta Dental operate in the Southeast while Burkhart primarily operates in the Pacific Northwest."

23. Complaint Counsel's expert, Dr. Marshall, analyzed full-service distributor shares by state. His analysis shows that full-service distributors other than Schein, Patterson, Benco, and Burkhart are active in every state and account for a total of 13% of full-service distribution nationwide. (CX7100-057). The identity of the active distributors varies from state to state, leading to differing alternate sources of supply by region. (RX 2834-014). In the Southeast region of the United States, for example, there are five or six full-service dental distributors as well as internet and mail-order companies. (McFadden, Tr. 2749).

Response to Proposed Finding No. 23

To the extent that the proposed finding relies on expert testimony or expert reports for substantive facts, it should be disregarded. For example, the only support for the first two sentence are to facts recited in the expert reports (RX2834 and CX7100). Reliance on expert witness testimony or reports to establish substantive facts that should be established by fact witnesses or documents contravenes this Court's February 21, 2019 Order on Post-Trial Briefs at 3, prohibiting citation to expert witness testimony for this purpose.

Moreover, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that regional distributors (including regional distributors serving only Southeast United States) are substitutes buying groups seeking national full service distributors. *See* Complaint Counsel's Response to Joint Proposed Finding No. 15.

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it implies that non-full-service, mail order, phone-order, and internet distributors compete directly with Respondents or are a substitute for full-service distributors. *See, e.g.*, CCFF ¶¶ 1495-1499, 1507-1508, 1525, 1536, 1537, 1540-1543. The record evidence shows that non-full-service distributors are based on a fundamentally different business model than full-service distributors. CCFF ¶¶ 1494 (quoting CX0311 (Sullivan, IHT at 69-70 ("[T]here's the full-service dealers and then the non-full-service dealers. We're all [] approaching the same customer, but our go-to-market strategies are different . . ."))), 1492-1493.

Indeed, Respondents were not threatened by buying groups forming relationships with non-full-service distributors, but felt differently if full-service distributors began partnering with buying groups. *See, e.g.*, CCFF ¶ 1508 (quoting CX0015 ("Shit. I know Burkhart got Nashville

and Atlanta involved [with Smile Source]. If it's just Darby, I don't care as much…but when full service guys get in….")).

4. *Non-Full-Service Distributors*

24. The distribution channel also includes, among others, mail-order distributors, telesales distributors, and internet-based distributors. (Goldsmith, Tr. 1945-47; Sullivan, Tr. 4171).

Response to Proposed Finding No. 24

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it implies that non-full-service, mail order, phone-order, and internet distributors compete directly with Respondents or are a substitute for full-service distributors. *See, e.g.*, CCFF ¶¶ 1495-1499, 1507-1508, 1525, 1536, 1537, 1540-1543. For example, the record evidence establishes that the products sold by Darby, the largest non-full-service distributor, did not cover the full-line of products and services sold by full-service distributors. (Ryan, Tr. 1046-1047; Goldsmith, Tr. 1947; CX0310 (Steck, IHT at 60); CX0315 (McFadden, IHT at 72-73); CX0314 (Guggenheim, IHT at 52-54); CCFF ¶¶ 1502-1508.)

Moreover, the record evidence shows that non-full-service distributors are based on a fundamentally different business model than full-service distributors. CCFF ¶¶ 1494 (quoting CX0311 (Sullivan, IHT at 69-70 ("[T]here's the full-service dealers and then the non-full-service dealers. We're all [] approaching the same customer, but our go-to-market strategies are different . . .")))), 1492-1493.

Indeed, Respondents were not threatened by buying groups forming relationships with non-full-service distributors, but felt differently if full-service distributors began partnering with buying groups. *See, e.g.*, CCFF ¶ 1508 (quoting CX0015 ("Shit. I know Burkhart got Nashville and Atlanta involved [with Smile Source]. If it's just Darby, I don't care as much…but when full service guys get in….")).

25. Burkhart's Jeffrey Reece included among its competitors not just Schein, Patterson, and Benco, and other full-service distributors, but also "Darby, Amazon, Scott's Dental, … they are all over the place." (Reece, Tr. 4455).

Response to Proposed Finding No. 25

See Response to Proposed Finding No. 24.

26. Darby Dental Supply ("Darby") is a national internet, mail-order and telesales distributor of dental products. (Goldsmith, Tr. 2161-62; Sullivan, Tr. 4171). Darby distributes over 40,000 dental products; in 2016, it had over [redacted] in sales. (CX 7100-051-52). Review of sales data reveals that, in 2016, Darby supplied over [redacted] of all purchases of dental supplies made by Smile Source members. (RX 2834-058). Four of the seven individual dentists named as plaintiffs in the class litigation purchased dental supplies from Darby. (RX 2834-020-21). Dr. Mason purchased approximately 85-90% of his dental supplies from Darby. (Mason, Tr. 2405-06).

Response to Proposed Finding No. 26

See Response to Proposed Finding No. 24.

Moreover, the proposed finding is misleading, contrary to the weight of the evidence, relies on improper evidence for factual findings, and irrelevant. To the extent that the proposed finding relies on expert testimony or expert reports for substantive facts, it should be disregarded. For example, the only support for the statements about Darby's offering, annual sales and sales to Smile Source members are to facts recited in the expert reports (RX2834 and CX7100). Reliance on expert witness testimony or reports to establish substantive facts that should be established by fact witnesses or documents contravenes this Court's February 21, 2019 Order on Post-Trial Briefs at 3, prohibiting citation to expert witness testimony for this purpose.

The proposed finding is also misleading with respect to the sentence regarding Dr. Mason's purchases from Darby because it takes Dr. Mason's testimony out of context. Dr. Mason testified that, after Patterson refused to do business with the New Mexico Dental Co-op, he ultimately joined another buying group served by Darby, but still purchased items from Patterson and Schein. (Mason, Tr. 2406.) His testimony does not support an implied finding that dental practices can use internet-based distributors to meet all of their dental products purchasing needs.

Finally, to the extent that the proposed finding references purchases by dentists who were named plaintiffs another case, it should be disregarded as irrelevant and lacking probative value for the instant case, which focuses on buying groups. Moreover, Respondents' only citation for the underlying fact is to an expert report (RX2834) from another litigation. Respondents' citation fails to provide a permissible basis for a factual finding, as reliance on expert witness testimony or reports to establish substantive facts that should be established by fact witnesses or documents contravenes this Court's February 21, 2019 Order on Post-Trial Briefs at 3, prohibiting citation to expert witness testimony for this purpose.

27. Safco Dental Supply is an internet and mail-order dental distributor; two of the seven individual dentists named as plaintiffs in the class litigation purchased dental supplies from Safco. (RX 2834-020-21).

Response to Proposed Finding No. 27

See Response to Proposed Finding No. 24.

Moreover, the proposed finding relies on inadmissible evidence and is irrelevant. First, it relies entirely on an expert report (RX2834) for substantive facts, in contravention of this Court's February 21, 2019 Order on Post-Trial Briefs at 3, prohibiting citation to expert witness testimony for this purpose. Because there is no permissible factual citation for the finding, it should be disregarded.

Finally, to the extent that the proposed finding references purchases by dentists who were named plaintiffs in another case, as irrelevant and lacking probative value for the instant case, which focuses on buying groups.

28. Scott's Dental is an internet and mail-order dental distributor. (Reece, Tr. 4455). Three of the seven individual dentists named as plaintiffs in the class litigation purchased dental supplies from Scott's Dental. (RX 2834-020-21).

Response to Proposed Finding No. 28

See Response to Proposed Finding No. 24.

In addition, to the extent that this finding references purchases by dentists who were named plaintiffs in another case, it should be disregarded as irrelevant and lacking probative value for the instant case, which focuses on buying groups. Moreover, Respondents' only citation for the underlying fact is to an expert report (RX2834) from another litigation. Respondents' citation fails to provide a permissible basis for a factual finding, as reliance on expert witness testimony or reports to establish substantive facts that should be established by fact witnesses or documents contravenes this Court's February 21, 2019 Order on Post-Trial Briefs at 3, prohibiting citation to expert witness testimony for this purpose.

Complaint Counsel has no specific response to the fact that Scott's Dental is an internet and mail order dental distributor.

29. Net32 is an internet and mail-order dental distributor; three of the seven individual dentists named as plaintiffs in the class litigation purchased dental supplies from Net32. (RX 2834-020-21).

Response to Proposed Finding No. 29

See Response to Proposed Finding No. 24.

Finally, to the extent that the proposed finding references purchases by dentists who were named plaintiffs another case, it should be disregarded as irrelevant and lacking probative value for the instant case, which focuses on buying groups. Moreover, Respondents' only citation for the underlying fact is to an expert report (RX2834) from another litigation. Respondents' citation fails to provide a permissible basis for a factual finding, as reliance on expert witness testimony or reports to establish substantive facts that should be established by fact witnesses or documents contravenes this Court's February 21, 2019 Order on Post-Trial Briefs at 3, prohibiting citation to expert witness testimony for this purpose.

30. In addition to specialized dental distributors, general internet distributors and retailers such as Amazon and eBay sell dental products. Four of the seven individual dentists named as plaintiffs in the class litigation purchased dental supplies from eBay, and two of the seven purchased dental supplies from Amazon. (RX 2834-020-21).

Response to Proposed Finding No. 30

See Response to Proposed Finding No. 24.

Moreover, the proposed finding references purchases by dentists who were named plaintiffs another case, it should be disregarded as irrelevant and lacking probative value for the instant case, which focuses on buying groups. Moreover, Respondents' only citation for the underlying fact is to an expert report (RX2834) from another litigation. Respondents' citation fails to provide a permissible basis for a factual finding, as reliance on expert witness testimony or reports to establish substantive facts that should be established by fact witnesses or documents contravenes this Court's February 21, 2019 Order on Post-Trial Briefs at 3, prohibiting citation to expert witness testimony for this purpose.

31. Mail-order distributors, such as Darby, are not full-service and do not provide any value-added services. (Mason, Tr. 2406; Goldsmith, Tr. 2161-62; McFadden, Tr. 2749; Sullivan, Tr. 4171; CX 8031 (Steck, Dep. at 60-61)). This means that distributors such as Darby do not employ field sales representatives to visit offices and therefore do not maintain the substantial cost of carrying a field sales force. (Goldsmith, Tr. 2161-62). This allows Darby to be a low-cost option. (Goldsmith, Tr. 2162).

Response to Proposed Finding No. 31

Complaint Counsel has no specific response.

5. *Dentists.*

a. Independent Dentists.

32. Though distributors like Schein partner with buying groups, the "ultimate customer" is "the dentist, not the group." (Sullivan, Tr. 3935; Cohen, Tr. 680).

Response to Proposed Finding No. 32

The proposed finding is misleading, not supported by the testimony cited, and contrary to the weight of the evidence. It is misleading and contrary to the record evidence to the extent that it suggests that Schein partnered with buying groups during the conspiracy period. The record evidence is replete with examples of buying groups that Schein categorically rejected during the

conspiracy period because it had a policy not to do business with buying groups. CCFF ¶¶ 661-1100; *see also* Complaint Counsel's Post-Tr. Br., at Attach. C.

The proposed finding is also misleading because it quotes Sullivan's testimony out of context and offers it for a statement the witness did not make. In stating that the "ultimate customer" is the dentist, Sullivan was talking about who was the ultimate customer for DSOs – not buying groups. (Sullivan, Tr. 3935 ("Q. We were talking about private practice dentists or a corporate chain, a DSO customer. If you lose such a customer to a competitor, you want to win that customer back, you wouldn't tell your team that you wanted to see what you could do to kill the customer's business model, right? A. No. The private practice dentist is our – the bulk of our customers. There's no model to kill. It would be about – they are the ultimate customer, the dentist, not the group in the case, the dentist.").)

33. In 2017, there were approximately 200,000 dentists practicing in the United States, most of whom worked as solo practitioners or in small group practices. (RX 2820).

Response to Proposed Finding No. 33

Complaint Counsel has no specific response.

34. Independent dentists are also referred to as "private practice" dentists. (Rogan, Tr. 3427; Sullivan, Tr. 3904).

Response to Proposed Finding No. 34

Complaint Counsel has no specific response.

35. Even the largest dental distributors may not have all of the products a single dentist wants. (*See, e.g.*, Kois Sr., Tr. 175-76; *see also* RX 2821-004 (the "average dental practitioner purchases supplies from more than one supplier")).

Response to Proposed Finding No. 35

Complaint Counsel has no specific response.

36. Independent dentists value the quality of their supplies, so much so that Dr. Kois testified that "the price isn't the factor" when he purchases "specific products … from direct companies..." (Kois Sr., Tr. 176).

Response to Proposed Finding No. 36

The proposed finding is misleading and incomplete. Although Dr. Kois stated that price is not a factor for "the specific products" he purchases "from direct companies," his very next response was that price *is* a factor for disposable products and that he could not rely on direct purchases from manufacturers to supply the needs of his practice. (Kois Sr., Tr. 176-177 ("Q. What about for disposable products? Is price a factor there? A. Many times it is. Q Could you rely on multiple manufacturers in place of a distribution company to supply the needs of your practice? A. No. Because many of the distribution companies don't offer specific equipment that I might need to purchase, and so there are companies that only sell through dental supply companies. So I need the full range of options, so I will use both dental supply companies and direct supply companies. They don't go through a distributor.").)

37. Independent dentists also value their relationships with the sales representatives that call on their practices. (Sullivan, Tr. 4086 ("Q. Based on your 30 years' experience, do you believe customers value their relationship with their sales representatives more than they do with a discount on supplies? A. Absolutely."); Cohen, Tr. 406 ("Q. And your customers really value the sales reps, right? A. I believe they do. Yes."); Guggenheim, Tr. 1533-34 (Territory sales reps "main focus is to, you know, maintain the relationships, help the practice grow and identify ways to improve their businesses....").

Response to Proposed Finding No. 37

Complaint Counsel has no specific response.

38. Dentists' preferences make it hard to change a given dentist's purchasing behavior. (CX8008 (Kois Jr., Dep. at 134 ("Q. … there's no reason for you to add Patterson as a vendor? A. I think more than that, that added value would have to outweigh the effort it would take to explain to our members that we've been telling for the last three and a half, four years that go to Burkhart to go to a different supply company. That's not an easy ask.")); Meadows, Tr. 2506-07 ("dentists are very hard to win or they're hard to change their behaviors"); Reece, Tr. 4406 (independent dentists "tend[] to like" and are entrenched in what they are used to using); *see also* Meadows, Tr. 2508-10 (explaining the difficulties and hurdles that dentists face when switching distributors, from changing ordering software to FSCs)).

Response to Proposed Finding No. 38

The proposed finding is misleading and contrary to the weight of the evidence to the extent that is implies that individual dentists will not switch from one distributor to another. While Respondents did not compete for buying groups during the conspiracy period, the weight of the evidence shows that the dental distributors, including Schein, Patterson and Benco compete vigorously to win individual dentist customers. (Misiak, Tr. 1396 ("And it's a highly competitive market in which they're, you know, doing this business and trying to take accounts back and forth . . . .")) The evidence further shows that dentists are willing to switch between Respondents to take advantage of lower prices. (Cohen, Tr. 668, 938-941; Sullivan, Tr. 3932; McFadden, Tr. 2846; Ryan, Tr. 1129-1130; Mason, Tr. 2405-2406; [redacted]; CX0149 at 001); CCFF ¶53-54. Finally, the evidence shows that distributors can steer customers to different manufacturers, meaning dentists are willing to switch brands. (CX8017 (Rogan, Dep. at 83-84); CX0310 (Steck, IHT at 253-254)); CCFF ¶ 55.

b. DSOs.

39. In the late 1990s, dentists began consolidating multiple offices into group practices managed by common ownership. (CX3285-029; RX 2794). This consolidation resulted in a business model: Dental Support (or Service) Organizations ("DSOs"). (CX8005 (Muller, Dep. at 103-04); Cohen, Tr. 804).

Response to Proposed Finding No. 39

Complaint Counsel has no specific response.

40. DSOs provide non-clinical, centralized support services in administration, business, marketing, procurement, and/or management to their member dental practices in exchange for a fee. (Puckett Tr. 2203; McFadden 2846-47; *see also* RX 0544-043-47).

Response to Proposed Finding No. 40

The proposed finding is misleading and not supported by the testimony or documents cited. Puckett's supports only the limited point that DSOs provide "nonclinical services," which he describes as "accounting, finance, IT, legal, marketing . . . ." (Puckett, Tr. 2203.) McFadden's testimony provides no support whatsoever, as it is expressly addressing what he

calls "nonequity DSOs," not DSOs generally. (McFadden, Tr. 2846-2847.) The document citation (RX0544 at 043-047), moreover, offers no definition of DSOs, but rather contains information on the size and locations of several specifically identified DSOs.

Finally, none of the evidence cited contains support for the proposition that DSOs provide the stated services "in exchange for a fee." The record evidence shows DSOs consist of large group practices that have multiple locations combined under a single ownership structure and are part of a corporation. (Cohen, Tr. 808, 411-412; Foley, Tr. 4512; CX0310 (Steck, IHT at 126); CX0301 (Cohen, IHT at 39); Guggenheim, Tr. 1539, 1687-1688; Misiak, Tr. 1310, 1313-1314; CX8021 (Reece, Dep. at 24); [redacted]); CCFF ¶¶ 60-66.

41. DSOs offer scaled platforms for "all of the non-clinical aspects of running a dental office," including: accounting, marketing, human resources, information technology, insurance reimbursement, patient payment collection, banking, payroll, operations, and procurement (including purchasing, supply, returns, and vendor management). (CX 0315 (McFadden, IHT at 15); *see also* Puckett Tr. 2203; McFadden Tr. 2846-47).

Response to Proposed Finding No. 41

The proposed finding is misleading and vague as to the meaning of the phrase "scaled platforms" in the context of providing the listed services for corporate dental practices.

Complaint Counsel has no specific response to the extent the proposed finding suggests that the DSO corporate office provides the listed services, but notes that McFadden's trial testimony does not provide factual support for the proposed finding.

42. DSOs handle all procurement through a single administrative and logistical point of contact to select products and quantities, negotiate pricing, and manage delivery, returns, and payments for numerous offices. (Puckett, Tr. 2205-06; Ryan, Tr. 1166; CX 8033 (Cavaretta, Dep. at 42-45); CX 8010 (Titus, Dep. at 26-27, 255-56); CX 8005 (Muller, Dep. at 94-95)).

Response to Proposed Finding No. 42

Complaint Counsel has no specific response.

43. DSOs are able to commit (either contractually or in practice) large volumes of purchases for all of their owned, managed, or affiliated practices. (Sullivan, Tr. 3902-03; Meadows,

Tr. 2491-92 ("[I]f we sign a contract with a DSO, that DSO is entering into a contractual agreement that, according to the contract, would guarantee us the volume and that we would be the primary vendor in each one of that DSO's locations."), 2523-24; Puckett, Tr. 2201-06; Ryan, Tr. 1166; Cohen, Tr. 412-413; Foley, Tr. 4567-68; Guggenheim, Tr. 1767-68 ("when a DSO makes a commitment to buy from you, there's a contractual agreement that's generated, and they will represent their volume and what they're intending to buy from you, and largely that's directionally accurate."); CX 6599; RX 2247; RX 2295).

Response to Proposed Finding No. 43

The proposed finding is misleading, as not fully supported by testimony cited and irrelevant. Although the cited testimony supports a finding that DSOs are able to commit to purchase a certain volume, none of the cited evidence supports a finding that DSOs are able to commit "large volumes of purchases." The record shows that smaller DSOs (sometimes called "mid-market" customers) can have as few as three dental offices. (CX0310 (Steck, IHT at 26).) There is no basis for finding that smaller DSOs commit to "large volumes of purchases."

Moreover, facts about volume commitments of DSO business is irrelevant to whether Schein, Patterson and Benco entered into an agreement not to do business with buying groups.

44. DSO contracts often include requirements that the DSO's members purchase 70% or more of its supplies from a particular distributor. (CX0309 (Muller, Dep. at 63); Sullivan Tr. 3903; Meadows, Tr. 2649; RX 2247-006 (Dental One commits to "purchase 90% of its professional merchandise … from SCHEIN on a quarterly basis."); RX 2295 (MB2 Contract listing an [redacted] commitment)).

Response to Proposed Finding No. 44

The proposed finding is misleading as irrelevant, as DSO volume no relevance to whether Schein, Patterson and Benco entered into an agreement not to do business with buying groups. Otherwise, Complaint Counsel has no specific response to this proposed finding.

45. Once DSOs contract with a particular distributor, "[the] locations are instructed not to do business with" other distributors. (Meadows, Tr. 2493-94). This means that if a distributor loses out on a DSO contract, that distributor also loses out on the opportunity to supply all of the DSOs member offices. (Meadows Tr. 2493 ("Q. So even if you try to offer a large discount to a DSO, but you don't have the contract, so you're offering a big discount to the individual office, but you don't have the DSO contract, can you get that customer? A. No.")).

Response to Proposed Finding No. 45

The proposed finding is misleading as irrelevant, as DSO contracts have no relevance to whether Schein, Patterson and Benco entered into an agreement not to do business with buying groups. Otherwise, Complaint Counsel has no specific response to this proposed finding.

46. DSOs typically do not need the hands-on education and consulting services offered by field sales representatives, which further lowers a distributor's costs in serving them and, in turn, allows a distributor to offer DSOs formularies with reduced prices. (Meadows, Tr. 2523-24; CX8016 (Meadows, Dep. at 271-72); CX0309 (Muller, IHT at 59-60, 63)).

Response to Proposed Finding No. 46

The proposed finding is misleading as irrelevant, as the needs of DSO customers have no relevance to whether Schein, Patterson and Benco entered into an agreement not to do business with buying groups. Otherwise, Complaint Counsel has no specific response to this proposed finding.

47. DSOs' centralized purchasing system not only reduces a distributor's costs of servicing the customer, but also facilitates large-scale purchasing through one point of contact, thereby reducing pricing. (CX8033 (Cavaretta, Dep. at 42-45); CX8010 (Titus, Dep. at 26, 255-56; CX8005 (Muller, Dep. at 94-95)).

Response to Proposed Finding No. 47

The proposed finding is misleading as irrelevant, as DSO customers purchasing systems have no relevance to whether Schein, Patterson and Benco entered into an agreement not to do business with buying groups. Otherwise, Complaint Counsel has no specific response to this proposed finding.

48. Large-scale consolidated orders through one point of contact also reduce shipping costs. (J. Johnson, Tr. 4832).

Response to Proposed Finding No. 48

The proposed finding is misleading as irrelevant and not supported by the permissible facts. To the extent the proposed finding addresses DSO's single point of contact, it has no

relevance to whether Schein, Patterson and Benco entered into an agreement not to do business with buying groups.

The proposed finding lacks permissible support, as reliance on expert witness testimony to establish substantive facts contravenes this Court's February 21, 2019 Order on Post-Trial Briefs at 3, prohibiting citation to expert witness testimony for this purpose.

Otherwise, Complaint Counsel has no specific response to this proposed finding.

49. Because DSOs can commit to purchasing from a limited product formulary at set volumes, distributors like the Respondents can negotiate better pricing from manufacturers, passing on the savings to these customers. (CX 0309 (Muller, IHT at 59-60); Meadows, Tr. 2491-92; Foley, Tr. 4687-88; *see also* Ryan, Tr. 1166 (explaining that DSOs can say "what we spend … will be delivered," which makes it easy to "base pricing" on such volume commitments)).

Response to Proposed Finding No. 49

The proposed finding is misleading as irrelevant, as DSO formularies have no relevance to whether Schein, Patterson and Benco entered into an agreement not to do business with buying groups. Otherwise, Complaint Counsel has no specific response to this proposed finding

To the extent this proposed finding suggests that Respondents could not negotiate with manufacturers for discounted pricing for buying groups, it is misleading as factually inaccurate. For example, in August 2013, Dentsply (one of Patterson's largest suppliers) told Patterson Regional Manager Fruehauf, "I wanted to respond to your question about our interaction with the Smile Source account group. We treat Smile Source in the same fashion as our other regional and national key account groups and/or buying groups. . . . We have varying programs for each group that range from net or lower retail pricing, to free good auto processing offers, to cash rebates." (CX3054 at 001; Rogan, Tr. 3550 (Dentsply is one of Patterson's largest manufacturing partners).) The record evidence establishes that many manufacturers found it profitable to work with buying groups. CCFF ¶¶ 1314-1315. For example, [redacted]

[redacted]

[redacted]

c. MSOs.

50. MSOs, or "Managed Service Organizations," "provide a platform with a suite of nonclinical business services that they offer to private practice dentists...." (Titus, Tr. 5327; Sullivan, Tr. 3902). MSOs helps manage its member's offices and the members pay the MSO for the management-type services it provides. (CX 8025 (Sullivan, Dep. at 234); CX 8033 (Cavaretta, Dep. at 50-51)). Some MSOs provide management services in exchange for equity in a dental practice. (CX 8033 (Cavaretta, Dep. at 50-51)).

Response to Proposed Finding No. 50

The proposed finding is misleading to the extent that it is incomplete. Evidence in the record shows that the terms DSO and MSO are often used interchangeably, although a DSO may be more likely to own a dental practice, while an MSO provides management services. (CX8025 (Sullivan, Dep. at 236-237) (sometimes no difference between an MSO and a DSO; a DSO may be more likely to own a practice while an MSO provides management services)); CCFF ¶ 63.

Otherwise, Complaint Counsel has no specific response.

d. Community Health Centers and Other Institutional Customers.

51. CHCs or "Community Health Centers" are "nonprofit health centers that offer medical care to the indigent," and are "usually federally funded." (Steck, Tr. 3690).

Response to Proposed Finding No. 51

Complaint Counsel has no specific response.

52. CHCs have also formed buying groups. (Ryan, Tr. 1136-37 (describing CHC buying groups and noting that "there's nothing that ties them together ... each one is independent of the others.")).

Response to Proposed Finding No. 52

The proposed finding is misleading to the extent that it attempts to draw parallels between CHC buying groups and buying groups of independent dentists. The record evidence

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

Moreover, the proposed finding is irrelevant to the extent it addresses entities that form buying groups unrelated to dental buying groups for independent dentists.

53. Schein has partnered with many of these CHC buying groups. (*See, e.g.*, RX 2309; RX 2306; RX 2107; RX 2287; RX 2527; RX 2269; RX 2271).

Response to Proposed Finding No. 53

See Response to Proposed Finding No. 52.

Moreover, the proposed finding is misleading as factually inaccurate to the extent that it suggests that Schein partnered with buying groups for independent dentists during the conspiracy period. *See, e.g.*, CCFF ¶¶ 925-954.

54. Schein's competitors knew Schein did business with CHC buying groups. (Ryan, Tr. 1134-35).

Response to Proposed Finding No. 54

See Response to Proposed Finding No. 53.

e. Buying Groups.

55. 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).

Response to Proposed Finding No. 55

Complaint Counsel has no specific response.

56. Many buying groups are no more than "loosely held-together groups of dentists...." (Rogan, Tr. 3432).

Response to Proposed Finding No. 56

The proposed finding is misleading, vague, and contrary to the weight of the evidence. To the extent that Respondents seek a finding that "many" buying groups have a particular characteristic, that language is too vague to provide a basis for any useful factual conclusion. Moreover, the term "loosely held-together" is vague and void of significance.

The proposed finding is also misleading because it is contrary to the weight of the evidence. A number of witnesses currently or previously affiliated with buying groups testified about their groups, including the structure of those groups. For example, Dr. Kois and Mr. Kois testified about the formation and structure of the Kois Buyers' Group, a buying group of 570 dentists formed by Dr. Kois, one of the dental industry's opinion leaders and a well-known clinical educator. CCFF ¶¶ 163-169. Kois members must have taken a course from the Kois Center and pay an annual membership fee of $299 to be eligible for the buying group. CCFF ¶ 169. Similarly, Dr. Goldsmith and Trevor Maurer testified about Smile Source, a buying group created with the goal leveling the playing field for independent dentists against corporate group practices by providing resources and discounts that independent dentists could not get on their own by leveraging economies of scale. CCFF ¶¶ 175-178. At the end of 2017, Smile Source had 562 members. CCFF ¶¶ 183.

To the extent this proposed finding implies that buying groups cannot drive purchasing volume because they are "loosely-held together," it is misleading as factually inaccurate. *See, e.g.*, CCFF ¶¶ 182, 184, 1246-1249 (Burkhart gained new customers and new sales through its partnership with Smile Source), 1738-1742 (Respondents lost business by not competing for buying groups).

57. There is no one-size-fits-all definition of buying groups, however. As Jeffrey Reece, Vice President at Burkhart, testified, "a buying group is not a buying group is not a buying group. Each one kind of comes to us in a different way...." (Reece, Tr. 4367). Patterson's Neal McFadden likewise explained, "buying groups were not all created equally. And they were like a jar of jellybeans. They each tasted differently." (CX 8004 (McFadden, Dep. at 119–20)).

Response to Proposed Finding No. 57

The proposed finding is misleading, contrary to the weight of the evidence, and provides an incomplete quotation to Reece's testimony. The record evidence shows that the Respondents, other distributors, buying groups, and dentists have a shared understanding that the term "dental buying group" means an organization of independent dentists that seeks to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products. *See, e.g.*, (Kois Jr., Tr. 348-349; Sullivan, Tr. 3899 (buying group "mean[s] a group of customers that get together and form a group to negotiate with their larger volume"), 3941; Guggenheim, Tr. 1566 (a buying group is a collection of customers that work together to leverage buying power to secure pricing); Meadows, Tr. 2418-2419; Steck, Tr. 3681-3683; Goldsmith, Tr. 1936, [redacted]; Cohen, Tr. 432-433; Reece, Tr. 4365; CX0301 (Cohen, IHT at 106); CX8004 (McFadden, Dep. at 19-20 ("[A] buying group is a group of independent dentists that get together to form a group in order to get discounted dental supplies."); CX2487 at 002 (as recognized by Schein, buying groups "seek to leverage their purchasing power" to extract lower prices); CX1156 at 001 (Benco's Patrick Ryan wrote: "Group Purchasing Organizations. They aggregate the purchase volume of unrelated entities in order to leverage price.")); CCFF ¶¶ 67-68. While there was testimony that different buying groups had different features in addition to their core purpose of obtaining discounts, it is misleading and contrary to the weight of the evidence to suggest that there is no basic understanding in the industry of what constitutes a dental buying group.

The proposed finding is also misleading as incomplete because it fails to provide the remainder of Reece's quote: "generally speaking, there isn't a single owner. It is a group of independent practices that kind of band together, ideally for a common cause or theme, and it's individual ownership." (Reece, Tr. 4367).

58. Reece testified that some buying groups are so loosely held together that "[i]t just seems like it's a couple of guys that over cocktails decided they wanted to save money on supplies, so they formed a group of buddies." (CX 0319 (Reece, IHT at 76)).

Response to Proposed Finding No. 58

The proposed finding is misleading, incomplete, and irrelevant. The proposed finding is misleading and incomplete because it fails to provide the context of the questions to which Reece was responding. Reece was addressing factors that make certain buying groups successful over others. [redacted]. He was not offering a generalization about buying groups. The proposed finding's mischaracterization of Reece's investigational hearing testimony conflicts with his trial testimony on buying groups: "[b]uying groups to Burkhart is a group of dentists that come together, ideally for a common cause or theme, and they leverage that size to their benefit as a means to try and increase their purchasing abilities and access to products . . . ." (Reece, Tr. 4365.)

59. When a buying group is involved in a relationship with a distributor, the individual dentist member still places the order directly with the distributor (if the member chooses to order from the distributor). (Reece, Tr. 4458-59).

Response to Proposed Finding No. 59

Complaint counsel has no specific response.

60. Unlike DSOs, buying groups are not centralized purchasers or under common ownership, so they generally cannot make volume purchasing commitments on behalf of their members or control their members' purchasing. (Misiak, Tr. 1469; Rogan, Tr. 3432-34, 3541-42; Ryan, Tr. 1166 ("with ownership structure there can be compliance"); Meadows, Tr. 2491-92 (while a DSO "would guarantee us the volume," but with buying groups, it's "rolling the dice"); CX 8013 (Fruehauf, Dep. at 63-65); CX 8023 (Guggenheim, Dep. at 270-72)). With a buying group, purchase orders are placed by each individual member, and distributors must ship to each individual member. (Cavaretta, Tr. 5568-69; Cohen, Tr. 861; Ryan, Tr. 1034-36; *see also* RX 2928 (member "[p]urchases are made directly from the vendor"); Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65).

Response to Proposed Finding No. 60

The proposed finding is misleading and not supported by weight of the evidence to the extent it implies that buying groups do not provide distributors with access to incremental sales. While buying groups do not have contractual volume commitments with their members, buying

nonetheless drive purchase volume to distributors. *See, e.g.*, CCFF ¶¶ 182, 184, 1246-1249, 1297-1313, 1320-1322, 1385-1386; *see also* CCFF ¶¶ 1352 (Patterson bid on Smile Source after the conspiracy because there was potential for incremental sales); 1376-1377 (after the conspiracy, Cohen believed working with EDA would increase sales). For example, [redacted]. Moreover, Respondents lost sales when customers joined buying groups affiliated with other distributors, demonstrating that buying groups have the ability to drive purchase volume. *See, e.g.*, CCFF ¶¶ 1738-1742, 1359-1363.

61. Many buying groups use the fact that their members could purchase from whomever they wanted as a selling point. ([redacted] CX 1034 (Kois: "You can purchase as much or as little as you like from any vendor listed. There are no exclusivity agreements and no obligations."); RX 2929 (Mari's List: "You can pick and choose what you change. You have total control over whom you choose to buy from.")).

Response to Proposed Finding No. 61

To the extent that the proposed finding implies that buying groups cannot drive purchase volume, it is misleading as to the facts. *See* Response to Proposed Finding No. 60.

62. Most buying groups do not offer the added services provided by DSOs either, such as marketing and education. (Rogan, Tr. 3432-33).

Response to Proposed Finding No. 62

The proposed finding is misleading, not supported by the testimony cited, and irrelevant. The cited testimony is a comparison of GPOs in the medical industry versus GPOs in the dental industry. There is no discussion whatsoever of DSOs in the cited testimony, and no comparison of the services offered by DSO and buying groups.

Moreover, the proposed finding is irrelevant to the extent that it suggests that any differences in services provides by DSOs and buying groups provides a justification for Respondents to enter into a conspiracy not to do business with buying groups.

63. Throughout trial, Complaint Counsel elicited testimony that the terms "GPO" and "buying group" were often used interchangeably in the dental industry. (Cavaretta, Tr. 5645; Guggenheim, Tr. 1566; Meadows, Tr. 2426; Reece, Tr. 4367-68; Sullivan, Tr. 3901; Rogan, Tr. 3429).

Response to Proposed Finding No. 63

Complaint Counsel has no specific response.

64. During its investigation, Complaint Counsel defined GPOs more broadly to also include "any entity that the [Respondent] referred to or defined as a dental [GPO], dental buying cooperative, [or] dental buying group ... in the ordinary course of business." (RX 2810-009).

Response to Proposed Finding No. 64

The proposed finding is misleading as irrelevant. While there is little difference between the definition of buying groups in the Civil Investigative Demand versus the Complaint, definitions used in the pre-Complaint investigative stage are irrelevant to the allegations in the Complaint.

B. Responses to Proposed Findings Regarding "Complaint Counsel's Conspiracy Claim."

65. On February 12, 2018, the Commission issued its Complaint against Respondents Benco, Patterson, and Schein. (*See* Complaint).

Response to Proposed Finding No.65

Complaint Counsel has no specific response.

66. Complaint Counsel has not moved to amend the Complaint to conform the allegations to the evidence.

Response to Proposed Finding No. 66

The proposed finding is misleading and irrelevant to the extent that it implies there is any reason that Complaint Counsel should have moved to amend the Complaint. Commission Rule of Practice §3.15 allows for motions to amend the complaint if issues not raised by the pleadings arise during the hearing. No such issues have arisen.

Moreover, the proposed finding is vague to the extent that it suggests that the evidence is inconsistent with Complaint allegations, but fails to identify any inconsistency.

Complaint Counsel has no specific response to the fact that Complaint Counsel has not moved to amend the Complaint.

1. *The Alleged Conspiracy.*

67. Complaint Counsel alleges 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...." (Complaint ¶ 1; *see also* Complaint ¶ 8 ("Benco, Schein, and Patterson executives agreed not to provide discounts to or otherwise contract with Buying Groups composed of independent dentists...."); RXD 0005).

Response to Proposed Finding No. 67

To the extent that the proposed finding relies on a demonstrative (RXD0005) as support for the finding, that reliance contravenes the Court's February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence. Otherwise, Complaint Counsel has no specific response.

68. Complaint Counsel does not allege a conspiracy specific to any particular buying group or groups. (*See* Kahn, Tr. 17 ("JUDGE CHAPPELL: And are you saying that respondents, all three, are refusing to deal with all so-called buying groups? MS. KAHN: We are alleging ... that respondents agreed with each other that none of them would do business with buying groups or discount to buying groups.")).

Response to Proposed Finding No. 68

The proposed finding is misleading to the extent it tries to distinguish between buying groups generally and specific buying groups, or that such a distinction is significant.

Moreover, the proposed finding is misleading as it omits that Respondents agreed not to discount to buying groups, and they each complied with that agreement by instructing their sales team not to discount to buying groups. *See, e.g.*, CCFF ¶¶ 396, 399, 401, 416-417, 423-424, 527-528, 540, 543-546, 607-611, 622-625, 630-652, 709, 713, 719, 729, 750, 754, 771, 773, 785, 788, 795, 799, 806, 809, 812, 828, 836, 850, 1187-1188.

Complaint Counsel has no specific response to the cited transcript.

69. Complaint Counsel has not introduced sufficient evidence from which a fact-finder can determine the start or end dates of the alleged conspiracy. Throughout trial, Complaint Counsel failed to identify specific dates, or to identify which acts were during the alleged conspiracy period and which occurred outside of the alleged conspiracy period.

Response to Proposed Finding No. 69

The proposed finding is misleading as contrary to the evidence in the record. Complaint Counsel has established that Benco and Schein entered into an agreement in 2011, and Patterson joined in 2013. CCFF ¶¶ 483, 495, 661-684, 687-732, 958-968.

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; *see also* CCFF ¶¶ 665-672), after that point, Benco gained the understanding that Schein had a policy *against* doing business with buying groups. CCFF ¶¶ 665-684. Thus, despite market rumors that Schein was working with buying groups, Benco understood in 2012, 2013, 2014, and 2015 that Schein (like Benco) did *not* do business with these customers. CCFF ¶¶ 665-684, 527, 1191, 1193. As Benco's Chuck 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 (quoting Cohen, Tr. 590).

The Feburary 2013 Cohen-Guggenheim exchange manifests the exchange of assurances that brought Patterson into the conspiracy. CCFF ¶ 495 (quoting CX0090 at 001).

Moreover, the proposed finding is irrelevant where the law does not require evidence of a precise start date. *See, e.g.*, *United States v. Consol. Packaging Corp.*, 575 F.2d 117, 126 (7th Cir. 1978) (evidence sufficient to find a conspiracy where no evidence in the record of the "specific agreement, its embryo or history of its development," noting "[t]he form or manner of making the agreement are not crucial.").

As to the end date of the conspiracy, there was no formal cessation of the agreement—Respondents themselves never affirmatively nullified the agreement. That is, in part, the reason

Complaint Counsel is seeking an injunction in this case. Instead, Complaint Counsel established that Benco, just like Schein and ultimately Patterson, started discounting to a buying group in late 2015 or early 2016. CCFF ¶¶ 1368, 1406; BFF ¶ 251. Benco's decision to discount to the buying group (Elite Dental Alliance or "EDA") was made *after* Benco settled the Texas Attorney General's antitrust investigation into Benco's response to the TDA buying group, and was thereafter required to log all of its communications with Schein and Patterson. CCFF ¶¶ 1159-1161. That logging requirement made the conspiracy difficult to maintain. CCFF ¶¶ 1159-1164.

2. *The Alleged Start of the Conspiracy.*

70. In their Complaint, Complaint Counsel alleged that "Benco and Schein entered into an agreement to refuse to provide discounts to or compete for Buying Groups no later than July 2012." (Complaint ¶ 32).

Response to Proposed Finding No. 70

Complaint Counsel has no specific response.

71. To support this July 2012 date, Complaint Counsel cited an internal Benco document, in which Mr. Cohen asked his report to send an email "so that [he] can print & send to Tim [Sullivan] with a note." (Complaint ¶ 35 (quoting CX 0018)).

Response to Proposed Finding No. 71

To the extent that the proposed finding cites the Complaint, Complaint Counsel has no specific response. To the extent that the proposed finding implies that Complaint Counsel's evidence is limited to that which it had at the date of filing the Complaint, the proposed response is misleading as factually inaccurate. Moreover, the Complaint allegation is that the conspiracy began *no later than* July 2012. The record evidence includes inter-firm communications between Benco and Schein prior to July 2012. *See, e.g.*, CCFF ¶¶ 679-681, 958-972.

72. The Complaint does not cite any specific communication between Mr. Sullivan and Mr. Cohen prior to July 2012, but refers generically to "frequent inter-firm communications between [them] prior to July 2012." (Complaint ¶ 33).

Response to Proposed Finding No. 72

See Response to Proposed Finding No. 71.

73. Complaint Counsel also did not cite to any specific *conduct* prior to July 2012 in their Complaint that could support an inference that the alleged conspiracy began prior to July 2012.

Response to Proposed Finding No. 73

The proposed finding is misleading and factually incorrect. Contrary to assertion in the proposed finding, Paragraph 34 of the Complaint specifically alleges conduct by Schein to support an inference of a conspiracy, to wit: "Sullivan and other top Schein executives began instructing its sales force to avoid selling to Buying Groups. As a result, Schein refused to provide discounts to or compete for the business of new Buying Groups."

To the extent that the proposed finding implies that Complaint Counsel's evidence is limited to that which it had at the date of filing the Complaint, the proposed response is misleading as factually inaccurate. The communications between Benco and Schein that amounted to efforts to enforce their agreement are, in and of themselves, conduct. The record contains additional evidence of communications between Cohen and Sullivan starting in early 2012 that were clearly about buying groups. In January 2012, Cohen confronted Sullivan when he discovered that Schein was working with buying group, Unified Smiles. CCFF ¶¶ 965-972. Ryan passed information to Cohen that Schein was working with a buying group called Unified Smiles with a note "For Timmy [Sullivan] conversation." CCFF ¶ 958. The next day, Cohen set up a call with Sullivan and Cohen responded to Ryan's initial email with the response "Talking this AM" just before his call with Sullivan. CCFF ¶¶ 964-967. Sullivan and Cohen spoke for 11 minutes and 34 seconds that day. CCFF ¶ 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.

The record evidence also establishes that Cohen planned to confront Sullivan a second time in July of 2012 after he once again learned from Ryan that Schein was working with a buying group, this time Smile Source. CCFF ¶¶ 978-983. This time, Ryan forwarded the

information to Cohen with a note saying, "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 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 he would not be surprised if he sent Sullivan a note about Smile Source. CCFF ¶ 992.

74. At trial, Complaint Counsel asserted that the conspiracy between Benco and Schein began at some unspecified time in 2011. (Kahn, Tr. 19 ("We allege that Schein and Benco entered into the conspiracy in the year 2011, and that's the start of the conspiracy between Schein and Benco."); *see also* Kahn, Tr. 33).

Response to Proposed Finding No. 74

Complaint Counsel has no specific response.

75. Complaint Counsel failed to identify any specific communication between Mr. Sullivan and Mr. Cohen in 2011. Instead, Complaint Counsel asserts that "[b]y [l]ate 2011, Schein '[n]o [l]onger [p]articipate[d] [i]n Buying Groups," quoting an e-mail from Schein's Randy Foley to a buying group. (RXD 0031 (citing CX 2062)). Complaint Counsel does not cite any communications between Schein and Benco prior to this email relating to buying groups.

Response to Proposed Finding No. 75

See Responses to Proposed Findings Nos. 71, 73; *see also* CCFF ¶¶ 327-385, 363, 378-383. 679.

To the extent that the proposed finding relies on a demonstrative (RXD0031) to establish a substantive fact, is should be disregarded. Reliance on a demonstrative to establish a substantive fact contravenes the Court's February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

76. Complaint Counsel then claims that "Benco [e]nforced [its] [a]greement [w]ith Schein in 2012," pointing to a telephone conversation between Mr. Cohen and Mr. Sullivan on January 13, 2012. (RXD 0101 (citing CX 0018)).

Response to Proposed Finding No. 76

Complaint Counsel has no substantive response.

77. Complaint Counsel does not cite any other communications or any conduct to support its allegation that an agreement was reached and the alleged conspiracy began in 2011.

Response to Proposed Finding No. 77

See Responses to Proposed Findings Nos. 71, 73; *see also* CCFF ¶¶ 327-385, 363, 378-383, 679.

The proposed finding is misleading, contrary to the weight of the evidence, and irrelevant. The record shows that, prior to late 2011, Schein had discounted to buying groups historically and profited from such arrangements. By late 2011, however, 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 (citing 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 (citing 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 (citing 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-Tr. Br. at Attach. 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. CCFF ¶¶ 680-681. Finally, while the record

evidence regarding inter-firm communications and Schein's change in behavior strongly suggests that Schein and Benco talked about buying groups prior to December 2011, The proposed finding is immaterial to the allegations in the Complaint, stating that the conspiracy started "no later than" July 2012.

3. *The Alleged Joinder of Patterson.*

78. Complaint Counsel alleges that "Patterson joined the agreement to refuse to provide discounts to or otherwise compete for Buying Groups no later than February 2013." (Complaint ¶ 36; *see also* Kahn, Tr. 19 ("Patterson joined the conspiracy in early 2013."); RX 2958-010 ("Patterson joined the agreement in February 2013.")).

Response to Proposed Finding No. 78

Complaint Counsel has no specific response.

4. *The Alleged End of the Conspiracy.*

79. *The Alleged End of the Conspiracy.* In their Complaint, Complaint Counsel claimed that the alleged "agreement continued at least into 2015." (Complaint ¶¶ 10, 61).

Response to Proposed Finding No. 79

Complaint Counsel has no specific response.

80. The Complaint does not cite any inter-firm communications in 2015 to support this allegation, but does cite to two internal Benco documents, one from May 2015 and the other from June 2015, indicating that Benco's head of Special Markets, Pat Ryan, believed that Patterson and Schein do not offer discounts to buying groups. (Complaint ¶¶ 63-64 (citing CX 0012-001 and CX 1185-002)).

Response to Proposed Finding No. 80

The proposed finding is vague as to the term "this allegation."

As to the end date of the conspiracy, there was no formal cessation of the agreement—Respondents themselves never affirmatively nullified the agreement. That is, in part, the reason Complaint Counsel is seeking an injunction in this case. Instead, Complaint Counsel established that Benco, just like Schein and ultimately Patterson, started discounting to a buying group in late 2015 or early 2016. CCFF ¶¶ 1368, 1406; BFF ¶ 251. Benco's decision to discount to the

buying group (Elite Dental Alliance or "EDA") was made *after* Benco settled the Texas Attorney General's antitrust investigation into Benco's response to the TDA buying group, and was thereafter required to log all of its communications with Schein and Patterson. CCFF ¶¶ 1159-1161. That logging requirement made the conspiracy difficult to maintain. CCFF ¶¶ 1159-1164.

The cited documents, CX0012 at 001 (May 2015 email from Ryan to Cohen: "The best part about calling these guys is I already KNOW that Patterson and Schein have said NO") (emphasis in original) and CX1185 at 002 (July 2015 email from Ryan: "We don't allow [large group] pricing unless there is common ownership. Neither Schein nor Patterson do either."), demonstrate that Benco believed the Respondents acted consistent with the conspiracy, even after the Texas order became effective.

81. At trial, Complaint Counsel clarified that the conspiracy ended "in April [] 2015 … [when] Benco entered into a settlement agreement with the Texas Attorney General" which made the conspiracy "difficult, if not impossible, to maintain," and "[R]espondents started dealing with buying groups after that point." (Kahn, Tr. 19; *see also* Kahn, Tr. 54 ("for all intents and purposes, the conspiracy was impossible to maintain much longer past that point" after April 2015); CC Pretrial Br. at 12 n.66).[1]

Response to Proposed Finding No. 81

The proposed finding is misleading and misstates the record by asserting that Complaint Counsel's explanation that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015 created a precise "end" date. Complaint Counsel has never taken the position that Benco's entry into a settlement with the Texas Attorney General created a precise "end" date. *See, e.g.*, Complaint Counsel's Opening Statement at 19; *see also* Complaint Counsel's Post-Tr. Br. at 37-38. In addition, to the extent that the Respondents' footnote 1 in their the Joint Proposed Findings is intended to be part of that finding, Respondents misstate the record.

[1] In its Opposition to Patterson's Motion to Dismiss, Complaint Counsel walked back from their Opening Statement in this regard: "Complaint Counsel does not allege the agreement was nullified on a specific date. Rather, Complaint Counsel alleges that the conspiracy started to fall apart in 2015, after Benco entered into a settlement agreement with the Texas Attorney General in April 2015 … The unlawful agreement between Respondents was difficult to maintain much longer after Benco settled with the Texas Attorney General." (CMTD at 17-18 n.99).

As to the end date of the conspiracy, there was no formal cessation of the agreement—Respondents themselves never affirmatively nullified the agreement. That is, in part, the reason Complaint Counsel is seeking an injunction in this case. Instead, Complaint Counsel established that Benco, just like Schein and ultimately Patterson, started discounting to a buying group in late 2015 or early 2016. CCFF ¶¶ 1368, 1406; BFF ¶ 251. Benco's decision to discount to the buying group (Elite Dental Alliance or "EDA") was made *after* Benco settled the Texas Attorney General's antitrust investigation into Benco's response to the TDA buying group, and was thereafter required to log all of its communications with Schein and Patterson. CCFF ¶¶ 1159-1161. That logging requirement made the conspiracy difficult to maintain. CCFF ¶¶ 1159-1164.

Moreover, the determination of a precise end date is irrelevant to the question of whether the Respondents entered into an agreement and acted in furtherance of the overarching conspiracy.

Finally, to the extent that Respondents' commentary in footnote 1 is intended to be part of the proposed finding, it is unclear what finding it proposes and should be disregarded.

C. Responses to Proposed Findings Regarding "Every Fact Witness Disclaimed the Existence of the Alleged Agreement."

1. *Every Fact Witness Either Outright Denied That Schein, Patterson, and Benco Participated in an Agreement Or Denied Having Knowledge of Any Such Agreement.*

82. Complaint Counsel listed the following individuals in a sworn interrogatory as being "person[s] hav[ing] knowledge" of the alleged conspiracy: Chuck (Charles) Cohen, Rick Cohen, Paul Jackson, Michael McElaney, Patrick Ryan, Timothy Sullivan, Kathleen Titus, Andrea Hight, Brian Brady, Hal Muller, Randall Foley, Debbie Foster, James Breslawski, Dave Steck, Michael Porro, Jake Meadows, Joseph Cavaretta, Scott Anderson, Paul Guggenheim, Dr. Brenton Mason, Neal McFadden, Dave Misiak, Devon Nease, Tim Rogan, Dr. Joseph Baytosh, Francis ("Frank") J. Capaldo, Dr. Andrew Goldsmith, John C. Kois, Jr., Dr. John C. Kois, Sr., Trevor Maurer, Jeffrey Reece, Justin Puckett, Mark Rowe, Brian Evans, Randall McLemore, Mark Mlotek, Glenn Showgren, Darci Wingard, Wesley Fields, and Anthony Fruehauf. (RX 2958-009-12).

Response to Proposed Finding No. 82

The proposed finding is misleading in that it misstates Complaint Counsel's response to Patterson's Interrogatory No. 4. Complaint Counsel's response lists the persons shown above as "persons who have knowledge *of the facts supporting the allegations* in Paragraphs 7, 8 and 38 and the finding of the agreement alleged in the Complaint." (RX2958 at 010-011) (emphasis added). Because the proposed finding misstates and misquotes Complaint Counsel's response, it should be disregarded.

83. Every individual listed above who testified in this case[2] denied before this Court, under penalty of perjury, any knowledge of the alleged conspiracy. (RX 2958-009-12). Indeed, several witnesses testified that Complaint Counsel's interrogatory response was false. (Foley, Tr. 4735-36 ("Q. That's false; right, sir? A. That is correct."); (Titus, Tr. 5279-80) ("That is not true." ... "That is not a true statement."); Cavaretta, Tr. 5621-22 ("That would be false."); Cavaretta, Tr. 5623 ("Q. So the statement in the document is false. A. False, correct.") Reece, Tr. 4490-91 ("Q. It's true that it's a lie? A. It's true that I … do not have awareness of an agreement specific to group purchasing organizations."); Maurer, Tr. 4989-90 ("Q. So this is false. Fair? A. I guess so.")).

Response to Proposed Finding No. 83

The proposed finding is misleading and irrelevant in that it relies upon a misstatement of Complaint Counsel's response to Patterson's Interrogatory No. 4. Complaint Counsel's response to Interrogatory 4 states the names of "persons who have knowledge *of the facts supporting the allegations* in Paragraphs 7, 8 and 38 and the finding of the agreement alleged in the Complaint." (RX2958 at 010-011) (emphasis added).

[2] All witnesses listed testified except for Rick Cohen, Mark Rowe, Brian Evans, Randall McLemore and Glenn Showgren. However, Brian Evans, Benco's Director of Sales for the West, testified in a separate matter that it would "surprise [him]" if executives from Benco and Patterson had coordinated with one another to not work with buying groups. (RX 1121 (Evans, Class Action Dep. at 279 ("Q. Would it surprise you if executives from Benco and Patterson had coordinated with one another to ban working with buying groups?... A. Yes."))). Moreover, Paul Jackson, Michael McElaney, Mark Mlotek and Wesley Fields were only deposed in an investigational hearing capacity. Dean Kyle is not listed by Complaint Counsel as a "person hav[ing] knowledge" of the alleged conspiracy and was only deposed in an investigational hearing capacity.

Moreover, the proposed finding relies on questions asked of witnesses in which Patterson's counsel misstates Complaint Counsel's response to Interrogatory No. 4. The witnesses' responses are, therefore meaningless.

In addition, the opinions of a fact witness about discovery responses are irrelevant as to whether the record contains facts supporting the allegations of the Complaint.

Finally, to the extent that Respondents are treat footnote 2 as support for this finding, it deserves no weight. Brian Evans was not submitted for testimony in this matter. Although the deposition of Brian Evans taken in a separate litigations (*SourceOne, Inc. v. Patterson Cos., Inc.,* No. 2:15-CV-05440 (E.D.N.Y.); *In re Dental Supplies Antitrust Litig.,* No 16-CV-00696 (E.D.N.Y.)) is an exhibit in this matter, Complaint Counsel did not participate in the deposition and had no opportunity to ask about the foundation for any of Evans' answers.

84. Patterson's Requests for Admission 11 and 12 asked Complaint Counsel to admit, respectively, that "no witness has admitted to having personal knowledge of an agreement between Respondents not to do business with Buying Groups," and that "no witness currently or formerly employed by Respondents has admitted to the existence of an agreement between Respondents not to business with Buying Groups." (RX 2944-009-10).

Response to Proposed Finding No. 84

Complaint Counsel has no specific response.

85. Complaint Counsel denied both requests. (RX 2944-009-10).

Response to Proposed Finding No. 85

The proposed finding is misleading as vague as to the meaning of "both requests."

Moreover, the proposed finding is misleading, incomplete and irrelevant. In citing to Complaint Counsel's response to Patterson's Request for Admission 11 and 12, Respondent Patterson has failed to provide Complaint Counsel's complete response, including Complaint Counsel's General and Specific Objections. With respect to Patterson's Request for Admission 11, Complaint Counsel's full answer states as follows: "In addition to its General Objections,

Complaint Counsel specifically objects to this Request as overly broad and vague, including as to the terms "witness," "admitted," and "agreement." Complaint Counsel also objects to this Request as unduly burdensome and oppressive in that it asks Complaint Counsel to ascertain or disclose information that is in the possession, custody, or control of Respondents. Complaint Counsel further objects that the Request is unduly burdensome where it seeks information that is more readily available to Respondents. Complaint Counsel further objects to this Request as seeking Complaint Counsel's legal conclusion. Subject to and without waiving these objections, Complaint Counsel denies this request."

With respect to Patterson's Request for Admission 12, Complaint Counsel's full response states as follows: "In addition to its General Objections, Complaint Counsel specifically objects to this Request as overly broad and vague, including as to the terms "witness" "admitted," and "agreement." Complaint Counsel also objects to this Request as unduly burdensome and oppressive in that it asks Complaint Counsel to ascertain or disclose information that is in the possession, custody, or control of Respondents. Complaint Counsel further objects that the Request is unduly burdensome where it seeks information that is more readily available to Respondents. Complaint Counsel further objects to this Request as seeking Complaint Counsel's legal conclusion. Subject to and without waiving these objections, Complaint Counsel denies this request."

Otherwise, Complaint Counsel has no specific response.

86. There was no evidence in the record at the time Complaint Counsel completed this sworn discovery response that any witness had admitted to having personal knowledge of a conspiracy between Schein, Patterson, and Benco not to do business with buying groups.[3]

Response to Proposed Finding No. 86

[3] Respondents understand and have endeavored to abide by this Court's Order that "All proposed findings of fact shall be supported by specific references to the evidentiary record." (Feb. 21, 2019 Order on Post-Trial Briefs). But where a proposed finding of fact involves the absence of evidence in the record supporting a given point, Respondents cannot usually cite the record.

The proposed finding is misleading, factually inaccurate, and irrelevant. The contents of the evidentiary record during mid-discovery have no bearing on whether Complaint Counsel have proven Respondents' illegal agreement by a preponderance of the evidence. Nonetheless, the proposed finding is factually inaccurate as Respondents' own documents reveal an admission of the conspiracy. *See, e.g.*, CCFF ¶ 657 (quoting CX0164 at 002 ("[W]e've signed an agreement that we don't do business with [buying groups].")).

87. There is no evidence in the record that any witness has admitted to having personal knowledge of a conspiracy between Schein, Patterson, and Benco not to do business with buying groups. (*Compare* RX 2944-009-10 *with* ¶¶ 82-106 *infra*).

Response to Proposed Finding No. 87

See Response to Proposed Finding No. 86. Moreover, the proposed finding is misleading to the extent that it suggests that absence of an admission of conspiracy hinders Complaint Counsel's ability to prove Respondents' illegal agreement by a preponderance of the evidence.

88. Complaint Counsel's denials of Patterson's Requests for Admission 11 and 12 were false. (RX 2944-009-10; *see* ¶¶ 82-106 *infra*).

Response to Proposed Finding No. 88

See Response to Proposed Finding No. 86. The proposed finding is misleading, incomplete and irrelevant. To the extent the proposed finding is an effort to raise a discovery dispute, it is untimely and irrelevant at the post-trial stage.

2. *Responses to Proposed Findings Regarding "No Party Witness Testified to Any Knowledge of the Alleged Agreement."*

89. Every Schein witness to testify at trial disclaimed the existence of the alleged agreement or any knowledge of the agreement.

Response to Proposed Finding No. 89

The proposed finding has no evidentiary citations and should be disregarded. Moreover, the proposed finding is misleading as the underlying conclusion is contradicted by Respondents'

contemporaneous documents. *See, e.g.*, CCFF ¶¶ 527, 549, 603, 1103, 1183, 1190-1191, 1193-1195.

Moreover, the proposed finding is irrelevant. Aside from the executives who participated in the inter-firm communications about buying groups, or were forwarded such inter-firm communications, or otherwise referenced the Big Three's conspiracy, it is very likely that Respondents' employees who testified at trial or in a deposition would not have been informed of the agreement. The conspirators (Cohen, Sullivan, and Guggenheim) of course had knowledge of the agreement. *E.g.*, CCFF ¶¶ 483-484, 495-496, 570, 572, 575-577, 661-680, 958-972, 980-992, 996-997, 1029-1036, 1068-1069. There is also evidence that some individuals had knowledge of some of the underlying conduct that is the basis of the conspiracy. For example, Benco's Ryan (CCFF ¶¶ 958, 982, 527, 1191, 1193), Patterson's Misiak, Rogan, and McFadden (CCFF ¶¶ 491, 549, 1188, 1190, 657), and Schein's Foley (CCFF ¶¶ 1009-1017, 1194, 1195). For individuals not informed about the agreement, their testimony is not evidence of the lack of a conspiracy.

Furthermore, whether Respondents entered into an "agreement," as defined by the Sherman Act and relevant case law, is a mixed question of law and fact based on the totality of the evidence. *United States v. General Motors Corp.*, 384 U.S. 127, 141 n.16 (1966) ("[T]he ultimate conclusion by the trial judge [of whether] the defendants' conduct . . . constitute[s] a combination or conspiracy in violation of the Sherman Act . . . is not one of 'fact,' but consists rather of the legal standard required to be applied to the undisputed facts of the case."). Thus, witness denials of an agreement are given little weight when contemporaneous documents and other evidence show an agreement. *Gainesville Utils. Dep't v. Fla. Power & Light Co.*, 573 F.2d 292, 301 n.14 (5th Cir. 1978)

90. Tim Sullivan, President of Henry Schein Dental, was offended by Complaint Counsel's allegations and "never" entered into the alleged agreement with either Benco or Patterson. (Sullivan, Tr. 4020-21 ("I don't know if people understand the consequences of being falsely accused, the impact it has on family, our team members, customers who know what our brand stands for. There are consequences to falsely accusing people of

things we know we didn't do."), 4257 ("Q. Never had any kind of agreement with any of your competitors about buying groups? A. Never.")).

Response to Proposed Finding No. 90

See Response to Proposed Finding No. 89. Moreover, the proposed finding is misleading and contrary to the weight of the evidence. The evidence shows that Sullivan entered into an agreement with Cohen not to discount to buying groups. The record evidence establishes that, as early as 2011, Cohen communicated Benco's no buying group policy to Sullivan. Cohen testified that he informed Sullivan of Schein'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 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* CCFF ¶¶ 661-684.

Moreover, the record shows that, prior to late 2011, Schein had discounted to buying groups historically and profited from such arrangements. By late 2011, however, 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 (citing 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 (citing 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 (citing 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-Tr. Br. at Attach. B.

The record shows that Cohen and Sullivan communicated about buying groups multiple other times during the conspiracy. (1) In January 2012, Cohen confronted Sullivan when he discovered that Schein was working with buying group, Unified Smiles. CCFF ¶¶ 965-972. Ryan passed information to Cohen that Schein was working with a buying group called Unified Smiles with a note "For Timmy [Sullivan] conversation." CCFF ¶ 958. Cohen then set up a call with Sullivan and Cohen responded to Ryan's initial email with the response "Talking this AM" just before his call with Sullivan. CCFF ¶¶ 964-967. Sullivan and Cohen spoke for 11 minutes and 34 seconds on January 13, 2012. CCFF ¶ 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.

(2) Cohen planned to confront Sullivan a second time in July of 2012 after he once again learned from Ryan that Schein was 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 ¶¶ 981-986. Ryan wanted Cohen to tell Sullivan to stop working with buying group Smile Source. CCFF ¶¶ 984-986. Cohen agreed, 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 it would not be a surprise if he sent Sullivan a note about Smile Source. CCFF ¶ 992.

(3) 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. . . . 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 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.")).

(4) 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, Tim 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 Tim 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.

(5) 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 ¶¶ 1022, 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.

Sullivan was personally involved in all of the conversations discussed above.

91. Dave Steck, Vice President and General Manager of Henry Schein Dental, also knew nothing of an agreement between Patterson, Benco and Schein relating to buying groups. (Steck, Tr. 3708-10, 3830-33 ("Q. Do you have any knowledge of any agreement involving Patterson concerning not selling to buying groups? A. I have no knowledge. Q. From your perspective, has there ever been any such agreement? A. Not -- no …. Q. Do you have any knowledge of the existence of any agreement between Schein and Benco about buying groups? A. Do not.")).

Response to Proposed Finding No. 91

See Response to Proposed Finding No. 89. Moreover, the proposed finding is misleading, irrelevant, and contradicts the record evidence. Contemporaneous documents show that Steck was involved in communications with his counterpart at Patterson regarding the decision by Respondents to withdraw from the 2014 Texas Dental Association Annual Meeting because the TDA had sponsored a buying group called TDA Perks Supplies. The record evidence shows that Steck spoke with Misiak on January 6, 2014 for 14 minutes. CCFF ¶¶1123, 1124. On that call, Patterson's Misiak told Schein's Steck that it was planning to pull out of the TDA meeting. CCFF ¶1125. In response, Steck felt he had an obligation to get back to his competitor about whether Schein would also be pulling out of the TDA meeting. CCFF ¶ 1129 (quoting CX0205 at 002 (January 21, 2014 email from Steck to three Schein managers: "Guys, I have to get back to PDCO on whether or not we are attending the TDA.")). Indeed, Steck promised Misiak that he would get back to Misiak with Schein's final decision on pulling out of the TDA meeting. CCFF ¶¶ 1126, 1130 (citing CX0112 ("Hi Dave, I'll be calling you to let you know aobut our decision on the matter we recently discussed in the next couple of days.")).

Patterson's response to Steck's communications further illustrate the understanding between Steck and Misiak. Misiak wrote to his colleague Rogan: "He already told me they were out full blown!" CCFF ¶ 1131 (quoting CX0112). Rogan responded, "That sucks. You should call him. 'Thought I could trust you' type of conversation." *Id.*

92. Randy Foley, Schein's former Vice President of Sales for Special Markets, repeatedly denied the existence of an agreement between Patterson, Benco, and Schein relating to buying groups. (Foley, Tr. 4600 ("Q. Mr. Foley, are you aware of any such agreement

between Benco, Schein and Patterson not to provide discounts to or otherwise contract with buying groups of independent dentists? A. No.... Q. You've never heard of such an agreement. A. Never.")).

Response to Proposed Finding No. 92

See Response to Proposed Finding No. 89. Moreover, the proposed finding is misleading and contrary to the weight of the evidence. The evidence shows that Benco's Ryan reached out to Foley to discuss buying groups and informed Foley of Benco's bidding position relating to buying groups. 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. The record shows that Ryan spoke to Foley (his counterpart at Schein) 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.")).

In addition, Foley's own statements in documents suggest that he believed there was an agreement by Patterson, Schein and Benco to act together to stop the growth of buying groups. On March 5, 2014, Foley wrote to a third party at a large national DSO, "The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott." (CX2106 at 001; Foley, Tr. 4596-4598; *see* CCFF ¶¶ 1194, 1138).

Later, after the conspiracy had fallen apart, Foley commented on his knowledge that Schein, Patterson and Benco had previously not done business with buying groups, telling

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 ¶ 1185 (quoting CX2094 at 001).

93. Jake Meadows, Schein's former Vice President of Sales for the Eastern Area and current Vice President of Sales for Special Markets, had no knowledge of an agreement between Patterson, Benco, and Schein. (Meadows, Tr. 2467 ("Q. Do you know anything about such an agreement? A. I do not. Q. Have you ever heard of such an agreement? A. Never heard of it.")).

Response to Proposed Finding No. 93

See Response to Proposed Finding No. 89. The proposed finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Meadows, who was not personally a party to the conspiracy or 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.

94. Joe Cavaretta, Schein's former Vice President of Sales for the Eastern Area and Western Area, was not aware of, and did not enter into, an agreement relating to buying groups with Patterson or Benco. (Cavaretta, Tr. 5529 (Q. Are you aware of any agreement between Benco, Schein and Patterson not to do business with buying groups? A. I'm not. … Q. Are you aware of any agreement or understanding of any way between Benco, Schein and Patterson not to offer discounts to buying groups? A. No, I'm not."), 5622-27)).

Response to Proposed Finding No. 94

See Response to Proposed Finding No. 89. The proposed finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Cavaretta, who was not personally a party to the conspiracy or to 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.

95. Kathleen Titus, Schein's former Director of Group Practice and Zone Manager for Special Markets, felt personally diminished by Complaint Counsel's allegations and disclaimed the existence of any such agreement between Schein, Patterson, and Benco. (Titus, Tr. 5191-93 ("Q. Ms. Titus, are you aware of any agreement between Benco, Schein and Patterson not to provide discounts to or otherwise contract with buying groups of independent dentists? A. Absolutely not, because no agreement existed, and I know that because it was my job to work with buying groups over the last twenty-plus years. In fact, I find it personally diminishing because I spent so much of my career at Henry Schein working with buying groups.")). Ms. Titus further testified that Complaint Counsel's sworn response to Schein's Interrogatory 11, naming her as a Schein executive or employee who had "referred to and/or enforced Schein's policy not to provide discounts to or compete for the business of Buying Groups" was false. (RX 2957-012-13; Titus, Tr. 5280 ("And you see the part that he just highlighted at the beginning of that sentence, 'Other Schein executives and employees also referred to and/or enforced Schein's policy not to provide discounts to or compete for the business of Buying Groups, including' -- and your name is listed, Kathleen Titus. Is that a true statement? A. That is not a true statement. Q. Have you ever referred to or enforced a conspiracy involving Patterson? A. No, I have not, and there was no conspiracy.")).

Response to Proposed Finding No. 95

See Response to Proposed Finding No. 89. The proposed finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Titus, 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 the testimony of Titus, a fact witness, to offer an ultimate opinion on what constitutes a conspiracy, it is misleading and irrelevant. Titus, as a fact witness, is not competent to opine on a legal conclusion.

Moreover, the weight of the evidence calls into question the credibility of Titus's testimony. For example, in July 2014, Titus also wrote to Cavaretta regarding turning down PGMS, a GPO, "[j]ust delivered the news moments ago to Kathy Khalik. She was absolutely gracious, but clearly devastated. I explained if there was a time in the future they become an MSO that could demonstrate compliance, we would be pleased to revisit." (CX2219 at 002; CX8010 (Titus, Dep. at 208-209)). The next day, Titus wrote to Schein's Showgren and Kevin

Upchurch: "We had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this and sent to Joe for review. It went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO's are not good for Schein." (CX2235 at 001; Titus, Tr. 5310-5311.) Although Titus confirmed this statement at her deposition (CX8010 (Titus, Dep. at 151)), she contradicted herself in her sworn testimony at trial. (Titus, Tr. 5312-5313 ("Q. As of the time that you wrote this e-mail [CX2235], it was your understanding that Tim Sullivan had shot down a PGMS agreement? A. No.")). Thus, Titus' contradictory testimony about what had occurred at Schein with respect to dealing with buying groups raises questions of either her credibility or her recall of specific facts.

Finally, the proposed finding is irrelevant to the extent that it seeks to establish the witness disagrees with that Complaint Counsel's response to a discovery request. The witness's opinion about a discovery response is irrelevant.

96. Every Schein witness who was deposed but not called to testify at trial disclaimed the existence of the alleged agreement or any knowledge of the agreement, including Jim Breslawski, Brian Brady, Hal Muller, Debbie Foster, Andrea Hight, Michael Porro, Darci Wingard, and Mark Mlotek. (CX 8012 (Breslawski, Dep. at 242 ("Q. The FTC alleges in this action that Henry Schein had an agreement with Patterson and Benco to not do business with buying groups. Do you have any knowledge of such an agreement? A. I do not. Q. Would such an agreement be contrary to Henry Schein's business practices about working with buying groups? A. It would.")); CX 8020 (Brady, Dep. at 318-19 ("Q. And it's fair to say you've never reached an agreement or understanding with anyone at Patterson about buying groups or GPOs? A. Correct. Q. The FTC alleges in this case that Henry Schein had an agreement with Patterson and Benco to not do business or not offer discounts to buying groups or GPOs. Do you have any knowledge of such an agreement? A. No. Q. Would you say that such an alleged agreement would be contrary to your understanding of Henry Schein's business principles? A. Yes.")); CX 8001 (Foster, Dep. at 163-66 ("Q. Are you aware of any agreement between Schein and Patterson not to do business with buying groups? A. No.... [Q.] [A]re you aware of any agreement between Benco and Schein not to do business with buying groups? .... A. No.")); CX 8022 (Hight, Dep. at 192-193 ("I have no knowledge at all of any such agreement.")); CX 8005 (Muller, Dep. at 223 ("Q. Do you have any knowledge of the allegation made by the FTC that there's an agreement between Patterson, Benco and Henry Schein regarding buying groups? A. No.")); CX 8000 (Porro, Dep. at 287-89 ("Q. Are you aware of any agreement between Schein and Patterson not to do business with buying groups? A. No.... Q. And again, you certainly didn't reach any agreement with anyone at Patterson not to do business with buying groups? A. I have not.... Q. Are you aware of any agreement

between Benco and Schein not to do business with buying groups? A. No.")); CX 8009 (Wingard, Dep. 233, 248-49 ("Q. Are you aware of any agreement between Schein and Benco not to do business with any APC or buying group? A. No.")); CX 0308 (Mlotek, IHT at 183 ("Q. Has Schein ever entered into any agreement, acquisition or joint venture agreement with Patterson? A. No."), 184 (Q. And are you aware of anyone from Schein communicating with Benco about group purchasing organizations or buying groups? A. Not to the best of my knowledge.")).

Response to Proposed Finding No. 96

See Response to Proposed Finding No. 89. The proposed finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Schein employees or executives, who was not personally parties to the conspiracy or directly involved in 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.

With respect to Wingard, her testimony about her understanding of an agreement should also be disregarded because she did not become a Schein employee until May 2016, approximately a year after the conspiracy began to fall apart. Accordingly, she could have had no personal knowledge relevant to the question she was asked. Her testimony is irrelevant for that additional reason.

97. Every Patterson witness to testify at trial disclaimed the existence of the alleged agreement or any knowledge of the agreement.

Response to Proposed Finding No. 97

See Response to Proposed Finding No. 89. Moreover, the proposed finding has no evidentiary citations and should be disregarded.

98. Paul Guggenheim, former-President and current-CEO of Patterson, denied that he has ever agreed to, or heard of, such an agreement with Benco or Schein to not sell to buying groups. (Guggenheim, Tr. 1853 ("Q. Have you ever heard of such an agreement between [Schein] and Patterson? A. No."), 1870 ("Q…. [D]id you believe that you formed any agreement between Patterson and Benco not to do business with buying groups? A. Absolutely not.")).

Response to Proposed Finding No. 98

See Response to Proposed Finding No. 89. The proposed finding is misleading and contrary to the weight of the evidence to the extent that it implies that Patterson did not participate in a conspiracy with Schein and Benco not to do business with buying groups merely because Guggenheim did not view his communications with his competitor as an agreement.

The proposed finding is contrary to extensive documentary evidence that Guggenheim entered into an agreement with Benco not do business with buying groups, and that Patterson was part of an overarching conspiracy not to discount to buying groups. The record also shows that, as part of that conspiracy, Respondents rejected buying groups. CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198. The record shows that Cohen communicated Benco's no buying group policy to Guggenheim February 8, 2013 (Cohen, Tr. 501 ("Q. You've communicated Benco's no-buying group policy to Mr. Guggenheim? A. . . . [Y]es.")), and that, within a few hours of receiving 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." (CX0090 at 001; Guggenheim, Tr. 1607-1608; CCFF ¶¶ 483, 495-496). The record shows that Guggenheim meant that Patterson felt the same way about buying groups. (Guggenheim, Tr. 1611-1612). The record also shows that Guggenheim could not identify any business rationale or procompetitive justifications for his February 2013 communications with Cohen. (Guggenheim, Tr. 1605-1606, 1612; CX0314 (Guggenheim, IHT at 234, 235, 248); CCFF ¶1168).

The record also shows that four months later, in June 2013, when Guggenheim learned that Benco was working with Atlantic Dental Care ("ADC"), a group 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 with respect to buying groups. (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

record shows Guggenheim viewed Benco's bidding on and doing business with ADC as a deviation from what Cohen previously told him about Benco's policy not to do business with buying groups in February 2013 (CX0056; Guggenheim, Tr. 1628; CCFF ¶¶ 570-572). In addition, the record shows that Guggenheim communicated with Cohen to acknowledge his understanding of (and agreement with) Cohen's position regarding which entities were covered and which entities were not covered by their agreement. (CX0062 at 001 (June 10, 2013 Guggenheim email to Cohen: "Sounds good Chuck. Just wanted to clarify where you guys stand."); CCFF ¶ 582). As with the February 2013 communication, Guggenheim could not provide any procompetitive justification for his June 2013 communications with Chuck Cohen regarding ADC. (CX0314 (Guggenheim, IHT at 297-299); CCFF ¶ 1169).

Contrary to Guggenheim's testimony, contemporaneous documentary evidence from Guggenheim's key executives refer to an overarching agreement among Schein, Patterson, and Benco. (CX0093 at 001 (Misiak: **"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."**) (emphasis in original); CCFF ¶¶ 1184; CX0106 at 001 (Rogan: ". . . 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). Schein documents, moreover, confirm this understanding. (CX2106 at 001 ("The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott."); CCFF ¶ 1185).

99. Neal McFadden, President of the Special Markets division at Patterson, repeatedly denied the existence of an agreement between Patterson, Benco, and Schein relating to buying groups. (McFadden, Tr. 2740 ("Q. Did you personally, Neal McFadden, at any time in your 21 years with Patterson, did you strike an agreement with somebody from Benco or somebody from Schein that you would not sell or discount to buying groups? Did you do that, sir? A. I did not."), 2836-37).

Response to Proposed Finding No. 99

See Response to Proposed Finding No. 89. The proposed finding is misleading to the extent that it implies there was no agreement between Schein, Patterson and Benco because McFadden claims that he did not know of the agreement. The proposed finding is also contrary to the weight of the evidence in the record. For example, on June 12, 2014, McFadden expressly told a potential customer that Patterson has "signed an agreement that we won't work with GPO's." (CX0164 at 002, line 248 (Text message from McFadden to former Patterson employee who was representing an entity called "Choice One": "Is choice one a GPO or are you all actually acquiring practices? The reason I'm asking is we've signed an agreement that we won't work with GPO's.")). Whether there was an actually signed agreement, McFadden's statement to a potential customer is indicative of his belief that there was at least an understanding – and certainly indicative of his desire for a potential customer to believe there was an agreement. McFadden's after-the-fact effort to explain that his statement was not correct, asserted that he lied to a potential customer. (CX8004 (McFadden, Dep. Tr. 110-111)). But this claim is contradicted by other contemporaneous evidence. CCFF ¶¶ 658-660.

The record evidence also shows that McFadden, who had been open to the possibility of working with buying groups when he started working with Patterson's Special Markets division, quickly learned that he should not do business with buying groups. *See* (CX0315 (McFadden, IHT at 169-170) (McFadden was anxious to develop new business and saw "any sale" as a "potential opportunity" including sales to GPOs); CX0106 at 001 (August 2013 email from McFadden to Misiak and Rogan, "Is it worth it to explore GPO???????"); CX0106 at 001 (Rogan's response to McFadden's GPO interest inquiry, "We don't need GPO's [sic] in the dental business. Schein, Benco, and Patterson have always said no."); *See also* CCFF ¶¶ 597-604). Despite McFadden's earlier interest in buying group business, by September 2013, McFadden told a regional manager that Patterson was "choosing to forgo this route [joining with a GPO] as its [sic] both anti rep, manufacturer and distributor." (CX3116 at 001; CCFF ¶ 606). On September 4, 2013, McFadden sent a memorandum to the whole Patterson sales team that

defined Special Markets as excluding GPOs (CX0158 at 002). McFadden's denials of the existence of an agreement are thus contrary to the weight of the evidence. The proposed finding is misleading and should be disregarded.

100. Dave Misiak, Patterson's former North American President, denied Patterson's involvement in an agreement with Schein or Benco to boycott buying groups. (Misiak, Tr. 1502 (Q. "This document up here is the agreement that the FTC and complaint counsel allege that we had. It says, 'Benco, Schein and Patterson agreed not to provide discounts to, or otherwise contract with, buying groups of independent dentists.' Do you have any knowledge of such an agreement with my client Henry Schein? A. Absolutely not ... Q. Do you have any knowledge of such an agreement with Benco? A. I do not.")).

Response to Proposed Finding No. 100

See Response to Proposed Finding No. 89. The proposed finding is misleading and contrary to the weight of the evidence to the extent that it implies that Patterson did not participate in a conspiracy with Schein and Benco not to do business with buying groups merely because Misiak did not testify that Patterson had reached an agreement. In particular, the proposed finding is contrary to extensive documentary evidence that Patterson entered into an agreement with Benco that the Respondents would not do business with buying groups. For example, the record shows that Cohen communicated Benco's no buying group policy to Guggenheim February 8, 2013 (Cohen, Tr. 501 ("Q. You've communicated Benco's no-buying group policy to Mr. Guggenheim? A. . . . [Y]es.")), and that Guggenheim immediately forwarded Cohen's email regarding its no buying group policy to Misiak. (Misiak, Tr. 1329, 1331; Guggenheim, Tr. 1606-1607; CX0091 at 001). 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." (CX0090 at 001; Guggenheim, Tr. 1607-1608; CCFF ¶¶ 483, 495-496). Shortly after this exchange, Misiak instructed his team not to bid for a group he believed was a buying group, stating, **"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 the original); Misiak, Tr. 1356-1358; CCFF ¶¶ 549, 1184; CX0106 at 001). The evidence also shows that, when Guggenheim contacted Benco to ask about Benco working with ADC (which Patterson believed was a buying group) (CCFF ¶¶ 564-587), Guggenheim sent Misiak a copy of his email communication with Cohen. (CCFF ¶¶ 570-571).

The record also shows that Misiak was personally 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 had sponsored a buying group called TDA Perks Supplies. The contemporaneous documentary evidence shows that Misiak believed that he had an agreement with his Schein counterpart to pull out of the 2014 TDA Annual Meeting. (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)). Misiak's testimony directly contradicts these contemporaneous business documents. Because this Proposed Finding is contrary to the weight of the evidence, it should be disregarded.

101. Tim Rogan, Patterson's former Vice President of Marketing and Merchandise and current Vice President and General Manager for North America, also denied the existence of an agreement between Patterson, Benco, and Schein relating to buying groups. (Rogan, Tr. 3652 ("Q. Have you ever reached such an agreement with Schein or Benco? A. No. Q. Do you have any knowledge whatsoever about such an alleged agreement? A. No. Q. Have you ever heard of such an alleged agreement? A. No.")).

Response to Proposed Finding No. 101

See Response to Proposed Finding No. 89. The proposed finding is misleading and contrary to the weight of the evidence to the extent that it implies that Patterson did not participate in a conspiracy with Schein and Benco not to do business with buying groups merely because Rogan did not himself participate in communications with competitors or did not view his boss's communications as an agreement. The proposed finding is contrary to extensive documentary evidence showing that Rogan was aware of communications between Patterson and

Benco regarding an agreement between Patterson and Benco not to do business with buying groups. For example, the record shows that, after Cohen communicated Benco's no buying group policy to Guggenheim in February 8, 2013 (Cohen, Tr. 501 ("Q. You've communicated Benco's no-buying group policy to Mr. Guggenheim? A. . . . [Y]es.")), Guggenheim immediately forwarded Cohen's email to Rogan and Misiak. (CX0090 at 001). 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. (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!")). As noted above, the record shows Guggenheim viewed Benco's bidding on and doing business with ADC as a deviation from what Cohen previously told him about Benco's policy not to do business with buying groups in February 2013 (CX0056; Guggenheim, Tr. 1628; CCFF ¶¶ 570-572).

The record also shows that, in August 2013, after Rogan had received copies of the email correspondence between Guggenheim and Cohen, Rogan communicated to others at Patterson that their competitors were saying "no" to buying groups. (CX0106 at 001 (Rogan: ". . . 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). In addition, another contemporaneous document in the record shows that Rogan was aware of Guggenheim's communications with Cohen, and even expressed skepticism about whether Cohen had provided an acceptable explanation of why Benco was doing business with ADC. (CX0097 at 001 (October 2013 email from Rogan to Guggenheim: "Chesapeake buying group deal. You spoke with Chuck Cohen about this, but it is suspect we believe.") Because this Proposed Finding is contrary to the weight of the evidence, it should be disregarded.

102. Patterson witnesses who were deposed but not called to testify at trial also disclaimed the

existence of the alleged agreement or any knowledge of the agreement, including Scott Anderson, Wesley Fields, Anthony Fruehauf, Joe Lepley, and Devon Nease. (CX 8027 (Anderson, Dep. at 161-63 (Q. Are you aware that the FTC in this Complaint has alleged that Benco, Schein and Patterson executives agreed not to provide discounts to or otherwise contract with buying groups? A. No. Q. Do you know of any such agreements involving any Schein executives? A. No.")); CX 0312 (Fields, IHT at 104-05 ("Q. Did Paul Guggenheim ever tell you about any agreement that Patterson had with Benco or Schein relating to GPOs or buying groups? A. No. Q. Mr. Guggenheim never mentioned any agreement that Patterson had with regard to Schein or Benco? A. No.")); CX 8013 (Fruehauf, Dep. at 191, 195-96 ("Q. The Complaint in this case alleges that rather than respond to the threat of buying groups independently, the distributors, that is, Schein, Patterson and Benco entered into an agreement to force all this threat through collective coordinated action. Do you know of any such agreements involving Schein? A. I do not.)); CX 8028 (Lepley, Dep. at 112-13 (Q. The Complaint in this matter also reads, 'Benco, Schein and Patterson executives agreed not to provide discounts to or otherwise contract with buying groups.' Q. Do you know of any such agreements involving any Schein executives? A. I do not have any knowledge of such things.")); CX 8002 (Nease, Dep. at 127-28 ("Q. Are you aware of any agreement between Benco and Patterson not to do business with so-called buying groups? A. I am not."), 134-35, 137 ("Q. Mr. Nease, do you know of any such agreements referenced in paragraph 8 involving any Schein executives? A. No.)).

Response to Proposed Finding No. 102

See Response to Proposed Finding No. 89. The proposed finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Scott Anderson, Wesley Fields, Anthony Fruehauf, Joe Lepley, and Devon Nease – who were not personally parties to the conspiracy or to the communications between Patterson and Benco or Patterson and Schein – were 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.

103. Every Benco witness who testified at trial disclaimed the existence of the alleged agreement or any knowledge of the agreement.

Response to Proposed Finding No. 103

See Response to Proposed Finding No. 89. Moreover, the proposed finding lacks a record citation and should be disregarded.

104. Chuck Cohen, Managing Director of Benco, testified that he never formed an agreement

with Patterson or Schein relating to buying groups. (Cohen, Tr. 705 ("Q. Did you ever form or seek to form any agreement with Patterson or Schein on buying groups? A. No.")).

Response to Proposed Finding No. 104

See Response to Proposed Finding No. 89. The proposed finding is misleading and contrary to the weight of the evidence. The evidence shows that Cohen initiated communications with and participated in a conspiracy with Schein and Patterson not to do business with buying groups. Cohen does not deny the underlying conduct and communications that formed the basis of the agreement. For example, the record shows that Cohen admitted that he communicated Benco's no buying group policy to Guggenheim February 8, 2013 (Cohen, Tr. 501 ("Q. You've communicated Benco's no-buying group policy to Mr. Guggenheim? A. . . . [Y]es.")), and 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." (CX0090 at 001; Guggenheim, Tr. 1607-1608; CCFF ¶¶ 483, 495-496). The record also shows that Cohen had no business reasons for communicating Benco's no buying group policy. (CX0301 (Cohen, IHT at 243) ("Q. Can you think of any business reason for you to tell Mr. Guggenheim of Benco's no-GPO policy? A. I don't think [there] is a business reason.")). Cohen, moreover, admitted that he was concerned with communicating with Guggenheim about "the buying group situation" in New Mexico because it was a "customer situation" and might be construed as price fixing. (Cohen, Tr. 539-540).

The record also shows that, several months later in June 2013, when Guggenheim learned that Benco was working with Atlantic Dental Care ("ADC"), a group Patterson thought was a buying group, Guggenheim initiated a communication with Cohen asking if Benco was changing its position. (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 record shows Guggenheim viewed Benco's bidding on and doing business with ADC as a deviation from what Cohen previously told him about Benco's

policy not to do business with buying groups in February 2013 (CX0056; Guggenheim, Tr. 1628; CCFF ¶¶ 570, 572). Cohen then provided Guggenheim – his competitor – with extensive information about how he evaluated customers and why he did or did not do business with those customers. (CX0062 at 001 (June 8, 2013 email from Cohen to Guggenheim, reiterating Benco's no buying-group policy); Cohen, Tr. 561-562; CCFF ¶575). Cohen not only disclosed his policy and his decisions about competing to his competitor, he also assured Guggenheim about his future plans -- that he would "continue monitoring the process to ensure that ADC delivers on their commitment to us," including ensuring that ADC was not a buying group. (Cohen, Tr. 563-564; CX0062 at 001).

The proposed finding is also misleading to the extent that it implies that there is not substantial evidence that Benco orchestrated an agreement with Schein that neither would discount to buying groups. (See, e.g., CCFF ¶¶661-1100). Cohen also admitted that he communicated Benco's no buying group policy to Sullivan. Cohen testified that he informed Sullivan of Schein'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 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* CCFF ¶¶ 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. (CX2456 at 001 (emphasis in original); 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. The proposed finding is misleading, contrary to the weight of the evidence, and irrelevant. The record shows that, prior to late 2011, Schein had discounted to buying groups historically and profited from such arrangements. By late 2011, however, 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 (citing 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 (citing 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 (citing 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-Tr. Br. at Attach. B.

The record evidence also shows that Cohen and Sullivan communicated about buying groups multiple other times during the conspiracy. (1) In January 2012, Cohen confronted Sullivan when he discovered that Schein was working with buying group, Unified Smiles. (CCFF ¶¶ 965-972). Ryan passed information to Cohen that Schein was working with a buying group called Unified Smiles with a note "For Timmy [Sullivan] conversation." (CCFF ¶ 958). Cohen then set up a call with Sullivan and Cohen responded to Ryan's initial email with the response "Talking this AM" just before his call with Sullivan. (CCFF ¶¶ 964-967). Sullivan and Cohen spoke for 11 minutes and 34 seconds on January 13, 2012. (CCFF ¶ 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).

(2) Cohen planned to confront Sullivan a second time in July of 2012 after he once again learned from Ryan that Schein was 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 ¶¶ 981-986). Ryan wanted Cohen to tell Sullivan to stop working with buying group Smile Source (CCFF ¶¶ 984-986). Cohen agreed, 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 it would not be a surprise if he sent Sullivan a note about Smile Source. (CCFF ¶ 992).

(3) 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. . . . 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 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.")).

(4) 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, Tim 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 Tim 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).

(5) 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). 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).

Accordingly, in light of these extensive communications, Cohen's testimony regarding his lack of knowledge of an agreement is not only contrary to the weight of the

evidence, but is hardly credible.

105. Patrick Ryan, Benco's former Director of Sales and Strategic Markets and current Director of Equipment Research and Development, denied that Benco had any agreement with Patterson or Schein relating to buying groups. (Ryan, Tr. 1238 ("Q. Did you ever have such an agreement with anyone at Henry Schein? A. No. Q. Did you ever have a discussion about such an agreement with anyone at Henry Schein? A. No."), 1269 ("Q. Mr. Ryan, did Benco have – to your knowledge, did Benco have an agreement of any kind with my client Patterson regarding buying groups? A. Not to my knowledge. Q. So their allegations are false; correct, sir? A. Yes.")).

Response to Proposed Finding No. 105

See Response to Proposed Finding No. 89. The proposed finding is misleading and contrary to the weight of the evidence to the extent that it implies that Benco did not initiate communications with and participate in a conspiracy with Schein and Patterson not to do business with buying groups. For example, the record shows that Cohen admitted that he communicated Benco's no buying group policy to Guggenheim February 8, 2013 (Cohen, Tr. 501 ("Q. You've communicated Benco's no-buying group policy to Mr. Guggenheim? A. . . . [Y]es.")), and 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." (CX0090 at 001; Guggenheim, Tr. 1607-1608; CCFF ¶¶ 483, 495-496). The record also shows that Cohen had no business reasons for communicating Benco's no buying group policy. (CX0301 (Cohen, IHT at 243) ("Q. Can you think of any business reason for you to tell Mr. Guggenheim of Benco's no-GPO policy? A. I don't think [there] is a business reason.")). The record also shows that, several months later in June 2013, when Guggenheim learned that Benco was working with Atlantic Dental Care ("ADC"), a group Patterson thought was a buying group, Guggenheim initiated a communication with Cohen asking if Benco was changing its position. (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 record shows Guggenheim viewed Benco's bidding on and doing

business with ADC as a deviation from what Cohen previously told him about Benco's policy not to do business with buying groups in February 2013 (CX0056; Guggenheim, Tr. 1628; CCFF ¶¶ 570, 572). Cohen then provided Guggenheim – his competitor – with extensive information about how he evaluated customers and why he did or did not do business with those customers. (CX0062 at 001 (June 8, 2013 email from Cohen to Guggenheim, reiterating Benco's no buying-group policy); Cohen, Tr. 561-562; CCFF ¶575). Cohen not only disclosed his policy and his decisions about competing to his competitor, he also assured Guggenheim about his future plans -- that he would "continue monitoring the process to ensure that ADC delivers on their commitment to us," including ensuring that ADC was not a buying group. (Cohen, Tr. 563-564; CX0062 at 001).

The proposed finding is also misleading to the extent that it implies that there is not substantial evidence that Benco orchestrated an agreement with Schein that neither would discount to buying groups. (*See, e.g.,* CCFF ¶¶661-1100). The proposed finding is also contrary to contemporaneous documents that show Ryan had knowledge of communications between Schein and Benco not to do business with buying groups and even initiated one such conversation. For example, in January 2012, Ryan passed information to Cohen that Schein was working with a buying group called Unified Smiles with a note "For Timmy [Sullivan] conversation." (CCFF ¶ 958). Cohen then set up a call with Sullivan and Cohen responded to Ryan's initial email with the response "Talking this AM" just before his call with Sullivan. (CCFF ¶¶ 964-967). Sullivan and Cohen spoke for 11 minutes and 34 seconds on January 13, 2012. (CCFF ¶ 968).

Similarly, in July 2012, when Ryan learned that Schein had done business with Smile Source, Ryan wrote to Cohen, his boss, "Better tell your buddy Tim [Sullivan] to knock this shit off." (CX0018 at 001; Ryan, Tr. 1065; CCFF ¶ 982). He admitted under oath that he was referring to Schein working with Smile Source. (Ryan, Tr. 1065-66; CCFF ¶ 985). 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).

Additionally, 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.")).

The record also shows that Ryan authored several other emails indicating that he was confident that his competitors refused to discount to buying groups. When regional distributor, Burkhart Dental, rebuffed Benco's invitation to stop working with buying groups, Ryan asked Cohen to tell Schein and Patterson to stay the course on their no buying group position just as Benco was. Ryan wrote, "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 (quoting CX0023 at 001)).

On February 23, 2013, the final day of an industry conference attended by the Big Three, Ryan wrote, "[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 (quoting CX1149 at 002)). Ryan testified that he was referring specifically to Benco, Schein, and Patterson through his statement

"all of the major dental companies." (CCFF ¶ 528).

Likewise, Ryan wrote in an email to Cohen, "I already KNOW that Patterson and Schein have said NO [to buying groups]." (CCFF ¶¶ 1191 (quoting CX0012 at 001)). And he instructed a sales representative, "We don't allow [volume discount] pricing unless there is common ownership. Neither Schein nor Patterson do either." (CCFF ¶ 1193 (quoting CX1185 at 002)). Accordingly, Ryan's testimony is not only contrary to the weight of the evidence, but is hardly credible. The proposed finding is contrary to the evidence. It should be disregarded.

106. Every Benco witness who was deposed at the investigational phase, but not called to testify at trial also disclaimed any knowledge of the alleged conspiracy, including Paul Jackson and Michael McElaney. (CX 0302 (Jackson, IHT at 204 ("Q. But you are not aware of conversations with Patterson or Schein regarding GPOs – A. No.")); CX 0303 (McElaney, IHT at 108 (Q. Okay. Do you know if Schein or Patterson have no GPO policies today? A. No.")).

Response to Proposed Finding No. 106

See Response to Proposed Finding No. 89. The proposed finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because McElaney and Jackson, who was not parties to the conspiracy, were not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed.

The proposed finding should also be disregarded because the testimony cited does not support the finding. For example, the fact that McElaney did not know whether Schein and Patterson had "no GPO" policies in March 2017 (when his investigational hearing took place) provides no support for the assertion that he disclaimed knowledge of the conspiracy. Indeed, McElaney was personally involved in soliciting Burkhart to join the conspiracy in fall 2013. (CCFF ¶¶1207-1245). It is no surprise then that Respondents have not cited any McElaney testimony denying the existence of an agreement.

3. *No Non-Party Witness Testified to Any Knowledge of the Alleged Agreement.*

107. Dr. Baytosh, a practicing dentist and the former President of the Corydon Palmer Dental Society, testified at trial that he has no knowledge of an agreement between Schein, Benco, and Patterson not to do business with buying groups. (Baytosh, Tr. 1879, 1898 ("Q. Do you have any knowledge of an agreement between Schein, Benco, and Patterson not to do business with buying groups? A. No. Q. Other than in this case, have you ever heard of such an agreement? A. Not to my knowledge.")).

Response to Proposed Finding No. 107

The proposed finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Dr. Baytosh, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed.

108. Dr. Brenton Mason, a practicing dentist and one of the founding members of the New Mexico chapter of the Utah Dental Co-Op, testified at trial that he had no knowledge of any agreement between Schein, Patterson, and Benco not to offer discounts to or do business with buying groups. (Mason, Tr. 2331, 2390-91 ("Q. So before we get started, do you have any knowledge of any agreement between Schein, Patterson, and Benco not to offer discounts to or do business with buying groups? A. No, I do not.")).

Response to Proposed Finding No. 108

The proposed finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Dr. Mason, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed.

109. Dr. Richard Johnson, co-owner and founder of the buying group Klear Impakt, testified at trial that he has never heard of the agreement alleged by Complaint Counsel. (R. Johnson, Tr. 5505-08 ("Q. They allege that Benco, Schein and Patterson agreed not to provide discounts to, or otherwise contract with, buying groups of independent dentists. Do you see that? A. Yes. Q. Do you know anything about such an alleged agreement? A. I don't know anything about that agreement. Q. Have you heard of any agreement

like this? A. No, I have not.")).

Response to Proposed Finding No. 109

The proposed finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Johnson, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed.

110. Trevor Maurer, President and CEO of Smile Source, testified at trial that he had no knowledge of any agreement between Schein, Benco, and Patterson to not do business with buying groups. (Maurer, Tr. 4935, 4956, 4987-88, 4990 ("[T]hey said the following persons have knowledge of the facts underlying their conspiracy allegation against my client Patterson. … And if we go to the next page, at about the bottom of the list they listed you, Trevor Maurer. Do you see that? A. I do. Q. But you don't actually have that knowledge, do you, sir? A. That's correct. Q. So this is false. Fair? A. I guess so. Q. And did they ask your permission to put this false answer with your name on it in their interrogatory answer? A. I don't know how to answer that, but nobody asked me my permission to put something false in a document, no.")).

Response to Proposed Finding No. 110

The proposed finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Maurer, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed.

The proposed finding is also misleading to the extent that the witness was asked a question that misrepresented Complaint Counsel's discovery responses. Any testimony based on this false premise presented by counsel for one of the Respondents has no evidentiary value and should be disregarded.

111. Jeffrey Reece, Vice President of Sales and Marketing at Burkhart, testified at trial that he had no knowledge of any agreement between Schein, Benco, and Patterson to not do business with buying groups. (Reece, Tr. 4359, 4463-64 ("Q.... On the screen is the agreement … that the FTC alleges in this case that Schein was a participant in, and it

says, "Benco, Schein, and Patterson agreed not to provide discounts to, or otherwise contract with, buying groups of independent dentists." Do you see that? A. I do. Q. Do you have any personal knowledge about whether Schein has ever entered into such an agreement? A. I do not.")).

Response to Proposed Finding No. 111

The proposed finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Reece, who was not a party to the conspiracy (and whose company was not a party to the conspiracy), was not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed.

Nothing in this Response is meant to address the extensive evidence that Reece received a solicitation from Cohen to join Benco in a conspiracy to not do business with buying groups. Although the evidence of Benco's solicitation to Reece and Burkhart to join the conspiracy is not raised in this proposed finding, this Response should not be viewed as addressing that solicitation. For facts regarding that solicitation, see CCFF ¶¶1199-1251.

112. Dr. John Kois Sr., founder of the Kois Buyers Group, testified at trial that he had no knowledge of any agreement between Schein, Benco, and Patterson to not do business with buying groups. (Kois Sr., Tr. 180, 223 ("Q. Dr. Kois, … You have no firsthand knowledge of any conspiracy between my client Patterson and anyone from Schein or Benco; correct? A. That's correct.")).

Response to Proposed Finding No. 112

The proposed finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Dr. Kois, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who had not involvement in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed.

113. Mr. John Kois Jr., CEO of Kois Center and manager of the Kois Buyers Club, testified at his deposition that he had no knowledge of any agreement between Schein, Patterson, and Benco to refuse to work with buying groups. (CX 8008 (Kois Jr., Dep. at 8-9, 117 ("Q. And you don't have any personal knowledge of the existence of any such agreement,

do you? A. Any what kind of agreement? Q. Any agreement between Patterson, Schein and Benco to not do business with buying groups? A. I have no knowledge of that."), 173)).

Response to Proposed Finding No. 113

The proposed finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Mr. Kois, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who had not involvement in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed.

114. Dr. Goldsmith, former President and Chief Dental Officer of Smile Source, testified to facts that directly contradicted the alleged agreement: he received three different responses from each of the three Respondents. (Goldsmith, Tr. 2177 ("… [s]o three different respondents, three different responses; correct? A. Yes."); 2175-77 ("Q. And by the way, during the meeting, did they stop the meeting and say, Hey, I have to call Chuck Cohen at Benco to see if we can do this because we have an agreement? A. No. Q. Nobody ever said that. A. No."); Goldsmith, Tr. 2177 ("Q. So three different respondents, three different responses; correct? A. Yes.")).

Response to Proposed Finding No. 114

The proposed finding is misleading and contrary to the weight of the evidence to the extent that it implies that differences in responses from Schein, Patterson and Benco preclude a finding either of a conspiracy or of parallel conduct by the three. The weight of the evidence is to the contrary, 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, 661-954; see also Complaint Counsel's Post-Tr. Br., at Attach. C.

With respect to Smile Source. Both Benco and Patterson refused to provide a discount to Smile Source because it was a buying group. Benco rejected Smile Source every year from 2011 through 2013. CCFF ¶ 410 (quoting CX1138 at 001 (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"); quoting CX1219 at 002 (2012: "Benco doesn't recognize GPOs as a single customer")); [redacted]). Patterson also rejected Smile Source in 2013: *"[W]e have said no to smile source. They are [a] buying club."* CCFF ¶ 642 (quoting CX3009 at 001). [redacted] CCFF ¶ 642 [redacted]

Schein's attempt at cheating on the conspiracy by negotiating with Smile Source in 2014 does not negate Respondents' otherwise parallel conduct or the existence of an agreement. 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." *See, e.g.*, CCFF ¶ 816 (quoting CX2354 at 001); *see also* CCFF ¶¶ 788 (quoting CX2073 at 001 (Dec. 20, 2013 email from Schein's Foley: "It's a buying group that we do not participate with, as with all buying groups.")), 799 (quoting CX2235 at 001 (July 17, 2014 email from Schein's Titus: "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.")).

Finally, the proposed finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Dr. Goldsmith, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed.

115. Mr. Ryan Dew, Senior Director of Business Operations at Brasseler, a manufacturer and direct seller of dental instruments, testified at deposition that he had no knowledge of any agreement between Schein, Patterson, and Benco to refuse to work with buying groups. (RX 2955 (Dew, Dep. at 10, 178-80 ("Q. And do you have any direct or personal knowledge that Benco, Schein and Patterson entered into any agreements to refuse to

provide discounts to or compete for the business of buying groups? A. I do not.”))).

Response to Proposed Finding No. 115

The proposed finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Dew, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed.

116. Mr. Mitchell Goldman, CEO of Mid-Atlantic Dental Partners (a DSO), testified at deposition that he had no knowledge of any agreement between Schein, Patterson, and Benco to refuse to work with buying groups. (RX 2953 (Goldman, Dep. at 10-12, 153 (“Q. I have just one question for you: Do you have any knowledge of any agreements between Patterson, Schein, or Benco not to do business with anyone? A. No.”))).

Response to Proposed Finding No. 116

The proposed finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Goldman, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed.

117. Mr. Robert Lowther, Owner and President of the Denali Group, testified at deposition that he had no knowledge of any agreement between Schein, Patterson, and Benco to refuse to work with buying groups, and that his experience had actually been the exact opposite of that. (RX 2961 (Lowther, Dep. at 11-12 (“From my understanding of what the complaint is alleging, it’s not true or correct based on – on what actually happens in our relationship...What the Denali Group does is exactly what – with Henry Schein, Patterson, and Benco in the past is exactly what the FTC says they do not do.”), 193-94 (“I do not. That has not been our company's experience...”))).

Response to Proposed Finding No. 117

The proposed finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Lowther, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the

agreement existed.

118. Mr. Frank Capaldo, Executive Director and CEO of the Georgia Dental Association since March 2014 and CEO of Integrity Dental Buyers Group, LLC since its inception in July 2015, testified at deposition that he had no personal knowledge of any agreement between Schein, Patterson, and Benco to not do business with buying groups. (CX 8011 (Capaldo, Dep. at 11-12, 33-34 ("Q. And are you aware that the FTC is alleging that Patterson, Schein and Benco entered into an agreement in 2013 not to do business with buying groups? A. Generally, yes. Q. Have you read the complaint in this case? A. I have. Q. You have no personal knowledge of any such agreement, do you, sir? A. I do not.")).

Response to Proposed Finding No. 118

The proposed finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Dr. Capaldo, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed.

RESPONSES TO PROPOSED "CONCLUSIONS OF LAW[4]"

A. Responses to Proposed Conclusions of Law Regarding "Legal Framework"

1. Burden of Proof

1. Complaint Counsel must prove each element of its case by a preponderance of the evidence. *See In re Adventist Health Sys./W.*, 117 F.T.C. 224, at *297 (1994); *see also FTC* v. *Cement Inst.*, 333 U.S. 683, 705 (1948); *Cal. Dental Ass'n* v. *FTC*, 224 F.3d 942, 957 (9th Cir. 2000); *Cinderella Career & Finishing Sch., Inc.* v. *FTC*, 425 F.2d 583, 592 n.2 (D.C. Cir. 1970); *Rayex Corp.* v. *FTC*, 317 F.2d 290, 292 (2d Cir. 1963).

Response to Proposed Conclusion No. 1

Complaint Counsel has no specific response.

2. The burden of showing something by a preponderance of the evidence "requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden…." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993). "Where the evidence points equally to two or more inferences, an objective fact finder should not decide the inference in favor of the party with the burden of proof," here, Complaint Counsel. *In re McWane, Inc. & Star Pipe Prods., Ltd.*, 155 F.T.C. 903, at *268 (2013), *aff'd in part, rev'd in part*, FTC No. 9351, 2014 WL 556261 (Jan. 30, 2014), *aff'd sub nom. McWane, Inc. v. FTC*, 783 F.3d 814 (11th Cir. 2015); *see Venture Tech., Inc. v. Nat'l Fuel Gas Co*., 685 F.2d 41, 48 (2d Cir. 1982) (reversing and remanding for judgment in favor of the defendants and holding that the evidence was insufficient to support a finding of conspiracy when it "point[ed] with at least as much force toward unilateral actions by [the respondents] as toward conspiracy").

Response to Proposed Conclusion No. 2

Complaint Counsel has no specific response.

2. Section 1 Bars Only "Agreements" In Restraint of Trade

3. Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies that unreasonably restrain trade. 15 U.S.C. § 1.

[4] Unless otherwise noted, all emphasis is added and internal citations and quotation marks are omitted.

Response to Proposed Conclusion No. 3

Complaint Counsel has no specific response.

4. "The existence of an agreement is the very essence of a section 1 claim."[5] *In re McWane, Inc.*, 155 F.T.C., at *223; *In re Benco Dental Supply Co.*, FTC No. 9379, 2018 WL 6338485, at *4 (Nov. 26, 2018); *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 356 (3d Cir. 2004); *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 553 (2007); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 117 (3d Cir. 1999). Thus, the central question in this case is whether Respondents' decisions regarding "buying groups" "stem[] from independent decision or from an agreement" *preceding* those decisions. *Twombly*, 550 U.S. at 553.

Response to Proposed Conclusion No. 4

Complaint Counsel objects to the word "preceding." Respondents misquote *Twombly* to suggest that an agreement must precede conduct, but that is not what *Twombly* says. Instead, *Twombly* specifically addresses conscious parallelism cases: "when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).[6] Complaint Counsel does not rest on evidence of parallel conduct alone. Moreover, to the extent that this conclusion conflicts with the Supreme Court's holding in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), it should be disregarded: "It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement." *Id.* at 142; *see also Am. Tobacco v. United States*, 328 U.S. 781, 809-810 (1946) ("No formal agreement is necessary to constitute an

[5] Proof of an illegal agreement under Section 5 of the FTC Act is identical to proof of an illegal agreement under Section 1 of the Sherman Act. *See, e.g.*, *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 762 & n.3 (1999) (explaining that Section 5 of the FTC Act "overlaps the scope of § 1 of the Sherman Act"); *FTC v. Cement Inst.*, 333 U.S. 683, 691-92 (1948) ("[S]oon after its creation the Commission began to interpret the prohibitions of § 5 as including those restraints of trade which also were outlawed by the Sherman Act, and … this Court has consistently approved that interpretation of the Act.").

[6] Respondents cite to page 553 of *Twombly* for the proposed conclusion that agreements must precede actions consistent with agreement, but this is believed to be a typo, as the referenced page makes no mention of agreements preceding parallel conduct.

unlawful conspiracy. . . . The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words.").

5. "Section 1 of the Sherman Act 'does not prohibit [all] unreasonable restraints of trade[;] ... only restraints effected by a contract, combination, or conspiracy.'" *In re McWane, Inc.*, 155 F.T.C., at *223 (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775 (1984)). As such, "[i]t does not reach independent decisions, even if they lead to the same anticompetitive result as an actual agreement among market actors." *In re McWane, Inc.*, 155 F.T.C., at *223.

Response to Proposed Conclusion No. 5

Complaint Counsel has no specific response.

6. Because "Section 1 'does not prohibit independent business actions and decisions[,]'" a "person still has the right to refuse to do business with another, provided he acts independently, and not pursuant to an unlawful understanding, tacit or expressed." *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1042 (2d Cir. 1976); *see also, e.g.*, *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 221 (3d Cir. 2011) ("Unilateral action, regardless of the motivation, is not a violation of Section 1."); *H.L. Moore Drug Exch. v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981) ("A unilateral refusal ... to deal ..., absent proof that it was pursuant to a conspiracy, does not violate § 1 of the Sherman Act."). This is an "elementary" right under the antitrust laws. *Tidmore Oil Co. v. BP Oil Co./Gulf Prods. Div.*, 932 F.2d 1384, 1388 (11th Cir. 1991).

Response to Proposed Conclusion No. 6

Complaint Counsel has no specific response.

7. As Judge Posner observed, "the Sherman Act imposes no duty on firms to compete vigorously, or for that matter at all, in price." *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 873-74 (7th Cir. 2015) ("It is one thing to prohibit competitors from agreeing not to compete; it is another to order them to compete. How is a court to decide how vigorously they must compete in order to avoid being found to have tacitly colluded in violation of antitrust law?"); *see also In re Citric Acid*, 191 F.3d 1090, 1101 (9th Cir. 1999) ("Courts have recognized that firms must have broad discretion to make decisions based on their judgments of what is best for them and that business judgments should not be second-guessed even where the evidence concerning the rationality of the challenged activities might be subject to reasonable dispute.").

Response to Proposed Conclusion No. 7

Complaint Counsel has no specific response.

8. Thus, "the crucial question" in this case is "whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement…'" *In re McWane, Inc.*, 155 F.T.C. at *223; *City of Moundridge v. Exxon Mobil Corp.*, 2009 WL 5385975, at *6 (D.D.C. 2009) ("[W]here there is an independent business justification for the defendants's [*sic*] behavior, no inference of conspiracy can be drawn."), *aff'd sub nom. City of Moundridge, KS v. Exxon Mobil Corp.*, 409 F. App'x 362 (D.C. Cir. 2011).

Response to Proposed Conclusion No. 8

Complaint Counsel has no specific response to the textual sentence in the proposed conclusion, but objects to the parenthetical, to the extent that it suggests that no agreement can be found where Respondents also have some business justification consistent with their agreement. *First*, the quotation is an imprecise paraphrase of an Eleventh Circuit case. *Moundridge* quotes the Eighth Circuit in *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1037 (8th Cir. 2000), which poorly paraphrased *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1456-57 (11th Cir. 1991). *Todorov* stands for the proposition that "when the defendant puts forth a plausible, procompetitive explanation for his actions, [courts] will not be quick to infer, from circumstantial evidence that a violation of the antitrust laws has occurred; the plaintiff must produce more probative evidence that the law has been violated." 921 F.3d at 1456; *see also In re McWane*, Docket No. 9351, 2013 FTC LEXIS 76, at *648 (Initial Dec. May 8, 2013) ("Where there is an independent business justification for a defendant's behavior, an inference of conspiracy is not easily drawn.") (citing *Todorov*, 921 F.2d at 1456). *Todorov* does not state that a claim of independent business justification ends the inquiry as to whether Respondents entered into an agreement. *Second*, even *Blomkest* recognizes that claims of

independent business justifications are not irrebuttable. 203 F.3d at 1037 (referring to the class's burden to rebut defendants' independent business justifications).

Third, as Areeda and Hovenkamp instruct, "It is important not to be misled by *Matsushita*'s statement that the plaintiff's evidence, if it is to prevail, must 'tend to exclude the possibility that the alleged conspirators acted independently.' The Court surely did not mean that the plaintiff must disprove all nonconspiratorial explanations for the defendants' conduct. Not only did the [C]ourt use the word 'tend,' but the context made clear that the Court was simply requiring sufficient evidence to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not." Areeda & Hovenkamp ¶ 14.03(b); *see also In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012) ("Requiring a plaintiff to 'exclude' or 'dispel' the possibility of independent action places too heavy a burden on the plaintiff. Rather if a plaintiff relies on ambiguous evidence to prove its claim, the existence of a conspiracy must be a reasonable inference that the jury could draw from that evidence; it need not be the *sole* inference."); *In re Benco Dental Supply Co.*, Docket No. 9379, 2018 FTC LEXIS 185, at *14 (Comm'n Op. Nov. 26, 2018) ("The plaintiff . . . need not demonstrate that the inference of conspiracy is the sole inference. Rather, the inference of conspiracy need only be 'reasonable in light of the competing inferences of independent action or collusive activity.'") (citation omitted). As the Second Circuit has recognized, "'independent reasons' can also be "interdependent," and the fact that [defendant's] conduct was in its own economic interest in no way undermines the inference that it entered an agreement to raise . . . prices." *United States v. Apple, Inc.*, 791 F.3d 290, 317-18 (2d Cir. 2015) (citing Areeda & Hovenkamp ¶ 1413a); *see also United States v. Apple,* 952 F. Supp. 2d 638, 700 (S.D.N.Y. 2013), *aff'd, United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015) ("Apple's entirely appropriate or even admirable

motives do not preclude a finding that Apple also intentionally engaged with the Publisher Defendants in a scheme to raise e-book prices."); *see also Apple,* 952 F. Supp. 2d at 700 ("Apple's entirely appropriate or even admirable motives do not preclude a finding that Apple also intentionally engaged with the Publisher Defendants in a scheme to raise e-book prices.").

9. "An 'agreement' is a 'unity of purpose or a common design and understanding, or a meeting of minds' as to the alleged unlawful arrangement at issue." *In re McWane, Inc.*, 155 F.T.C. at *223 (quoting *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)). "In other words, there must be a 'conscious commitment to a common scheme designed to achieve an unlawful objective.'" *In re McWane, Inc.*, 155 F.T.C. at *223. (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)); *see also In re Benco Dental Supply Co.*, 2018 WL 6338485, at *5 ("there must be evidence 'that reasonably tends to prove … a conscious commitment to a common scheme designed to achieve an unlawful objective.'").

Response to Proposed Conclusion No. 9

Complaint Counsel has no specific response.

10. Moreover, in a multi-party case, Complaint Counsel must show that each Respondent participated in the alleged agreement in order to find that particular Respondent liable. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 463 (1978) ("[L]iability [can] only be predicated on the knowing involvement of each defendant, considered individually, in the conspiracy charged."); *Anderson News, L.L.C. v. Am. Media, Inc.*, 899 F.3d 87, 106-11 (2d Cir. 2018) (assessing the evidence defendant-by-defendant), *cert. denied*, 2019 WL 1318586 (2019); *In re Citric Acid*, 191 F.3d at 1106 ("Considered as a whole, the evidence in the record, though it clearly shows that several citric acid producers conspired to fix prices and to allocate market shares, does not tend to exclude the possibility that Cargill acted independently – and thus does not support a reasonable inference that *Cargill* was involved in the citric acid price-fixing conspiracy."); *see also, e.g.*, *Mylan Labs., Inc. v. Akzo, N.V.*, 770 F. Supp. 1053, 1066-67 (D. Md. 1991) (plaintiff "must show that each alleged conspirator 'participated in the conspiracy with knowledge of the essential nature of the plan'").

Response to Proposed Conclusion No. 10

Complaint Counsel objects to this proposed conclusion's citation to *Mylan Labs, Inc. v. Akzo, N.V.*, 770 F. Supp. 1053, 1066-67 (D. Md. 1991), as the parenthetical is incomplete. The full sentence reads: plaintiff "*need not show that each alleged conspirator had knowledge of all*

of the details of the conspiracy, but [plaintiff] must show that each alleged conspirator 'participated in the conspiracy with knowledge of the essential nature of the plan.'" *Id.* (emphasis added). Otherwise, Complaint Counsel has no specific response to this proposed conclusion.

11. "[M]erely intoning the magic words 'unitary conspiracy'" is not enough. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1310-11 (E.D. Pa. 1981). Plaintiffs must show evidence "not only of the existence of a conspiracy to restrain trade, but also of the membership of that defendant in the conspiracy." *Zenith Radio Corp.*, 513 F. Supp. at 1265.

Response to Proposed Conclusion No. 11

Complaint Counsel has no specific response.

12. Evidence of "bilateral agreements" between two defendants thus cannot support an "overarching conspiracy" among all defendants. *See In re Actos End Payor Antitrust Litig.*, 2015 WL 5610752, at *26 (S.D.N.Y. 2015) (dismissing conspiracy allegations where plaintiffs' "overarching conspiracy claim … lack[ed] sufficient factual support" because the complaint merely detailed bilateral agreements rather than coordinated action by all the defendants, which was not "sufficient factual support" for coordinated action by all the defendants), *aff'd in part, vacated in part*, *In re Actos End-Payor Antitrust Litig.*, 848 F.3d 89 (2d Cir. 2017); *In re Iowa Ready-Mix Concrete Antitrust Litig.*, 768 F. Supp. 2d 961, 975 (N.D. Iowa 2011) (guilty pleas in "separate bilateral conspiracies" could not support an inference of a "wider conspiracy"); *see also, e.g.*, *Kotteakos v. United States*, 328 U.S. 750, 771, 775 (1946) (reversing judgments against defendants where the jury was impermissibly asked to "impute to each defendant the acts and statements of the others ... and to find an overt act affecting all in conduct which admittedly could only have affected some" because it is defendants' "right not to be tried en masse for the conglomeration of distinct and separate offenses committed by others...."); *In re Optical Disk Drive Antitrust Litig.*, 2011 WL 3894376, at *9 (N.D. Cal. 2011) (an allegation that "auctions involv[ing] only a small subset of defendants" were rigged "is a far cry from establishing plausibility for a broad six year continuing agreement among all defendants....").

Response to Proposed Conclusion No. 12

This proposed conclusion is misleading to the extent it implies Respondents' agreement amounts to a series of bilateral agreements. In proving an overarching conspiracy, there is no

requirement that Complaint Counsel show that all co-conspirators communicated with, or were aware of the participation of the others. *Interstate Circuit v. United States*, 306 U.S. 208, 227 (1939) ("It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators ."); *United States v. Bibbero*, 749 F.2d 581, 587 (9th Cir. 1984) ("[A] single conspiracy may involve several subagreements or subgroups of conspirators."); *Esco Corp. v. United States*, 340 F.2d 1000, 1006 (9th Cir. 1965) (no requirement "that each defendant or all defendants must have participated in each act or transaction; nor is proof required 'that each accused knew the identity and function of all his alleged co-conspirators or that all worked together consciously to achieve a desired end.'"); *see also Bluemthal v. United States*, 332 U.S. 539, 559 (1947) (finding that several agreements were "essential and integral steps in forming a single conspiracy").

To prove an overarching agreement among horizontal competitors, courts look at whether separate agreements can be "connected together" to show a common design or purpose. *United States v. Beachner Const. Co.*, 729 F.2d 1278, 1283 (10th Cir. 1984) (evidence that each participant shared "common objective" to eliminate price competition and ensure higher individual profits was sufficient to prove the existence of a single conspiracy); *Esco Corp. v. U.S.*, 340 F.2d 1000, 1005–06 (9th Cir. 1965) ("where several acts or transactions are alleged to constitute a single general conspiracy, there must be proof of a common purpose…"); *Am. Tobacco Co. v. United States*, 147 F.2d 93, 107 (6th Cir. 1944) ("It is the common design which is the essence of the conspiracy or combination; and this may be made to appear when the parties steadily pursue the same object, whether acting separately or together, by common or different means, but always leading to the same unlawful result..") (citation omitted); *In re Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d 968, 996–97 (N.D. Ohio 2015) (evidence of a single

conspiracy sufficient reach jury where there is evidence of a "common goal" among defendants). A single conspiracy does not fragment into multiple conspiracies because a member does not "know every other member" or "know of or become involved in all of the activities in furtherance of the conspiracy." *In re Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d 968, 979 (N.D. Ohio 2015).

13. Certainly, communications that do not involve a Respondent do not "constitute evidence" that the Respondent participated in a conspiracy. *In re McWane, Inc.*, 155 F.T.C. at *264 (rejecting conspiracy claim against Respondent where two other alleged conspirators communicated because "[r]egardless of what the foregoing communications may imply about the conduct of [the two alleged co-conspirators], these communications do not implicate ... the Respondent....").

Response to Proposed Conclusion No. 13

This proposed conclusion is misleading as it tries to draw parallels to a factually distinguishable case. In *McWane*, the inter-firm communications between McWane and its alleged co-conspirators were ambiguous at best, and the Court was unwilling to impute communications between two alleged co-conspirators to *McWane* where those communications did not involve McWane. 155 F.T.C. at *264. The instant case is distinguishable where the record contains evidence of each of the Respondents communicating with one another (CCFF ¶¶ 474-502, 564-588, 661-684, 955-1100, 1123-1138), as well as internal correspondence documenting such communications.

Moreover, this proposed conclusion is contrary to precedent that establishes that each defendant need not participate in each and every communication or transaction related to the overarching conspiracy. *See Esco Corp. v. United States*, 340 F.2d 1000, 1006 (9th Cir. 1965) (no requirement "that each defendant or all defendants must have participated in each act or transaction; nor is proof required that each accused knew the identity and function of all his

alleged co-conspirators or that all worked together consciously to achieve a desired end.") (internal quotations omitted).

14. While it "is not necessary to find an express agreement in order to find a conspiracy," Complaint Counsel must show that "***a concert of action is contemplated*** and that the defendants conformed to the arrangement." *In re Benco Dental Supply Co.*, 2018 WL 6338485, at *15 (quoting *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948)); *see also In re Flat Glass*, 385 F.3d at 356-57 (quoting *Alvord-Polk*, 37 F.3d at 999 & n.1) ("The Sherman Act speaks in terms of a 'contract,' 'combination' or 'conspiracy,' but courts have interpreted this language to require 'some form of concerted action.'"). "Concerted action" is "[a]n action that has been planned, arranged, and agreed on by parties acting together to further some scheme or cause, so that all involved are liable for the actions of one another." Black's Law Dictionary (10th Ed. 2014).

Response to Proposed Conclusion No. 14

Complaint Counsel objects to the proposed definition of concerted action, as it is not based on relevant precedent and imports a suggestion of pre-agreement activity that finds no basis in antitrust law. Black's Law Dictionary's definition of concerted action is cited by zero courts in the context of an antitrust case. Instead, courts recognize the familiar principle that in the antitrust context, "concerted action [is] defined as having 'a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Corr Wireles Commcn's, L.L.C. v. AT&T, Inc.*, 893 F. Supp. 2d 789, 801 (N.D. Miss. 2012); *see also In re Baby Foods Antitrust Litig.*, 166 F.d 112, 117 (3d Cir. 1999) ("Liability is necessarily based on some form of 'concerted action.' Indeed, we have defined a conspiracy as a 'conscious commitment to a common scheme designed to achieve an unlawful objective. In other words, 'unity of purpose or a common design and understanding or a meeting of the minds in an unlawful arrangement' must exist to trigger Section 1 liability.'") (citations omitted); *Mich. State Podiatry Ass'n v. Blue Cross & Blue Shield*, 617 F. Supp. 1139, 1147 (E.D. Mich. 1987) ("'Concerted action' is defined

as a consensus or agreement by the parties to act together.") (citing *Am. Tobacco Co. v. United States*, 328 U.S. 781 (1946)).

3. Proof of a Conspiracy

15. "A conspiracy may be demonstrated by direct or circumstantial evidence." *In re McWane, Inc.*, 155 F.T.C. at *223; *Erie Cty., Ohio v. Morton Salt, Inc.*, 702 F.3d 860, 867-68 (6th Cir. 2012) ("An agreement, either tacit or express, may ultimately be proven either by direct evidence of communications between the defendants or by circumstantial evidence of conduct that, in the context, negates the likelihood of independent action and raises an inference of coordination.").

Response to Proposed Conclusion No. 15

This proposed conclusion is incomplete, insofar as the parenthetical suggests the only category of direct evidence of conspiracy is communications between defendants. While inter-firm communications can constitute direct evidence of conspiracy, so too can admissions by a conspirator, or even a defendant's ability to speak confidently about what its rivals will do. *See Toledo Mack Sales & Serv. v. Mack Trucks, Inc.*, 530 F.3d 204, 220 (3d Cir. 2008) (claims of a "gentleman's agreement" was unambiguous evidence of conspiracy); *B&R Supermkt., Inc. v. Visa, Inc.*, No. 16-01150, 2016 U.S. Dist. LEXIS 136204, *20-22 (N.D. Cal. Sept. 30, 2016) (speaking on behalf of all competitors was direct evidence of collusion where Mastercard's representative could not talk confidently on competitors' future actions without knowledge of collusion).

Further, the parenthetical is misleading to the extent that it requires evidence to negate all independent action. "Even where a plaintiff relies on ambiguous evidence . . . to prove its claim, the plaintiff does not bear the burden of showing that the existence of a conspiracy is the 'sole inference' to be drawn from the evidence. The plaintiff is only required to present evidence that is sufficient to allow the fact-finder to 'infer that the conspiratorial agreement is more likely than

not.'" *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013) (internal citation omitted); *accord id.* at 697, *aff'd,* 791 F.3d 290 (2d Cir. 2015) ("It is important not to be misled by *Matsushita*'s statement that the plaintiff's evidence, if it is to prevail, must 'tend to exclude the possibility that the alleged conspirators acted independently.' The Court surely did not mean that the plaintiff must disprove all nonconspiratorial explanations for the defendants' conduct. Not only did the court use the word 'tend,' but the context made clear that the Court was simply requiring sufficient evidence to allow a reasonable fact-finder to infer the conspiratorial explanation is more likely than not.") (quoting *Publ'n Paper*, 690 F.3d at 63 and Areeda & Hovenkamp ¶ 14.03(b)); *see also Apple,* 952 F. Supp. 2d at 700 ("Apple's entirely appropriate or even admirable motives do not preclude a finding that Apple also intentionally engaged with the Publisher Defendants in a scheme to raise e-book prices."

"Requiring a plaintiff to 'exclude' or 'dispel' the possibility of independent action places too heavy a burden on the plaintiffs." *In re Publ'n Papers Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012). Indeed, as the Seventh Circuit in *Toys "R" Us v. FTC* noted:

> [T]here must be some evidence that "tends to exclude the possibility" that the alleged conspirators acted independently. This does not mean, however, that the Commission had to exclude *all* possibility that the manufacturers acted independently. . . . [T]hat would amount to an absurd and legally unfounded burden to prove with 100% certainty that an antitrust violation occurred. The test states only that there must be *some* evidence which, if believed, would support a finding of concerted behavior."

221 F.3d 928, 934-35 (7th Cir. 2000) (internal citation omitted). Thus, a plaintiff need only produce "sufficient evidence to allow a reasonable fact-finder to infer the conspiratorial explanation is more likely than not." *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013).

Otherwise, Complaint Counsel has no specific response.

a. Proving a Conspiracy through Direct Evidence

16. "Direct evidence in a Section 1 conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted." *In re McWane, Inc.*, 155 F.T.C. at *223 (quoting *In re Baby Food Antitrust Litig.*, 166 F.3d at 118); *In re Benco Dental Supply Co.*, 2018 WL 6338485, at *6; *In re Citric Acid*, 191 F.3d at 1093-94. "'Direct' evidence must evince with clarity a concert of illegal action." *Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 52 (3d Cir. 2007).

Response to Proposed Conclusion No. 16

This proposed conclusion is misleading to the extent that it distinguishes between direct and unambiguous evidence. "'Unambiguous evidence of an agreement to fix prices . . . is all the proof a plaintiff needs' to establish a violation of Section 1." *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013). "[I]n Section 1 cases, it is unnecessary for a court to engage in the exercise of distinguishing strong circumstantial evidence of concerted action from direct evidence of concerted action for both are 'sufficiently unambiguous.'" *Petruzzi's IGA Supermkts. v. Darling-Del Co.*, 998 F.2d 1224, 1233 (3d Cir. 1993) (internal citation omitted). And where Complaint Counsel's theory is not implausible, it is "doubly unnecessary" to distinguish between direct and unambiguous circumstantial evidence. *Id.* at 1233 (distinguishing between strong circumstantial evidence and direct evidence "is doubly unnecessary because [plaintiff's] theory [of conspiracy] is not implausible). Moreover, "[a]ll evidence, including direct evidence, can sometimes require a factfinder to draw inferences to reach a particular conclusion, though 'perhaps on average circumstantial evidence requires a longer chain of inferences.'" *In re Publ'n Papers Antitrust Litig.*, 690 F.3d 51, 64 (2d Cir. 2012) (internal citation omitted); *accord United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013) (citation omitted) ("In fact, even direct evidence in antitrust cases 'can sometimes require a factfinder to draw inferences to reach a particular conclusion.'"); *see also Sylvester v. SOS*

Children's Villages Ill., Inc., 453 F.3d 900, 903 (7th Cir. 2006) ("[A]ctually all evidence, even eyewitness testimony, requires drawing inferences; the eyewitness is drawing an inference from his raw perceptions. 'All evidence is probabilistic, and therefore uncertain; eyewitness testimony and other forms of 'direct' evidence have no categorical epistemological claim to precedence over circumstantial . . . evidence.' Perhaps on average circumstantial evidence requires a longer chain of inferences, but if each link is solid, the evidence may be compelling—may be more compelling than" sworn testimony.).

17. Direct evidence of a conspiracy can include eyewitness testimony about the agreement by a person who participated in or witnessed the agreement; a written agreement reflecting the unreasonable restraint; or party-admissions in documents unambiguously revealing the existence of an agreement. *Superior Offshore Int'l, Inc. v. Bristow Grp., Inc.*, 490 F. App'x 492, 497-98 (3d Cir. 2012) ("Direct evidence" consists of "a document or conversation explicitly manifesting the existence of the agreement in question.") (quoting *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 324 n.23 (3d Cir. 2010)); *see also Mayor & City Council of Balt., Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013) (a "recorded phone call"); *Burtch*, 662 F.3d at 226 ("'A document or conversation explicitly manifesting the existence of the agreement in question' is an example [of] direct evidence.") (quoting *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 324 n.23)).

Response to Proposed Conclusion No. 17

This proposed conclusion is incomplete to the extent that it limits direct evidence to the listed categories of evidence. For example, courts have found direct evidence of conspiracy to include a memorandum describing discussion from a competitor meeting, or even a defendant's ability to confidently predict a rival's future conduct. *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1338 (3d Cir. 1987); *B&R Supermkt., Inc. v. Visa, Inc.*, No. 16-01150, 2016 U.S. Dist. LEXIS 136204, *20-22 (N.D. Cal. Sept. 30, 2016). This proposed conclusion is misleading to the extent that it distinguishes between direct and unambiguous evidence. *See supra* Response to Proposed Conclusion No. 16.

18. In contrast, it is well established that evidence of competitor communications does not by itself create even an inference of a conspiracy, let alone direct evidence of one. *See City of Moundridge*, 409 F. App'x at 364 (a "few scattered communications" and other evidence "falls far short" of establishing a conspiracy); *Cosmetic Gallery, Inc.*, 495 F.3d at 52-53 (agreeing with district court that evidence of competitor communications "lacked the clarity of the direct evidence proffered in other antitrust cases" and instead "required several inferences to serve as direct proof of a conspiracy"); *In re Baby Food Antitrust Litig*., 166 F.3d at 126 ("[C]ommunications between competitors do not permit an inference of an agreement to fix prices unless 'those communications rise to the level of an agreement, tacit or otherwise.'"); *Alvord-Polk, Inc.*, 37 F.3d at 1013 (finding no direct or indirect evidence of an agreement where communications between defendants related to the "800-number subject" – and "actions [defendants] were taking concerning them" – but did not constitute an agreement "to injure the 800-number dealers," explaining that "[c]ommunications alone ... do not necessarily result in liability [because] it is only when those communications rise to the level of an agreement ... that they become an antitrust violation."); *Mkt. Force Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1173 (7th Cir. 1990) ("[I]t is well established that evidence of informal communications among several parties does not unambiguously support an inference of a conspiracy.") (collecting cases); *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75, 79 (2d Cir. 1980) ("A mere showing of close relations or frequent meetings between the alleged conspirators, however, will not sustain a plaintiff's burden absent evidence which would permit the inference that those close ties led to an illegal agreement.").

Response to Proposed Conclusion No. 18

This proposed conclusion is misleading as contrary to the law. Competitor communications that rise to the level of documenting an exchange of assurances, meeting of the minds, or conscious commitment to a common scheme may provide unambiguous evidence of the conspiracy, and may alone be sufficient to prove a plaintiff's case. *See United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013) ("'Unambiguous evidence of an agreement to fix prices . . . is all the proof a plaintiff needs' to establish a violation of Section 1.") The cited cases do not indicate otherwise. *See, e.g.*, *In re Baby Food Antitrust Litig*., 166 F.3d at 126 ("[C]ommunications between competitors do not permit an inference of an agreement to fix prices *unless 'those communications rise to the level of an agreement, tacit or otherwise.*'") (emphasis added); *accord Alvord-Polk, Inc.*, 37 F.3d at 1013. "[A] court should carefully scrutinize firms to see if their conduct or any communication among them supports or

requires a finding of conspiracy." *Gainesville Utils. Dep't v. Fla. Power & Light Co.*, 573 F.2d 292, 303 (5th Cir. 1978). In *Gainesville*, the court found "incriminating correspondence between the two largest electrical power companies in Florida warrant[ed] such a finding." *Id.*

The cited cases are distinguishable on their facts, as the subject communications were ambiguous or otherwise failed to establish that agreement was more likely than not. *Cosmetic Gallery, Inc.*, 495 F.3d at 50 n.2, 52-53 (distributor-manufacturer communications were ambiguous, requiring "several inferences to serve as direct proof of a conspiracy"); *In re Baby Food Antitrust Litig.*, 166 F.3d at 126 (communications about current, public prices that had no effect on a company's price setting mechanism did not rise to the level of unambiguous evidence of a conspiracy); *Alvord-Polk, Inc.*, 37 F.3d at 1013 (communications provided only an opportunity to collude and did not demonstrate an agreement); *Mkt. Force Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1173 (7th Cir. 1990) (noting "the evidence of the existence of a conspiracy among the brokers in Milwaukee is ambiguous"); *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 80-81 (2d Cir. 1980) (proffered statements were hearsay and not admissible) *City of Moundridge*, 409 F. App'x at 364 (plaintiff took communications out of context).

19. At best, such evidence constitutes mere opportunity evidence, and cannot support an inference of wrongdoing. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Del. Co.*, 998 F.2d 1224, 1235, 1242 n.15 (3d Cir. 1993) (treating evidence of social calls and telephone contacts as "[p]roof of opportunity to conspire [which], without more, will not sustain an inference that a conspiracy has taken place"); *Cosmetic Gallery, Inc.*, 495 F.3d at 53 (an "account" of a "communication between alleged conspirators" was "at best evidence of an opportunity to conspire, not of concerted action."); *Venzie Corp. v. U.S. Mineral Prods. Co.*, 521 F.2d 1309, 1312 (3d Cir. 1975) (evidence that defendants made "numerous telephone calls" to each other, at least one of which concerned allegedly boycotted plaintiffs, only proved an opportunity for an agreement, and would not suffice to support a verdict); *Kleen Prods. LLC v. Georgia-Pac. LLC*, 910 F.3d 927, 938 (7th Cir. 2018) ("[H]aving the *opportunity* to conspire does not necessarily imply that wrongdoing *occurred*.")

Response to Proposed Conclusion No. 19

Complaint Counsel objects to the phrase "such evidence" as vague. To the extent this proposed conclusion attempts to negate all probative value of opportunity evidence it is misleading. While opportunity evidence on its own may not be definitive evidence of an agreement, considered in the context of the totality of the evidence, it may further corroborate other evidence of agreement and provide probative value. *See, e.g.*, *C-O-Two Fire Equip. Co. v. United States*, 197 F.2d 489, 493 (9th Cir. 1952) (finding evidence of defendants' membership in same association and resulting opportunity for meeting, without evidence of what occurred at meeting, contributed to evaluation of plus factors leading to conclusion of conspiracy).

Moreover, to the extent this proposed conclusion attempts to portray all competitor communications as opportunity to collude evidence, it is misleading. As discussed in Response to Proposed Conclusion No. 18, where competitor communications rise to the level of documenting an exchange of assurances, meeting of the minds, or conscious commitment to a common scheme, they may provide unambiguous evidence of the conspiracy, and may alone be sufficient to prove a plaintiff's case. *See United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013) ("'Unambiguous evidence of an agreement to fix prices . . . is all the proof a plaintiff needs' to establish a violation of Section 1.")

20. Likewise, "vague statements such as an admonition to competitors to 'play by the rules' do not constitute direct evidence of a conspiracy." *Superior Offshore Int'l, Inc.*, 490 F. App'x at 498 (citing *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 149, 156 n.5 (3d Cir. 2003)) (holding that "cases require that direct evidence of an illegal agreement be established with much greater clarity" than the ambiguous statements made between bond traders in that case).

Response to Proposed Conclusion No. 20

To the extent that this proposed conclusion notes that ambiguous or "vague" statements do not constitute direct evidence of a conspiracy, Complaint Counsel has no specific response. However, Complaint Counsel objects to any suggestion that its direct evidence of agreement constitutes "vague statements."

Insofar as this proposed conclusion suggests that the record facts are analogous to those in *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144 (3d Cir. 2003), it is misleading. In *InterVest*, plaintiff's argument implicated the entire bond market, with thousands of broker-dealers, in an alleged conspiracy to maintain a closed bond trading system. *Id.* at 162. Such an allegation "stretche[d] credibility to suggest that they all agreed on 'rules' in a manner approximating an illegal conspiracy." *Id.* Here, there are only three Respondents who spoke specifically about individual buying groups and exchanged assurances about Respondents' policies not to do business with buying groups. *See, e.g.*, CCFF ¶¶ 483, 498-90, 495, 500, 564-577, 580-581, 661-664, 679. Far from stretching credibility, the instant case is much more akin to *Petruzzi's IGA Supermarkets v. Darling-Delaware Co.*, 998 F.2d 1224, 1232 (3d Cir. 1993), where a conspiracy not to compete among bone renderers was not implausible, but made "perfect economic sense."

21. Evidence that a competitor *invited* a Respondent to participate in a conspiracy also does not constitute direct evidence that Respondent actually reached an *agreement* to restrain trade. "It remains the plaintiff's burden to prove that the [Respondent] succumbed to the temptation and conspired. It is not enough to point out the temptation and ask that the [Respondents] bear the onerous, if not impossible, burden of proving the negative – that no conspiracy occurred." *In re McWane, Inc.*, 155 F.T.C. at *265; *see also Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 50 n.9 (7th Cir. 1992) (evidence that a party provided vague information that it foresaw only moderate growth and very little increase in capacity to a competitor and that the competitor "did not respond with any information ... or plans" concerning its own business strategies in response "is insufficient to infer an agreement....").

Response to Proposed Conclusion No. 21

This proposed conclusion is incomplete and misleading to the extent that it suggests that an invitation to collude does not provide any probative value on the question of agreement. While an invitation to collude, without more, is not direct evidence of conspiracy, courts have found that invitations to collude constitute circumstantial evidence of conspiracy. *See Gainesville Util. Dep't v. Fla. Power & Light Co.*, 573 F.2d 292, 300-301 (5th Cir. 1978) (holding that correspondence that "contemplated and invited" concerted action was a plus factor); *Fishman v. Wirtz*, 74-C-2814 & 78-C-3621, 1981 WL 2153, at *59 (N.D. Ill. Oct. 28, 1981) ("One of the strongest circumstantial indicators of a conspiracy is the existence of a common invitation or request to join into a concerted plan of action."). And where an invitation is accepted, the combination of the invitation and the acceptance constitute unambiguous evidence of conspiracy. *Interstate Circuit v. United States*, 306 U.S. 208, 227 (1939)

The facts of *Reserve Supply Corp. v. Owens-Corning Fiberglass Corp.*, 971 F.2d 37 (7th Cir. 1992), are distinguishable. There, the Seventh Circuit held that a "single, isolated, and vague" statement by a competitor that it "foresaw 'moderate growth ahead' in the market, and that 'they anticipate very little increase' in industry capacity" was insufficient to infer an agreement to fix prices. *Id.*at 50 n.9. *Reserve Supply* involved no unambiguous evidence of conspiracy, and the allegations were centered on consciously parallel price increases and "underdeveloped" plus factor evidence. *Id.* at 50. This is in stark contrast to the exchanges of assurances among Respondents' CEOs, as well as actions taken in conformance with those assurances. *See, e.g.*, CCFF ¶¶ 416-417, 422-424, 483, 498-90, 495, 500, 527-528, 540, 543-546, 564-577, 580-581, 607-611, 622-625, 630-652, 661-664, 679.

22. Indeed, "[i]t would not be reasonable to infer that [a defendant] engaged in illegal

> activities merely from evidence that an illegal course of action was suggested but immediately rejected." *In re Citric Acid*, 191 F.3d at 1093, 1098 (dismissing case against defendant who "conced[ed] the existence of a conspiracy in the citric acid market but den[ied] its participation therein"); *see also El Cajon Cinemas, Inc. v. Am. Multi-Cinema, Inc.*, 832 F. Supp. 1395, 1398 (S.D. Cal. 1993) ("[W]hen Pacific attempted to initiate the conversations with AMC, [and] AMC declined to speak with Pacific on the issues ... the potential for a conspiracy, the Court finds, was wholly negated.").

Response to Proposed Conclusion No. 22

The proposed conclusion is misleading as irrelevant, as there are no record facts that any of the Respondents immediately rejected a suggestion of concerted action. Indeed, the only evidence of a distributor immediately rejecting a suggestion not to discount to buying groups is Burkhart's rejection of Benco's invitation to join the conspiracy.

Further, the proposed conclusion cites *In re Citric Acid* in misleading fashion by suggesting that the quoted language and the parenthetical are both part of the Ninth Circuit's reasoning in analyzing rebuffed invitations. While the quoted language is properly cited, the parenthetical comes from much earlier in the opinion where the court simply describes the defendant's arguments. *In re Citric Acid Antitrust Litig.*, 191 F.3d 1090, 1093 (9th Cir. 1999).

Moreover, the proposed conclusion cites *El Cajon Cinemas, Inc. v. American Multi-Cinema, Inc.*, 832 F. Supp. 1395 (S.D. Cal. 1993), which is inapposite to the instant case. There, the court found that when a competitor attempted to initiate a conversation with a rival, the rival declined to speak. *Id.* at 1398. "To the extent that the word 'conversation' implies an exchange of information between two parties, the Court [found] there were no conversations . . . .One party inquired and the other declined to comment . . . ." *Id.* This is in stark contrast to the February 2013 Cohen-Guggenheim exchange where Guggenheim responded with information about Patterson's situation or plans: "We feel the same way about these"—meaning Patterson also would not discount to buying groups. CCFF ¶ 495. Moreover, it is in contrast to the

exchanges between Benco and Schein, where Cohen communicated assurances against discounting to buying groups and Schein acted in conformance with those assurances. CCFF ¶ 686; *see Interstate Circuit v. United States*, 306 U.S. 208, 226 (1939), "[i]t was enough [to support a conspiracy] that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it.

b. Response to: Sworn Denials Are Direct Evidence Entitled to Significant Weight

23. Sworn denials of the existence of an agreement by those alleged to have personal knowledge of the agreement is direct evidence that there was no agreement. *In re McWane, Inc.*, 155 F.T.C. at *267 (finding that defendants' sworn testimony denying the illegal conduct is "direct evidence contrary to the asserted [agreement] and is entitled to weight" and that such testimony cannot be "dismissed as 'self-serving'" absent a finding that the witness lied under oath or is otherwise not credible); *see also Lamb's Patio Theatre, Inc. v. Universal Film Exchs., Inc.*, 582 F.2d 1068, 1070 (7th Cir. 1978) (affirming summary judgment when there was a "lack of any credible evidence" and a sworn affidavit denying the conspiracy); *Weit v. Cont'l Ill. Nat'l Bank & Tr. Co. of Chi.*, 641 F.2d 457, 464-65 (7th Cir. 1981) (affirming summary judgment when plaintiffs could not produce "significant probative evidence" and the record contained "consistent sworn denials" of the alleged conspiracy); *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1302 (11th Cir. 2003) (finding plaintiffs' evidence insufficient to overcome the defendants' sworn denials and that it would have been improper to permit the jury "to engage in speculation" in the face of defendants' denials).

Response to Proposed Conclusion No. 23

This proposed conclusion is misleading as to the relative import of sworn denials of an agreement. Courts have regularly found the existence of an agreement despite the defendants' denials of any agreement. *See, e.g.*, *Gainesville Utils. Dept. v. Fla. Power & Light Co.*, 573 F.2d 292, 301 n.14 (5th Cir. 1978) ("The officials of the power companies deny the existence of a territorial agreement, but where such testimony is in conflict with contemporaneous documents we can give it little weight . . . .") (internal quotation omitted); *United States v. Champion*, 557 F.2d 1270, 1273 (9th Cir. 1977) (upholding finding of agreement to eliminate competitive bidding for timber even though defendants asserted their meetings were innocent); *Vitagraph,*

Inc. v. Perelman, 95 F.2d 142, 146 (3d Cir. 1936) (upholding conspiracy finding notwithstanding witnesses testimony that "there was no conspiracy or concerted action between the defendants"); *United States v. Beachner Constr. Co.*, 555 F. Supp. 1273, 1278-79 (D. Kan. 1983) ("Although witnesses denied any overall agreement or understanding or participation in a single conspiracy, there can be no doubt that bid rigging was a way of life in the industry in Kansas."), *aff'd*, 729 F.2d 1278 (10th Cir. 1984); *United States v. Capitol Serv., Inc.*, 568 F. Supp. 134, 144-45 (E.D. Wis. 1983) (finding a non-bidding agreement despite defendants' testimony of no agreement). Indeed, where testimony is in direct conflict with the contemporaneous documents, courts afford such testimony little weight. *Gainesville*, 573 F.2d at 301 n.14. Because witness memories fade over time, contemporaneous documents are the best evidence of the witness intentions and beliefs at the time. *United States v. Gen. Elec. Co.*, 82 F. Supp. 753, 844 (D.N.J. 1949), *decision supplemented*, 115 F. Supp. 835 (D.N.J. 1953) (As the documents in the record were "never intended to meet the eyes of any[]one but the [executives] themselves, [they were] cinematographic photographs of their purposes at the time when they were written. They have, therefore, the highest validity as evidence of intention, and although in many instances [a defendant's executive] attempted to contradict them, his contradiction only served to affect the general credibility of his testimony.").

Furthermore, witnesses who truly believe that they did not enter into an agreement may nonetheless have engaged in unlawful conduct under antitrust laws. It is a mixed question of law and fact to be decided by the Court whether an "agreement" exists. *See Mayor and City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 135-36 (2d Cir. 2013) ("The ultimate existence of an 'agreement' under antitrust law, however, is a legal conclusion, not a factual allegation."); *Gainesville Util. Dep't v. Fla. Power & Light Co.*, 573 F.2d 292, 301 n.14 (5th Cir. 1978) ("The officials of the power companies deny the existence of a territorial agreement, but where such testimony is in conflict with contemporaneous documents we can give it little weight, *particularly when the crucial issues involve mixed questions of law and fact.*") (emphasis

added and internal quotations omitted). Thus, lay witness testimony that there was no "agreement" under antitrust laws does not end the inquiry.

Moreover, the proposed conclusion is irrelevant where the cited cases rely on witness denials in the absence of offsetting evidence of conspiracy. Here, the record evidence contains persuasive evidence of conspiracy that contradicts Respondents' denials. Indeed, the Commission has already noted that *Lamb's Patio Theatre Inc. v. Universal Film Exchanges, Inc.*, 582 F.2d 1068 (7th Cir. 1978) is inapposite. *In re Benco Dental Supply Co.*, Docket No. 9379, 2018 FTC LEXIS 185, at *54 n.17 (Nov. 26, 2018). The Commission contrasted a case built solely on mere allegations of actions against self-interest and change in conduct with "the instant case [where] we have before us not only allegations that could support a showing of conspiracy, but also sufficient evidence from which a reasonable trier of fact could infer an agreement, something that was entirely lacking in *Lamb's Patio Theatre*." *Id.* *In re McWane*, Docket No. 9351, 2013 FTC LEXIS 76 (Initial Dec. May 8, 2013), is similarly distinguishable where evidence of "opportunity to conspire," without more, did not prove agreement. *Id.*, at *686. Here, Respondents specifically discussed not discounting to buying groups (*see, e.g.*, CCFF ¶¶ 474-502, 564-588, 661-684, 955-1100, 1123-1138)—the very communications that "rise to the level of an agreement" and that were missing in *McWane*. *Id.*, at *686. Similarly, the plaintiff's evidence in *Weit v. Continental Illinois National Bank & Trust Co. of Chicago*, 641 F.2d 457, 464-65 (7th Cir. 1981), is not comparable to this case where the *Weit* plaintiffs relied on only two inter-firm discussions about interest rates, and the discussions had non-collusive justifications and did not support a finding of agreement. *Id.*

Complaint Counsel objects to the implication that it asks the Court to discount Respondents' denials as self-serving. It does not ask the Court to blindly dismiss Respondents' denials, but instead to weigh the denials against the totality of the record evidence, including Respondents' own contemporaneous documents, that point strongly towards agreement. *See In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002) ("A plaintiff

cannot make his case just by asking the jury to disbelieve the defendant's witnesses, but there is much more here.").

The proposed conclusion of law is also misleading because it cites *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287 (11th Cir. 2003), to support the probative value of defendant denials, but the issue of defendant denials appears nowhere in the opinion.

24. Complaint Counsel "cannot make its case just by asking the fact finder to disbelieve the defendant's witnesses." *In re McWane, Inc.*, 155 F.T.C. at *267; *see also City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 130 (D.D.C. 2006) ("Facing the sworn denial of the existence of conspiracy, it is up to plaintiff to produce significant probative evidence ... that conspiracy existed...."); *City of Moundridge*, 409 F. App'x at 364 (a "few scattered communications" and other evidence "falls far short" of overcoming defendants' sworn denials); *Venzie Corp.*, 521 F.2d at 1313 ("mere disbelief [does] not rise to the level of positive proof of agreement to sustain plaintiffs' burden of proving conspiracy"); *Valspar Corp. v. E.I. Du Pont De Nemours & Co.*, 873 F.3d 185, 195 n.6 (3d Cir. 2017) (noting that, even if the court were to reject denials as pretextual, "pretextual reasons [for the alleged conduct] are insufficient to create a genuine issue of fact without other evidence pointing to [an unlawful] agreement"); *Alvord-Polk, Inc*., 37 F.3d at 1014 ("Plaintiffs, however, seek to infer an agreement from those communications despite a lack of independent evidence tending to show an agreement and in the face of uncontradicted testimony that only informational exchanges took place. Without more, they cannot do so."); *Benton v. Blair*, 228 F.2d 55, 61 (5th Cir. 1955) (holding that "it was clearly error for the district court to reject the uncontradicted, unimpeached and not inherently improbable or suspicious testimony...."); *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 214 (1931) ("[T]he court ... is not at liberty to disregard the testimony of a witness on the ground that he is an employee of the defendant, in the absence of conflicting proof or of circumstances justifying countervailing inferences or suggesting doubt as to the truth of his statement, unless the evidence be of such a nature as fairly to be open to challenge as suspicious or inherently improbable.").

Response to Proposed Conclusion No. 24

The proposed conclusion is misleading insofar as it suggests Respondents' denials deserve greater weight than the rest of the evidence, or that Complaint Counsel asks the Court to discount Respondents' denials as self-serving. Complaint Counsel does not ask the Court to dismiss Respondents' denials blindly, but instead to weigh the denials against the totality of the

record evidence—including Respondents' own contemporaneous documents—that point strongly towards agreement. *See In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002) ("A plaintiff cannot make his case just by asking the jury to disbelieve the defendant's witnesses, but there is much more here.").

The cited cases are inapposite or do not support the proposition that Respondents' denials deserve greater weight or end the inquiry as to agreement. *In re McWane*, Docket No. 9351, 2013 FTC LEXIS 76 (Initial Dec. May 8, 2013), is distinguishable where evidence of "opportunity to conspire," without more, did not prove agreement and could not overcome sworn denials. *Id.*, at *686. Similarly, plaintiffs in *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309, 1312-13 (3d Cir. 1975), and *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1013-14 (3d Cir. 1994), rested on opportunity evidence. Here, Respondents specifically discussed not discounting to buying groups (*see, e.g.*, CCFF ¶¶ 474-502, 564-588, 661-684, 955-1100, 1123-1138)—the very communications that "rise to the level of an agreement" and that were missing in *McWane*, *Venzie*, and *Alvord-Polk*. *Alvord-Polk*, 37 F.3d at 1013; *McWane*, 2013 FTC LEXIS, at *686. The Commission has already held that *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117 (D.D.C. 2006), and its subsequent appellate opinion, 409 F. App'x 362 (D.C. Cir. 2011), are inapposite. *In re Benco Dental Supply Co.*, Docket No. 9379, 2018 FTC LEXIS 185, at *54 n.17 (Nov. 26, 2018). The *Moundridge* plaintiffs could not show that defendants discussed pricing or made pricing decisions based on information exchanges. *Id.* Here, "there is evidence from which a trier of fact could find that Respondents discussed their refusals to deal with buying groups and made decisions based on these communications." *Id.*

The proposed conclusion is misleading and incomplete to the extent that it portrays *Benton v. Blair*, 228 F.2d 55, 61 (5th Cir. 1955), and *Chesapeake & Ohio Railway Co. v. Martin*, 283 U.S. 209, 214 (1931), as unequivocally valuing evidence of sworn denials. In *Benton*, the Fifth Circuit found it was error to reject "*uncontradicted*" denials. 228 F.2d at 61 (emphasis added). In *C&O Railway*, the Supreme Court valued employee testimony "*in the absence of conflicting proof or of circumstances justifying countervailing inferences.*" 283 U.S. at 214 (emphasis added). Respondents' denials are contradicted by their own contemporaneous documents, which provide sufficient conflicting proof to undercut the weight due to the denials. *Benton* and *C&O Railway* do not advocate a different result.

c. Proving a Conspiracy through Circumstantial Evidence

25. Because "it is rare to be able to prove a conspiracy with direct evidence, such as explicit agreements or admissions of conspiracy," "the proponent of an alleged conspiracy will [more typically] rely upon inferences drawn from circumstantial evidence, such as the conduct of the parties." *In re McWane, Inc.*, 155 F.T.C. at *223 (citing *City of Tuscaloosa v. Harcros Chems. Inc.*, 158 F.3d 548, 569 (11th Cir. 1998)); *ES Dev., Inc. v. RWM Enters.*, 939 F.2d 547, 553-54 (8th Cir. 1991); 6 Areeda & Hovenkamp, Antitrust Law ¶ 1410(c) at 71 (3d ed. 2010)).

Response to Proposed Conclusion No. 25

Complaint Counsel has no specific response.

26. Circumstantial evidence is "usually ... of two types – economic evidence suggesting that the defendants were not in fact competing, and noneconomic evidence suggesting that they were not competing because they had agreed not to compete." *In re McWane, Inc.*, 155 F.T.C., at *223 (quoting *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002)).

Response to Proposed Conclusion No. 26

Complaint Counsel has no specific response.

27. Though an agreement can be proven through circumstantial evidence, "antitrust law

limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). "[M]istaken inferences in [antitrust] cases ... are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Indus. Co.*, 475 U.S. at 594. For that reason, the "circumstantial evidence of a conspiracy, when considered as a whole, must tend to rule out the possibility of independent action." *In re McWane, Inc.*, FTC No. 9351, 2012 WL 5375161, at *6 (Aug. 9, 2012) (citing *Matsushita Elec. Indus. Co.*, 475 U.S. at 764); *Valspar Corp.*, 873 F.3d at 192.

Response to Proposed Conclusion No. 27

This proposed conclusion is irrelevant to the extent that Complaint Counsel has produced unambiguous evidence of agreement. The cautions of *Matsushita* "do not apply at all when a plaintiff has produced unambiguous evidence of an agreement to fix prices." *In re Publ'n Papers Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012). Moreover, this proposed conclusion is misleading, as it relies on a summary judgment standard for permissible inferences. Notably, Respondents find no support for the limitation on permissible inferences in this Court's post-trial opinion in *In re McWane*, Docket No. 9351, 2013 FTC LEXIS 76 (Initial Op. May 8, 2013). At the post-trial stage, the fact finder assigns reasonable inferences consistent with the totality of the evidence. *See Esco Corp. v. United States*, 340 F.2d 1000, 1007 (9th Cir. 1965) (noting the trier of fact is to determine the logical inferences from a round-robin exchange of price information after hearing the full context of the evidence); *see also In re EPDM Antitrust Litig.*, 681 F. Supp. 2d 141, 168 (2009) ("As Judge Posner notes, evidence that is 'susceptible of differing interpretations' is not 'devoid of probative value' . . . it is the role of the jury to determine 'whether, when the evidence is considered as a whole, it is more likely that the defendants had conspired to fix prices than that they had not conspired to fix prices.") (quoting *In re High Fructose Corn Syrup*, 295 F.3d at 655-56).

But even if *Matsushita*'s limitation on permissible inferences applies at this stage, the proposed conclusion is incomplete, as not all circumstantial evidence is treated alike. "[T]he

acceptable inferences which can be drawn from circumstantial evidence vary with the plausibility of the plaintiffs' theory and the dangers associated with such inferences.'" *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 357 (3d Cir. 2004) (internal citation omitted); *accord In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012). Where the "theory of conspiracy is not implausible" and "the challenged activities could not reasonably be perceived as procompetitive . . . more liberal inferences from the evidence should be permitted . . . because the attendant dangers from drawing inferences recognized in *Matsushita* are not present." *In re Flat Glass Antitrust Litig.*, 385 F.3d 358 (3d Cir. 2004) (citing *Petruzzi's*, 998 F.2d at 1232); *accord In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012) (By contrast, broader inferences are permitted, and the 'tends to exclude' standard is more easily satisfied, when the conspiracy is economically sensible for the alleged conspirators to undertake and the challenged activities could not reasonably be perceived as procompetitive."); Areeda & Hovenkamp ¶ 308 ("[G]iven evidence must [not] be treated precisely the same way in all cases. . . . [T]he 'range of permissible conclusions' that a fact finder might draw becomes larger as the alleged conspiracy becomes more economically plausible.").

The proposed conclusion is also incomplete and misleading to the extent that it warns of inadvertent chilling of procompetitive behavior. "[I]f the alleged conduct is 'facially anticompetitive and exactly the harm the antitrust laws aim to prevent,' no special care need be taken in assigning inferences to circumstantial evidence." *Alvord-Polk, Inc. v. F. Schumacher Co.*, 37 F.3d 996, 1001 (3d Cir. 1994); *accord Arnold Pontiac-GM, Inc. v. Budd Baer, Inc.*, 862 F.2d 1335, 1339 (3d Cir. 1987) (*Matsushita*'s "is of little or no applicability" when the challenged activity is overtly anticompetitive). "[P]ermitting an inference of conspiracy from

direct competitor contacts will not have significant anticompetitive effects." *In re Petrol. Prods. Antitrust Litig.*, 906 F.2d 432, 453 (9th Cir. 1990).

Further, the proposed conclusion is misleading and incomplete, as Complaint Counsel need not disprove all possibility of independent action. "Even where a plaintiff relies on ambiguous evidence . . . to prove its claim, the plaintiff does not bear the burden of showing that the existence of a conspiracy is the 'sole inference' to be drawn from the evidence. The plaintiff is only required to present evidence that is sufficient to allow the fact-finder to 'infer that the conspiratorial agreement is more likely than not.'" *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013) (internal citation omitted); *accord id.* at 697, *aff'd*, 791 F.3d 290 (2d Cir. 2015) ("It is important not to be misled by *Matsushita*'s statement that the plaintiff's evidence, if it is to prevail, must 'tend to exclude the possibility that the alleged conspirators acted independently.' The Court surely did not mean that the plaintiff must disprove all nonconspiratorial explanations for the defendants' conduct. Not only did the court use the word 'tend,' but the context made clear that the Court was simply requiring sufficient evidence to allow a reasonable fact-finder to infer the conspiratorial explanation is more likely than not.") (quoting *Publ'n Paper*, 690 F.3d at 63 and Areeda & Hovenkamp ¶ 14.03(b)); *see also Apple,* 952 F. Supp. 2d at 700 ("Apple's entirely appropriate or even admirable motives do not preclude a finding that Apple also intentionally engaged with the Publisher Defendants in a scheme to raise e-book prices.").

"Requiring a plaintiff to 'exclude' or 'dispel' the possibility of independent action places too heavy a burden on the plaintiffs." *In re Publ'n Papers Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012). Indeed, as the Seventh Circuit in *Toys "R" Us v. FTC* noted:

> [T]here must be some evidence that "tends to exclude the possibility" that the alleged conspirators acted independently. This does not mean, however, that the

> Commission had to exclude *all* possibility that the manufacturers acted independently. . . . [T]hat would amount to an absurd and legally unfounded burden to prove with 100% certainty that an antitrust violation occurred. The test states only that there must be *some* evidence which, if believed, would support a finding of concerted behavior."

221 F.3d 928, 934-35 (7th Cir. 2000) (internal citation omitted). Thus, a plaintiff need only produce "sufficient evidence to allow a reasonable fact-finder to infer the conspiratorial explanation is more likely than not." *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013).

28. In weighing ambiguous or circumstantial evidence, a tie – evidence that is equally consistent with permissible competition as with illegal conspiracy – does not permit an inference of conspiracy. *Anderson News, L.L.C.*, 899 F.3d at 98, 104-05 ("[I]f the evidence is in equipoise, then ... judgment must be granted against the plaintiff.… A jury's choice between these two equally likely explanations for defendants' conduct, one legal and one illegal, would 'amount to mere speculation.'"); *see also, e.g.*, *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 903 (9th Cir. 1987) (affirming summary judgment for defendants despite testimony of a "gentlemen's agreement" because "[a]t least three interpretations of the deposition testimony are possible[,]" including that "it might refer to industrywide acceptance of the competitive reality").

Response to Proposed Conclusion No. 28

This proposed conclusion is misleading to the extent that it implies Complaint Counsel must disprove all independent justifications for Respondents' conduct. Even *Anderson News, LLC v. American Media, Inc.* 899 F.3d 87 b(2d Cir. 2018)—a case cited by Respondents for this proposed conclusion—acknowledges that while a plaintiff must produce evidence that "tends to exclude the possibility that the alleged conspirators acted independently[, t]his does not mean that the plaintiff must disprove all nonconspiratorial explanations for the defendants' conduct; rather the evidence need be sufficient only to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not." *Id.* at 98 (internal quotation and citations

omitted). For a more robust response to the suggestion that Complaint Counsel must disprove all independent justifications, see Response to Proposed Conclusion No. 29.

To the extent this proposed conclusion reiterates the preponderance burden of proof, Complaint Counsel has no specific response.

29. Complaint Counsel's evidence must "exclude" or "foreclose" the possibility of independent action. *Cosmetic Gallery, Inc.*, 495 F.3d at 53 ("Evidence that does not exclude the possibility of independent action or that relies on a factual context that is implausible is insufficient…."); *Mkt. Force Inc.*, 906 F.2d at 1173 (affirming dismissal where the evidence did "not foreclose the conclusion that the competitors were not engaged in a conspiracy"); *see also, e.g.*, *Kleen Prods. LLC*, 910 F.3d at 934 (plaintiff's evidence must "rule out the hypothesis that the defendants were engaged in self-interested but lawful oligopolistic behavior during the relevant period"); *In re Citric Acid*, 191 F.3d at 1095 (even testimony of "a gentlemen's agreement ... was not necessarily inconsistent with lawful behavior ... and thus did not tend to exclude the possibility of legitimate behavior"); *Reserve Supply Corp.*, 971 F.2d at 49 ("[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.... The plaintiff must demonstrate ... that the defendant acted in a way that, but for a hypothesis of joint action, would not be in its own interest.") (quoting *Matsushita Elec. Indus. Co.*, 475 U.S. at 588 and *Ill. Corp. Travel Inc. v. Am. Airlines, Inc.*, 806 F.2d 722, 726 (7th Cir. 1986)); *In re K-Dur Antitrust Litig.*, 2016 WL 755623, at *18 (D.N.J. 2016) ("[I]f conduct can be explained in an equally plausible manner by an illegal conspiracy or by permissible competition, the finder of fact is not permitted to draw an inference of conspiracy.").

Response to Proposed Conclusion No. 29

The proposed conclusion is misleading and incomplete, as Complaint Counsel need not disprove all possibility of independent action. "Even where a plaintiff relies on ambiguous evidence . . . to prove its claim, the plaintiff does not bear the burden of showing that the existence of a conspiracy is the 'sole inference' to be drawn from the evidence. The plaintiff is only required to present evidence that is sufficient to allow the fact-finder to 'infer that the conspiratorial agreement is more likely than not.'" *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013) (internal citation omitted); *accord id.* at 697, *aff'd*, 791 F.3d 290 (2d Cir. 2015) ("It is important not to be misled by *Matsushita*'s statement that the plaintiff's

evidence, if it is to prevail, must 'tend to exclude the possibility that the alleged conspirators acted independently.' The Court surely did not mean that the plaintiff must disprove all nonconspiratorial explanations for the defendants' conduct. Not only did the court use the word 'tend,' but the context made clear that the Court was simply requiring sufficient evidence to allow a reasonable fact-finder to infer the conspiratorial explanation is more likely than not.") (quoting *Publ'n Paper*, 690 F.3d at 63, and Areeda & Hovenkamp ¶ 14.03(b)); *see also Apple,* 952 F. Supp. 2d at 700 ("Apple's entirely appropriate or even admirable motives do not preclude a finding that Apple also intentionally engaged with the Publisher Defendants in a scheme to raise e-book prices.").

"Requiring a plaintiff to 'exclude' or 'dispel' the possibility of independent action places too heavy a burden on the plaintiffs." *In re Publ'n Papers Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012). Indeed, as the Seventh Circuit in *Toys "R" Us v. FTC* noted:

> [T]here must be some evidence that "tends to exclude the possibility" that the alleged conspirators acted independently. This does not mean, however, that the Commission had to exclude *all* possibility that the manufacturers acted independently. . . . [T]hat would amount to an absurd and legally unfounded burden to prove with 100% certainty that an antitrust violation occurred. The test states only that there must be *some* evidence which, if believed, would support a finding of concerted behavior."

221 F.3d 928, 934-35 (7th Cir. 2000) (internal citation omitted). Thus, a plaintiff need only produce "sufficient evidence to allow a reasonable fact-finder to infer the conspiratorial explanation is more likely than not." *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015).

Respondents' cited cases are not to the contrary. In *Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46 (3d Cir. 2007), the evidence did not tend to exclude the possibility of independent action where plaintiffs relied solely upon opportunity to collude

evidence and lacked a "factual context from which a reasonable inference could be drawn that would prove conspiracy." *Id.* at 53. The *Market Forces, Inc. v. Wauwatosa Realty Co.* court relied in part on Judge Wood's articulation that a plaintiff must provide "evidence tending to exclude the possibility that the defendants acted independently, or that would show that the inference of conspiracy to fix prices is reasonable in light of the competing inference of independent action." 906 F.2d 1167, 1171 (7th Cir. 1990) (citation omitted); *accord Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d. 37, 49 (7th Cir. 1992). In *Kleen Products LLC v. Georgia-Pacific LLC*, 910 F.3d 927 (7th Cir. 2018), the Seventh Circuit instructed: plaintiffs "need[] evidence that would allow a trier of fact to nudge the ball over the 50-yard line and rationally to say that the existence of an agreement is more likely than not. Put more directly, they must put on the table '*some* evidence which, if believed, would support a finding of concerted behavior.'" *Id.* at 934 (internal citation omitted).

30. The finder of fact must be particularly discerning when applying this standard in an oligopolistic setting. "Oligopolies pose a special problem under § 1 because rational, independent actions taken by oligopolists can be nearly indistinguishable from [concerted action]. This problem is the result of 'interdependence,' which occurs because 'any rational decision [in an oligopoly] must take into account the anticipated reaction of other firms." *Valspar Corp.*, 873 F.3d at 192 (quoting *In re Flat Glass Antitrust Litig.*, 385 F.3d at 359). "Even though such interdependence or 'conscious parallelism' harms consumers just as a monopoly does, it is beyond the reach of [the] antitrust laws." *Valspar Corp.*, 873 F.3d at 198. "Where interdependence seems likely, the finder of fact must 'weigh all the evidence in the actual business context to decide whether a traditional agreement emphasizing commitment is more probable than not.'" *In re McWane, Inc.*, 155 F.T.C. at *227 (quoting *Kreuzer v. Am. Acad. of Periodontology*, 735 F.2d 1479, 1488 (D.C. Cir. 1984)).

Response to Proposed Conclusion No. 30

Complaint Counsel has no specific response.

31. Accordingly, to determine whether the circumstantial evidence suffices to prove an agreement, courts follow a three-step process.

> First, the court must determine whether the plaintiff has established a pattern of parallel behavior. Second, it must decide whether the plaintiff has demonstrated the existence of one or more plus factors that 'tends to exclude the possibility that the alleged conspirators acted independently'…. Third, if the first two steps are satisfied, the defendants may rebut the inference of collusion by presenting evidence" that negates the inference "that they entered into a ... conspiracy.

Williamson Oil Co. v. Philip Morris USA, 346 F. 3d 1287, 1301 (11th Cir. 2003); *In re Beef Indus. Antitrust Litig.*, 907 F.2d 510, 514 (5th Cir. 1990) (to prove an antitrust conspiracy through circumstantial evidence, a plaintiff "must first demonstrate that the defendants' actions were parallel"); *In re Baby Food Antitrust Litig.*, 166 F.3d at 122 ("Once the plaintiffs have presented evidence of the defendants' consciously parallel [conduct] and supplemented this evidence with plus factors, a ***rebuttable*** presumption of conspiracy arises.").

Response to Proposed Conclusion No. 31

This proposed conclusion is misleading and incomplete as to the law. Moreover, to the extent Respondents have not produced evidence to rebut a presumption of conspiracy, the third-step of the proposed conclusion is irrelevant. *First*, it is misleading because it conflates the test proving conspiracy through parallel conduct versus proving conspiracy with circumstantial evidence. Respondents posit that absent direct evidence, Complaint Counsel must prove parallel conduct and plus factors to prevail. However, "[p]arallel pricing is merely 'one such form of circumstantial evidence.'" *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 158 (N.D.N.Y. 2010). "Plaintiffs need not prove parallel pricing in order to prevail on per se claim based on circumstantial evidence." *Id.*; *accord id.* at 159 ("The Court has already held that evidence of parallel pricing is not a prerequisite to a finding of an agreement based on circumstantial evidence."). Instead, the Court is to examine the record, with reasonable inferences consistent with the totality of the evidence, to determine whether agreement is more likely than not. *See Esco Corp. v. United States*, 340 F.2d 1000, 1007 (9th Cir. 1965) (describing circumstantial evidence of an agreement consisting of a round-robin exchange of price information among rivals, and noting that the trier of fact is to determine the logical inferences after hearing the full

context of the evidence); *In re EPDM Antitrust Litig.*, 681 F. Supp. 2d 141, 168 (2009) ("As Judge Posner notes, evidence that is 'susceptible of differing interpretations' is not 'devoid of probative value' . . . and it is the role of the jury to determine 'whether, when the evidence is considered as a whole, it is more likely that the defendants had conspired to fix prices than that they had not conspired to fix prices.") (quoting *In re High Fructose Corn Syrup*, 295 F.3d at 655-56).

The cases cited in support are not to the contrary. As in *Cason-Merenda v. Detroit Medical Center*, 862 F. Supp. 2d 603 (E.D. Mich. 2012):

> Defendants quote only the language that aids their cause—*i.e.*, that a plaintiff in a § 1 conspiracy case 'must first demonstrate that the defendants' actions were parallel'—while notably omitting the language that immediately precedes it—namely, that this standard applies to plaintiffs who 'rely on *circumstantial evidence of conscious parallelism* to prove a § 1 claim.'"

Id. at 627 (internal citation omitted). It is tautological that if a plaintiffs' theory of the case is based upon parallel conduct, then the plaintiff must show parallel conduct. *Id.*; *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 158 (N.D.N.Y. 2010).

Second, the proposed conclusion is incomplete, as the inquiry does not end once a defendant produces evidence to rebut a presumption of collusion. If a defendant "puts forth a plausible, procompetitive explanation for his actions, . . . the plaintiff must produce more probative evidence that the law has been violated." *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1456 (11th Cir. 1991); *see also Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1037 (8th Cir. 2000) (referring to the class's burden to rebut defendants' independent business justifications).

Third, the burden shifting framework is irrelevant here, where, Respondents failed to rebut the presumption of illegal conduct. They do not produce evidence of procompetitive

benefits; instead, contrary to the totality of the evidence, they argue that their conduct was not parallel. *But see* CCFF ¶¶ 396, 399, 401, 416-417, 423-424, 603, 607, 611, 622-623, 632, 634-635, 646, 648, 650, 709, 713, 719, 729, 750, 754, 771, 773, 785, 788, 795, 799, 806, 809, 812, 828, 836, 850, 1187-1188.

32. At all times, however, "the ultimate burden of persuading the factfinder that a conspiracy exists is on the plaintiff." *In re McWane, Inc.*, 155 F.T.C. at *226 (quoting *Kreuzer*, 735 F.2d at 1488); *City of Moundridge*, 2009 WL 5385975, at *4.

Response to Proposed Conclusion No. 32

Complaint Counsel has no specific response.

i. Response to: Parallel Conduct Is Required to Prove an Agreement Through Circumstantial Evidence

33. To find a pattern of parallel behavior, the finder of fact may not gloss over differences in Respondents' conduct, chalk up deviations among the Respondents to "cheating," or focus on broad generalities about the Respondents' intentions. *Kleen Prods. LLC*, 910 F.3d at 936 ("[A] close look at the record reveals that the Purchasers overstate how coordinated these hikes actually were."); *In re Baby Foot Antitrust Litig.*, 166 F.3d at 132 (while there were some parallel movements in list prices, "defendants' prices were neither uniform nor within any agreed upon price range of each other.... [D]efendants' marketing activities [thus] refute rather than support parallel pricing"); *In re McWane, Inc.*, 155 F.T.C. at *238-39, 258 ("Complaint Counsel's daisy chain of assumptions fail[ed] to support or justify an evidentiary inference of any unlawful agreement involving [Respondent], and the multilayered inference [was] rejected" where evidence did not show parallel conduct. "To the extent Complaint Counsel is arguing that circumstantial evidence of parallel 'intentions' proves actual parallel [conduct], the argument is rejected. It will not be presumed that intentions resulted in corresponding conduct.").

Response to Proposed Conclusion No. 33

This proposed conclusion (and the heading that precedes it) is misleading as to the import of parallel conduct and what is required to find parallel conduct. "Parallel pricing is merely 'one such form of circumstantial evidence.'" *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 158 (N.D.N.Y. 2010). "Plaintiffs need not prove parallel pricing in order to prevail on per se

claim based on circumstantial evidence." *Id.*; *accord id.* at 159 ("The Court has already held that evidence of parallel pricing is not a prerequisite to a finding of an agreement based on circumstantial evidence."). Lacking parallel conduct, a plaintiff may nonetheless prove an agreement based on circumstantial evidence if agreement is more likely than not after a court assigns reasonable inferences consistent with the totality of the evidence to circumstantial evidence. *See Esco Corp. v. United States*, 340 F.2d 1000, 1007 (9th Cir. 1965) (describing circumstantial evidence of an agreement consisting of a round-robin exchange of price information among rivals, and noting that the trier of fact is to determine the logical inferences after hearing the full context of the evidence); *In re EPDM Antitrust Litig.*, 681 F. Supp. 2d 141, 168 (2009) ("As Judge Posner notes, evidence that is 'susceptible of differing interpretations' is not 'devoid of probative value' . . . and it is the role of the jury to determine 'whether, when the evidence is considered as a whole, it is more likely that the defendants had conspired to fix prices than that they had not conspired to fix prices.") (quoting *In re High Fructose Corn Syrup*, 295 F.3d at 655-56).

Where a plaintiff's case rests solely on parallel conduct, of course, the plaintiff must show parallel conduct. *Cason-Merenda v. Detroit Medical Center*, 862 F. Supp. 2d 603, 627 (E.D. Mich. 2012). Parallel conduct, however, is not necessarily simultaneous or identical conduct. *SD3, LLC v. Black & Decker Inc.*, 801 F.3d 412, 429 (4th Cir. 2015). "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators." *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939). For parallel conduct, a plaintiff needs to prove defendants acted "similarly." *Petruzzi's IGA Supermkts. v. Darling-Del. Co.*, 998 F.2d 1224, 1234 (3d Cir. 1993); *SD3, LLC v. Black & Decker Inc.*, 801 F.3d 412, 427 (4th Cir. 2015). Indeed, in *United States v. Foley*, the

court upheld a conspiracy where the defendants were far from acting in perfect tandem: some defendants waited months after the conspiracy formed to raise commissions, while one defendant raised commissions before the conspiracy formed, and other defendants only "partially" joined, charging higher commissions when available but also charging lower ones. 598 F.2d 1323, 1332-34 (4th Cir. 1979); *see SD3, LLC v. Black & Decker Inc.*, 801 F.3d 412, 429 (4th Cir. 2015) (describing *Foley* facts).

Minor variances among Respondents' actions will not preclude a finding of parallel conduct. In assessing parallel conduct, the precise manner of parallel action is not as relevant as the effect of the action. *SD3, LLC v. Black & Decker, Inc.* 801 F.3d 412, 428-29 (citing *Am. Tobacco Co. v. United States*, 328 U.S. 781-800-01 (1946), for the proposition that co-conspirators may use "a variety of different methods to achieve the same ultimate objective," and noting it was not fatal that SawStop never alleged a common manner for the conspirators to effectuate the anticompetitive agreement). In *SD3*, the Fourth Circuit held that defendants need not "move in relative lockstep" to have parallel activity, and where defendants achieved the objective of the alleged boycott in different ways—i.e., outright refusal, spurious discussions and negotiations followed by refusal, reaching but not implementing an agreement—it could not be said that they did not act in parallel. 801 F.3d at 427-28. "It is the common design which is the essence of the conspiracy or combination; and this may be made to appear when the parties steadily pursue the same object, *whether acting separately or together, by common or different means, but always leading to the same unlawful result*." *Am. Tobacco Co. v. United States*, 147 F.2d 93, 107 (6th Cir. 1944) (emphasis added). "[A] horizontal agreement to fix prices need not succeed for sellers to be liable under the Sherman Act; it is the attempt that the Sherman Act proscribes." *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 363 (3d Cir. 2004). As the

Commission recognized in this matter: "Complaint Counsel need not prove that the parties to a conspiracy complied perfectly with it." *In re Benco Dental Supply Co.*, Docket No. 9379, 2018 FTC LEXIS 185, *43 (Comm'n Op. Nov. 26, 2018) (citing Judge Posner in *In re High Fructose Corn Syrup Antitrust Litigation,* 295 F.3d 651, 656 (7th Cir. 2002) (courts must not fall into the trap of "failing to distinguish between the existence of a conspiracy and its efficacy.")).

34. Importantly, behavior "contrary to the existence of a conspiracy" – such as Respondents dealing with allegedly boycotted firms – precludes a finding of parallel conduct and undermines any circumstantial inference of a conspiracy. *Anderson News, L.L.C.*, 899 F.3d at 105 (finding no evidence of parallel conduct where "[m]any defendants ... undertook independent efforts to negotiate with" the allegedly boycotted plaintiff); *see also Valspar Corp.*, 873 F.3d at 196 n.7 ("We are mindful that a 'failed attempt to fix prices' is illegal ... but it is likewise significant that the alleged conspirators behaved contrary to the existence of a conspiracy."); *Burtch*, 662 F.3d at 228 (evidence that one defendant is "declining all orders" while another is "extending [credit to] at least some" "fall[s] far short of demonstrating parallel behavior").

Response to Proposed Conclusion No. 34

This proposed conclusion misstates the factual record and is misleading as to both the import of parallel conduct and what is required to find parallel conduct. For a more robust response as to the import of parallel conduct and what constitutes parallel conduct, see Response to Proposed Conclusion No. 33. The factual record indicates that Respondents acted in parallel by instructing their sales teams not to discount to buying groups. *See, e.g.*, CCFF ¶¶ 396, 399, 401, 416-417, 423-424, 603, 607, 611, 622-623, 632, 634-635, 646, 648, 650, 709, 713, 719, 729, 750, 754, 771, 773, 785, 788, 795, 799, 806, 809, 812, 828, 836, 850, 1187-1188. Moreover, Respondents rejected (and in the case of Schein, terminated) buying groups during the conspiracy period. *See, e.g.*, CCFF ¶¶ 404-425, 621-624, 637-652, 925-954.

35. Without parallel conduct, Complaint Counsel's case collapses. *Anderson News, L.L.C.*, 899 F.3d at 106-12 ("Without 'parallel acts' to be reviewed 'in conjunction with' the circumstantial evidence, evidence supporting the presence of certain plus factors ... can

provide little support for a finding of unlawful conspiracy."); *Michelman*, 534 F.2d at 1036, 1043 (rejecting conspiracy claim where a defendant "pursued a substantially dissimilar and divergent course from the others"). Where the "dissimilarity between the conduct of the two defendants ... extended to such basic matters as their willingness to ship goods on credit[,] ... the credit policy terms of each[,] ... and the adjustment of quality claims[,]" the conduct was "diametrically opposed to and inconsistent with any ... combination or agreement." *Michelman*, 534 F.2d at 1043.

Response to Proposed Conclusion No. 35

This proposed conclusion is misleading as to the import of parallel conduct and what is required to find parallel conduct. For a more robust response as to the significance of parallel conduct and what constitutes parallel conduct, see Response to Proposed Conclusion No. 33. "Parallel [conduct] is merely 'one such form of circumstantial evidence.' Accordingly, Plaintiffs need not prove parallel pricing in order to prevail on per se claim based on circumstantial evidence." *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 158 (N.D.N.Y. 2010) (internal citation omitted). Nonetheless, Complaint Counsel has amassed evidence of parallel conduct. *See, e.g.*, CCFF ¶¶ 396, 399, 401, 416-417, 423-424, 603, 607, 611, 622-623, 632, 634-635, 646, 648, 650, 709, 713, 719, 729, 750, 754, 771, 773, 785, 788, 795, 799, 806, 809, 812, 828, 836, 850, 1187-1188. To the extent that this proposed conclusion suggests there is no evidence of parallel conduct, it is misleading on the facts.

36. Non-parallel conduct cannot be disregarded or explained away as evidence of "cheating" absent extrinsic evidence independently establishing the existence of a conspiracy. *In re McWane, Inc.*, 155 F.T.C. at *260 ("the cases" holding that an agreement can be inferred from "complaints about cheating" involved "independent proof of the underlying agreement allegedly 'breached'"); *see also In re McWane, Inc.*, 155 F.T.C. at *241 ("to accept Complaint Counsel's inference that any increase in Project Pricing during this period was the result of a collapsed conspiracy, rather than a common reaction to the competitive environment, would require presuming the existence of the conspiracy in the first instance, which is improper"); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1023, 1033 (8th Cir. 2000) ("[A] litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly.").

Response to Proposed Conclusion No. 36

This proposed conclusion misstates the factual record and is misleading as to the import of parallel conduct and what is required to find parallel conduct. For a more robust response as to the significance of parallel conduct and what constitutes parallel conduct, see Response to Proposed Conclusion No. 33. This proposed conclusion ignores the record evidence—including direct and unambiguous evidence—that independently establishes Respondents' agreement. *See, e.g.*, CCFF ¶¶ 474-502, 564-588, 661-684, 955-1100, 1123-1138. As such, the instant case is distinguishable from *McWane*, where the allegation of agreement was based on parallel conduct and plus factor evidence—cheating on the agreement being one of the plus factors. *In re McWane*, Docket No. 9351, 2013 FTC LEXIS 76, at *669 (Initial Dec. May 8, 2013). This is not a case, as Respondents suggest, where the Court needs to presume the existence of the conspiracy in the first instance. While confrontations about presumed cheating are probative of Respondents agreement (*see, e.g.*, CCFF ¶¶ 572, 566, 568, 570, 573, 956-961, 967-968, 982, 990-992, 996-997, 1005-1010), the record evidence goes beyond parallel conduct and plus factors.

37. Moreover, "consciously parallel behavior by competitors in a concentrated market without a meeting of the minds is not, by itself, unlawful." *In re Benco Dental Supply Co.*, 2018 WL 6338485, at *19 n.13. Thus, "evidence of parallel behavior or even conscious parallelism alone, without more, is insufficient to establish a Section 1 violation…." *In re McWane, Inc.*, 155 F.T.C. at *225; *Twombly*, 550 U.S. at 553-54; *In re Benco Dental Supply Co.*, 2018 WL 6338485, at *5 ("In a concentrated market, evidence of parallel behavior by market participants, without more, is insufficient to establish a Section 1 violation.").

Response to Proposed Conclusion No. 37

Complaint Counsel has no specific response.

ii. Plus Factors Capable of Distinguishing Between Lawful Interdependence and Unlawful Conspiracy Are Required

38. Even where the evidence shows that respondents engaged in parallel refusals to deal, such "evidence ... is insufficient to establish a Section 1 violation." *In re Benco Dental Supply Co.*, 2018 WL 6338485, at *5. Rather, "to prove an oligopolistic conspiracy with proof of parallel behavior, that evidence 'must go beyond mere interdependence' and 'be so unusual that in the absence of an advance agreement, no reasonable firm would have engaged in it.'" *Valspar Corp.*, 873 F.3d at 193 (quoting *In re Baby Food Antitrust Litig.*, 166 F.3d at 135).

Response to Proposed Conclusion No. 38

This proposed conclusion is misleading to the extent that it implies that parallel conduct generally does not support an inference of conspiracy. The proposed conclusion omits a key phrase from the Commission's summary decision opinion in this matter: "Evidence of parallel behavior by market participants, *without more*, is insufficient to establish a Section 1 violation." *In re Benco Dental Supply Co.*, Docket No. 9379, 2018 FTC LEXIS 185, at *13 (Comm'n Op. 9379 Nov. 26, 2018) (emphasis added).

Moreover, this proposed conclusion is misleading to the extent that it requires a showing of parallel conduct to prevail where a plaintiff's case is not limited to proving agreement by parallel conduct. "Plaintiffs need not prove parallel pricing in order to prevail on per se claim based on circumstantial evidence." *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 158 (N.D.N.Y. 2010); *accord id.* at 159 ("The Court has already held that evidence of parallel pricing is not a prerequisite to a finding of an agreement based on circumstantial evidence.").

Complaint Counsel does not dispute that Respondents accurately quote language from *Valspar Corp. v. E.I. DuPont de Nemours & Co.*, 873 F.3d 185, 193 (Cir. 2017), but to the extent that this excerpt sets a different standard than other precedent, this proposed conclusion is incomplete and misleading. It is well accepted that to prove conspiracy through parallel

behavior, a plaintiff needs to produce plus-factor evidence that "tends to ensure that courts punish 'concerted action'—an actual agreement—instead of the 'unilateral, independent conduct of competitors." *Petruzzi's IGA Supermkts., Inc. v. Darling-Del. Co.*, 998 F.2d 1224, 1244 (3d Cir. 1993). Even *Valspar* recognizes "[p]lus factors are proxies for direct evidence because they tend to ensure that courts punish concerted action—an actual agreement." 873 F.3d at 193. And "a plaintiff in an oligopoly case must provide inferences that show that the alleged conspiracy is 'more likely than not.'" *Id.* at 192 n.1 (quoting *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 412 (3d Cir. 2015). More is not required.

39. To determine whether parallel conduct is so unusual that no firm would engage in it absent a pre-existing conspiracy, courts look to whether there are "plus" factors that render the existence of a conspiracy more probable than not. *In re McWane, Inc.*, 155 F.T.C. at *250 ("[T]o constitute a 'plus' factor evincing a conspiracy, [the] evidence must be more than 'suggestive' of a conspiracy. The inference of a conspiracy must be more likely than not."). The "dispositive issue for determination," therefore, "is whether the greater weight of the credible and probative evidence, with respect to the demonstrated parallel conduct and the demonstrated 'plus' factors, makes the inference of a preceding agreement more likely than not." *In re McWane, Inc.*, 155 F.T.C. at *246.

Response to Proposed Conclusion No. 39

Moreover, this proposed conclusion is misleading to the extent that it requires a showing of parallel conduct and plus factors to prevail where a plaintiff's case is not limited to proving agreement by parallel conduct. "Plaintiffs need not prove parallel pricing in order to prevail on per se claim based on circumstantial evidence." *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 158 (N.D.N.Y. 2010); *accord id.* at 159 ("The Court has already held that evidence of parallel pricing is not a prerequisite to a finding of an agreement based on circumstantial evidence.").

Complaint Counsel acknowledges that Respondents borrow the phrase "so unusual that no firm would engage in it absent a pre-existing conspiracy" from *Valspar Corp. v. E.I. DuPont*

de Nemours & Co., 873 F.3d 185, 193 (3d Cir. 2017), but to the extent that this excerpt sets a different standard than other precedent, this proposed conclusion is incomplete and misleading. It is well accepted that to prove conspiracy through parallel behavior, a plaintiff needs to produce plus-factor evidence that "tends to ensure that courts punish 'concerted action'—an actual agreement—instead of the 'unilateral, independent conduct of competitors." *Petruzzi's IGA Supermkts., Inc. v. Darling-Del. Co.*, 998 F.2d 1224, 1244 (3d Cir. 1993). Even *Valspar* recognizes "[p]lus factors are proxies for direct evidence because they tend to ensure that courts punish concerted action—an actual agreement." 873 F.3d at 193. And "a plaintiff in an oligopoly case must provide inferences that show that the alleged conspiracy is 'more likely than not.'" *Id.* at 192 n.1. (quoting *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 412 (3d Cir. 2015). More is not required.

Otherwise, Complaint Counsel has no specific response to this proposed conclusion.

40. "The plus factor analysis seeks to ensure that courts punish concerted action and not merely the 'unilateral, independent conduct of competitors.'" *In re Benco Dental Supply Co.*, 2018 WL 6338485, at *7. While the "plus factor analysis" usually arises in pricing cases, it can also be "useful for a claim of conspiracy that involves ... putatively parallel refusals to bid for sales to certain types of customers." *In re Benco Dental Supply Co.*, 2018 WL 6338485, at *7.

Response to Proposed Conclusion No. 40

This proposed conclusion is misleading to the extent that it requires a showing of plus factors to prevail where a plaintiff's case is not limited to proving agreement based on parallel conduct. "Plaintiffs need not prove parallel pricing in order to prevail on per se claim based on circumstantial evidence." *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 158 (N.D.N.Y. 2010); *accord id.* at 159 ("The Court has already held that evidence of parallel pricing is not a prerequisite to a finding of an agreement based on circumstantial evidence."). Moreover, the

existence of an independent justification for conduct does not automatically undermine a showing of plus factors and preclude a finding of agreement. *In re Benco Dental Supply Co.*, Docket No. 9379, 2018 FTC LEXIS 185, at *46-47 (Comm'n Op. Nov. 26, 2018) ("Patterson's asserted independent reasons arguably might be a plausible basis for Patterson to decline to bid for buying group business, but such reasons are insufficient to preclude a finding that Patterson had a collective interest to conspire with Benco and Schein."). Otherwise, Complaint Counsel has no specific response.

41. While there "is no exhaustive list of 'plus' factors[,]" they "[can be] grouped into the following three categories: (1) evidence that the alleged conspirator had a motive to enter into a ... conspiracy; (2) evidence that [it] acted contrary to its interest[]; and (3) evidence implying a traditional conspiracy." *In re McWane, Inc.*, 155 F.T.C. at *244.

Response to Proposed Conclusion No. 41

Complaint Counsel has no specific response.

(A) Response to: To Constitute a Plus Factor, Change in Conduct Must be "Abrupt" or "Radical" and Tied to Competitor Communications

42. In determining whether the surrounding context makes an inference of a conspiracy more or less probable, particular attention is paid to whether there was a change in conduct following that suspect communication that would likely not have occurred absent a pre-existing agreement. *Kleen Prods. LLC*, 910 F.3d at 940 (discussing that an inference of conspiracy was more persuasive where, following suspect communications, one defendant took steps that "could not be undone easily").

Response to Proposed Conclusion No. 42

This proposed conclusion is misleading to the extent that it suggests that evidence of plus factors should be considered individually. Rather, plus factors must be considered as a whole, not individually dissected:

> In antitrust conspiracy cases, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.

In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1118 (N.D. Cal. 2012) (internal quotation marks omitted) (quoting *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)). Just as no one plus factor is always determinative of an agreement, *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999), the absence of any particular plus factor is not fatal to a plaintiff's case where the totality of other plus factors tends to prove agreement is more likely than not. *Cf. United States v. Apple, Inc.*, 952 F. Supp. 2d 638, 690 (S.D.N.Y. 2013) (noting that the change of conduct plus factor may strengthen the inference of agreement). Otherwise, Complaint Counsel has no specific response.

43. But to constitute a plus factor supporting an inference of conspiracy, "[a] change in industry practices must be 'radical,' or 'abrupt.'" *Valspar Corp.*, 873 F.3d at 196 (quoting *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d at 410 and *Valspar Corp.*, 152 F. Supp. 3d 234, 252 (D. Del. 2016)) (finding no abrupt shift in behavior that could support a reasonable inference of a conspiracy where defendants' conduct at issue was "consistent with how [an] industry has historically operated" and continued after the alleged conspiracy); *see also Kleen Prods. LLC*, 910 F.3d at 936 (change must be "abrupt"); *White*, 635 F.3d at 581 (Conduct that is consistent before, during, and after an alleged conspiracy cannot give rise to an inference of a conspiracy "because that factual context undermines any inference that the pricing behavior represents a sudden shift marking the *beginning* of a price-fixing conspiracy."); *cf. In re Domestic Drywall Antitrust Litigation*, 163 F. Supp. 3d 175, 255-56 (E.D. Pa. 2016) (defendants' sudden decision within weeks of each other to eliminate a "major competitive tool" of job quotes when they were a common industry feature was a "radical" and "abrupt" change supporting an inference of conspiracy); *Twombly*, 550 U.S. at 557 n.4 (to support an inference of a conspiracy the changes in conduct must be of the type that "would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties[,]" such as "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors ... for no other discernable reason.").

Response to Proposed Conclusion No. 43

Complaint Counsel does not dispute Respondents have accurately quoted the cited case support, however, to the extent this proposed conclusion suggests that a change in conduct is necessary to find agreement, it is misleading. An agreement to adhere to an existing course of action nonetheless constitutes an agreement; and when that course of action forecloses competition, such an agreement contravenes Section 1. *See United States v. Champion Int'l Corp.*, 557 F.2d 1270, 1273 (9th Cir. 1977) (A bidding pattern among defendants that "developed by 'normal economic forces'" was condemned as part of an illegal agreement after defendants discussed their preferred auctions and had an understanding about bidding, with the court noting: "defendants did not leave the exchange of this information to chance").

For example, in *United States v. North Dakota Hospital Ass'n*, 640 F. Supp. 1018 (D.N.D. 1986), the court found an unlawful agreement where rival hospitals agreed not to discount to Indian Health Services and "to adhere to [the hospitals'] independently developed, preexisting policies against granting [such] discounts." *Id.* at 1036-37. While the hospitals' policies predated the agreement, the agreement nonetheless had the effect of "foreclose[ing] any potential competition" among the hospitals. *Id.; see also FTC v. Actavis*, 570 U.S. 136, 157 (2013) (explaining that preventing "the risk of competition . . . constitutes the relevant anticompetitive harm").

Similarly, in *United States v. Foley*, the court upheld a conspiracy where some defendants waited months after the conspiracy formed to raise commissions, while one defendant raised commissions before the conspiracy formed, and other defendants only "partially" joined, charging higher commissions when available but also charging lower ones. 598 F.2d 1323, 1332-34 (4th Cir. 1979).

44. To determine whether there has been the type of "radical" or "abrupt" change in industry practice, the court must consider behavior before and after the alleged change. If the alleged behavior occurred "before the [alleged] period as well" as after the alleged change, there can be no inference of a conspiracy. *Kleen Prods. LLC*, 910 F.3d at 936-37 ("A continuation of a historic pattern – including of parallel [conduct] – does not plausibly allow one to infer the existence of a cartel."); *see also In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d at 1024 (dismissing conspiracy complaint and holding that allegations of conduct occurring after alleged conspiracy were insufficient where plaintiff failed to allege how it differed from conduct prior to alleged conspiracy).

Response to Proposed Conclusion No. 44

This proposed conclusion is misleading to the extent that it suggests that evidence of plus factors should be considered individually. Rather, plus factors must be considered as a whole, and not individually dissected:

> In antitrust conspiracy cases, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.

In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1118 (N.D. Cal. 2012) (internal quotation marks omitted) (quoting *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)). Just as no one plus factor is always determinative of an agreement, *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999), the absence of any particular plus factor is not fatal to a plaintiff's case where the totality of other plus factors tends to prove agreement is more likely than not. *Cf. United States v. Apple, Inc.*, 952 F. Supp. 2d 638, 690 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015) (noting that the change of conduct plus factor may strengthen the inference of agreement).

To the extent this proposed conclusion suggests that a change in conduct is necessary to find agreement, it is misleading. An agreement to adhere to an existing course of action

nonetheless constitutes an agreement; and when that course of action forecloses competition, such an agreement contravenes Section 1. *See United States v. Champion Int'l Corp.*, 557 F.2d 1270, 1273 (9th Cir. 1977) (A bidding pattern among defendants that "developed by 'normal economic forces'" was condemned as part of an illegal agreement after defendants discussed their preferred auctions and had an understanding about bidding, with the court noting: "defendants did not leave the exchange of this information to chance"). For example, in *United States v. North Dakota Hospital Ass'n*, 640 F. Supp. 1018 (D.N.D. 1986), the court found an unlawful agreement where rival hospitals agreed not to discount to Indian Health Services and "to adhere to [the hospitals'] independently developed, preexisting policies against granting [such] discounts." *Id.* at 1036-37. While the hospitals' policies predated the agreement, the agreement nonetheless had the effect of "foreclose[ing] any potential competition" among the hospitals. *Id.; see also FTC v. Actavis*, 570 U.S. 136, 157 (2013) (explaining that preventing "the risk of competition . . . constitutes the relevant anticompetitive harm").

Similarly, in *United States v. Foley*, the court upheld a conspiracy where some defendants waited months after the conspiracy formed to raise commissions, while one defendant raised commissions before the conspiracy formed, and other defendants only "partially" joined, charging higher commissions when available but also charging lower ones. 598 F.2d 1323, 1332-34 (4th Cir. 1979).

45. The court must also consider the timing of the alleged change in relation to the alleged starting and ending points of the conspiracy. "Logic dictates that one cannot prove a curtailment or reduction in Project Pricing without proof of a *starting point* for comparison." *In re McWane, Inc.*, 155 F.T.C. at *240. Any alleged change in conduct must also be viewed in relation to alleged concerted action and communications in furtherance of the alleged conspiracy. Where changes in conduct occurred prior to, or long after, a suspect communication or the start of the alleged conspiracy, such changes will not support an inference of a conspiracy. *In re McWane, Inc.*, 155 F.T.C. at *240-41; *Cosmetic Gallery, Inc.*, 495 F.3d at 54 (holding that "even if the action of not selling

> to [plaintiff] were parallel among distributors, [plaintiff's] own evidence asserts and demonstrates [defendant] had determined not to sell to [plaintiff] ... from the outset, before any of the alleged acts took place ... negat[ing] awareness of parallel action....").

Response to Proposed Conclusion No. 45

This proposed conclusion is misleading to the extent that it suggests a lack of change in conduct negates a finding of conspiracy or that conduct that pre-dates a conspiracy must differ from conspiracy-related conduct. *See* Response to Proposed Conclusion No. 44.

46. Similarly, changes in conduct that are minor, non-uniform, or explained by extrinsic changes in market conditions also do not support an inference of a conspiracy. *Valspar Corp.*, 873 F.3d at 196 (noting that a mere "uptick in frequency of a pre-established industry practice" is far from the sort of "radical or abrupt change" necessary to "indicate conspiracy"); *Kleen Prods. LLC*, 910 F.3d at 936-37 (rejecting inference of conspiracy where "the shift [in defendant's behavior] may be explained by external factors, such as the emergence from the economic downturn of 2008").

Response to Proposed Conclusion No. 46

To the extent this proposed conclusion claims that "non-uniform" changes in conduct cannot support an inference of conspiracy, it is unsupported by the cited cases and misleading as contrary to the law. *See, e.g., United States v. Foley*, 598 F.2d 1323, 1332-34 (4th Cir. 1979) (upholding a finding of conspiracy where some defendants waited months after the conspiracy formed to raise commissions, while one defendant raised commissions before the conspiracy formed, and other defendants only "partially" joined, charging higher commissions when available but also charging lower ones).

This proposed conclusion is also misleading to the extent that it claims independent justifications (e.g., external factors) for conspiracy conduct negate the finding of agreement. "Requiring a plaintiff to 'exclude' or 'dispel' the possibility of independent action places too heavy a burden on the plaintiff. Rather if a plaintiff relies on ambiguous evidence to prove its claim, the existence of a conspiracy must be a reasonable inference that the jury could draw from

that evidence; it need not be the *sole* inference." *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012); *In re Benco Dental Supply Co.*, Docket No. 9379, 2018 FTC LEXIS 185, at *14 (Comm'n Op. Nov. 26, 2018) ("The plaintiff . . . need not demonstrate that the inference of conspiracy is the sole inference. Rather, the inference of conspiracy need only be 'reasonable in light of the competing inferences of independent action or collusive activity.'") (citation omitted). As the Second Circuit has recognized, "'independent reasons' can also be "interdependent," and the fact that [defendant's] conduct was in its own economic interest in no way undermines the inference that it entered an agreement to raise . . . prices." *United States v. Apple, Inc.*, 791 F.3d 290, 317-18 (2d Cir. 2015) (citing Areeda & Hovenkamp ¶ 1413a).

To the extent this proposed conclusion suggests that a change in conduct is necessary to find agreement, it is misleading. An agreement to adhere to an existing course of action nonetheless constitutes an agreement; and when that course of action forecloses competition, such an agreement contravenes Section 1. *See United States v. Champion Int'l Corp.*, 557 F.2d 1270, 1273 (9th Cir. 1977) (A bidding pattern among defendants that "developed by 'normal economic forces'" was condemned as part of an illegal agreement after defendants discussed their preferred auctions and had an understanding about bidding, with the court noting: "defendants did not leave the exchange of this information to chance"). For example, in *United States v. North Dakota Hospital Ass'n*, 640 F. Supp. 1018 (D.N.D. 1986), the court found an unlawful agreement where rival hospitals agreed not to discount to Indian Health Services and "to adhere to [the hospitals'] independently developed, preexisting policies against granting [such] discounts." *Id.* at 1036-37. While the hospitals' policies predated the agreement, the agreement nonetheless had the effect of "foreclose[ing] any potential competition" among the

hospitals. *Id.; see also FTC v. Actavis*, 570 U.S. 136, 157 (2013) (explaining that preventing "the risk of competition . . . constitutes the relevant anticompetitive harm").

Finally, this proposed conclusion is misleading to the extent that it suggests that evidence of plus factors should be considered individually. Rather, plus factors must be considered as a whole, and not individually dissected:

> In antitrust conspiracy cases, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.

In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1118 (N.D. Cal. 2012) (internal quotation marks omitted) (quoting *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)). Just as no one plus factor is always determinative of an agreement, *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999), the absence of any particular plus factor is not fatal to a plaintiff's case where the totality of other plus factors tends to prove agreement is more likely than not. *Cf. United States v. Apple, Inc.*, 952 F. Supp. 2d 638, 690 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015) (noting that the change of conduct plus factor may strengthen the inference of agreement).

47. Of course, conduct that is consistent before, during, and after an alleged conspiracy cannot give rise to an inference of a conspiracy. *White v. R.M. Packer Co.*, 635 F.3d 571, 581 (1st Cir. 2011) ("[P]ricing behaviors do not function as 'plus factors' when they are stable over time, because that factual context undermines any inference that the pricing behavior represents a sudden shift marking the beginning of a price-fixing conspiracy."); *see also In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 410 (3d Cir. 2015) (finding no abrupt shift in behavior that could support a reasonable inference of a conspiracy where defendants' conduct at issue was "consistent with how [an] industry has historically operated" and continued after the alleged conspiracy); *Kleen Prod. LLC v. Int'l Paper*, 276 F. Supp. 3d 811, 826 (N.D. Ill. 2017), *aff'd sub nom. Kleen Prod. LLC v. Georgia-Pac. LLC*, 910 F.3d 927 (7th Cir. 2018) (finding that "the Court could not detect in Defendants' fifteen price announcements any notable break with their prior

practice. … The dearth of support on this point seriously weakens the inference of conspiracy."); *Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 54 (3d Cir. 2007) (affirming summary judgment where defendant's decision not to sell to plaintiff had been made prior to any alleged agreement explaining that "[e]ven if the action of not selling to [plaintiff] were parallel among distributors, [plaintiff's] own evidence asserts and demonstrates [defendant] had determined not to sell to [plaintiff] from the outset, before any of the alleged acts took place.").

Response to Proposed Conclusion No. 47

This proposed conclusion is misleading to the extent that it suggests a lack of change in conduct negates a finding of conspiracy or that conduct that pre-dates a conspiracy must differ from conspiracy-related conduct. *See* Response to Proposed Conclusion No. 44.

(B) Response to: Plus Factors that Merely Restate Oligopolistic Competition are Not Entitled to Significant Weight

48. In a concentrated market, plus factors that merely restate oligopolistic competition have little role to play. *In re McWane, Inc.*, 155 F.T.C. at *245 ("Because the factors of motive and actions contrary to interest may only restate the theory of interdependence among oligopolists ... evidence indicating an 'actual, manifest agreement,' is the key to a proper determination."); *Valspar Corp.*, 873 F.3d at 196 ("In oligopolistic markets, 'the first two factors [motive and actions against self-interest] largely restate the phenomenon of interdependence, [which] leaves traditional non-economic evidence of a conspiracy as the most important plus factor.'").

Response to Proposed Conclusion No. 48

This proposed conclusion is misleading to the extent that it suggests that evidence of plus factors should be considered individually. Rather, plus factors must be considered as a whole, and not individually dissected:

> In antitrust conspiracy cases, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.

In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1118 (N.D. Cal. 2012) (internal quotation marks omitted) (quoting *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)). Otherwise, Complaint Counsel has no specific response.

(1) Motive to Conspire

49. Evidence of a motive to conspire is a "background" plus factor that cannot establish a conspiracy on its own. *Blomkest*, 203 F.3d at 1043. Thus, motive is neither necessary nor sufficient to prove the existence of an agreement. *Blomkest*, 203 F.3d at 1043. In fact, where alleged co-conspirators "had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." *Matsushita Elec. Indus., Co.*, 475 U.S. at 596-97 ("Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence...."); *accord Cohlmia v. St. John Med. Ctr.*, 693 F.3d 1269, 1284 (l0th Cir. 2012); *see also First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 280 (1968) (refusal to deal could not support a finding of antitrust liability because the defendant lacked any rational motive to join the alleged boycott and defendant's refusal to deal was consistent with its independent interest).

Response to Proposed Conclusion No. 49

This proposed conclusion is misleading to the extent that it suggests that evidence of plus factors should be considered individually. Rather, plus factors must be considered as a whole, and not individually dissected:

> In antitrust conspiracy cases, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.

In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1118 (N.D. Cal. 2012) (internal quotation marks omitted) (quoting *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)).

Moreover, the proposed conclusion is misleading to the extent that it cites *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 203 F.3d 1028 (8th Cir. 2000), to suggest

that motive provides no probative value of agreement. While recognizing that motive alone is insufficient to prove agreement, *Blomkest* states the opposite of Respondents' proposed conclusion:

> "[M]otive to conspire" and "high level of inter-firm communications," are often cited as "plus factors" because they make conspiracy possible. Background facts showing a situation conducive to collusion do not tend to exclude the possibility of independent action, but they nevertheless form an essential foundation for a circumstantial case. In *Matsushita*, the Supreme Court held that a conspiracy case based on circumstantial evidence must be economically plausible. The background "plus factors" of market structure, motivation and opportunity play an important role in establishing such plausibility. Generally, these background "plus factors" are necessary but not sufficient to prove conspiracy.

Id. at 1043-44. The cited cases do not support the proposed conclusion that motive is not necessary for, or probative of, an agreement. Indeed, the cited language notes that conspiracy is implausible where there is a lack of motive.

50. It is not enough to show that a respondent's profits increase by engaging in collective action. Rather, Complaint Counsel must show that the parallel behavior is unlikely to arise naturally absent an agreement, thereby creating a motive to violate the law. *In re McWane, Inc.*, 155 F.T.C. at *247 ("Even if McWane was motivated in part to increase profits, this is still a free country and '[i]n a free capitalistic society, all entrepreneurs have a legitimate understandable motive to increase profits,' which does not, on its own, constitute a 'plus factor' indicating an unlawful agreement.").

Response to Proposed Conclusion No. 50

The proposed conclusion is not supported by the cited case law. *McWane* notes that the general motivation to increase profits, *without more*, is insufficient to justify a plus factor indicating agreement. To the extent this proposed conclusion suggests that conduct that may arise naturally absent agreement negates the existence of an agreement, it is contrary to legal precedent. An agreement to adhere to an existing course of action nonetheless constitutes an agreement; and when that course of action forecloses competition, such an agreement

contravenes Section 1. *See United States v. Champion Int'l Corp.*, 557 F.2d 1270, 1273 (9th Cir. 1977) (A bidding pattern among defendants that "developed by 'normal economic forces'" was condemned as part of an illegal agreement after defendants discussed their preferred auctions and had an understanding about bidding, with the court noting: "defendants did not leave the exchange of this information to chance").

For example, in *United States v. North Dakota Hospital Ass'n*, 640 F. Supp. 1018 (D.N.D. 1986), the court found an unlawful agreement where rival hospitals agreed not to discount to Indian Health Services and "to adhere to [the hospitals'] independently developed, preexisting policies against granting [such] discounts." *Id.* at 1036-37. While the hospitals' policies predated the agreement, the agreement nonetheless had the effect of "foreclose[ing] any potential competition" among the hospitals. *Id.; see also FTC v. Actavis*, 570 U.S. 136, 157 (2013) (explaining that preventing "the risk of competition . . . constitutes the relevant anticompetitive harm").

Similarly, in *United States v. Foley*, the court upheld a conspiracy where some defendants waited months after the conspiracy formed to raise commissions, while one defendant raised commissions before the conspiracy formed, and other defendants only "partially" joined, charging higher commissions when available but also charging lower ones. 598 F.2d 1323, 1332-34 (4th Cir. 1979).

51. Evidence of a motive to conspire must be more than speculative. An alleged "'hope' that reduced competition ... might eventually work in defendants' favor" requires "[t]he kind of broad inferences ... [that] are not appropriate...." *Anderson News, L.L.C.*, 899 F.3d at 102 (declining to adopt plaintiff's expert's suggestion "that reducing competition in the wholesaler market *could* result in higher prices for retailers" because "it does not show that reducing competition would in any way benefit or has already benefited defendant publishers").

Response to Proposed Conclusion No. 51

This proposed conclusion is misleading, as the ellipses omit key words that demonstrate that the *Anderson* court was speaking to its own facts. In particular, the *Anderson* court did not say that broad inferences as to motive are never appropriate, only that they are inappropriate where the alleged conspiracy is not economically sensible, as in *Anderson*:

> We are not persuaded that some "hope" that reduced competition in the wholesaler market might eventually work in defendant's favor "can be said to be a rational motive for joining the conspiracy alleged in this case." The kind of broad inferences Anderson urges upon us and that would be permitted if the conspiracy were economically sensible are not appropriate here."

899 F.3d at 102 (internal citations omitted).

52. A motive to conspire will be "negated" where "the alleged agreement would harm the alleged conspirators" or a "plausible and justifiable reason for its conduct that is consistent with proper business practice" is shown. *Anderson News, L.L.C.*, 899 F.3d at 112.

Response to Proposed Conclusion No. 52

Complaint Counsel does not dispute Respondents have accurately quoted *Anderson News, L.L.C. v. American Media, Inc.*, 899 F.3d 87 (2d Cir. 2018), however, to the extent this proposed conclusion suggests that an independent justification will negate motive and preclude a finding of agreement, it is misleading and contrary to the Commission's previous holding in this matter. *See In re Benco Dental Supply Co.*, Docket No. 9379, 2018 FTC LEXIS 185, at *46-47 (Comm'n Op. Nov. 26, 2018) ("Patterson's asserted independent reasons arguably might be a plausible basis for Patterson to decline to bid for buying group business, but such reasons are insufficient to preclude a finding that Patterson had a collective interest to conspire with Benco and Schein."); *see also United States v. Apple, Inc.*, 791 F.3d 290, 317-18 (2d Cir. 2015) ("[T]he

fact that Apple's conduct was in its own economic interest in no way undermines the inference that it entered an agreement to raise ebook prices.").

53. Because firms in concentrated industries often employ a range of competitive strategies – such as "follow-the-leader" or "wait-and-see" – Complaint Counsel must show that such strategies are unavailable, unsuccessful, or unlikely to lead to the observed parallelism. That is because, where such strategies are viable, an "agreement is not necessary to achieve conscious parallelism," and thus, to hold respondents liable in that setting would, "in effect, foist a nefarious motive upon the Suppliers merely because they conduct their business within an oligopoly market." *In re McWane, Inc.*, 155 F.T.C. at *247, 267 (no inference of a conspiracy is warranted where the conduct "is at least as consistent with oligopolistic, 'follow-the-leader' behavior, which is not illegal, as it is with an unlawful agreement," since a "firm in a concentrated industry typically has reason to decide (individually) to copy an industry leader"); *see also In re McWane, Inc.*, 155 F.T.C. at *249 ("Where, as here, a ... decision can be easily changed if competitors do not follow, it is not irrational to proceed without advance assurances of competitor compliance."); *Kleen Prods. LLC*, 910 F.3d at 938, 940 ("[F]lexible behavior" that could be "undone easily" in the event it did "not pa[y] off ... does not point towards ... a role in any conspiracy.").

Response to Proposed Conclusion No. 53

This proposed conclusion is not supported by the cited cases, and indeed, finds no support in the law. The cited cases stand for the proposition that the presence of an oligopoly market is insufficient on its own to demonstrate agreement, and contributes little probative value to the totality of plus factor evidence. *In re McWane, Inc.*, Docket No. 9351, 2013 FTC LEXIS 76, at *626-27 (Initial Dec. 2013). With respect to plus factor evidence, "Complaint Counsel's burden is to prove that the asserted 'plus factor' evidence tends to make the inference of an agreement more likely than not." *Id.*, at *625. There is no legal requirement that it prove follow-the-leader or wait-and-see behavior is unavailable, unsuccessful, or unlikely.

Moreover, this conclusion is misleading where Respondents cobble together words from non-consecutive pages of *Kleen Products, LLC v. Georgia-Pacific LLC*, 910 F.3d 927 (7th Cir. 2018), to manufacture a rule of law that appears nowhere in the opinion. Instead, in the cited

excerpts, the *Kleen Products* court was addressing its own facts, noting that one of its defendant's excess supply capacity was not probative of conspiracy while another defendant's supply restrictions were probative of agreement. *Id.* at 938, 940.

54. In an oligopoly, "motivation is ... synonymous with interdependence and therefore adds nothing...." *White v. R.M. Packer Co.*, 635 F.3d 571, 582 (1st Cir. 2011) (quoting 6 Areeda & Hovenkamp ¶ 1434(c)(1) at 269). For that reason, even if there is "evidence showing defendants have 'a plausible reason to conspire,'" such evidence alone "does not create a triable issue as to whether there was a conspiracy." *White*, 635 F.3d at 582; *see also In re Baby Food Antitrust Litig.*, 166 F.3d at 122 ("[C]onspiratorial motivation is ambiguous because it can describe mere interdependent behavior.... Thus, no conspiracy should be inferred from ambiguous evidence or from mere parallelism when defendants' conduct can be explained by independent business reasons."); *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1194-95 (9th Cir. 2015) ("'[C]ommon motive to conspire' simply restates that a market is interdependent (*i.e.*, that the profitability of a firm's decisions regarding pricing depends on competitors' reactions).").

Response to Proposed Conclusion No. 54

This proposed conclusion is misleading to the extent that it suggests that evidence of plus factors should be considered individually. Rather, plus factors must be considered as a whole, and not individually dissected:

> In antitrust conspiracy cases, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.

In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1118 (N.D. Cal. 2012) (internal quotation marks omitted) (quoting *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)).

While motive, by itself, is insufficient to prove agreement, the proposed conclusion is misleading to suggest that motive provides no probative value. As the Eighth Circuit recognized

in *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 203 F.3d 1028 (8th Cir. 2000):

> "[M]otive to conspire" and "high level of inter-firm communications," are often cited as "plus factors" because they make conspiracy possible. Background facts showing a situation conducive to collusion do not tend to exclude the possibility of independent action, but they nevertheless form an essential foundation for a circumstantial case. In *Matsushita*, the Supreme Court held that a conspiracy case based on circumstantial evidence must be economically plausible. The background "plus factors" of market structure, motivation and opportunity play an important role in establishing such plausibility. Generally, these background "plus factors" are necessary but not sufficient to prove conspiracy.

Id. at 1043-44.

Complaint Counsel does not dispute that Respondents accurately quoted the cited authorities. To the extent this proposed conclusion suggests that an independent justification will negate motive and preclude a finding of agreement, it is misleading and contrary to the Commission's previous holding in this matter. *See In re Benco Dental Supply Co.*, Docket No. 9379, 2018 FTC LEXIS 185, at *46-47 (Comm'n Op. Nov. 26, 2018) ("Patterson's asserted independent reasons arguably might be a plausible basis for Patterson to decline to bid for buying group business, but such reasons are insufficient to preclude a finding that Patterson had a collective interest to conspire with Benco and Schein."); *see also United States v. Apple, Inc.*, 791 F.3d 290, 317-18 (2d Cir. 2015) ("[T]he fact that Apple's conduct was in its own economic interest in no way undermines the inference that it entered an agreement to raise ebook prices.").

Otherwise, Complaint Counsel has no specific response.

(2) Acts Against Self-Interest

55. Actions against a defendant's economic self-interest are a less important plus factor because, like motive, they largely "restate interdependence" in the context of an alleged price fixing conspiracy. *In re Flat Glass*, 385 F.3d at 360-61.

Response to Proposed Conclusion No. 55

This proposed conclusion is misleading to the extent that it suggests that evidence of plus factors should be considered individually. Rather, plus factors must be considered as a whole, not individually dissected:

> In antitrust conspiracy cases, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.

In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1118 (N.D. Cal. 2012) (internal quotation marks omitted) (quoting *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)).

While the cited language is accurately quoted, this proposed conclusion is misleading to the extent that it is contrary to precedent that recognizes probative value in evidence of actions against self-interest. *See, e.g.*, *Toys "R" Us v. FTC*, 221 F.3d 928, 935-36 (7th Cir. 2000) (refusal to sell to warehouse stores was against manufacturers' self-interest and supported the inference of conspiracy); *Petruzzi's IGA Supermkts. v. Darling-Del. Co.*, 998 F.2d 1224, 1244-45 (3d Cir. 1993) (noting concerns about actions against self-interest being synonymous with interdependence are not germane in a case involving refusals to bid on certain accounts).

56. "To constitute a 'plus' factor," such acts must involve "proof that 'each defendant ... would have acted unreasonably in a business sense if it had engaged in the challenged conduct unless that defendant had received assurances from the other defendants that they would take the same action.'" *In re McWane, Inc.*, 155 F.T.C. at *248 (quoting *Bolt v. Halifax Hosp. Med. Ctr.*, 891 F.2d 810, 826-27 (11th Cir. 1990)). "Proof of actions contrary to interest for 'plus' factor purposes means 'showing that the defendants' behavior would not be reasonable or explicable (*i.e.*, not in their legitimate economic self-interest) if they were not conspiring to ... restrain trade – that is, that the defendants would not have acted as they did, had they not been conspiring in restraint of trade." *In re McWane, Inc.*, 155 F.T.C. at *248 (quoting *City of Tuscaloosa*, 158 F.3d at 569).

Response to Proposed Conclusion No. 56

Complaint Counsel has no specific response.

57. Complaint Counsel must show that Respondents' actions did "not ... amount to good faith business judgment." *Cayman Expl. Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1361 (10th Cir. 1989). Because business judgment should not be lightly disturbed, the burden on Complaint Counsel here is "substantial" and "compel[s] them to produce evidence which 'tends to exclude the possibility that the defendants were acting independently.'" *In re Chocolate Confectionary Antitrust Litig.*, 999 F. Supp. 2d 777, 791 (M.D. Pa. 2014), *amended*, 2014 WL 4104474 (M.D. Pa. 2014), *aff'd*, 801 F.3d 383 (3d Cir. 2015).

Response to Proposed Conclusion No. 57

This proposed conclusion is misleading and omits a key phrase that indicates proof of actions against self-interest are required to the extent a plaintiff relies solely on parallel conduct for an inference of agreement. The full sentence reads:

> The antitrust plaintiff *who relies on a theory of "conscious parallelism"* must establish that "defendants engaged in consciously parallel action which was contrary to their economic self-interest so as not to amount to good faith business judgment."

Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1358, 1361 (10th Cir. 1989) (emphasis added). Where a plaintiff relies on evidence beyond conscious parallelism, it need not prove actions against self-interest. *Cf. Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 158 (N.D.N.Y. 2010) ("Plaintiffs need not prove parallel pricing in order to prevail on per se claim based on circumstantial evidence.").

Moreover, the proposed conclusion is misleading to the extent that it suggests Complaint Counsel must prove Respondents' conduct amounted to bad faith business judgment. While *Cayman* is accurately quoted, it cites *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 559 (5th Cir. 1980), which cites *Theater Enterprises, Inc. v. Paramount Film Distributing Corp.*,

346 U.S. 537 (1954), for the proposition that actions against self-interest need to amount to an action contrary to good faith business judgment. Yet *Theater Enterprises* says nothing about proving actions are contrary to good faith business judgment. Instead, *Theater Enterprises* stands for the proposition that where alleged co-conspirators forward independent justifications for their parallel conduct, plaintiffs cannot rely on conscious parallelism alone to gain an inference of conspiracy. 346 U.S. at 542-44.

Further, the parenthetical is misleading to the extent that it requires evidence of bad faith business judgment or evidence that negates all independent action. "Even where a plaintiff relies on ambiguous evidence . . . to prove its claim, the plaintiff does not bear the burden of showing that the existence of a conspiracy is the 'sole inference' to be drawn from the evidence. The plaintiff is only required to present evidence that is sufficient to allow the fact-finder to 'infer that the conspiratorial agreement is more likely than not.'" *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013) (internal citation omitted), *aff'd*, 791 F.3d 290 (2d Cir. 2015); *accord id.* at 697 ("It is important not to be misled by *Matsushita*'s statement that the plaintiff's evidence, if it is to prevail, must 'tend to exclude the possibility that the alleged conspirators acted independently.' The Court surely did not mean that the plaintiff must disprove all nonconspiratorial explanations for the defendants' conduct. Not only did the court use the word 'tend,' but the context made clear that the Court was simply requiring sufficient evidence to allow a reasonable fact-finder to infer the conspiratorial explanation is more likely than not.") (quoting *Publ'n Paper*, 690 F.3d at 63 and Areeda & Hovenkamp ¶ 14.03(b)); *see also Apple,* 952 F. Supp. 2d at 700 ("Apple's entirely appropriate or even admirable motives do not preclude a finding that Apple also intentionally engaged with the Publisher Defendants in a scheme to raise e-book prices.").

"Requiring a plaintiff to 'exclude' or 'dispel' the possibility of independent action places too heavy a burden on the plaintiffs." *In re Publ'n Papers Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012). Indeed, as the Seventh Circuit in *Toys "R" Us v. FTC* noted:

> [T]here must be some evidence that "tends to exclude the possibility" that the alleged conspirators acted independently. This does not mean, however, that the Commission had to exclude *all* possibility that the manufacturers acted independently. . . . [T]hat would amount to an absurd and legally unfounded burden to prove with 100% certainty that an antitrust violation occurred. The test states only that there must be *some* evidence which, if believed, would support a finding of concerted behavior."

221 F.3d 928, 934-35 (7th Cir. 2000) (internal citation omitted). Similarly, to the extent the proposed conclusion mischaracterizes Complaint Counsel's burden as "substantial" or greater than it actually is, it is misleading. A plaintiff need only produce "sufficient evidence to allow a reasonable fact-finder to infer the conspiratorial explanation is more likely than not." *Apple*, 952 F. Supp. 2d at 689.

58. By definition, "[w]here there is an independent business justification for a defendant's behavior," there is no act against self-interest, and "an inference of conspiracy is not easily drawn." *In re McWane, Inc.*, 155 F.T.C. at *253; *see also In re Citric Acid*, 191 F.3d at 1100 (rejecting plaintiff's argument that an action was against defendant's self-interest where "it *did* explicitly weigh the costs and benefits" of taking the action); *Alvord-Polk, Inc.*, 37 F.3d at 1014 ("[T]he absence of action contrary to one's economic interest renders consciously parallel business behavior 'meaningless, and in no way indicates agreement'....").

Response to Proposed Conclusion No. 58

This proposed conclusion is misleading as it distorts the cited authority by adding the phrase, "there is no act against self-interest." The quote from *McWane* states only, "[w]here there is an independent business justification for a defendant's behavior, an inference of conspiracy is not easily drawn." *In re McWane*, Docket No. 9351, 155 F.T.C. at *253 (FTC May 1, 2013) (Initial Decision). The quoted excerpt says nothing of actions against self-interest;

indeed, the quote is not even from the section of the opinion addressing actions against self-interest. Importantly, *McWane* notes that independent business justifications make conspiracy inferences more difficult, but that does not meant that they preclude such inferences. Complaint Counsel's burden remains the same: to prove conspiracy is more likely than not. *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013) (internal citations omitted), *aff'd*, 791 F.3d 290 (2d Cir. 2015).

Further, the citation to *In re Citric Acid*, 191 F.3d 1090, 1100 (9th Cir. 1999) is misleading to the extent it suggests that merely evaluating whether to take a perceived-conspiratorial action negates a finding of action against self-interest. Instead, the court weighed the independent justification and plaintiff's proof of acts contrary to self-interest and found that the plaintiff failed to prove conspiracy was more probable than not. *Id.* at 1099-100. *Alvord-Polk, Inc. v. F. Schumacher & Co.* is inapposite where plaintiffs proffered only evidence of parallel conduct and no actions against self-interest. 37 F.3d 996, 1013 (3d Cir. 1994). Here, Complaint Counsel has proffered much more than parallel conduct, and plus factor evidence corroborates Respondents' agreement.

59. Courts are particularly reluctant to second-guess a company's business judgment whether to pursue new opportunities, especially a company's *inaction*. *See In re Baby Food Antitrust Litig.*, 166 F.3d at 127 (holding that the court was "unwilling to question [defendant's] business judgment" where "the evidence reflect[ed] [defendant's] strategic planning as to whether and when to pursue particular business opportunities."); Brief for the United States as Amicus Curiae, Department of Justice, *Bell Atl. Corp. v. Twombly*, 2006 WL 2482696 at *21 (U.S.) (quoting Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 307d, at 155 (Supp. 2006)) ("Parallel inaction is even less suggestive of illicit agreement. In particular, 'parallel decisions by business firms not to enter new markets create no such inference.'... Thus, drawing inferences from what a business fails to do is a problematic exercise; one can analyze the harms and benefit of an action as a discrete matter, but the number of territories a business does not enter or products it does not offer is virtually infinite. Even the most vigorous rivals will end up not competing in some respects.").

Response to Proposed Conclusion No. 59

While the cited cases are accurately quoted, this proposed conclusion is misleading to the extent it suggests that the record evidence contains examples of companies that independently chose not to pursue particular business opportunities. Unlike *In re Baby Food Antitrust Litigation*, 166 F.3d 112, 125, 126 (3d Cir. 1999), the record evidence contains multiple examples of Respondents' presidents and CEOs exchanging assurances not to discount to buying groups, as well as confronting one another based on perceived deviations from those assurances. *See, e.g.*, CCFF ¶¶ 483, 498-90, 495, 500, 564-577, 580-581, 661-664, 679, 956-961, 967-968, 982, 990-992, 996-997, 1005-1010. In *Baby Food*, Heinz, as part of its strategic planning, decided against investing substantial capital and resources in the Chicago and Miami markets after a failed attempt to enter the Chicago market. 166 F.3d at 127 & n.9. Here, Respondents Schein and Patterson initially discounted to buying groups (or at a minimum, considered discounting to buying groups), and following inter-firm communications, stopped discounting. *See, e.g.*, CCFF ¶¶ 404-425, 621-624, 637-652, 925-954. As a result, this was not mere parallel inaction, but action followed by inter-firm communication followed by parallel inaction.

(3) Market Structure

60. Because competition in an oligopolistic market can be equally consistent with natural, lawful behavior as with unlawful conspiracy, conspiracy cannot be inferred from evidence of market structure or interdependence. *Reserve Supply Corp.*, 971 F.2d at 50, 53 ("[T]he mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws.... A firm in a concentrated industry typically has reason to decide (individually) to copy an industry leader."); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988) ("One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry."); *In re Chocolate Confectionary*, 999 F. Supp. 2d at 790 ("The mere fact that a market may exhibit oligarchic tendencies and characteristics is, without more, insufficient to establish antitrust liability."); *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d at 1023 n.6 (dismissing case where the alleged facts showed nothing more than "a small

> number of firms [that] can affect the total market output and the market price, [making] firms' ... decisions [] interdependent."); *Burtch*, 662 F.3d at 227 (the "fact that market behavior is interdependent and characterized by conscious parallelism" is "legally insufficient"); *Reserve Supply Corp.*, 971 F.2d at 51 ("Interdependence ... is a *necessary* condition for inferring any conspiracy from parallelism but is not *sufficient* to infer a traditional conspiracy .") (quoting 6 Phillip E. Areeda, *Antitrust Law* ¶ 1411 (1986)).

Response to Proposed Conclusion No. 60

This proposed conclusion is misleading to the extent that it suggests that evidence of plus factors should be considered individually. Rather, plus factors must be considered as a whole, not individually dissected:

> In antitrust conspiracy cases, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.

In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1118 (N.D. Cal. 2012) (internal quotation marks omitted) (quoting *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)).

Moreover, this proposed conclusion misleadingly omits a key caveat: *without more*, conspiracy cannot be inferred from evidence of market structure or interdependence. Indeed, Respondents' citation to *In re Chocolate Confectionary* and accompanying parenthetical confirms this point: "The mere fact that a market may exhibit oligarchic tendencies and characteristics is, *without more*, insufficient to establish antitrust liability." 999 F. Supp. 2d at 790 (emphasis added).

To the extent that this proposed conclusion contradicts precedent holding oligopoly market structure to be a probative plus factor of agreement, it is misleading. For example, courts have recognized that "[i]ndustry structure that facilitates collusion constitutes supporting

evidence of collusion." *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 873 (7th Cir. 2015). "Generally speaking, the possibility of anticompetitive collusive practices is most realistic in concentrated industries." *Todd v. Exxon Corp.*, 275 F.3d 191, 208 (2d Cir. 2001).

61. Accordingly, evidence of "high barriers to entry" and "highly inelastic demand" is just evidence of "hallmarks of oligopolistic markets susceptible to successful parallel pricing practices, but neither helps to distinguish between agreement and mere conscious parallelism as the root cause of those practices." *White*, 635 F.3d at 582.

Response to Proposed Conclusion No. 61

This proposed conclusion is misleading to the extent that it suggests that evidence of plus factors should be considered individually. Rather, plus factors must be considered as a whole, not individually dissected:

> In antitrust conspiracy cases, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.

In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1118 (N.D. Cal. 2012) (internal quotation marks omitted) (quoting *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)). Otherwise, Complaint Counsel has no specific response.

(4) Response to: Applying Plus Factors to Alleged Boycotts of New Modes of Commerce

62. Because firms have a unilateral incentive to resist engaging new modes of commerce that may threaten their existing business, evidence of such resistance does not create an inference of a conspiracy. As the Supreme Court explained, because "resisting competition is ***routine market conduct*** ... there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway...." *Twombly*, 550 U.S. at 566 (rejecting claim where the complaint failed to allege that the "resistance to the upstarts was anything more than the natural, unilateral reaction of each [incumbent competitor] intent on keeping its regional dominance").

Response to Proposed Conclusion No. 62

While the cited language is accurately quoted, this proposed conclusion is misleading to the extent it suggests that the record evidence contains examples of companies that unilaterally resisted competition. Unlike *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 566 (2007), there *is* reason to infer that the companies had agreed among themselves not to discount to buying groups. The record evidence contains precisely what was missing in *Twombly*: exchanges of assurances among Respondents' high-level executives not to discount to buying groups, as well as confrontations for perceived deviations from those assurances. *See, e.g.*, CCFF ¶¶ 483, 498-90, 495, 500, 564-577, 580-581, 661-664, 679, 956-961, 967-968, 982, 990-992, 996-997, 1005-1010.

Moreover, to the extent this proposed conclusion suggests that acting according to one's natural impulses precludes a finding of conspiracy, it is misleading and contrary to precedent. As the Second Circuit has recognized, "'independent reasons' can also be "interdependent," and the fact that [defendant's] conduct was in its own economic interest in no way undermines the inference that it entered an agreement to raise . . . prices." *United States v. Apple, Inc.*, 791 F.3d 290, 317-18 (2d Cir. 2015) (citing Areeda & Hovenkamp ¶ 1413a).

63. The problem of inferring collusion from putatively parallel refusals to deal with new forms of commerce was aptly described in *Twombly*. There, the complaint alleged that incumbent phone companies ("ILECs") faced competition from competitive local exchange carriers ("CLECs"). These CLECs provided consumers with phone services in competition with the incumbent firms. CLECs also paid for access as customers of the incumbent firms and presented a competitive threat to the incumbent firms, as well as a potential opportunity. The *Twombly* complaint alleged a conspiracy by the incumbent firms to deny access to competitive entrants and to not themselves enter each other's territories as CLECs. The Supreme Court rejected the claim, noting that "there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway...." *Twombly*, 550 U.S. at 566. The Court reasoned:

> In the decade preceding the 1996 Act and well before that, monopoly was the norm in telecommunications, not the exception. The ILECs were born in that world, doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.

Twombly, 550 U.S. at 567-68. As such, there was "no need for joint" action and no basis for inferring a conspiracy. *Twombly*, 550 U.S. at 566.

Response to Proposed Conclusion No. 63

The proposed conclusion is misleading to the extent that it suggests the facts of this case are similar to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *Twombly* was decided on a motion to dismiss where plaintiffs failed to allege more than parallel conduct for an inference of agreement. Not only has Complaint Counsel alleged facts beyond parallel conduct, the record contains unambiguous and circumstantial evidence—including Respondents' own documents—that support a finding of agreement. Importantly, the record includes multiple examples of inter-firm communications about buying groups, the very communications that were missing in *Twombly.* In this way, the instant case is more akin to *Gainesville Utilities Dep't v. Florida Power & Light Co.*, 573 F.2d 292 (5th Cir. 1978), than *Twombly*. As in *Gainesville*:

> The record, however, indicates much more than just parallel activity. We cannot ignore the continuous exchange of letters between high executives [of the defendants]. Although the refusals to serve certain [customers] may have been influenced by valid economic considerations, the inferences are irresistible that "concerted action was contemplated and invited" by the correspondence. Indeed, if solid economic reasons existed for refusing [certain customers] there was no reason for communicating with a competitor about the refusal, and certainly not for expressing such decisions in terms of hopeful, if not expected, reciprocity.

Id. at 300-01.

Moreover, *Twombly* is distinguishable where there was a history of Government-sanctioned monopolies, whereas here, there is a history of fierce competition for customers

(independent dentists and DSOs), which contrasts sharply with Respondents' détente on buying groups, underscoring how Respondents' unusual behavior towards buying groups is something other than interdependent oligopoly conduct. *In re Benco Dental Supply Co.*, Docket No. 9379, 2018 FTC LEXIS 185, at *44 (Nov. 26, 2018).

64. In so ruling, *Twombly* also rejected the argument that the incumbents acted contrary to their self-interest by not interconnecting with the CLECs or expanding their territories. As the Court noted, "although the complaint says generally that the [incumbent firms] passed up 'especially attractive business opportunities' by declining to [expand outside their historic territories], it does not allege that [such] competition ... was potentially any more lucrative than other opportunities being pursued by the [defendants] during the same period...." *Twombly*, 550 U.S. at 569. And, in any event, "firms do not expand without limit and none of them enters every market that an outside observer might regard as profitable, or even a small portion of such markets." *Twombly*, 550 U.S. at 568.

Response to Proposed Conclusion No. 64

The proposed conclusion is vague as to the phrase "in so ruling." Moreover, the proposed conclusion is misleading to the extent it implies the facts of the instant case are analogous to *Twombly*, for the reasons described in Response to Proposed Conclusion No. 63, *supra*. Additionally, the facts of *Twombly* are distinguishable from the instant case where the CLECs "declined to [expand outside their historic territories], but at least one of the Respondents did business with buying groups prior to the conspiracy, and all of the Respondents sought to do business with buying groups after the conspiracy. *See, e.g.*, CCFF ¶¶ 1343-1345; 1366-1383, 1406, 503, 1317-1320, 1710-1712, 1722-1725, 1681; PFF ¶¶ 760-761.

65. As *Twombly* shows, a conspiracy cannot be inferred from respondents' parallel failure to embrace a new method of doing business that threatens to cannibalize their existing business. Firms in concentrated industries can reasonably expect their rivals to feel similarly and avoid taking actions that would be detrimental to their existing way of doing business. As such, there would be neither a motive to conspire nor any act against self-interest by behaving in this manner. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 349 (where defendants were reaping significant profits from their current business practices, it was natural for them to have "no desire to upset the apple cart"); *In re*

Interest Rate Swaps Antitrust Litig., 261 F. Supp. 3d 430, 464 (S.D.N.Y. 2017) (defendants had "good reason" to discourage "development of a new trading paradigm that threatened, some day, to cannibalize their trading profits").

Response to Proposed Conclusion No. 65

The proposed conclusion is misleading as to the meaning of *Twombly*. *See* Response to Proposed Conclusion No. 63. Moreover, Respondents misconstrue the excerpt in *In re Interest Rate Swaps Antitrust Litigation*, 261 F. Supp. 3d 430 (S.D.N.Y. 2017), to address actions against self-interest, but the cited passage addresses independent justifications for parallel conduct. *Id.* at 464. It is not until much later in the opinion that the court notes the complaint failed to plead acts against the defendants' "apparent individual economic self-interest." *Id.* at 471. And there, the failure was the complete lack of an allegation of an action against self-interest; not some balancing between an allegation of acts against economic interest and a fear of cannibalization. *Id.*

66. Numerous courts have applied this principle. In *In re Graphics Processing Units Antitrust Litigation*, for example, the court dismissed a case alleging an anticompetitive conspiracy because "defendants' behavior could simply be consistent with conscious parallelism … [and] simply may not have much of an incentive to cut prices or rush their new products to market." *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1023 n.6 (N.D. Cal. 2007) (quoting 6 Areeda & Hovenkamp, Antitrust Law § 1410(b) (2d ed. 2000)) (firms will "'hesitate to reduce prices at all' ... [w]here a small number of firms can affect the total market output and the market price ... [because] 'each knows that expanding its sales or lowering its price will reduce the sales of rivals, who will notice that fact, identify the cause, and probably respond with a matching price reduction.'"); *see also, e.g.*, *Cosmetic Gallery, Inc.*, 495 F.3d at 54-55 ("[T]he simple fact that [plaintiff] wanted to buy product is not enough to show [defendant] acted contrary to his economic interest[,]" as the argument "amounts to an assertion that its desire to buy product ... was automatically in [defendant's] economic interest."); *In re Citric Acid*, 191 F.3d at 1101 (finding concerns "that an excessively rapid expansion ... would undermine prices" and a desire "to avoid precipitating a costly price war" were legitimate explanations to "not expand even more rapidly"); *InterVest, Inc.*, 340 F.3d at 165 ("There are many reasons that a broker□dealer might independently choose not to partner with a fledgling start-up whose technology and business model remained unproven.").

Response to Proposed Conclusion No. 66

Complaint Counsel objects to the sentence, "Numerous courts have applied this principle" as vague as to the terms "this principle." To the extent this proposed conclusion suggests that the presence of independent justifications for parallel conduct negate a finding of agreement, it is misleading. "Even where a plaintiff relies on ambiguous evidence . . . to prove its claim, the plaintiff does not bear the burden of showing that the existence of a conspiracy is the 'sole inference' to be drawn from the evidence. The plaintiff is only required to present evidence that is sufficient to allow the fact-finder to 'infer that the conspiratorial agreement is more likely than not.'" *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015) (internal citation omitted). "Requiring a plaintiff to 'exclude' or 'dispel' the possibility of independent action places too heavy a burden on the plaintiffs." *In re Publ'n Papers Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012). Thus, a plaintiff need only produce "sufficient evidence to allow a reasonable fact-finder to infer the conspiratorial explanation is more likely than not." *Apple*, 952 F. Supp. 2d at 689.

(C) Plus Factors Implying a Traditional Conspiracy

67. Because conduct in an oligopolistic setting "can be nearly indistinguishable from" a conspiracy, courts rely most heavily on "non-economic evidence [implying] a traditional conspiracy." *See Valspar Corp.*, 873 F.3d at 191, 203 n.15.

Response to Proposed Conclusion No. 67

Complaint Counsel has no specific response.

68. Generally, courts require "proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though" there may not be direct evidence of an actual agreement. *Valspar Corp.*, 873 F.3d at 193. Mere "awareness that [defendants] were engaging in conscious parallelism" does not suffice. *Valspar Corp.*, 873 F.3d at 193 n.3.

Response to Proposed Conclusion No. 68

This proposed conclusion is misleading to the extent that it requires an exchange of assurances. While an exchange of assurances is proof of an agreement, an agreement may also be proven without such an exchange. As the Supreme Court held in *Interstate Circuit v. United States*, "[i]t was enough [to support a conspiracy] that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it." 306 U.S. 208, 226 (U.S. 1939). Similarly, in *Esco Corp. v. United States*, the Ninth Circuit affirmed a price fixing conviction where the defendant followed a course of conduct suggested by a competitor, even though the defendant never expressly gave an assurance of commitment to the competitor. 340 F.2d 1000, 1007-08 (9th Cir. 1965).

69. In making this determination, "particular attention, and weight, is accorded to whether or not the evidence shows: (1) a prior understanding" among the Respondents; (2) "a commitment to one another" to refrain from competing; and (3) a "restricted [sense of] freedom of action" because of the "obligation" that one Respondent owes to the others. *In re McWane, Inc.*, 155 F.T.C. at *246, 267 (rejecting conspiracy claim because "the evidence fails to demonstrate that [decisions] were made because of any understanding[,] ... perceived commitment," or sense of "restricted freedom," which are "the evidentiary hallmarks for proving the required 'actual, manifest agreement,' especially in an oligopolistic market characterized by pricing interdependence").

Response to Proposed Conclusion No. 69

This proposed conclusion is vague as to the words "this determination." The proposed conclusion also jumbles the Court's language in *McWane* with respect to the third factor: "a restricted freedom of action and sense of obligation to one another" with respect to the alleged conspiracy. *In re McWane*, Docket No. 9351, 2013 FTC LEXIS 76, at *623 (Initial Dec. May 8, 2013). Otherwise, Complaint Counsel has no specific response.

(1) Response to: Evidence Inconsistent with the Alleged Conspiracy Is Entitled to Significant Weight

70. Evidence that a Respondent carefully considered the impact of a course of action on its volume, prices, and profits suggests the *absence* of any pre-existing commitment, lack of freedom of action, or sense of obligation to its competitors. *See, e.g.*, *In re Baby Food Antitrust Litig.*, 166 F.3d at 132 (Defendants' internal "memoranda reveal that [they] engaged in independent pricing determined by market conditions at the time, profit margins, and the effect of price increases or decreases on sales volume and distribution. They provide a striking insight into the defendants' marketing strategy which negates the plaintiffs' inference of conscious parallelism."); *see also Market Force Inc.*, 906 F.2d at 1174 (evidence of "independent business reasons ... [which were] not economically irrational" defeated conspiracy claim).

Response to Proposed Conclusion No. 70

This proposed conclusion is misleading and irrelevant. It is irrelevant to the instant case, as Respondents have not proffered any evidence that they carefully considered the effect of discounting to buying groups on their volume, price, or profits. This proposed conclusion is misleading to the extent that it requires Complaint Counsel to produce evidence that negates all independent action. "Even where a plaintiff relies on ambiguous evidence . . . to prove its claim, the plaintiff does not bear the burden of showing that the existence of a conspiracy is the 'sole inference' to be drawn from the evidence. The plaintiff is only required to present evidence that is sufficient to allow the fact-finder to 'infer that the conspiratorial agreement is more likely than not.'" *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015) (internal citation omitted); *accord id.* at 697 ("It is important not to be misled by *Matsushita*'s statement that the plaintiff's evidence, if it is to prevail, must 'tend to exclude the possibility that the alleged conspirators acted independently.' The Court surely did not mean that the plaintiff must disprove all nonconspiratorial explanations for the defendants' conduct. Not only did the court use the word 'tend,' but the context made clear that the Court was simply requiring sufficient evidence to allow a reasonable fact-finder to infer the conspiratorial

explanation is more likely than not.") (quoting *Publ'n Paper*, 690 F.3d at 63 and Areeda & Hovenkamp ¶ 14.03(b)); *see also Apple,* 952 F. Supp. 2d at 700 ("Apple's entirely appropriate or even admirable motives do not preclude a finding that Apple also intentionally engaged with the Publisher Defendants in a scheme to raise e-book prices.").

"Requiring a plaintiff to 'exclude' or 'dispel' the possibility of independent action places too heavy a burden on the plaintiffs." *In re Publ'n Papers Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012). Indeed, as the Seventh Circuit in *Toys "R" Us v. FTC* noted:

> [T]here must be some evidence that "tends to exclude the possibility" that the alleged conspirators acted independently. This does not mean, however, that the Commission had to exclude *all* possibility that the manufacturers acted independently. . . . [T]hat would amount to an absurd and legally unfounded burden to prove with 100% certainty that an antitrust violation occurred. The test states only that there must be *some* evidence which, if believed, would support a finding of concerted behavior."

221 F.3d 928, 934-35 (7th Cir. 2000) (internal citation omitted). Thus, a plaintiff need only produce "sufficient evidence to allow a reasonable fact-finder to infer the conspiratorial explanation is more likely than not." *Apple*, 952 F. Supp. 2d at 689.

Moreover, this proposed conclusion is misleading as the *In re Baby Foods* excerpt does not support the conclusion; it addressed whether conduct was parallel, not whether agreement could be found. 166 F.3d 112, 132 (3d Cir. 1999). Similarly, *Market Force, Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167 (7th Cir. 1990), is inapposite where plaintiff's case rested on ambiguous evidence. *Id.* at 1172-74.

71. Similarly, conduct that is inconsistent with the alleged conspiracy also suggests the absence of any pre-existing commitment, lack of freedom of action, or sense of obligation to competitors. *Valspar Corp.*, 873 F.3d at 196 n.7, 198 ("We are mindful that a 'failed attempt to fix prices' is illegal ... but it is likewise significant that the alleged conspirators behaved contrary to the existence of a conspiracy."); *see also In re McWane, Inc.*, 155 F.T.C. at *259 (rejecting conspiracy claim, in part, because the documentary evidence stated that one alleged conspirator was "using 'project pricing to get every

order,' which is inconsistent with the existence of an agreement ... to curtail Project Pricing.").

Response to Proposed Conclusion No. 71

This proposed conclusion is misleading to the extent that it suggests that perfect compliance is required. "[A] horizontal agreement to fix prices need not succeed for sellers to be liable under the Sherman Act; it is the attempt that the Sherman Act proscribes." *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 363 (3d Cir. 2004). As the Commission recognized in this matter: "Complaint Counsel need not prove that the parties to a conspiracy complied perfectly with it." *In re Benco Dental Supply Co.*, Docket No. 9379, 2018 FTC LEXIS 185, *43 (Comm'n Op. Nov. 26, 2018) (citing Judge Posner in *In re High Fructose Corn Syrup Antitrust Litigation,* 295 F.3d 651, 656 (7th Cir. 2002) (courts must not fall into the trap of "failing to distinguish between the existence of a conspiracy and its efficacy.")) In *United States v. Foley*, the court upheld a conspiracy where the defendants were far from complying perfectly with the conspiracy to raise real estate agent rates: some defendants waited months after the conspiracy formed to raise commissions, and other defendants only "partially" joined, charging higher commissions when available but also charging lower ones. 598 F.2d 1323, 1332-34 (4th Cir. 1979).

72. Thus, an alleged boycott cannot stand where a defendant did precisely what the plaintiff claimed the defendant had promised not to do. *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1368 (3d Cir. 1996) (alleged refusal to grant first-run licenses to plaintiff failed where "the evidence is to the contrary; [plaintiff] received a first-run license from Miramax"); *see also In re Baby Food Antitrust Litig.*, 166 F.3d at 127 n.9 (dismissing claim that Heinz's decision not to enter the Chicago market was the result of an unlawful "truce," given Heinz's "formal, written proposal to [a] large Chicago supermarket chain [which] rejected the proposal"); *see In re Citric Acid*, 191 F.3d at 1101 (finding "the factual context renders [plaintiff's] claims implausible" where defendant's decision to reduce expansion was six months *before* plaintiff alleged the defendant joined the conspiracy); *Michelman*, 534 F.2d at 1044-46 (an allegation of a concerted boycott fails against a defendant whose "shipments to [the allegedly boycotted entity] increased substantially during th[e] period").

Response to Proposed Conclusion No. 72

This proposed conclusion is misleading for the reasons described in Response to Proposed Conclusion No. 71.

(2) Response to: Evidence of Internal Discussions About Competitors Are Not Entitled to Significant Weight

73. Because "competitors in concentrated markets watch each other like hawks[,]" internal discussions about what other competitors might be doing do not give rise to an inference of agreement. *In re Text Messaging Antitrust Litig.*, 782 F.3d at 875. In *In re Text Messaging Antitrust Litigation*, plaintiffs thought they had a "smoking gun" in a pair of emails between executives of T-Mobile that read, "Gotta tell you but my gut says raising messaging pricing again is nothing more than a price gouge on consumers. I would guess that consumer advocates groups are going to come after us at some point.... I know the other guys are doing it but that doesn't mean we have to follow," and calling T-Mobile's latest price increase "colusive [*sic*] and opportunistic." 782 F.3d at 872. However, the Seventh Circuit rejected this evidence, finding "[n]othing in any of [these] emails suggests that [the executive] believed there was a conspiracy...." *In re Text Messaging Antitrust Litig.*, 782 F.3d at 873 (Posner, J.); *see also In re Baby Food Antitrust Litig.*, 166 F.3d at 126 ("the mere possession of" a competitor's "memoranda" is not "evidence of concerted action to fix prices ... [because] it makes common sense to obtain as much information as possible of the pricing policies and marketing strategy of one's competitors"); *In re Citric Acid*, 191 F.3d at 1103 ("[P]ossession of competitor price lists ... does not, at least in itself, tend to exclude legitimate competitive behavior."); *In re K-Dur Antitrust Litig.*, 2016 WL 755623, at *22 ("[A]wareness of a competitor's actions is not enough to create an inference of a conspiracy.").

Response to Proposed Conclusion No. 73

To the extent that this proposed conclusion characterizes the evidence as mere monitoring, it is misleading. While monitoring, without more, may not give rise to a finding of conspiracy, monitoring and exchanges of assurances among horizontal competitors constitutes evidence of an agreement. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 361 (3d Cir. 2004). Similarly, monitoring and confrontations about perceived cheating constitute evidence of an agreement. *United States v. Beaver*, 515 F.3d 730, 738 (7th Cir. 2008).

Moreover, the cited cases are distinguishable. In *In re Text Messaging Antitrust Litigation*, there was no evidence the competitors communicated at all about the topic of the alleged conspiracy. 782 F.3d 867, 873, 878 (7th Cir. 2015). Additionally, *In re Baby Food Antitrust Litigation* lacked evidence of any exchange assurances or confrontations of cheating by high-level executives. 166 F.3d 112, 126 (7th Cir. 1999). Indeed, in contrast to the exchange of policies by the Presidents and CEO of rivals in this case, *Baby Food* involved only "chit-chat during chance encounters in the field" by local sales people without pricing authority. *Id.* Courts have held that it is a "far different situation where upper level executives have secret conversations about price." *In re Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d 968, 983 (N.D. Ohio 2015).

74. Internal communications discussing what a firm's "peers" are doing "do not provide any evidence of *inter-firm* communications" and "at most ... suggest a high level of inter-firm *awareness*." *Mayor & City Council of Balt., Md.*, 709 F.3d at 139; *see also Valspar Corp.*, 873 F.3d at 199-200 (noting that "internal e-mails" only "show that the competitors were aware of the phenomenon of conscious parallelism and implemented pricing strategies in response to it."). For instance, internal emails speculating on what other competitors are doing in the marketplace – such as "all major global players have been very disciplined with pricing implementation up to this point" – are only "superficially" helpful to a plaintiff and only "show that the competitors were aware of the phenomenon of conscious parallelism[,]" which "makes sense" in an oligopoly. *Valspar Corp.*, 873 F.3d at 200.

Response to Proposed Conclusion No. 74

This proposed conclusion is misleading to the extent that it suggests that internal communications can never provide evidence of inter-firm communications. Moreover, this proposed conclusion attempts to fashion a general rule based on facts from a case that are distinguishable from the record facts. In *Mayor & City Council of Baltimore, Maryland v. Citigroup, Inc.*, 7093 F.3d 129, 139-40 (2d Cir. 2013), plaintiffs relied on two "vague references to isolated discussions among only three defendants," as well as a host of internal

communications that simply restated conscious parallelism. In contrast, the record contains numerous instances where the Respondents discussed future action on specific buying group entities, as well as their policies on whether to discount to buying groups. *See, e.g.*, CCFF ¶¶ 474-502, 564-588, 661-684, 955-1100, 1123-1138.

Internal pronouncements about what Respondents would do were not based on mere speculation; the record shows that they were based on actual inter-firm communications. This is particularly so where internal pronouncements contradicted inaccurate market intelligence—or, what would have been mistaken inter-firm *awareness*. During the conspiracy, Benco's Cohen understood that "the policy that Henry Schein had was that they do not recognize GPOs," despite getting market intelligence suggesting Schein was dealing with buying groups. CCFF ¶ 676, 955-977, 994-1004. Patterson had the same understanding. In August 2013, when Patterson executive Tim Rogan received inaccurate market intelligence that Schein might be selling to a buying group, he responded: "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 ¶ 603 (quoting (CX0106 at 001)); CCFR (Schein) ¶ 133.

Moreover, to the extent that this proposed conclusion suggests that unilateral statements are not probative of conspiracies, it is misleading as contrary to precedent. In *B&R Supermarket, Inc. v. Vis, Inc.,* the court held that a unilateral announcement predicting defendant's rivals' conduct constituted direct evidence of conspiracy. Case No. 16-01150, 2016 U.S. Dist. LEXIS 136204, at *111 (N.D. Cal. Sept. 30, 2016) ("Ms. Tedder could not speak so confidently on behalf of all networks save and except for her knowledge of collusion, for true competition would have driven one or more networks to break ranks and offer more competitive terms.").

(3) Response to: Competitor Communications Unrelated to the Alleged Conspiracy Are Not Entitled to Significant Weight

75. While evidence of competitor communications can in appropriate circumstances constitute a plus factor, not all communications are probative of a conspiracy. Communications among individuals *allegedly* involved in reaching an unlawful agreement are not relevant if the evidence shows that such communications related to topics other than the alleged restraint of trade. *See, e.g.*, *In re Baby Food Antitrust Litig.*, 166 F.3d at 133 ("evidence of social contacts and telephone calls [is] insufficient to exclude the possibility that the defendants acted independently"); *In re Chocolate Confectionary*, 999 F. Supp. 2d at 804 ("social contacts between competitors without more are not unlawful"); *Holiday Wholesale Grocery Co. v. Philip Morris Inc*., 231 F. Supp. 2d 1253, 1308 (N.D. Ga. 2002) ("opportunities to conspire" was not a plus factor in a case where there were social contacts between tobacco company executives "such as golf, dinner, lunches, trade association conferences, and teleconferences"), *aff'd sub nom. Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287 (11th Cir. 2003); *Hinds Cty. Miss.* v. *Wachovia Bank N.A.*, 708 F. Supp. 2d 348, 362 (S.D.N.Y. 2010) ("mere presence at industry associations and meetings" insufficient to establish agreement); *LaFlamme v. Societe Air Fr.*, 702 F. Supp. 2d 136, 148 (E.D.N.Y. 2010) ("[M]embership and participation in a trade association alone does not give rise to a plausible inference of illegal agreement.").

Response to Proposed Conclusion No. 75

This proposed conclusion is misleading to the extent that it suggests that evidence of plus factors should be considered individually. Rather, plus factors must be considered as a whole, and not individually dissected:

> In antitrust conspiracy cases, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.

In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1118 (N.D. Cal. 2012) (internal quotation marks omitted) (quoting *Continental Ore Co. v. Union Carbide & Carbon Corp*., 370 U.S. 690, 699 (1962)).

To the extent this proposed conclusion suggests that opportunities to collude are devoid of probative value, it is misleading as to the law. *See, e.g.*, *C-O-Two Fire Equip. Co. v. United States*, 197 F.2d 489, 493 (9th Cir. 1952) (finding evidence of defendants' membership in same association and resulting opportunity for meeting, without evidence of what occurred at meeting, contributed to evaluation of plus factors leading to conclusion of conspiracy).

(4) Response to: Context Determines the Weight Afforded to Ambiguous Competitor Communications

76. The weight afforded to other communications among individuals allegedly involved in reaching an unlawful agreement – such as communications that relate to subject matter of the alleged restraint (but do not rise to the level of direct evidence of an agreement) or are devoid of content – depends on the context and other circumstantial evidence surrounding such communications. *Anderson News, L.L.C.*, 899 F.3d at 104 (noting that "defendants' conduct and communications must be evaluated in context and with the 'overall picture' in mind"). In *Anderson*, plaintiff pointed to "the increased level of inter-firm communications" during the relevant period, but the court gave them little weight, noting "what exactly they signify eludes us." *Anderson News, L.L.C.*, 899 F.3d at 113.

Response to Proposed Conclusion No. 76

This proposed response is vague as to the terms "other communications," otherwise Complaint Counsel has no specific response to the first sentence of this proposed conclusion.

To the extent this proposed conclusion draws parallels between *Anderson News, L.L.C. v. American Media, Inc.*, 899 F.3d 87 (2d Cir. 2018), and the record facts, it is disputed. In *Anderson*, the plaintiff gave defendant media companies a window of three days to assent to its wholesaling surcharge. *Id.* at 105 ("the tight timeframe for [defendants' responses to Anderson's proposed surcharge] was of Anderson's own making"). Thus, the court found that "the inference that can reasonably be drawn from the increased level of inter-firm communications during the two-week period between Anderson's announcement and the deadline to accept the terms of the [increased surcharge] amounts to little." *Id.* at 113. As such, the context and industry conditions

of the *Anderson News* communications is distinguishable from the record communications, where Respondents' inter-firm communications were not tied to collecting market intelligence in advance of arbitrary deadlines. *Id.* Here, Respondents communicated to reach an agreement and to confront one another upon perceived non-conformance with the agreement. *See, e.g.*, CCFF ¶¶ 474-502, 564-588, 661-684, 955-1100, 956-961, 967-968, 982, 990-992, 996-997, 1005-1010, 1123-1138.

77. The court must be careful not to resort to impermissible speculation, or to first assume the existence of a conspiracy and then interpret ambiguous evidence in light of such an assumption. *In re McWane, Inc.*, 155 F.T.C. at *253 (where witnesses "denied having any recollection of the telephone calls and/or denied any recollection of what was discussed[,]" it "would be pure speculation ... to simply assume" that unlawful agreements were reached); *see also In re McWane, Inc.*, 155 F.T.C. at *258 ("Complaint Counsel's daisy chain of assumptions fails to support or justify an evidentiary inference of any unlawful agreement ... and the multilayered inference is rejected."); *In re McWane, Inc.*, 155 F.T.C. at *255 ("Complaint Counsel next contends that [the suppliers] participated in an 'information exchange' in order to 'detect cheating'... and that, therefore, this constitutes a 'plus' factor.... Importantly, however, for this evidence to be material under Complaint Counsel's argument, it must first be assumed that there was, in fact, an [unlawful] agreement ... and that [Respondent] was a party to it[,]" which cannot "be presumed."); *Valspar Corp.*, 873 F.3d at 198 ("A litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly.").

Response to Proposed Conclusion No. 77

While the cited cases are accurately quoted, this proposed conclusion is misleading and irrelevant. Unlike *In re McWane, Inc.*, Docket No. 9351, 2013 WL 2100132 (FTC May 9, 2013) (Initial Decision), and *Valspar Corp. v. E.I. Du Pont De Nemours & Co.*, 873 F.3d 185 (3d Cir. 2017), the record reveals unambiguous inter-firm communications that evidence Respondents' agreement. *See, e.g.*, CCFF ¶¶ 474-502, 564-588, 661-684, 955-1100, 1123-1138. As such, this is not a case of resorting to impermissible speculation or assuming the conspiracy in order to make sense of ambiguous evidence.

Valspar and *McWane* rely on *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 203 F.3d 1028, 1033 (8th Cir. 2000), for the proposition that "a litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly." *Valspar*, 873 F.3d at 198; *McWane*, 155 F.T.C. 903, at *241. In *Blomkest*, the Eighth Circuit found class plaintiff's evidence of inter-firm communication to be ambiguous and not probative of the conspiracy where the communications amounted to past sale price verifications. 203 F.3d at 1033, 1037. The class was guilty of "first assuming a conspiracy and then setting out to prove it." *Id.* at 1037. But the court noted that "[i]f the class were to present independent evidence tending to exclude an inference that the producers acted independently, then, and only then could it use these communications for whatever additional evidence of conspiracy they may provide." *Id.* The record evidence reveals inter-firm communications about *future* sales and provides the "independent evidence tending to exclude an inference" of independent conduct that was missing in *Blomkest*. *See, e.g.*, CCFF ¶¶ 483, 498-90, 495, 500, 564-577, 580-581, 661-664, 679.

(D) Response to: Expert Testimony is Not Entitled to Significant Weight in Applying Plus Factors

78. Though of little relevance in concentrated markets, an economist may be asked to opine on economic plus factors. *See In re Domestic Drywall Antitrust Litig.*, 163 F. Supp. 3d 175, 254 (E.D. Pa. 2016) ("In § 1 Sherman Act cases involving oligopolies, the most important evidence will generally be non-economic evidence that there was an actual, manifest agreement not to compete.").

Response to Proposed Conclusion No. 78

This proposed conclusion is misleading to the extent it suggests economic plus factors are of little relevance, it is not supported by the cited case. Indeed, *In re Domestic Drywall Antitrust Litig.*, 163 F. Supp. 3d 175 (E.D. Pa. 2016), notes that "courts must consider [economic plus

factors] because they are relevant and inform the inferences that might be drawn from plaintiffs' other evidence." *Id.* at 191.

This proposed conclusion is misleading to the extent that it suggests that evidence of plus factors should be considered individually. Rather, plus factors must be considered as a whole, and not individually dissected:

> In antitrust conspiracy cases, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.

In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1118 (N.D. Cal. 2012) (internal quotation marks omitted) (quoting *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)).

79. Federal Rule of Evidence 702 requires that trial judges perform a "gatekeeping role" regarding expert testimony. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 597 (1993). "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-93.

Response to Proposed Conclusion No. 79

While the proposed conclusion accurately quotes the cited authority, it is misleading because it is irrelevant. "[T]he Supreme Court instructed that district courts are to perform a "gatekeeping" role concerning the admission of expert scientific testimony. However, because this is a non-jury trial, the gatekeeping purpose of *Daubert* is not implicated." *Johnson & Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 616 F. Supp. 2d 1250, 1256 & n.4 (citing *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000) ("Most of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a

jury.")). "There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself." *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005).

80. In evaluating expert testimony, the court must consider whether: (1) the expert is qualified; (2) the expert's testimony is reliable; and (3) the expert's testimony is helpful to the trier of fact, *i.e.*, it must fit "the facts of the case…." *See Daubert*, 509 U.S. at 591; *United States v. Schiff*, 602 F.3d 152, 173 (3d Cir. 2010) (courts must consider "'whether [the] expert testimony proffered ... is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.'").

Response to Proposed Conclusion No. 80

To the extent this proposed conclusion addresses the admissibility of expert testimony, it is misleading as irrelevant, as "[m]ost of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury." *Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 616 F. Supp. 2d 1250, 1256 n.4 (citing *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000); *see also supra* Response to Proposed Conclusion No. 79.

Additionally, any attempt to exclude Dr. Marshall's testimony from consideration under *Daubert* is time barred. 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).

Otherwise, Complaint Counsel has no specific response.

81. Even with a qualified expert, "an opinion [may] be excluded not because it is necessarily incorrect, but because it is not sufficiently reliable and ... too likely to lead the factfinder to an erroneous conclusion." *In re TMI Litig.*, 193 F.3d 613, 666 (3d Cir. 1999), *amended*, 199 F.3d 158 (3d Cir. 2000). In determining whether expert testimony is sufficiently reliable, courts must determine whether it applies "the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

Response to Proposed Conclusion No. 81

To the extent this proposed conclusion addresses the admissibility of expert testimony, it is misleading as irrelevant, as "[m]ost of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury." *Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 616 F. Supp. 2d 1250, 1256 n.4 (citing *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000); *see also supra* Response to Proposed Conclusion No. 79.

Additionally, any attempt to exclude Dr. Marshall's testimony from consideration under *Daubert* is time barred. 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).

Otherwise, Complaint Counsel has no specific response.

82. The Court must "ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 265 (2d Cir. 2002); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 744 (3d Cir. 1994).

Response to Proposed Conclusion No. 82

To the extent this proposed conclusion addresses the admissibility of expert testimony, it is misleading and irrelevant, as "[m]ost of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury." *Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 616 F. Supp. 2d 1250, 1256 n.4 (citing *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000); *see also supra* Response to Proposed Conclusion No. 79.

Additionally, any attempt to exclude Dr. Marshall's testimony from consideration under *Daubert* is time barred. 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).

Otherwise, Complaint Counsel has no specific response.

83. In "assessing the reliability of an expert opinion," a "resort to common sense is not inappropriate." *Johnson Elec. N. Am., Inc. v. Mabuchi Motor Am. Corp.*, 103 F. Supp. 2d 268, 286 (S.D.N.Y. 2000). Thus, "expert testimony should be excluded if it is speculative or conjectural, or if it is based on assumptions that are so unrealistic and contradictory as ... to be in essence an apples and oranges comparison...." *In re Vitamin C Antitrust Litig*, 2012 WL 6675117, at *3 (E.D.N.Y. 2012).

Response to Proposed Conclusion No. 83

To the extent this proposed conclusion addresses the admissibility of expert testimony, it is misleading as irrelevant, as "[m]ost of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury." *Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 616 F. Supp. 2d 1250, 1256 n.4 (citing *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000); *see also supra* Response to Proposed Conclusion No. 79.

Additionally, any attempt to exclude Dr. Marshall's testimony from consideration under *Daubert* is time barred. 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).

84. Courts routinely exclude experts who fail to properly analyze data to prove the trends they are offered to establish. *See In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 496 (N.D. Cal. 2008) (noting that an economic expert "may not meet his burden by simply stating that 'economic theory' dictates that prices for retail and wholesale purchases generally go up together."); *Concord Boat Corp. v. Brunswick*

Corp., 207 F.3d 1039, 1056-57 (8th Cir. 2000) (excluding expert opinion for failure to "incorporate all aspects of the economic reality" and "ignor[ing] inconvenient evidence.").

Response to Proposed Conclusion No. 84

To the extent this proposed conclusion addresses the admissibility of expert testimony, it is misleading as irrelevant, as "[m]ost of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury." *Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 616 F. Supp. 2d 1250, 1256 n.4 (citing *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000); *see also supra* Response to Proposed Conclusion No. 79.

Additionally, any attempt to exclude Dr. Marshall's testimony from consideration under *Daubert* is time barred. 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).

85. Rule 702 requires that "expert testimony rest on 'knowledge,' a term that 'connotes more than subjective belief or unsupported speculation.'" *Highland Capital Mgmt., L.P. v. Schneider*, 379 F. Supp. 2d 461, 469, 473 n.2 (S.D.N.Y. 2005). An expert thus cannot speculate about the "state of mind and motivations of certain parties," or the "intent ... of parties...." To do so would be pure speculation and outside the expert's expertise. *Highland Capital Mgmt, L.P.*, 379 F. Supp. 2d at 469-70; *see also United States v. Mejia*, 545 F.3d 179, 192 (2d Cir. 2008) (expert cannot "stray from the scope of his expertise"); *In re TMI Litig.*, 193 F.3d at 670 (affirming exclusion of an expert's testimony based on what the expert described as "an assumption ... not an unreasonable one...."); *Chemipal Ltd. v. Slim-Fast Nutritional Foods Int'l, Inc.*, 350 F. Supp. 2d 582, 593 (D. Del. 2004) (explaining that to allow expert testimony based solely on an expert's untested belief "would eviscerate the standards set by *Daubert* and Federal Rule of Evidence 702.").

Response to Proposed Conclusion No. 85

To the extent this proposed conclusion addresses the admissibility of expert testimony, it is misleading as irrelevant, as "[m]ost of the safeguards provided for in *Daubert* are not as

essential in a case such as this where a district judge sits as the trier of fact in place of a jury." *Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 616 F. Supp. 2d 1250, 1256 n.4 (citing *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000); *see also supra* Response to Proposed Conclusion No. 79.

Additionally, any attempt to exclude Dr. Marshall's testimony from consideration under *Daubert* is time barred. 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).

86. "[I]t is critical that an expert's analysis be reliable at every step" because any "step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible." *Amorgianos*, 303 F.3d at 267.

Response to Proposed Conclusion No. 86

To the extent this proposed conclusion addresses the admissibility of expert testimony, it is misleading as irrelevant, as "[m]ost of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury." *Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 616 F. Supp. 2d 1250, 1256 n.4 (citing *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000); *see also supra* Response to Proposed Conclusion No. 79.

Additionally, any attempt to exclude Dr. Marshall's testimony from consideration under *Daubert* is time barred. 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).

87. Expert testimony is useful only "as a guide to interpreting market facts, but it is not a substitute for them." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S.

209, 242 (1993).

Response to Proposed Conclusion No. 87

Complaint Counsel has no specific response.

88. If there is "too great an analytical gap between the data and the opinion proffered[,]" the opinion is properly excluded because "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

Response to Proposed Conclusion No. 88

To the extent this proposed conclusion addresses the admissibility of expert testimony, it is misleading as irrelevant, as "[m]ost of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury." *Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 616 F. Supp. 2d 1250, 1256 n.4 (citing *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000); *see also supra* Response to Proposed Conclusion No. 79.

Additionally, any attempt to exclude Dr. Marshall's testimony from consideration under *Daubert* is time barred. 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).

89. Analyses that represent nothing more than a "compartmentalized view" based on a "modicum of data not fully representative" of sales at issue are insufficient. *In re Class 8 Transmission Indirect Purchaser Antitrust Litig.*, 140 F. Supp. 3d 339, 353-56 (D. Del. 2015) ("In no way does an analysis of one percent compel the conclusion that plaintiffs can proffer sufficient common evidence to prove the alleged overcharges were passed through to indirect purchasers."), *aff'd in part, vacated in part*, 679 F. App'x 135 (3d Cir. 2017).

Response to Proposed Conclusion No. 89

While the cited language is accurately quoted, this proposed conclusion is misleading as irrelevant to the extent that it suggest that Dr. Marshall's opinions were based on "not fully representative" sales data. Respondents would have Dr. Marshall study a broader percentage of the total number of dentists nationwide, but such an analysis is uncalled for, and is an attempt to unjustifiably increase the denominator for a representative sample. Dr. Marshall needed to study sales for dentists who were buying group members; examining sales of independent dentists who were not members of buying groups would have been irrelevant.

Moreover, the record facts are distinguishable from *In re Class 8 Transmission Indirect Purchaser Antitrust Litigation*, 140 F. Supp. 3d 339 (D. Del. 2015). In that case, the class's expert attempted to calculate pass-through harm to indirect purchasers from an alleged overcharge on truck transmissions. The class's expert analyzed one type of truck transmission (Eaton Class 8 line haul transmissions), and ignored other transmission models that comprised the bulk of relevant product sold, assuming the pass-through ratio would be the same across all transmissions. *Id.* at 352-53. Here, Dr. Marshall's studies analyzed the purchasing behavior of *all* dentists who were members of Smile Source and Kois who purchased from the buying group distributor. There is nothing to suggest that the purchasing behaviors of these dentists are not representative of other buying group members. Dr. Marshall reviewed Kois and Smile Source because they were representative of the market in that they covered a broad geography of the country, a broad time span from 2012 through 2017, and they were varied in terms of size and stage of existence. CCFF ¶¶ 1642-1643.

Additionally, to the extent this proposed conclusion 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).

90. With respect to benchmarks, courts have held that "[w]hen constructing a benchmark statistic, the regression analyst may not 'cherry-pick' the time frame or data points so as to make her ultimate conclusion stronger." *Reed Constr. Data, Inc. v. McGraw-Hill Cos.*, 49 F. Supp. 3d 385, 400 (S.D.N.Y. 2014), *aff'd*, 638 F. App'x 43 (2d Cir. 2016). "Rather, some passably scientific analysis must undergird the selection of the frame of reference." *Reed Constr. Data, Inc.*, 49 F. Supp. 3d at 400.

Response to Proposed Conclusion No. 90

While the cited language is accurately quoted, this proposed conclusion is misleading as irrelevant to the extent that it suggests Dr. Marshall cherry-picked statistical benchmarks. Dr. Marshall used the well-recognized method of analyzing natural experiments to determine the impacts on price, margin, and customer switching when distributors begin and/or stop working with a buying group as well as the price and margin impacts on independent dentist buying group members. Studying natural experiments is a widely accepted method of analysis in antitrust cases. *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 345 (3d Cir. 2016) (relying on results of natural experiment); *In re NCAA Grant-in-Aid Cap Antitrust Litig.*, Case No. 14-md-02541, 2019 WL 1747780, at *13 (N.D. Cal. Mar. 8, 2019) (expert analysis based on natural experiments "reliable and persuasive"); *FTC v. ProMedica Health Sys., Inc.*, Case No. 3:11-CV-47, 2011 WL 1219281, at *14 (N.D. Ohio Mar. 29, 2011) (relying on "real-world natural experiments in the marketplace" to confirm that merging parties competed for significant number of patients in the marketplace); *FTC v. Foster*, Case No. 07-352, 2007 WL 1793441, at *38 (D.N.M. May 29, 2007) ("Where available, the antitrust agencies rely extensively on natural market experiments."); 2010 Horizontal Merger Guidelines, Section 2.1.2 (antitrust enforcement

agencies look for "natural experiments," that are informative regarding the competitive effects of mergers).

Moreover, Dr. Marshall's studies analyzed the purchasing behavior of *all* dentists who were members of Smile Source and Kois who purchased from the buying group distributor. There is nothing to suggest that the purchasing behaviors of these dentists are not representative of other buying group members. Far from being cherry-picked, Dr. Marshall reviewed Kois and Smile Source because they were representative of the market in that they covered a broad geography of the country, a broad time span from 2012 through 2017, and were varied in terms of size and stage of existence. CCFF ¶¶ 1642-1643.

Additionally, any attempt to exclude Dr. Marshall's testimony from consideration under *Daubert* is time barred. 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).

91. Notably, "serious consideration" cannot be given to an expert whose "opinion was based on the express assumption that the defendants had agreed to conspire." *In re Baby Food Antitrust Litig.*, 166 F.3d at 134. In *Baby Food*, the court found the expert's improper assumption in the expert's deposition testimony. The expert testified,

> If Heinz or Beech-Nut determined their sales independently, free of any restraint imposed by a conspiratorial agreement, the total sales of baby food would be higher and the prices lower than would be obtained under an agreement. It is precisely this specter of lower prices and profit margins from independent behavior which provides the incentive for the parties to enter into and maintain a price-fixing agreement.

166 F.3d at 134. Given this, the court noted that the expert's "opinion is nothing more than an abstract statement based on 'economic theory' that the interest in enhancing profits motivated the defendants to conspire." *In re Baby Food*, 166 F.3d. at 134.

Response to Proposed Conclusion No. 91

While the cited case is accurately quoted, the proposed conclusion is misleading as irrelevant to the extent it suggest Dr. Marshall's analysis is based on an assumption of conspiracy. Moreover, the record facts underlying Dr. Marshall's opinions are distinguishable from the expert in *In re Baby Food Antitrust Litigation*, 166 F.3d (3d Cir. 1999). In *Baby Food*, Dr. Peltzman's opinion amounted to an abstract statement on economic theory regarding motive to conspire. *Id.* at 134. "He never made any reference to the evidence in th[e] case; he never analyzed the pricing conduct of any of the defendants." *Id.* This is in contrast to Dr. Marshall who conducted quantitative analyses on lost sales and profits from blanket refusals to discount to buying groups, as well as harm to dentists. CCFF ¶¶ 1412-1441. Dr. Marshall did not opine in economic platitudes about motives to conspire, but employed a profitability analysis that calculated whether Respondents' agreement was against their individual self-interest. Further, Dr. Marshall confirmed his hypotheses and corroborated his results with a review of the qualitative evidence.

Additionally, any attempt to exclude Dr. Marshall's testimony from consideration under *Daubert* is time barred. 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).

92. Expert opinion is properly excluded where it "merely recite[s] what is on the face of documents produced during discovery" and "merely interpret[s] defendants' statements." *Anderson News, L.L.C.*, 899 F.3d at 112; *see also Newell Rubbermaid Inc. v. Raymond Corp.*, 676 F.3d 521, 527 (6th Cir. 2012) (affirming district court's decision to exclude expert opinion, and explaining that the "[r]ed flags that caution against certifying an expert include reliance on anecdotal evidence, improper extrapolation, failure to consider other possible causes, lack of testing, and subjectivity."); *Va. Vermiculite, Ltd. v. W.R. Grace & Co.-Conn. & Historic Green Springs, Inc.*, 98 F. Supp. 2d 729, 740 (W.D. Va. 2000) (excluding expert report because "[d]eriving analyses in the antitrust field from

anecdotal evidence ... is a basis for manifest error"); *JMJ Enters., Inc. v. Via Veneto Italian Ice, Inc.*, 1998 WL 175888, at *6 (E.D. Pa. 1998) ("Expert testimony that is based on speculation or unrealistic assumptions is not helpful."), *aff'd*, 178 F.3d 1279 (3d Cir. 1999).

Response to Proposed Conclusion No. 92

While the cited language is accurately quoted, this proposed conclusion is misleading as the cited cases following the *see also* signal do not support the stated proposition. The proposed conclusion is also misleading as irrelevant to the extent that it suggests Dr. Marshall did not conduct an independent economic analysis and merely interpreted Respondents' documents.

Moreover, the proposed conclusion is misleading to the extent that it implies that economic experts should not consider the factual record. "It is consistent with sound economic practice to review the factual record and formulate a hypothesis that can then be tested using economic theory—the examination of the factual record is necessary to determine which tests to run and to confirm that the stories drawn from the data and from the factual record are consistent." *In re Processed Egg Products Antitrust Litigation*, 81 F. Supp. 3d 412, 424 (E.D. Pa. 2015).

Additionally, any attempt to exclude Dr. Marshall's testimony from consideration under *Daubert* is time barred. 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).

iii. Rebutting a Circumstantial Inference of a Conspiracy

93. If the evidence of parallelism and plus factors creates an inference of a conspiracy, Respondents may rebut the presumption with evidence that they acted independently. *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 n.30 (11th Cir. 1991) (to "ensure[] that unilateral or procompetitive conduct is not punished or deterred[,]" "'plus factors' only create a rebuttable presumption of a conspiracy which the defendant may defeat with his own evidence"); *In re Baby Food Antitrust Litig.*, 166 F.3d at 122.

Response to Proposed Conclusion No. 93

This proposed conclusion is misleading as incomplete; as the inquiry does not end once a defendant produces evidence to rebut a presumption of collusion. *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1456 (11th Cir. 1991), stands for the proposition that "when the defendant puts forth a plausible, procompetitive explanation for his actions, [courts] will not be quick to infer, from circumstantial evidence that a violation of the antitrust laws has occurred; the plaintiff must produce more probative evidence that the law has been violated." Importantly, plaintiffs always have the opportunity to produce evidence that overcomes any stated justifications. *See also Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1037 (8th Cir. 2000) (referring to the class's burden to rebut defendants' independent business justifications).

Moreover, this proposed conclusion is misleading as irrelevant, as Respondents have not produced any procompetitive justifications for their agreement not to discount to buying groups.

94. Evidence that a Respondent acted independently includes (i) the sworn testimony of its employees attesting to that fact; (ii) evidence that it made business decisions based on legitimate factors, such as the likely effect of a course of action on its prices, profits, or sales volume, on its competitors' behavior, and on the structure of the market; and (iii) evidence that it took steps inconsistent with the alleged conspiracy. *In re Citric Acid*, 191 F.3d at 1105-06 (holding evidence "considered as a whole," could not support an inference that Cargill joined the conspiracy where the evidence included sworn testimony of independent action, consideration of the costs and benefits of a course of action, and actions inconsistent with the alleged conspiracy); *Valspar Corp.*, 873 F.3d at 200 (evidence of "internal deliberation" over a course of action "may negate an inference of conspiracy"); *Wilcox Dev. Co. v. First Interstate Bank of Or., N.A.*, 605 F. Supp. 592, 594 (D. Or. 1985) ("evidence of lawful business reasons for parallel conduct will dispel any inference of a conspiracy"), *aff'd sub nom. Wilcox v. First Interstate Bank of Or.*, 815 F.2d 522 (9th Cir. 1987); *see also In re Folding Carton Antitrust Litig.*, 1980 WL 1872, at *3 (N.D. Ill. 1980) (finding plaintiffs' inferences insufficient to establish a plus factor where there was uncontroverted employee testimony supporting defendants' explanation).

Response to Proposed Conclusion No. 94

This proposed conclusion is misleading and unsupported by the cited authorities. For example, *In re Citric Acid Litigation*, 191 F.3d 1090, 1105-1106 (9th Cir. 1999), addresses only Cargill's reasonable legitimate justification to explain what was mistaken for conspiratorial conduct. The cited reference does not mention sworn testimony or actions inconsistent with the alleged conspiracy. *Id.*

Moreover, the proposed conclusion is misleading as irrelevant to the extent that it suggests that "internal deliberations" may negate a finding of conspiracy. There is no record evidence of independent internal deliberations weighing how and whether Respondents should do business with buying groups.

The proposed conclusion is also irrelevant to the extent that it argues that *uncontroverted* witness denials overcome evidence of conspiracy. The record contains no uncontroverted witness denials; indeed, Respondents own contemporaneous documents reveal exchanges of assurances not to discount to buying groups. *See, e.g.*, CCFF ¶¶ 483, 498-90, 495, 500, 564-577, 580-581, 661-664, 679. These contemporaneous documents represent the most reliable evidence in the record. *United States v. Gen. Elec. Co.*, 82 F. Supp. 753 (D.N.J. 1949), *decision supplemented*, 115 F. Supp. 835, 844 (D.N.J. 1953) ("The documents were never intended to meet the eyes of any[]one but the officers themselves, and were, as it were, cinematographic photographs of their purposes at the time when they were written. They have, therefore, the highest validity as evidence of intention . . . .").

To the extent this proposed conclusion suggests that independent justifications for conduct negate a finding of agreement, it is misleading as contrary to precedent. As the Second Circuit has recognized, "'independent reasons' can also be "interdependent," and the fact that

[defendant's] conduct was in its own economic interest in no way undermines the inference that it entered an agreement to raise . . . prices." *United States v. Apple, Inc.*, 791 F.3d 290, 317-18 (2d Cir. 2015) (citing Areeda & Hovenkamp ¶ 1413a).

95. Because the ultimate burden of proof rests with Complaint Counsel, a Respondent only bears the burden of production with respect to showing that it acted independently. It remains Complaint Counsel's burden to show that the greater weight of the probative and credible evidence demonstrates that it is more likely than not that each Respondent participated in an unlawful conspiracy. *In re McWane, Inc.*, 155 F.T.C. at *246; *see also City of Moundridge*, 429 F. Supp. 2d at 130 ("At all times, of course, the ultimate burden of persuading the factfinder that a conspiracy exists is on the plaintiff.").

Response to Proposed Conclusion No. 95

Complaint Counsel has no specific response.

4. Anticompetitive Effect

96. Because the evidence does not establish that Respondents engaged in a conspiracy, there is no need to address anticompetitive effects – which Complaint Counsel bears the burden of proving by substantial evidence. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986); c*f. Cal. Dental Ass'n.*, 224 F.3d at 952 (where a prior opinion did find an unlawful agreement, the court still vacated the FTC's decision for failure to consider procompetitive attributes of restriction, concluding that the FTC had failed to demonstrate substantial evidence of anticompetitive effect, and stating that "our rule-of-reason case law usually requires the antitrust plaintiff to show some relevant data from the precise market at issue in the litigation....").

Response to Proposed Conclusion No. 96

This proposed conclusion is misleading because it begins with an incorrect factual premise. Moreover, the proposed conclusion is misleading to the extent the Respondents' conspiracy is *per se* illegal and anticompetitive harm is presumed. As the Supreme Court stated in *Catalano, Inc. v. Target Sales, Inc.*, "an agreement to eliminate discounts . . . falls squarely within the traditional *per se* rule against price fixing." 446 U.S. 643, 647 (1980). Similarly, in *United States v. Beaver*, the Seventh Circuit held that defendants' coordinated "net-price-

discount limit constituted an illegal price-fixing arrangement, and thus was . . . *per se* illegal." 515 F.3d 730, 737 n.3 (7th Cir. 2008); *see also United States v. Gen. Motors Corp.*, 384 U.S. 127, 145 (1966) ("Elimination, by joint collaborative action, of discounters from access to the market is a per se violation of the Act."). In *TFWS, Inc. v. Schaefer*, the Fourth Circuit held that Maryland's "volume discount ban is . . . a per se violation of the Sherman Act." 242 F.3d 198, 210 (4th Cir. 2001). "The anticompetitive nature of [an] agreement not to discount is obvious. . . . [T]his is simply a form of price fixing, and is *presumptively anticompetitive*." *In re PolyGram Holding, Inc.*, Docket No. 9298, 2003 WL 25797195, at *17 (FTC July 24, 2003) (Comm'n Op.) (emphasis added), *aff'd sub nom. Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005).

Similarly, "any agreement by a group of competitors to boycott a particular buyer or group of buyers is illegal *per se*." *Fed. Mar. Comm'n v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 250 (1968); *see also St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 543 (1978). "[T]he Sherman Act makes it an offense for [businessmen] to agree among themselves to stop selling to particular customers." *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 214 (1951); *St. Paul Fire & Marine*, 438 U.S. at 543. Thus, in *FTC v. Superior Court Trial Lawyers Ass'n*, the Supreme Court held that an agreement by a group of lawyers to boycott their customers to hold out for higher fees was a *per se* unlawful boycott. 493 U.S. 411, 422-23 (1990).

The citation to *California Dental Ass'n v. FTC*, 224 F.3d 942 (9th Cir. 2000), is distinguishable where the Ninth Circuit required a full rule of reason analysis on advertising restraints that may have also had a procompetitive benefits. *Id.* at 957-58. This is in contrast to the instant case where "refusing to bid on accounts hardly c[ould] be labeled as the very essence

of competition." *Petruzzi's IGA Supermkts. v. Darling-Del. Co.*, 998 F.2d 1224, 1232 (3d Cir. 1993).

97. Complaint Counsel has failed to establish that the alleged agreement should be considered so likely to cause harm to competition that it should be treated as unlawful *per se*. *See, e.g.*, *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) ("*[p]er se* liability is reserved for only those agreements that are 'so plainly anticompetitive that no elaborate study'" is needed) (quoting *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978); *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 103-104 (1984). As a result, Complaint Counsel has failed to establish any basis for departing from the rule of reason – the "prevailing" standard of evaluation of a restraint on competition. *See, e.g.*, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49, 59 (1977); *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006) ("[T]his Court presumptively applies rule of reason analysis…."); *Business Electronics Corp. v. Sharp Electronics Corp*., 485 U.S. 717, 723 (1988) ("Ordinarily, whether particular concerted action violates § 1 of the Sherman Act is determined through case-by-case application of the so-called rule of reason."); *Id*. at 726 ("[T]here is a presumption in favor of a rule-of-reason standard.").

Response to Proposed Conclusion No. 97

This proposed conclusion is misleading and contrary to law, as courts have consistently held that an agreements not to discount and agreements not to compete for a particular customer segment are illegal per se. *See* Response to Proposed Conclusion No. 96.

98. Complaint Counsel failed to provide any basis for considering the alleged agreement to be inherently suspect or to apply a truncated rule of reason analysis. Complaint Counsel provided no "experience of the market" or "empirical evidence" that would permit "a confident conclusion" regarding the effects of the alleged agreement. *California Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756, 776, 781 (1999).

Response to Proposed Conclusion No. 98

This proposed conclusion is misleading and contrary to law, as horizontal agreements to refuse discounts or other benefits are subject to the inherently suspect standard, if not treated as *per se* illegal. *See In re PolyGram Holding, Inc. ("Polygram I")*, Docket No. 9298, 2003 WL 25797195, at *17 (FTC July 24, 2003) (Comm'n Op.), *aff'd sub nom. Polygram Holding, Inc. v.*

FTC, 416 F.3d 29 (D.C. Cir. 2005) ("The anticompetitive nature of the agreement not to discount is obvious. As the ALJ correctly observed, this is simply a form of price fixing, and is presumptively anticompetitive."). In *PolyGram I*, Respondents' agreement restraining price discounting was "inherently suspect" and "patently an elimination of a basic form of rivalry between competitors." 2003 WL 25797195, at *18, *31 ("[A]n agreement between competitors not to discount is likely to result in higher prices to consumers, restriction of output, and reduced allocative efficiency. . . . Respondents' restraints on price discounting and advertising are inherently suspect, because experience and economic learning consistently show that restraints of this sort dampen competition and harm consumers."). Similarly, *North Carolina State Board of Dental Examiners* found that a conspiracy to exclude low-cost competitors from the market was inherently suspect because it was "likely to harm competition and consumers." *N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359, 374 (4th Cir. 2013), *aff'd*, 135 S. Ct. 1101 (2015) ("It is not difficult to understand that forcing low-cost teeth-whitening providers from the market has a tendency to increase a consumer's price for that service.").

99. The rule of reason involves an examination of the "demonstrable economic effect" to a defined antitrust market caused by the restraint in question. *See, e.g., Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 49, 59 (1977)); *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006) ("[T]his Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful."). Complaint Counsel failed to establish that the alleged agreement caused anticompetitive effects pursuant to this standard.

Response to Proposed Conclusion No. 99

This proposed conclusion is misleading as irrelevant, contrary to the law, and factually incorrect. First, it is irrelevant as the Respondents' agreement is illegal under a *per se* standard, or at a minimum, inherently suspect or truncated rule of reason standard. Under each of those

standards, antitrust harm is understood based on the nature of the restraint. Indeed, as discussed *supra* Responses to Proposed Conclusion Nos. 96 and 98, antitrust harm from Respondents' agreement is self-evident. *See In re PolyGram Holding, Inc. ("Polygram I")*, Docket No. 9298, 2003 WL 25797195, at *17 (FTC July 24, 2003) (Comm'n Op.), *aff'd sub nom. Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005) ("The anticompetitive nature of the agreement not to discount is obvious. As the ALJ correctly observed, this is simply a form of price fixing, and is presumptively anticompetitive.").

Second, it is contrary to established legal authority where under the inherently suspect standard where a plaintiff must make a more detailed showing of harm only after a respondent has provided a cognizable procompetitive justification for its conduct. *PolyGram Holding I*, 2003 WL 25797195, at *15. Where Respondents have failed to forward any procompetitive justification for their agreement, CCFF ¶¶ 1167-1172, 488, 1078, "the court [can] condemn[] the practice without ado." *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 674 (7th Cir. 1992); *see also In re Mass. Bd. of Registration in Optometry*, 1988 WL 490115, at *6 ("But if it is inherently suspect, we must pose a second question: Is there a plausible efficiency justification for the practice? That is, does the practice seem capable of creating or enhancing competition (e.g., by reducing the costs of producing or marketing the product, creating a new product, or improving the operation of the market)? Such an efficiency defense is plausible if it cannot be rejected without extensive factual inquiry. If it is not plausible, then the restraint can be quickly condemned.").

While Complaint Counsel need not proffer evidence of anticompetitive harm for a *per se* illegal agreement or an inherently suspect restraint without procompetitive justification, this proposed conclusion is factually inaccurate, as Complaint Counsel has done just that. Complaint

Counsel has introduced evidence that Respondents' elimination of competition for buying groups has come at the expense of their customers. CCFF ¶¶ 1416-1433, 1437-1441, 1606-1609. 125-132.

5. Remedies

100. Pursuant to Section 5 of the FTC Act, upon determination that the challenged practice is an unfair method of competition, the Commission "shall issue ... an order requiring such person ... to cease and desist from using such method of competition or such act or practice." 15 U.S.C. § 45(b); *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957). While "the Commission has considerable discretion in fashioning an appropriate remedial order," the order must "bear[] a reasonable relationship to the act or practice found unlawful." *In re McWane, Inc.*, 2014 WL 556261, at *39 (citing *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Rubbermaid, Inc. v. FTC*, 575 F.2d 1169, 1174 (6th Cir. 1978)); *see also FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965) ("The propriety of a broad order depends upon the specific circumstances of the case, but the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist."); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946) (same).

Response to Proposed Conclusion No. 100

Complaint Counsel has no specific response.

101. Complaint Counsel bears the burden of showing that an injunction is warranted. *Borg-Warner Corp. v. FTC*, 746 F.2d 108, 110 (2d Cir. 1984); *TRW, Inc. v. FTC*, 647 F.2d 942, 954 (9th Cir. 1981).

Response to Proposed Conclusion No. 101

This proposed conclusion is misleading to the extent Respondents rely solely on Clayton Act Section 8 (interlocking directorate) cases, which are distinguishable from FTC Act Section 5 cases. Otherwise, Complaint Counsel has no specific response.

102. Before imposing a prospective remedy "to obtain injunctive relief against illegal conduct that has been discontinued, the moving party must show that 'there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.'" *Borg-Warner Corp.*, 746 F.2d at 110 (reversing a cease and desist order on Section 8 and Section 5 claims where, "[c]ontrary to the

Commission's conclusion, we do not think complaint counsel carried the burden of showing that there was a 'cognizable danger of recurrent violation' in this case."); *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) (same); *TRW, Inc.*, 647 F.2d at 954 (setting aside a prospective remedy where the record facts were "not enough" to demonstrate "cognizable danger" of repetition: "while [the court] cannot say that it is 'absolutely clear' that repetition will not occur, [it] can and must say there is simply nothing to suggest a 'cognizable danger' of repetition....").

Response to Proposed Conclusion No. 102

This proposed conclusion is misleading as it relies on inapposite legal support and contravenes "the general rule that voluntary cessation of an illegal practice is no bar to a Commission cease and desist order." *ITT Cont'l Baking Co. v. FTC*, 532 F.2d 207, 222 n.22 (2d Cir. 1976). The legal authority is not supportive where Respondents rely on Clayton Act Section 8 (interlocking directorate) cases, which are distinguishable from FTC Act Section 5 cases. Section 8 of the Clayton Act has highly technical thresholds and requirements that apply only to interlocking directorate situations, unlike Section 5. Moreover, Section 8 of the Clayton Act provides a one-year grace period allowing a director to resign from the position creating the interlock and effectively "curing" the violation. 15 U.S.C. §19(b). Section 5 allows no such self-cures.

The weight of legal authority holds that termination of alleged infringing conduct does not warrant dismissal for mootness. *See FTC v. Goodyear Tire & Rubber Co.*, 304 U.S. 257, 260 (1938) ("Discontinuance of the practice which the Commission found to constitute a violation of the Act did not render the controversy moot.") (internal citations omitted); *In the Matter of Sears, Roebuck & Co.*, 95 F.T.C. 406, 520 (1980); ("Courts have recognized that discontinuance of an offending practice is neither a defense to liability, nor grounds for omission of an order.") (internal citations omitted). Indeed, even one of Respondents cited Section 8 cases, *TRW, Inc. v.*

F.T.C., holds that voluntary cessation of illegal conduct does not render a case moot. 647 F.2d 942, 953 (9th Cir. 1981).

B. Responses to Proposed Conclusions of Law Regarding "Application of Law to Fact"

103. Complaint Counsel failed to satisfy their burden of proof with respect to Counts I, II, or III of the Complaint with respect to Respondents Henry Schein, Inc.; Patterson Companies, Inc.; or Benco Dental.

Response to Proposed Conclusion of Law No. 103

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3. Consequently, it should be disregarded.

It should also be disregarded because Complaint Counsel has demonstrated by a preponderance of the evidence that Respondents violated Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by conspiring not to provide discounts to or otherwise compete for the business of buying groups of independent dentists as alleged in Counts I, II and III of the Complaint. *See generally* Complaint Counsel's Post-Tr. Br.; Complaint Counsel's Post-Tr. Br. in Reply to Resp'ts Henry Schein, Inc., Patterson Companies, Inc., and Benco Dental Supply Co.'s Post-Tr. Brs. ("Complaint Counsel's Post-Tr. Reply").

104. Complaint Counsel failed to prove by a preponderance of the evidence that Schein participated in any contract, combination, or conspiracy with either Patterson or Benco to refuse to do business with, or provide discounts to, buying groups.

Response to Proposed Conclusion of Law No. 104

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as

required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3. Consequently, it should be disregarded.

It should also be disregarded because Complaint Counsel has demonstrated by a preponderance of the evidence that Respondent Schein has violated the Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by conspiring not to provide discounts to or otherwise compete for the business of buying groups of independent dentists at alleged in Counts I, II and III of the Complaint. *See generally* Complaint Counsel's Post-Tr. Br.; Complaint Counsel's Post-Tr. Reply.

105. Complaint Counsel failed to prove by a preponderance of the evidence that Patterson participated in any contract, combination, or conspiracy with either Schein or Benco to refuse to do business with, or provide discounts to, buying groups.

Response to Proposed Conclusion of Law No. 105

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3. Consequently, it should be disregarded.

It should also be disregarded because Complaint Counsel has demonstrated by a preponderance of the evidence that Respondent Patterson has violated the Section 5 of the FTC Act, as amended, 15 U.S.C. §45, by conspiring not to provide discounts to or otherwise compete for the business of buying groups of independent dentists at alleged in Counts I, II and III of the Complaint. *See generally* Complaint Counsel's Post-Tr. Br.; Complaint Counsel's Post-Tr. Reply.

106. Complaint Counsel failed to prove by a preponderance of the evidence that Benco participated in any contract, combination, or conspiracy with either Schein or Patterson to

refuse to do business with, or provide discounts to, buying groups.

Response to Proposed Conclusion of Law No. 106

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3. Consequently, it should be disregarded.

It should also be disregarded because Complaint Counsel has demonstrated by a preponderance of the evidence that Respondent Benco has violated the Section 5 of the FTC Act, as amended, 15 U.S.C. §45, by conspiring not to provide discounts to or otherwise compete for the business of buying groups of independent dentists as alleged in Counts I, II and III of the Complaint. *See generally* Complaint Counsel's Post-Tr. Br.; Complaint Counsel's Post-Tr. Reply.

107. Complaint Counsel failed to prove a single, overarching conspiracy among Benco, Patterson, and Schein to refuse to do business with, or provide discounts to, buying groups.

Response to Proposed Conclusion of Law No. 107

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3. Consequently, it should be disregarded.

It should also be disregarded because Complaint Counsel has demonstrated by the preponderance of the evidence that there was an overarching conspiracy among Respondents to refuse to do business with, or provide discounts to, buying groups. *See generally* Complaint Counsel's Post-Tr. Br.; Complaint Counsel's Post-Tr. Reply.

108. Complaint Counsel failed to present any direct evidence of Schein's participation in any alleged contract, combination, or conspiracy with Patterson or Benco to not do business with, or provide discounts to, buying groups.

Response to Proposed Conclusion of Law No. 108

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3. Consequently, the statement should be disregarded.

This proposed conclusion is misleading to the extent that it distinguishes between direct and unambiguous evidence. "'Unambiguous evidence of an agreement to fix prices . . . is all the proof a plaintiff needs' to establish a violation of Section 1." *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015). "[I]n Section 1 cases, it is unnecessary for a court to engage in the exercise of distinguishing strong circumstantial evidence of concerted action from direct evidence of concerted action for both are 'sufficiently unambiguous.'" *Petruzzi's IGA Supermkts. v. Darling-Del. Co.*, 998 F.2d 1224, 1233 (3d Cir. 1993) (internal citation omitted). And where Complaint Counsel's theory is not implausible, it is "doubly unnecessary" to distinguish between direct and unambiguous circumstantial evidence. *Id.* at 1233 (distinguishing between strong circumstantial evidence and direct evidence "is doubly unnecessary because [plaintiff's] theory [of conspiracy] is not implausible]).

Moreover, this proposed conclusion is misleading where it suggests that direct evidence is necessary to find an agreement. *Petruzzi's IGA Supermkts. v. Darling-Del Co.*, 998 F.2d 1224, 1230 (3d Cir. 1993) ("[P]laintiff in a section 1 case does not have to submit direct evidence . . . but can rely solely on circumstantial evidence and the reasonable inferences drawn from such evidence.").

Additionally, this proposed conclusion is factually inaccurate because Complaint Counsel introduced both direct and unambiguous evidence of an agreement. *See, e.g.*, Complaint Counsel's Post-Tr. Br. §§ I.F I.G ("Benco Orchestrated an Agreement with Schein that Neither Would Discount to Buying Groups"), I.H ("Benco Planned to Shore up the Agreement with Schein and Patterson"), I.I ("The Big Three Communicated About the TDA Buying Group"); Complaint Counsel's Reply to Benco Post-Tr. Br. § 1.A.1 ("There is Direct and Unambiguous Evidence of an Agreement"); Complaint Counsel's Reply to Schein Post-Tr. Br. § III.A ("The Direct and Unambiguous Evidence Supports the Claim that Schein Agreed to Not Deal with Buying Groups.").

109. Complaint Counsel failed to present any direct evidence of Patterson's participation in any alleged contract, combination, or conspiracy with Schein or Benco to not do business with, or provide discounts to, buying groups.

Response to Proposed Conclusion of Law No. 109

This is not a proposed conclusion of law and should be disregarded for the reasons identified in Response to Proposed Conclusion of Law No. 108. Additionally, this proposed conclusion is factually inaccurate because Complaint Counsel introduced both direct and unambiguous circumstantial evidence of an agreement. *See, e.g.*, Complaint Counsel's Post-Tr. Br. §§ I.F ("Benco Orchestrated an Agreement with Patterson that Neither Would Discount to Buying Groups"), I.H ("Benco Planned to Shore up the Agreement with Schein and Patterson"), I.I ("The Big Three Communicated About the TDA Buying Group"); Complaint Counsel's Reply to Benco Post-Tr. Br. § 1.A.1 ("There is Direct and Unambiguous Evidence of an Agreement"); Complaint Counsel's Reply to Patterson Post-Tr. Br. §§ Introduction, I.A (Argument).

110. Complaint Counsel failed to present any direct evidence of Benco's participation in any alleged contract, combination, or conspiracy with Schein or Patterson to not do business with, or provide discounts to, buying groups.

Response to Proposed Conclusion of Law No. 110

This is not a proposed conclusion of law and should be disregarded for the reasons identified in Response to Proposed Conclusion of Law No. 108. Additionally, this proposed conclusion is factually inaccurate because Complaint Counsel introduced both direct and unambiguous circumstantial evidence of an agreement. *See e.g.*, Complaint Counsel's Post-Tr. Br. §§ I.F ("Benco Orchestrated an Agreement with Patterson that Neither Would Discount to Buying Groups"); I.G ("Benco Orchestrated an Agreement with Schein that Neither Would Discount to Buying Groups"); I.H ("Benco Planned to Shore up the Agreement with Schein and Patterson"); I.I ("The Big Three Communicated About the TDA Buying Group"); Complaint Counsel's Reply to Benco's Post-Tr. Br. § 1.A.1 ("There is Direct and Unambiguous Evidence of an Agreement").

111. Each piece of evidence Complaint Counsel presents as "direct evidence" requires inferences in order to reach the conclusion that Schein participated in an unlawful agreement; as such, none of Complaint Counsel's evidence qualifies as "direct evidence."

Response to Proposed Conclusion of Law No. 111

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3. Consequently, the statement should be disregarded.

This proposed conclusion is misleading for the reasons identified in Response to Proposed Conclusion of Law No. 16. This proposed conclusion is also misleading for the reasons identified in Response to Proposed Conclusion of Law No. 108.

Additionally, this proposed conclusion is factually inaccurate because Complaint Counsel introduced both direct and unambiguous evidence of an agreement. *See, e.g.*, Complaint Counsel's Post-Tr. Br. §§ I.F I.G ("Benco Orchestrated an Agreement with Schein that Neither Would Discount to Buying Groups"), I.H ("Benco Planned to Shore up the Agreement with Schein and Patterson"), I.I ("The Big Three Communicated About the TDA Buying Group"); Complaint Counsel's Reply to Benco Post-Tr. Br. § 1.A.1 ("There is Direct and Unambiguous Evidence of an Agreement"); Complaint Counsel's Reply to Schein Post-Tr. Br. § III.A ("The Direct and Unambiguous Evidence Supports the Claim that Schein Agreed to Not Deal with Buying Groups.").

112. Each piece of evidence Complaint Counsel presents as "direct evidence" requires inferences in order to reach the conclusion that Patterson participated in an unlawful agreement; as such, none of Complaint Counsel's evidence qualifies as "direct evidence."

Response to Proposed Conclusion of Law No. 112

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3. Consequently, the statement should be disregarded.

This proposed conclusion is misleading for the reasons identified in Response to Proposed Conclusion of Law No. 16. This proposed conclusion is also misleading for the reasons identified in Response to Proposed Conclusion of Law No. 108.

Additionally, this proposed conclusion is factually inaccurate because Complaint Counsel introduced both direct and unambiguous evidence of an agreement. *See, e.g.*, Complaint Counsel's Post-Tr. Br. §§ I.F ("Benco Orchestrated an Agreement with Patterson that Neither Would Discount to Buying Groups"), I.H ("Benco Planned to Shore up the Agreement with

Schein and Patterson"), I.I ("The Big Three Communicated About the TDA Buying Group"); Complaint Counsel's Reply to Benco Post-Tr. Br. § 1.A.1 ("There is Direct and Unambiguous Evidence of an Agreement"); Complaint Counsel's Reply to Patterson Post-Tr. Br. §§ Introduction, I.A (Argument).

113. Each piece of evidence Complaint Counsel presents as "direct evidence" requires inferences in order to reach the conclusion that Benco participated in an unlawful agreement; as such, none of Complaint Counsel's evidence qualifies as "direct evidence."

Response to Proposed Conclusion of Law No. 113

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3. Consequently, the statement should be disregarded.

This proposed conclusion is misleading for the reasons identified in Response to Proposed Conclusion of Law No. 16. This proposed conclusion is also misleading for the reasons identified in Response to Proposed Conclusion of Law No. 108.

Additionally, this proposed conclusion is factually inaccurate because Complaint Counsel introduced both direct and unambiguous evidence of an agreement. *See, e.g.*, Complaint Counsel's Post-Tr. Br. §§ I.F ("Benco Orchestrated an Agreement with Patterson that Neither Would Discount to Buying Groups"), I.G ("Benco Orchestrated an Agreement with Schein that Neither Would Discount to Buying Groups"), I.H ("Benco Planned to Shore up the Agreement with Schein and Patterson"), I.I ("The Big Three Communicated About the TDA Buying Group"); Complaint Counsel's Reply to Benco Post-Tr. Br. § 1.A.1 ("There is Direct and Unambiguous Evidence of an Agreement").

114. The sworn denials of an agreement by each of the witnesses alleged to have knowledge of the alleged agreement, including Mr. Sullivan, Mr. Cohen, and Mr. Guggenheim (the three individuals Complaint Counsel alleges were involved in reaching agreement), constitute direct evidence of the content of the communications to which they were a party. Such denials are entitled to weight.

Response to Proposed Conclusion of Law No. 114

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

This proposed conclusion because it is contrary to case law. *See* Response to Proposed Conclusion of Law Nos. 23-24; Complaint Counsel's Reply to Benco Post-Tr. Br. § I.A.2 ("Witness Denials Are Not Sufficient to Overcome the Overwhelming Unambiguous Evidence of Agreement").

Moreover, the facts of this case are distinguishable from other matters involving witness denials. For example, Benco argues that witness testimony denying the existence of a conspiracy is direct evidence of a lack of agreement, citing this Court's decision in *McWane.* But unlike *McWane*, the record contains unambiguous evidence establishing that the competitors directly communicated about the subject matter of the conspiracy. *In re McWane, Inc.*, Docket No. 9351, 2013 WL 8364918, at *265 (FTC May 1, 2013) (Initial Decision) ("There is no evidence showing what Mr. Tatman and Mr. Rybacki discussed . . . .").

This proposed conclusion provides no support for assigning more weight to conspiracy denials than contemporaneous business documents and other testimony supporting a finding of agreement. Contemporaneous documents represent the most reliable evidence, in part because witness memories fade over time. *United States v. Gen. Elec. Co.*, 82 F. Supp. 753, 844 (D.N.J. 1949) (The documents in the record "were never intended to meet the eyes of any one but the

[executives] themselves, and were, as it were . . . cinematographic photographs of their purposes at the time when they were written. They have, therefore, the highest validity as evidence of intention," and should be afforded greater weight than witness denials of an agreement), *decision supplemented*, 115 F. Supp. 835 (D.N.J. 1953) ("[A]lthough in many instances [the witness] attempted to contradict [documents], his contradiction only served to affect the general credibility of his testimony."); *FTC v. Qualcomm, Inc.*, No. 17-CV-00220, 2019 WL 2206013, at *7 (N.D. Cal. May 21, 2019) ("The Court finds Qualcomm's internal, contemporaneous documents more persuasive than Qualcomm's trial testimony prepared specifically for this antitrust litigation.").

Moreover, witnesses who truly believe that they did not enter into an agreement may nonetheless have engaged in unlawful conduct under antitrust laws. It is a mixed question of law and fact to be decided by the Court whether an "agreement" exists. *See Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 135-36 (2d Cir. 2013) ("The ultimate existence of an 'agreement' under antitrust law, however, is a legal conclusion, not a factual allegation."); *Gainesville Utils. Dep't v. Fla. Power & Light Co.*, 573 F.2d 292, 301 n.14 (5th Cir. 1978) ("The officials of the power companies deny the existence of a territorial agreement, but where such testimony is in conflict with contemporaneous documents we can give it little weight, *particularly when the crucial issues involve mixed questions of law and fact.*") (emphasis added and internal quotations omitted). Thus, lay witness testimony that there was no "agreement" under antitrust laws does not end the inquiry.

115. Dr. Marshall's conflicting interpretations of emails, and his insistence that he had "the correct interpretation," deserve no weight. This is especially true where participants on the emails provided contradictory interpretations than those reached by Dr. Marshall under oath – testimony which Dr. Marshall conceded he did not review.

Response to Proposed Conclusion of Law No. 115

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

To the extent this proposed conclusion addresses the admissibility of expert testimony, it is misleading as irrelevant, as "[m]ost of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury." *Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 616 F. Supp. 2d 1250, 1256 n.4 (M.D. Fla. 2009) (citing *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000)). Additionally, to the extent this proposed conclusion 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).

To the extent Dr. Marshall considered the factual record in preparing his report, it was appropriate to do so. "It is consistent with sound economic practice to review the factual record and formulate a hypothesis that can then be tested using economic theory—the examination of the factual record is necessary to determine which tests to run and to confirm that the stories drawn from the data and from the factual record are consistent." *In re Processed Egg Prods. Antitrust Litig.*, 81 F. Supp. 3d 412, 424 (E.D. Pa. 2015).

116. Complaint Counsel failed to adduce circumstantial evidence sufficient to prove by a preponderance of the evidence that Schein participated in an unlawful agreement. Rather, the greater weight of the evidence shows that Schein acted independently.

Response to Proposed Conclusion of Law No. 116

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

The proposed conclusion is also misleading where Complaint Counsel introduced both direct and unambiguous evidence sufficient to find an agreement. *See* Response to Proposed Conclusion of Law No. 108. Having demonstrated the existence of an agreement by direct and unambiguous evidence, Complaint Counsel need not also "adduce circumstantial evidence" sufficient to prove the agreement. "'Unambiguous evidence of an agreement to fix prices . . . is all the proof a plaintiff needs' to establish a violation of Section 1." *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015).

Although not required, Complaint Counsel has also presented circumstantial evidence that further confirms Respondents' unlawful agreement. *See, e.g.*, Complaint Counsel's Post-Tr. Br. §§ II.B ("The Big Three Entered into an Unlawful Agreement to Refuse Discounts to Buying Groups), II.I ("'Plus-Factor'" Evidence Confirms the Existence of an Unlawful Agreement."); Complaint Counsel's Reply to Benco Post-Tr. Br. §§ I.B-I.D; Complaint Counsel's Reply to Schein Post-Tr. Br. § III.B.

117. Complaint Counsel failed to adduce circumstantial evidence sufficient to prove by a preponderance of the evidence that Patterson participated in an unlawful agreement. Rather, the greater weight of the evidence shows that Patterson acted independently.

Response to Proposed Conclusion of Law No. 117

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

The proposed conclusion is also misleading where Complaint Counsel introduced both direct and unambiguous evidence sufficient to find an agreement. *See* Response to Proposed Conclusion of Law No. 109. Having demonstrated the existence of an agreement by direct and unambiguous evidence, Complaint Counsel need not also "adduce circumstantial evidence" sufficient to prove the agreement. "'Unambiguous evidence of an agreement to fix prices . . . is all the proof a plaintiff needs' to establish a violation of Section 1." *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015).

Although not required, Complaint Counsel has also presented circumstantial evidence that further confirms Respondents' unlawful agreement. *See, e.g.*, Complaint Counsel's Post-Tr. Br. §§ II.B ("The Big Three Entered into an Unlawful Agreement to Refuse Discounts to Buying Groups), II.I ("'Plus-Factor'" Evidence Confirms the Existence of an Unlawful Agreement."); Complaint Counsel's Reply to Benco Post-Tr. Br. §§ I.B-I.D; Complaint Counsel's Reply to Patterson Post-Tr. Br. § II (Argument).

118. Complaint Counsel failed to adduce circumstantial evidence sufficient to prove by a preponderance of the evidence that Benco participated in an unlawful agreement. Rather, the greater weight of the evidence shows that Benco acted independently.

Response to Proposed Conclusion of Law No. 118

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

The proposed conclusion is also misleading where Complaint Counsel introduced both direct and unambiguous evidence sufficient to find an agreement. *See* Response to Proposed Conclusion of Law No. 110. Having demonstrated the existence of an agreement by direct and unambiguous evidence, Complaint Counsel need not also "adduce circumstantial evidence"

sufficient to prove the agreement. "'Unambiguous evidence of an agreement to fix prices . . . is all the proof a plaintiff needs' to establish a violation of Section 1." *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015).

Although not required, Complaint Counsel has also presented circumstantial evidence that further confirms Respondents' unlawful agreement. *See, e.g.*, Complaint Counsel's Post-Tr. Br. §§ II.B ("The Big Three Entered into an Unlawful Agreement to Refuse Discounts to Buying Groups), II.I ("'Plus-Factor'" Evidence Confirms the Existence of an Unlawful Agreement."); Complaint Counsel's Reply to Benco Post-Tr. Br. §§ I.B-I.D.

119. Complaint Counsel failed to show that Schein, Patterson, and Benco engaged in parallel conduct. The evidence showed that Schein did business with numerous buying groups before, during, and after the alleged conspiracy period, whereas Patterson rarely worked with them and Benco did not work with them as a matter of policy – indeed, Schein engaged with buying groups that Patterson and/or Benco turned down.

Response to Proposed Conclusion of Law No. 119

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

This proposed conclusion is misleading, as it misstates the relevant legal standard. Complaint Counsel has proffered unambiguous evidence of Respondents' agreement. "'Unambiguous evidence of an agreement to fix prices . . . is all the proof a plaintiff needs' to establish a violation of Section 1." *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015). And even if Complaint Counsel lacked unambiguous evidence of Respondents' agreement, "[p]arallel pricing is merely 'one such form of circumstantial evidence.'" *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 158 (N.D.N.Y. 2010). Where, as here, a plaintiff's case is not centered on conscious parallelism,

plaintiffs need not show parallel conduct. *Cason-Merenda v. Detroit Med. Ctr.*, 862 F. Supp. 2d 603, 627 (E.D. Mich. 2012).

Nevertheless, the proposed conclusion is factually incorrect, as Complaint Counsel has introduced evidence of Respondents' parallel conduct. *See, e.g.*, Complaint Counsel's Reply to Benco Post-Tr. Br. § I.B.4. To the extent that the proposed conclusion suggests that Schein's conduct was not parallel to Benco and Patterson, it is disputed as misleading and irrelevant. *See, e.g.*, Complaint Counsel's Reply to Schein Post-Tr. Br. §§ II.B, III.B.1.

120. Complaint Counsel has cited, as proof of the alleged parallel conduct, Respondents' responses to the Kois Buyers Group, Smile Source, and the Georgia Dental Association. (CC's Pre-Trial Br. at 37). But Respondents' responses to the Kois Buyers Group were each different. Respondents' Patterson's and Benco's responses to Smile Source differed from Schein, which chose to pursue Smile Source's business. Similarly, Respondents each responded differently to the Georgia Dental Association, which in any event occurred after the alleged conspiracy period.

Response to Proposed Conclusion of Law No. 120

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

This proposed conclusion is also factually incorrect. First, it bears noting that parallel conduct need not be identical, only similar. *See SD3, LLC v. Black & Decker Inc.*, 801 F.3d 412, 429 (4th Cir. 2015) ("[P]arallel conduct must produce parallel results. . . . [P]arallel conduct 'need not be exactly simultaneous and identical in order to give rise to an inference of agreement.'") (citing *Petruzzi's IGA Supermkts. v. Darling-Del. Co.*, 998 F.2d 1224, 1234 (3d Cir. 1993)). The record evidence demonstrates that Respondents conduct was similar during the conspiracy period. *See, e.g.*, Complaint Counsel's Reply to Benco Post-Tr. Br. § I.B.4.

With respect to Kois, contemporaneous documents demonstrate identical refusals to discount to Kois. Benco did not bid for Kois in 2014, explaining to Dr. Kois: "At Benco, our policy is that we don't support, or work with, buying groups, so we'll decline your request." CCFF ¶ 421 (quoting CX1240 at 001). On August 18, 2014, a month *before* Patterson was scheduled to meet with Kois, Guggenheim already decided against working with the group, writing to Rogan, "Agreed . . . I'll kill it." CCFF ¶ 638 (CX0116 at 001; Guggenheim, Tr. 1676-1678). True to his word, Patterson did not bid for Kois in 2014 (CCFF ¶ 629 (CX3086 at 001)), despite Patterson losing "high quality / high producing" customers and feeling a "deep" cut to its business as a result. CCFF ¶ 1738 (CX3089 at 001). A few weeks later, on September 8, 2014, Schein's Sullivan explained regarding Kois: "I still believe this is a slippery slope and have yet to see a successful one in dental and don't plan to take the lead role." CCFF ¶ 809 (CX2469 at 002; CX8025 (Sullivan, Dep. at 295)). Like Benco and Patterson, Schein refused to work with Kois. CCFF ¶ 928. From the vantage of the Kois Buyers Group, Respondents certainly seemed to act in parallel. CCFF ¶ 928 (citing Kois Sr., Tr. 190, 196 (Respondents all refused to work with Kois)).

Similarly, Both Benco and Patterson refused to provide a discount to Smile Source because it was a buying group. Benco rejected Smile Source every year from 2011 through 2013. CCFF ¶ 410 (quoting CX1138 at 001 (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"); quoting CX1219 at 002 (2012: "Benco doesn't recognize GPOs as a single customer")); [redacted]). In 2014, as Benco's Patrick Ryan then described Smile Source as

"terrifying." CCFF ¶ 1021 (quoting CX0015 at 001; Ryan, Tr. 1045). Patterson also rejected Smile Source in 2013: *"[W]e have said no to smile source. They are [a] buying club."* CCFF ¶ 642 (quoting CX3009 at 001) (emphasis added). [redacted]

Schein made a proposal to Smile Source in early 2014 in an unsuccessful attempt to cheat on the agreement. Schein's attempt at cheating on the conspiracy by negotiating with Smile Source does not negate Respondents' otherwise parallel conduct. 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); *see e.g.*, CCFF ¶¶ 788 (quoting CX2073 at 001 (Dec. 20, 2013 email from Schein's Foley: "It's a buying group that we do not participate with, as with all buying groups.")), 799 (quoting CX2235 at 001 (July 17, 2014 email from Schein's Titus: "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.")). Moreover, while Schein offered Smile Source a least [redacted] off catalog price before and after the conspiracy (CCFF ¶¶ 1392-1395), Schein offered only [redacted] off catalog during the conspiracy. CCFF ¶¶ 1830-1831. Sullivan explicitly stated he was "*not interested*" in offering [redacted] discount to Smile Source in 2014, even though Schein offered just that before and after the conspiracy. CCFF ¶ 1849. [redacted] CCFF ¶¶ 1830-1840. At the same time, in 2014 Sullivan's view on buying groups

was "I still believe this is a slippery slope . . . don't plan to take the lead role." CCFF ¶ 809 (quoting CX2469 at 002).

With respect to the Georgia Dental Alliance ("GDA"), Respondents misstate the end date of the conspiracy. Complaint Counsel does not allege that the conspiracy came to a hard stop in April 2015. Instead, after Benco was forced to log its competitor communications, the conspiracy became harder to manage and began to unravel. Nevertheless, GDA requested bids from each of the Respondents. None of them responded, with Benco going so far as to acknowledge that Benco replied on September 13, 2015, that it declined to respond to the RFP, writing, "Benco, as a matter of policy, does not participle in GPOs. (CX1036 at 001; 0137 at 001; CX3020).

121. Complaint Counsel presented no evidence at trial that Schein, Patterson, or Benco engaged in parallel conduct "so unusual that in the absence of an advance agreement, no reasonable firm would have engaged in it." *See In re Baby Food*, 166 F.3d at 135.

Response to Proposed Conclusion of Law No. 121

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

This proposed conclusion is misleading as to the law on parallel conduct. *See* Response to Proposed Conclusions of Law No. 38-39. To the extent this proposed conclusion suggests the Respondents did not act in parallel, it is factually incorrect. *See, e.g.*, Complaint Counsel's Reply to Benco Post-Tr. Br. § I.B.4.

122. Complaint Counsel's failure to show parallel conduct between Schein, on the one hand, and Patterson and Benco on the other, negates the inference that Schein participated in a conspiracy to not do business with, or provide discounts to, buying groups.

Response to Proposed Conclusion of Law No. 122

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3. Additionally, it is factually incorrect. *See* Responses to Proposed Conclusions Nos. 119-120.

123. Complaint Counsel's failure to show parallel conduct between Patterson, on the one hand, and Schein and Benco on the other, negates the inference that Patterson participated in a conspiracy to not do business with, or provide discounts to, buying groups.

Response to Proposed Conclusion of Law No. 123

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3. Additionally, it is factually incorrect. *See, e.g.*, Responses to Proposed Conclusions Nos. 119-120.

124. Complaint Counsel's failure to show parallel conduct between Benco, on the one hand, and Schein and Patterson on the other, negates the inference that Benco participated in a conspiracy to not do business with, or provide discounts to, buying groups.

Response to Proposed Conclusion of Law No. 124

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3. Additionally, it is factually incorrect. *See, e.g.*, Responses to Proposed Conclusions Nos. 119-120.

125. Complaint Counsel's attempt to disregard Schein's dealings with buying groups as "cheating" is rejected. Complaint Counsel failed to introduce independent evidence sufficient to justify a finding of a conspiracy, or any evidence indicative of cheating (such as efforts to keep negotiations and business with buying groups secret), and as such, it would be improper for the finder of fact to transform evidence of non-parallel conduct

into evidence of "cheating.

Response to Proposed Conclusion of Law No. 125

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3. Additionally, it is factually incorrect. *See, e.g.*, Responses to Proposed Conclusions Nos. 119-120.

126. The testimony of Complaint Counsel's expert, Dr. Marshall, that Schein's dealings with Smile Source and other buying groups represent instances of cheating is unreliable, inadmissible under *Daubert* and F.R.E. 702, and, if admissible, entitled to little or no weight. Dr. Marshall's opinion improperly assumes the existence of a conspiracy, and failed to offer any basis, other than his own *ipse dixit*, for distinguishing between parallel conduct and cheating. *See Gen. Elec. Co.*, 522 U.S. at 146. Moreover, his opinion is not helpful to the trier of fact because it is based merely on the interpretation of the factual record, and not any economic analysis, or specialized knowledge or skill. *Highland Capital Mgmt., L.P.*, 379 F. Supp. 2d at 473 n.2; *see also Waymo LLC v. Uber Techs., Inc.*, 2017 WL 6887043, at *5 (N.D. Cal. 2017) (granting motion to exclude an expert witness where "[t]here is no reason for [the expert] to serve as a mouthpiece for arguments that [plaintiff's] lawyers can make.").

Response to Proposed Conclusion of Law No. 126

To the extent this proposed conclusion addresses the admissibility of expert testimony, it is misleading as irrelevant, as "[m]ost of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury." *Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 616 F. Supp. 2d 1250, 1256 n.4 (M.D. Fla. 2009) (citing *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000)). Additionally, to the extent this proposed conclusion 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).

Nonetheless, as explained in Complaint Counsel's Reply to Benco Post-Trial Brief § I.B.4, the record evidence, including Dr. Marshall's analyses, and legal precedent support Complaint Counsel's assertion that Schein acted in parallel with Benco and Patterson during the conspiracy period in instructing its sales forces to categorically turn down buying groups pursuant to a no buying group policy and also cheated on this conspiracy. *See also generally*, Responses to Proposed Conclusions Nos. 119-120.

To the extent Dr. Marshall considered the factual record in preparing his report, it was appropriate to do so. "It is consistent with sound economic practice to review the factual record and formulate a hypothesis that can then be tested using economic theory—the examination of the factual record is necessary to determine which tests to run and to confirm that the stories drawn from the data and from the factual record are consistent." *In re Processed Egg Prods. Antitrust Litig.*, 81 F. Supp. 3d 412, 424 (E.D. Pa. 2015).

127. Complaint Counsel's failure to adduce evidence of parallel conduct warrants a finding in Respondents' favor.

Response to Proposed Conclusion of Law No. 127

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3. Additionally, it is factually incorrect. *See, e.g.*, Responses to Proposed Conclusions Nos. 119-120.

128. Even if parallel conduct had been established, Complaint Counsel has also failed to introduce evidence of plus factors giving rise to an inference that Schein participated in an unlawful agreement.

Response to Proposed Conclusion of Law No. 128

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

This proposed conclusion is misleading because Complaint Counsel introduced both direct and unambiguous evidence sufficient to find an agreement. *See, e.g.*, Complaint Counsel's Post-Tr. Br. §§ I.F ("Benco Orchestrated an Agreement with Patterson that Neither Would Discount to Buying Groups"); I.G ("Benco Orchestrated an Agreement with Schein that Neither Would Discount to Buying Groups"); I.H ("Benco Planned to Shore up the Agreement with Schein and Patterson"); I.I ("The Big Three Communicated About the TDA Buying Group"); Complaint Counsel's Reply to Benco's Post-Tr. Br. § 1.A.1 ("There is Direct and Unambiguous Evidence of an Agreement"). Having demonstrated the existence of an agreement by direct and unambiguous evidence, Complaint Counsel need not also "adduce circumstantial evidence" sufficient to prove the agreement. *See* Complaint Counsel's Post-Tr. Br. § II.I ("'Plus-Factor'" Evidence Confirms the Existence of an Unlawful Agreement."); Complaint Counsel's Reply to Benco Post-Tr. Br. §§ I.B-I.D.

Indeed, this proposed conclusion is misleading to the extent that it requires a showing of plus factors to prevail where a plaintiff's case is not limited to proving agreement based on parallel conduct. "Plaintiffs need not prove parallel pricing in order to prevail on per se claim based on circumstantial evidence." *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 158 (N.D.N.Y. 2010); *accord id.* at 159 ("The Court has already held that evidence of parallel pricing is not a prerequisite to a finding of an agreement based on circumstantial evidence."). "Parallel pricing is merely 'one such form of circumstantial evidence.'" *Id.* at 158. Where, as here, a

plaintiff's case is not centered on conscious parallelism, plaintiffs need not show parallel conduct and plus factors. *Cason-Merenda v. Detroit Med. Ctr.*, 862 F. Supp. 2d 603, 627 (E.D. Mich. 2012).

This proposed conclusion is factually inaccurate, where Complaint Counsel introduced evidence of plus factors confirming Respondents' unlawful agreement. *See, e.g.*, Complaint Counsel's Reply to Schein Post-Tr. Br. § III.B; Complaint Counsel's Reply to Benco Post-Tr. Br. §§ I.B.5, I.B.8, I.C, I.D; Complaint Counsel's Reply to Patterson Post-Tr. Br. § II.B (Argument); Complaint Counsel's Post-Tr. Br. § II.I ("'Plus-Factor'" Evidence Confirms the Existence of an Unlawful Agreement.").

129. Even if parallel conduct had been established, Complaint Counsel has also failed to introduce evidence of plus factors giving rise to an inference that Patterson participated in an unlawful agreement.

Response to Proposed Conclusion of Law No. 129

See Response to Proposed Conclusion of Law 128.

130. Even if parallel conduct had been established, Complaint Counsel has also failed to introduce evidence of plus factors giving rise to an inference that Benco participated in an unlawful agreement.

Response to Proposed Conclusion of Law No. 130

See Response to Proposed Conclusion of Law 128.

131. Complaint Counsel failed to introduce any evidence showing that Schein's conduct went beyond mere interdependence and was so unusual that a reasonable firm would have been unlikely to have engaged in it absent an agreement. This failure warrants dismissal of Complaint Counsel's claims against Schein.

Response to Proposed Conclusion of Law No. 131

See Responses to Proposed Conclusions of Law Nos. 38-39, 121.

132. Complaint Counsel failed to introduce any evidence showing that Patterson's conduct went beyond mere interdependence and was so unusual that a reasonable firm would have been unlikely to have engaged in it absent an agreement. This failure warrants dismissal of Complaint Counsel's claims against Patterson.

Response to Proposed Conclusion of Law No. 132

See Responses to Proposed Conclusions of Law Nos. 38-39, 121.

133. Complaint Counsel failed to introduce any evidence showing that Benco's conduct went beyond mere interdependence and was so unusual that a reasonable firm would have been unlikely to have engaged in it absent an agreement. This failure warrants dismissal of Complaint Counsel's claims against Benco.

Response to Proposed Conclusion of Law No. 133

See Responses to Proposed Conclusions of Law Nos. 38-39, 121.

134. Complaint Counsel failed to show that Schein acted contrary to its unilateral self-interest. Rather, the evidence shows that Schein had independent reasons for doing business with some buying groups and declining to do business with other buying groups. As the largest distributor, Schein had the most to lose, and the least to gain, by doing business with such groups. Its deliberate strategy of choosing a select group of buying groups to enter into relationships with, while rejecting others, was rational in light of the fact that (i) many (or most) buying groups did not present sufficient opportunities for incremental business to offset the risks of cannibalization or the internal or external conflicts arising from doing business with such groups; (ii) buying groups remained a small portion of the market; (iii) Schein's largest competitors were not actively doing business with such groups; and (iv) should circumstances change, Schein could quickly enter into or expand its relationships with buying groups. As such, Schein did not face significant risk by not embracing all buying groups.

Response to Proposed Conclusion of Law No. 134

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

The proposed conclusion is misleading as to the law because Complaint Counsel has provided unambiguous evidence of Respondents' agreement. *See, e.g.*, Complaint Counsel's

Post-Tr. Br. §§ I.F ("Benco Orchestrated an Agreement with Patterson that Neither Would Discount to Buying Groups"); I.G ("Benco Orchestrated an Agreement with Schein that Neither Would Discount to Buying Groups"); I.H ("Benco Planned to Shore up the Agreement with Schein and Patterson"); I.I ("The Big Three Communicated About the TDA Buying Group"); Complaint Counsel's Reply to Benco's Post-Tr. Br. § 1.A.1 ("There is Direct and Unambiguous Evidence of an Agreement"). Where a plaintiff relies on evidence beyond conscious parallelism, it need not prove actions against self-interest. *Cf. Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 158 (N.D.N.Y. 2010) ("Plaintiffs need not prove parallel pricing in order to prevail on per se claim based on circumstantial evidence.").

Further, this proposed conclusion is factually inaccurate to the extent that it argues that Schein did not act contrary to its self-interest. *See, e.g.*, Complaint Counsel's Reply to Schein Post-Tr. Br. § III.B.2.b. It is also inaccurate to the extent it argues that Schein had a policy to do business with buying groups during the conspiracy period. *See, e.g.*, Complaint Counsel's Reply to Schein Post-Tr. Br. §§ II.B, III.B.1.

This proposed conclusion is also misleading to the extent it suggests that conduct consistent with self-interest negates a finding of agreement. As Areeda and Hovenkamp instruct, "It is important not to be misled by *Matsushita*'s statement that the plaintiff's evidence, if it is to prevail, must 'tend to exclude the possibility that the alleged conspirators acted independently.' The Court surely did not mean that the plaintiff must disprove all nonconspiratorial explanations for the defendants' conduct. Not only did the [C]ourt use the word 'tend,' but the context made clear that the Court was simply requiring sufficient evidence to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not." Areeda & Hovenkamp ¶ 14.03(b); *see also In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012) ("Requiring

a plaintiff to 'exclude' or 'dispel' the possibility of independent action places too heavy a burden on the plaintiff. Rather if a plaintiff relies on ambiguous evidence to prove its claim, the existence of a conspiracy must be a reasonable inference that the jury could draw from that evidence; it need not be the *sole* inference."); *In re Benco Dental Supply Co.*, Docket No. 9379, 2018 WL 6338485, at *5 (FTC Nov. 26, 2018) ("The plaintiff . . . need not demonstrate that the inference of conspiracy is the sole inference. Rather, the inference of conspiracy need only be 'reasonable in light of the competing inferences of independent action or collusive activity.'") (citation omitted). As the Second Circuit has recognized, "'independent reasons' can also be "interdependent," and the fact that [defendant's] conduct was in its own economic interest in no way undermines the inference that it entered an agreement to raise . . . prices." *United States v. Apple, Inc.*, 791 F.3d 290, 317-18 (2d Cir. 2015), *aff'd,* 791 F.3d 290 (2d Cir. 2015 (citing Areeda & Hovenkamp ¶ 1413a); *see also Apple,* 952 F. Supp. 2d at 700 ("Apple's entirely appropriate or even admirable motives do not preclude a finding that Apple also intentionally engaged with the Publisher Defendants in a scheme to raise e-book prices.").

135. Complaint Counsel failed to show that Patterson acted contrary to its unilateral self-interest. Patterson's choice in 2013 to have its new Special Markets division focus only on the most promising DSOs, and not on GPOs, was rational and in Patterson's interest. After having nearly ceded the DSO segment to Schein and Benco, Patterson invested millions to catch up, creating a new business infrastructure to handle DSOs' high-volume, centralized ordering. Because GPOs do not order product centrally, or at all, Patterson Special Markets' central ordering capabilities were not suited to serving them. Nor were GPOs as attractive a business opportunity as DSOs, and it was in Patterson's interest to ensure that its Special Markets initiative remained focused on the most lucrative opportunities, to justify its investment. Because this decision by Patterson was supported by an independent business justification, there is no basis to apply the actions-against-self-interest plus factor.

Response to Proposed Conclusion of Law No. 135

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3, and should be disregarded.

This proposed conclusion is legally misleading for the reasons discussed in Response to Proposed Conclusion of Law No. 134.

This proposed conclusion is also factually inaccurate, as Complaint Counsel produced evidence showing that Patterson acted contrary to its unilateral self-interest. Respondents acted against their self-interest by (1) communicating their internal company policies and future bidding plans with their competitors, and (2) passing up the opportunity to gain incremental profits by having a blanket refusal to do business with buying groups. *See, e.g.*, Complaint Counsel's Post-Tr. Br. § II.I.1 ("The Big Three Acted Against Their Unilateral Self-Interest."); Complaint Counsel's Reply to Patterson Post-Tr. Br. §§ III (Facts), II.B (Argument); Complaint Counsel's Post-Tr. Br. §§ I, I.F.4, II, IV.

136. Patterson Dental's choices not to engage with specific buying groups were also justifiable. Patterson Dental evaluated each buying group opportunity on its merits—it met with buying groups, listened to their proposals, and determined one-by-one whether these proposals made business sense for Patterson. Groups that could not deliver volume commitments or presented incoherent, dishonest, or outlandish proposals were not attractive business partners to Patterson. Thus, Patterson chose not to do business with these groups. Because this decision by Patterson was supported by an independent business justification, there is no basis to apply the actions-against-self-interest plus factor.

Response to Proposed Conclusion of Law No. 136

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as

required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3, and should be disregarded.

This proposed conclusion is legally misleading for the reasons discussed in Response to Proposed Conclusion of Law No. 134.

This proposed conclusion is also factually inaccurate, as Complaint Counsel produced evidence showing that Patterson acted contrary to its unilateral self-interest. Respondents acted against their self-interest by (1) communicating their internal company policies and future bidding plans with their competitors, and (2) passing up the opportunity to gain incremental profits by having a blanket refusal to do business with buying groups. *See, e.g.*, Complaint Counsel's Post-Tr. Br. § II.I.1 ("The Big Three Acted Against Their Unilateral Self-Interest."); Complaint Counsel's Reply to Patterson Post-Tr. Br. §§ III (Facts), II.B (Argument).

Moreover, the proposed conclusion is factually inaccurate to the extent that it claims that Patterson evaluated buying groups on their merits and made one-by-one determinations to reject them during the conspiracy period. Indeed, the excuses Patterson offers for not dealing with buying groups during the conspiracy were merely pretext, as the record evidence reveals that Patterson declined these groups because they were buying groups. *See, e.g.*, Complaint Counsel's Reply to Patterson Post-Tr. Br. § III (Facts).

137. Complaint Counsel also failed to show that Benco acted contrary to its unilateral economic self-interest. Benco's value proposition was based on staying close to its customers and not letting any other entity or middlemen come between it and its customers. Benco also saw no benefit to doing business with buying groups, as they could not guarantee volume or reduce Benco's costs to serve their members. Thus, from 1996 on, Benco followed a policy of not offering discounts to buying groups. Complaint Counsel acknowledges that Benco followed this policy for 15 years before the beginning of the alleged conspiracy period, and Complaint Counsel do not contest that Benco pursued this unilateral policy in its own self-interest.

Response to Proposed Conclusion of Law No. 137

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

As explained fully in Complaint Counsel's Post-Trial Brief, Respondents acted against their self-interest by (1) communicating their internal company policies and future bidding plans with their competitors, and (2) passing up the opportunity to gain incremental profits by having a blanket refusal to do business with buying groups. *See, e.g.*, Complaint Counsel's Post-Tr. Br. § II.I.1 ("The Big Three Acted Against Their Unilateral Self-Interest."); *see also* Complaint Counsel's Reply to Benco Post-Tr. Br. § I.D.2 ("The Factual Record Shows That Benco Acted Against Its Self-Interest").

This proposed conclusion is also misleading to the extent it suggests that conduct consistent with self-interest negates a finding of agreement. As Areeda and Hovenkamp instruct, "It is important not to be misled by *Matsushita*'s statement that the plaintiff's evidence, if it is to prevail, must 'tend to exclude the possibility that the alleged conspirators acted independently.' The Court surely did not mean that the plaintiff must disprove all nonconspiratorial explanations for the defendants' conduct. Not only did the [C]ourt use the word 'tend,' but the context made clear that the Court was simply requiring sufficient evidence to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not." Areeda & Hovenkamp ¶ 14.03(b); *see also In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012) ("Requiring a plaintiff to 'exclude' or 'dispel' the possibility of independent action places too heavy a burden on the plaintiff. Rather if a plaintiff relies on ambiguous evidence to prove its claim, the existence of a conspiracy must be a reasonable inference that the jury could draw from that

evidence; it need not be the *sole* inference."); *In re Benco Dental Supply Co.*, Docket No. 9379, 2018 WL 6338485, at *5 (FTC Nov. 26, 2018) ("The plaintiff . . . need not demonstrate that the inference of conspiracy is the sole inference. Rather, the inference of conspiracy need only be 'reasonable in light of the competing inferences of independent action or collusive activity.'") (citation omitted). As the Second Circuit has recognized, "'independent reasons' can also be "interdependent," and the fact that [defendant's] conduct was in its own economic interest in no way undermines the inference that it entered an agreement to raise . . . prices." *United States v. Apple, Inc.*, 791 F.3d 290, 317-18 (2d Cir. 2015) (citing Areeda & Hovenkamp ¶ 1413a), *aff'd,* 791 F.3d 290 (2d Cir. 2015); *see also Apple,* 952 F. Supp. 2d at 700 ("Apple's entirely appropriate or even admirable motives do not preclude a finding that Apple also intentionally engaged with the Publisher Defendants in a scheme to raise e-book prices.").

Additionally, this proposed finding is misleading because courts have repeatedly found a conspiracy where a defendant acted the same before and after joining the conspiracy. *United States v. Champion Int'l Corp.*, 557 F.2d 1270, 1274 (9th Cir. 1977); *Advert. Specialty Nat'l Ass'n v. FTC*, 238 F.2d 108, 117 (1st Cir. 1956)*; United States v. N.D. Hosp. Ass'n*, 640 F. Supp. 1028, 1036-37 (D.N.D. 1986);.

138. Benco followed exactly the same policy during the alleged conspiracy period – nothing changed. Benco's commitment to staying close to its customers remained unchanged; Benco's reasons for not offering discounts to buying groups remained unchanged; and Benco's conduct toward buying groups remained unchanged. Throughout the conspiracy period, Benco's actions were driven by the identical economic incentives and unilateral self-interest as its conduct for the previous 15 years.

Response to Proposed Conclusion of Law No. 138

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

As explained fully in Complaint Counsel's Post-Trial Brief, Respondents acted against their self-interest by (1) communicating their internal company policies and future bidding plans with their competitors, and (2) passing up the opportunity to gain incremental profits by doing business with buying groups. *See* Complaint Counsel's Post-Tr. Br. § II.I.1 ("The Big Three Acted Against Their Unilateral Self-Interest."); *see also* Complaint Counsel's Reply to Benco Post-Tr. Br. § I.D.2 ("The Factual Record Shows That Benco Acted Against Its Self-Interest").

Additionally, this proposed conclusion of law is misleading because courts have repeatedly found a conspiracy where a defendant acted the same before and after joining the conspiracy. *United States v. Champion Int'l Corp.*, 557 F.2d 1270, 1274 (9th Cir. 1977); *Advert. Specialty Nat'l Ass'n v. FTC*, 238 F.2d 108, 117 (1st Cir. 1956)*; United States v. N.D. Hosp. Ass'n*, 640 F. Supp. 1028, 1036-37 (D.N.D. 1986).

139. The testimony of Complaint Counsel's expert, Dr. Marshall, that Schein acted contrary to its self-interest is unreliable, inadmissible under *Daubert*, and, if admissible, entitled to little or no weight. *First*, Dr. Marshall relies on numerous factual assumptions that are not supported by the record. *Second*, Dr. Marshall failed to analyze the relevant question of whether Schein would make more money or less money had it behaved differently. *Third*, Dr. Marshall improperly extrapolates from his analyses of two unique buying groups (which are themselves flawed) to draw conclusions about buying groups generally. Such extrapolations are not warranted based on the record evidence and are improper under well-established precedent.

Response to Proposed Conclusion of Law No. 139

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as

required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3 and should be disregarded.

To the extent this proposed conclusion addresses the admissibility of expert testimony, it is misleading as irrelevant, as "[m]ost of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury." *Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 616 F. Supp. 2d 1250, 1256 n.4 (M.D. Fla. 2009) (citing *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000)). Additionally, to the extent this proposed conclusion 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).

This proposed conclusion is misleading, as Dr. Marshall's profitability analyses illustrating that Respondents acted contrary to their unilateral self-interests are reliable, well-supported, and consistent with the documentary evidence. *See, e.g.*, Complaint Counsel Reply to Patterson Post-Tr. Br. §§ II.B.2 (Argument), III; Complaint Counsel's Reply to Schein Post-Tr. Br. §§ II.D.4, III.B.2.b; Complaint Counsel's Reply to Benco Post-Tr. Br. §§ I.D.2-I.D.3. Respondents' criticisms of Dr. Marshall are unsupported and unfounded.

The suggestion that Dr. Marshall needed to conduct a but-for analysis is misleading and unsupported by the law. Further, it was not possible to reconstruct a hypothetical marketplace absent the conspiracy because, as a result of Respondents' conduct, no such data exists; Respondents cannot destroy the counterfactual world and then gripe when Dr. Marshall fails to study non-existent data. *Cf. United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) ("To require that Section 2 liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct would only encourage monopolists to take more and earlier anticompetitive action. . . . [N]either plaintiff nor the court

can confidently reconstruct a product's hypothetical technological development in a world absent the defendant's exclusionary conduct. To some degree, 'the defendant is made to suffer the uncertain consequences of its own undesirable conduct.'") (quoting Areeda & Hovenkamp ¶ 651c). Moreover, Dr. Marshall used the well-recognized method of analyzing natural experiments to determine the impacts on price, margin, and customer switching when distributors begin and/or stop working with a buying group as well as the price and margin impacts on independent dentist buying group members. CCFF ¶¶ 1637-1684; CCRF (Benco) ¶ 1023-1025; CCRF (Schein) ¶¶ 1715-1717 (contrasting Dr. Marshall's natural experiments to Dr. Carlton's unreliable and unsupported "formula" Schein attempts to buttress its but-for world arguments). Studying natural experiments is a widely accepted method of analysis in antitrust cases. *See, e.g.*, *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 345 (3d Cir. 2016) (relying on results of natural experiment); *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 14-md-02541 CW, 2019 WL 1747780, at *13 (N.D. Cal. Mar. 8, 2019) (expert analysis based on natural experiments "reliable and persuasive."); *FTC v. ProMedica Health Sys., Inc.*, No. 3:11 CV 47, 2011 WL 1219281, at *14 (N.D. Ohio Mar. 29, 2011) (relying on "real-world natural experiments in the marketplace" to confirm that merging parties competed for significant number of patients in the marketplace); *FTC v. Foster*, No. CIV 07-352 JBACT, 2007 WL 1793441, at *38 (D.N.M. May 29, 2007) ("Where available, the antitrust agencies rely extensively on natural market experiments to provide the relevant evidence."); U.S. Dep't of Justice & FTC Horizontal Merger Guidelines ("Merger Guidelines") § 2.1.2 (2010) ("[t]he [antitrust enforcement] Agencies look for historical events, or 'natural experiments,' that are informative regarding the competitive effects of the merger").

Moreover, this proposed conclusion is misleading to the extent that it suggests that Dr. Marshall's analyses of Kois and Smile Source are not representative of dentists who join buying groups. Dr. Marshall reviewed Kois and Smile Source because they were representative of the market in that they covered a broad geography of the country, a broad time span from 2012

through 2017, and they were varied in terms of size and stage of existence. CCRF (Benco) ¶ 1038-1039; *see also* CCRF (Patterson) ¶¶ 713-714; CCRF (Schein) ¶¶ 1689-1690, 1695. That Dr. Marshall did not study 36 other buying groups does not diminish his results from the Smile Source and Kois natural experiments. *See, e.g.*, *In re NCAA Athletic Grant-in-Aid Cap*, 2019 WL 1747780, at *13 (expert analysis based on natural experiments "reliable and persuasive."). Many of these groups were never fully formed because they could not secure supply discounts from Respondents, precluding any data analysis. CCRF (Benco) ¶ 997 (citing CX7101 at 064 (¶ 163) (Marshall Expert Rebuttal Report)); *see also* CCRF (Patterson) ¶ 713; CCRF (Schein) ¶¶ 1689-1690. Tellingly, Respondents do not argue that Dr. Marshall's numbers are wrong, nor do their own experts calculate lost sales and profits from any of the 36 other buying groups.

140. Dr. Marshall's testimony that Patterson acted contrary to its self-interest is improper under *Daubert* and Federal Rule of Evidence 702. Dr. Marshall testified that he did not study the proposals buying groups that approached Patterson made—whether these proposals were coherent or outlandish, whether these proposals were even made by dentists rather than, as in one case, a veterinarian, or, in another case, a discovered liar with no dental background, or even whether these groups approached Patterson at all during the alleged conspiracy period.

Response to Proposed Conclusion of Law No. 140

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3 and should be disregarded.

To the extent this proposed conclusion addresses the admissibility of expert testimony, it is misleading as irrelevant, as "[m]ost of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury." *Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 616 F. Supp. 2d 1250, 1256 n.4 (M.D. Fla. 2009) (citing *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000)). Additionally, to the extent this

proposed conclusion 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).

This proposed conclusion is misleading, as Dr. Marshall's profitability analyses illustrating that Respondents acted contrary to their unilateral self-interests are reliable, well-supported, and consistent with the documentary evidence. *See, e.g.*, Complaint Counsel Reply to Patterson Post-Tr. Br. §§ II.B.2 (Argument), III; Complaint Counsel's Reply to Schein Post-Tr. Br. §§ II.D.4, III.B.2.b; Complaint Counsel's Reply to Benco Post-Tr. Br. §§ I.D.2-I.D.3. Respondents' criticisms of Dr. Marshall are unsupported and unfounded.

Moreover, the proposed conclusion is misleading on the facts to the extent that it suggest that Respondents rejected buying groups for independent reasons. Indeed, the excuses Patterson offers for not dealing with buying groups during the conspiracy were merely pretext, as the record evidence reveals that Patterson declined these groups because they were buying groups. *See, e.g.*, Complaint Counsel's Reply to Patterson Post-Tr. Br. § III (Facts).

141. Also, in opining that Patterson acted contrary to its self-interest in not doing business with buying groups, Dr. Marshall studied only "a small fraction" of dentists – three-tenths of 1 percent or three one-thousandths of independent dentists. Dr. Marshall's explanation – that he had no additional data available to him—is plainly insufficient.

Response to Proposed Conclusion of Law No. 141

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as

required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3 and should be disregarded.

To the extent this proposed conclusion addresses the admissibility of expert testimony, it is misleading as irrelevant, as "[m]ost of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury." *Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 616 F. Supp. 2d 1250, 1256 n.4 (M.D. Fla. 2009) (citing *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000)). Additionally, to the extent this proposed conclusion 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).

Further, the proposed conclusion is misleading to the extent it suggests that Dr. Marshall should have studied a higher percentage of nationwide dentists. To analyze the profitability of discounting to buying groups, however, Dr. Marshall needed to study sales for dentists who were buying group members; examining sales of independent dentists who were not members of buying groups would have been irrelevant. CCRF (Benco) ¶¶ 1026-1028; *see also* CCRF (Patterson) ¶¶ 733-740; CCRF (Schein) ¶¶ 1689-1690. Dr. Marshall's studies analyzed the purchasing behavior of *all* dentists who were members of Smile Source and Kois who purchased from the buying group distributor. This entailed the analysis of hundreds of dentists across the country—[redacted]. CCFF ¶¶ 1642-1643; CCRF (Benco) ¶¶ 1038-1041, 1026-1028; CCRF (Patterson) ¶¶ 733-740; CCRF (Schein) ¶¶ 1689-1690. There is nothing to suggest that the

purchasing behaviors of these dentists are not representative of other buying group members. Indeed, given Respondents' conspiracy, buying groups remained a small segment of the market, thus significantly limiting the number of dentists appropriate for these studies. If followed, Respondents' attempt to gerrymander the biggest possible denominator to include all dentists in the country creates an absurd result that is of no use to this Court.

142. Finally, Dr. Marshall's case studies do not meet the standards for reliability. One of Dr. Marshall's case studies is limited to a time period one year *prior to* when Patterson allegedly joined a conspiracy, and another covers only the time period two years *after* the alleged conspiracy supposedly ended. And all of his case studies include time in the benchmark periods (*i.e.*, outside the alleged conspiracy period). As such, they fail to distinguish between lawful and allegedly unlawful behavior as required.

Response to Proposed Conclusion of Law No. 142

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

To the extent this proposed conclusion addresses the admissibility of expert testimony, it is misleading as irrelevant, as "[m]ost of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury." *Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 616 F. Supp. 2d 1250, 1256 n.4 (M.D. Fla. 2009) (citing *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000)). Additionally, to the extent this proposed conclusion 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).

To the extent this proposed conclusion suggests that Dr. Marshall's analyses are outside the benchmark period of the case, this argument overlooks that these analyses are natural experiments. Respondents' own experts attest to the "convincing" value of natural experiments. Complaint Counsel's Reply to Benco Post-Tr. Br. § I.D.3 (citing CCRF (Benco) ¶ 1023 (RX2833-050, at ¶ 122 (Wu Expert Report)); quoting *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 215 (D.D.C. 2018)). Dr. Marshall's analyses do no more than corroborate that buying groups provide opportunities for incremental sales. CCRF (Schein) ¶¶ 1662-1669 (explaining that Dr. Marshall's analyses are consistent in demonstrating that it was against Respondents' unilateral economic self-interest to have a no buying group policy whereby Respondents instructed their employees to categorically reject all buying groups, irrespective of the time period). Consistent with the documentary evidence, Dr. Marshall's profitability analyses demonstrated was against Patterson's unilateral self-interest to have a no buying group policy after 2013, whereby it instructed its employees to categorically reject buying groups. CCRF (Patterson) ¶¶ 742-745.

143. Dr. Marshall provided no explanation for why Benco's policy of not offering discounts to unaffiliated buying groups – which it pursued without interruption for 19 years from 1996 to 2015 – suddenly became contrary to Benco's unilateral economic self-interest in 2011. Dr. Marshall's studies underlying his opinion that Benco acted contrary to its unilateral economic self-interest were based on multiple errors and cannot be sustained. Dr. Marshall's theoretical basis was incorrect; he followed no accepted methodology; he studied only a tiny fraction of dentists; he studied only two buying groups, neither of which was representative; he studied third party distributors, but not Benco; his "after-the-fact" review failed to account for risk and uncertainty; his study improperly mixed data from different years; he failed to account for administrative fees and rebates; he relied on unsupported assumptions; he failed to control for other factors; and – most importantly – he failed to perform a counter-factual analysis. A proper counter-factual analysis reveals that Benco had far superior prospects pursuing its own business plan and customers than dealing with buying groups, and it was in Benco's unilateral economic self-interest to use its resources to pursue its own business.

Response to Proposed Conclusion of Law No. 143

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3, and should be disregarded.

To the extent this proposed conclusion addresses the admissibility of expert testimony, it is misleading as irrelevant, as "[m]ost of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury." *Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 616 F. Supp. 2d 1250, 1256 n.4 (M.D. Fla. 2009) (citing *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000)). Additionally, to the extent this proposed conclusion 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).

To the extent that this proposed conclusion suggests that Benco could not have conspired with Schein and Patterson on buying groups because it had a long-standing policy not to discount to buying groups, it is misleading on the law. Courts have repeatedly found a conspiracy where a defendant acted the same before and after joining the conspiracy. *United States v. Champion Int'l Corp.*, 557 F.2d 1270, 1274 (9th Cir. 1977); *Advert. Specialty Nat'l Ass'n v. FTC*, 238 F.2d 108, 117 (1st Cir. 1956)*; United States v. N.D. Hosp. Ass'n*, 640 F. Supp. 1028, 1036-37 (D.N.D. 1986).

Moreover, this proposed conclusion is misleading as to the import of Dr. Marshall's analysis. The purpose of Dr. Marshall's profitability studies was to assess whether buying groups drive incremental business to the contracted distributor, and thus, whether it was against Benco's self-interest to implement an across-the-board no buying group policy. Benco attempts to put the onus on Dr. Marshall's profitability analysis to prove all aspects of Complaint Counsel's case. The analyses do no more than corroborate that buying groups provide opportunities for incremental sales. CCRF (Schein) ¶¶ 1662-1669 (explaining that Dr. Marshall's analyses are consistent in demonstrating that it was against Respondents' unilateral economic self-interest to have a no buying group policy whereby Respondents instructed their employees to categorically reject all buying groups, irrespective of the time period). 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 (CCFF ¶¶ 214-218, 232, 246-249), which became a reality and prompted the conspiracy. CCFF ¶¶ 432-473. Additionally, following the conspiracy, Benco worked with buying group EDA, and sought to get the Kois Buyers Group to join EDA. CCRF (Benco) ¶ 242 (CX1084 at 003 ("JLR and I convinced [EDA] that . . . we should bring in Seattle Study Club and Kois as additional partners, because of their broad market reach and strong brands.").

144. Complaint Counsel also failed to show that Schein had a motive to enter into a conspiracy with Patterson and/or Benco. While the evidence shows that Schein believed that margins might erode if it did business with certain buying groups, such evidence by itself, does not establish a motive to conspire. This is normal, independent competitive behavior and also warrants dismissal of Complaint Counsel's claims against Schein.

Response to Proposed Conclusion of Law No. 144

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

This proposed conclusion is misleading as it downplays the factual record on the threat that Schein perceived from buying groups. Schein feared that competition for buying groups would lead to a "huge price war," "driving margins down across the board." CCFF ¶¶ 196-198 (quoting CX2113 at 001); *see also* CCFF ¶¶ 241-245 (Schein was concerned about how it would compete if buying groups had relationships with other distributors.). Sullivan identified buying groups as one of the "Top 5 'Keeps Me Up at Night'" issues. CCFF ¶ 224 (quoting CX0183 at 001).

Moreover, the proposed conclusion is misleading and inaccurate to the extent that it suggests that rejecting buying groups was normal, independent competitive behavior. While oligopolists might tacitly coordinate their conduct to avoid dealing with a discounter, that is not the factual record here. Instead, Schein *was* discounting to buying groups prior to the conspiracy. Thus, there was no oligopolist "wait-and-see" approach for Schein. Moreover, that Respondents specifically communicated about buying groups on multiple occasions undermines any claim of mere oligopoly behavior. *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 875 (7th Cir. 2015) ("If any of these reflections [to follow the industry leader] persuaded the . . . firm[]—***without any communication with the leader***—to raise their prices, there would be no conspiracy, but merely tacit collusion [or 'conscious parallelism'].") (emphasis added); *Gainesville Utils. Dep't v. Fla. Power & Light Co.*, 573 F.2d 292, 300-01 (5th Cir. 1978) (refuting the notion of conscious parallelism where the record consisted of numerous exchanges

of letters between high executives noting "[t]he record, however, indicates much more than just parallel activity").

145. Complaint Counsel also failed to show that Patterson viewed buying groups as a threat during the alleged conspiracy and thus did not have a motive to conspire about them with its arch-rivals. Particularly given buying groups' minimal market presence in early 2013, Patterson would have stood to gain little by departing from its daily competition with Schein and Benco to join an agreement over a non-material customer segment. Patterson's conduct towards buying groups is consistent with other, equally plausible explanations supported in the record (evaluating them individually and rejecting most as unattractive).

Response to Proposed Conclusion of Law No. 145

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3, and should be disregarded.

This proposed conclusion is misleading and factually inaccurate to the extent it suggests Patterson did not have a motive to conspire. Patterson's fear that buying groups were a "slippery slope" and "a race to the bottom in terms of pricing provided compelling motive to conspire. CCFF ¶ 201 (quoting CX3016 at 001; CX8004 (McFadden Dep. at 105-106)). Patterson's contemporaneous documents verify that the company viewed buying groups as a threat. *See, e.g.*, CCFF ¶ 237 (quoting CX0084 at 001 (buying groups are a threat that "scares me")); CCFF ¶ 228 (CX8023 (Guggenheim, Dep. at 221-222) (recognizing the threat posed by buying groups because "often [they] come with reduced pricing.")).

Moreover, this proposed conclusion is misleading and factually inaccurate to suggest that Patterson evaluated buying groups individually and had independent reasons for rejecting each one. Indeed, the excuses Patterson offers for not dealing with buying groups during the

conspiracy were merely pretext, as the record evidence reveals that Patterson declined these groups because they were buying groups. *See, e.g.*, Complaint Counsel's Reply to Patterson Post-Tr. Br. § III (Facts).

146. Complaint Counsel also failed to establish that Benco had a motive to conspire with Schein or Patterson. Benco was substantially different from either Schein or Patterson. It was much smaller than Schein or Patterson and, importantly, as of 2011, it was focused on completing its expansion across the continental United States. And as the report and testimony of Dr. Johnson confirm, Benco had attractive growth possibilities pursuing its own business opportunities. Regardless whether Schein and Patterson, with their large size and established nationwide footprints, chose to do business with buying groups, Benco's motive was to continue to pursue its own strategy. Benco representatives sometimes expressed disdain or even antipathy for buying groups, as they would for any entity that interfered with the customer relationship but offered little if any value, but this is hardly evidence of motive for entering into a conspiracy.

Response to Proposed Conclusion of Law No. 146

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

As described in detail in Complaint Counsel's Post-Trial Brief, Benco (along with Schein and Patterson) feared that competition for buying groups would lead to a "price war" and a "race to the bottom" for the industry. *See e.g.*, Complaint Counsel's Post-Tr. Br. § I.C. This proposed conclusion of law is contrary to the factual record, which shows that Benco in particular feared the growth of buying groups. *See, e.g.*, Complaint Counsel's Post-Tr. Br. § I.C; Complaint Counsel's Reply to Benco Post-Tr. Br. § I.B.5; *see also, e.g.*, CCFF ¶¶ 198-200, 203, 211, 214-217, 230-236, 246-249.

147. Complaint Counsel's argument, and the testimony of Complaint Counsel's expert, Dr. Marshall, that the market structure or other industry characteristics make the existence of an unlawful agreement likely is rejected. Such industry characteristics are incapable of distinguishing between lawful interdependence and unlawful agreement. Indeed, the

same industry characteristics that Complaint Counsel claims makes a conspiracy more likely, also make a conspiracy less likely, as they may obviate the need to enter into any conspiracy at all. Dr. Marshall failed to introduce any economic analysis, beyond his mere *ipse dixit*, that market structure makes lawful interdependent conduct, or conscious parallelism, unlikely.

Response to Proposed Conclusion of Law No. 147

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

This proposed conclusion is misleading, as it misconstrues the purpose of Dr. Marshall's opinions on market structure. Dr. Marshall did not opine that a conspiracy can be inferred from industry characteristics alone. Rather, he opined that the industry was "conducive to effective collusion." CCFF ¶ 1601 (citing CX7100 at 011 (¶12) (Marshall Expert Report)). Dr. Marshall's opinions are consistent with that of Patterson's expert, Dr. Wu, who described the industry structure in this case as having "the potential for strategic interaction." CCRF (Benco) ¶¶ 787-788, 820-821 (citing RX2833 at 017 (¶27) (Wu Expert Report)). Moreover, Dr. Marshall's opinion is well-supported. Dr. Marshall identified the following factors as relevant to his conclusion that the market structure was conducive to collusion: (1) high market concentration, (2) the low price elasticity of independent dentists' demand, (3) barriers to entry in full-service distribution, (4) a low supply elasticity by non-colluding full-service distributors outside of their relevant geographic and product footprints, and (5) manufacturers' low bargaining power. CCFF ¶¶ 1601-1623. Further bolstering Marshall's opinions, Respondents' own executives admit to their high market share. CCFF ¶¶ 1450, 1455-1458.

Further, to the extent this proposed conclusion claims that an oligopoly market structure makes conspiracy less likely, it is misleading as contrary to precedent. *See, e.g.*, *Todd v. Exxon*

Corp., 275 F.3d 191, 208 (2d Cir. 2001) ("Generally speaking, the possibility of anticompetitive collusive practices is most realistic in concentrated industries."); *Gainesville Utils. Dep't v. Fla. Power & Light Co.*, 573 F.2d 292, 303 (5th Cir. 1978) ("Economists recognize that when a market is concentrated it is easier to coordinate collusive behavior."); *HM Compounding Servs., Inc. v. Express Scripts, Inc.*, No. 4:14–CV–1858 JAR, 2015 WL 4162762, at *5 (E.D. Mo. July 9, 2015) (the highly concentrated nature of the PBM industry supports an inference of conspiracy).

At bottom, Complaint Counsel's case does not rest on inferring agreement from oligopoly market structure, even if some courts find that oligopolies are more conducive to collusion. Market structure is but a plus factor that is to be considered in the totality of the evidence.

148. Complaint Counsel failed to introduce sufficient non-economic evidence of a traditional conspiracy to carry its burden of showing that it is more likely than not that Schein participated in an unlawful agreement.

Response to Proposed Conclusion of Law No. 148

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

Nonetheless, as explained in Complaint Counsel's Post Trial Brief and Reply Brief, Complaint Counsel introduced non-economic evidence of a traditional conspiracy show that it is more likely than not that Schein participated in an unlawful agreement. *See, e.g.*, Complaint Counsel's Post-Tr. Br. §§ I-IV; Complaint Counsel's Reply to Benco Post-Tr. Br. §§ I-II; Complaint Counsel's Reply to Schein Post-Tr. Br. § III.

149. Complaint Counsel failed to introduce sufficient non-economic evidence of a traditional conspiracy to carry its burden of showing that it is more likely than not that Patterson participated in an unlawful agreement.

Response to Proposed Conclusion of Law No. 149

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

Nonetheless, as explained in Complaint Counsel's Post Trial Brief and Reply Brief, Complaint Counsel introduced non-economic evidence of a traditional conspiracy show that it is more likely than not that Patterson participated in an unlawful agreement. *See, e.g.*, Complaint Counsel's Post-Tr. Br. §§ I-IV; Complaint Counsel's Reply to Benco Post-Tr. Br. §§ I-II; Complaint Counsel's Reply to Patterson Post-Tr. Br. §§ Introduction, V (Facts), I.A (Argument).

150. Complaint Counsel failed to introduce sufficient non-economic evidence of a traditional conspiracy to carry its burden of showing that it is more likely than not that Benco participated in an unlawful agreement.

Response to Proposed Conclusion of Law No. 150

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

Nonetheless, as explained in Complaint Counsel's Post Trial Brief and Reply Brief, Complaint Counsel introduced non-economic evidence of a traditional conspiracy show that it is more likely than not that Benco participated in an unlawful agreement. *See, e.g.*, Complaint Counsel's Post-Tr. Br. §§ I-IV; Complaint Counsel's Reply to Benco Post-Tr. Br. §§ I-II.

151. The sworn denials of the witnesses, including the witnesses who were allegedly involved in reaching agreement or implementing it, weigh significantly against the finding of a

conspiracy. The court finds these sworn denials to be credible.

Response to Proposed Conclusion of Law No. 151

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

Moreover, the proposed conclusion is misleading as it is contrary to case law. *See, e.g.*, Response to Proposed Conclusion of Law No. 23; Complaint Counsel's Reply to Benco Post-Tr. Br. § I.A.2 ("Witness Denials Are Not Sufficient to Overcome the Overwhelming Unambiguous Evidence of Agreement"). The facts of this case are also distinguishable from other matters involving witness denials. For example, Benco has argued that witness testimony denying the existence of a conspiracy is direct evidence of a lack of agreement, citing this Court's decision in *McWane.* But this case is nothing like *McWane*, because here, unlike *McWane*, there is unambiguous evidence establishing that the competitors directly communicated about the subject matter of the conspiracy. *In re McWane, Inc.*, Docket No. 9351, 2013 WL 8364918, at *265 (FTC May 1, 2013) (Initial Decision) ("There is no evidence showing what Mr. Tatman and Mr. Rybacki discussed . . .").

Further, this proposed conclusion contains no citations to provide a basis for giving more weight to self-serving statements than contemporaneous business documents and other testimony. Contemporaneous documents represent the most reliable evidence, in part because witness memories fade over time. *United States v. Gen. Elec. Co.*, 82 F. Supp. 753, 844 (D.N.J. 1949) (The documents in the record "were never intended to meet the eyes of any one but the [executives] themselves, and were, as it were . . . cinematographic photographs of their purposes at the time when they were written. They have, therefore, the highest validity as evidence of

intention," and should be afforded greater weight than witness denials of an agreement), *decision supplemented*, 115 F. Supp. 835 (D.N.J. 1953) ("[A]lthough in many instances [the witness] attempted to contradict [documents], his contradiction only served to affect the general credibility of his testimony."); *FTC v. Qualcomm, Inc.*, No. 17-CV-00220, 2019 WL 2206013, at *7 (N.D. Cal. May 21, 2019) ("The Court finds Qualcomm's internal, contemporaneous documents more persuasive than Qualcomm's trial testimony prepared specifically for this antitrust litigation.").

Moreover, witnesses who truly believe that they did not enter into an agreement may nonetheless have engaged in unlawful conduct under antitrust laws. It is a mixed question of law and fact to be decided by the Court whether an "agreement" exists. *See Mayor & City Council of Baltimore, Maryland. v. Citigroup, Inc.*, 709 F.3d 129, 135-36 (2d Cir. 2013) ("The ultimate existence of an 'agreement' under antitrust law, however, is a legal conclusion, not a factual allegation."); *Gainesville Util. Dep't v. Fla. Power & Light Co.*, 573 F.2d 292, 301 n.14 (5th Cir. 1978) ("The officials of the power companies deny the existence of a territorial agreement, but where such testimony is in conflict with contemporaneous documents we can give it little weight, *particularly when the crucial issues involve mixed questions of law and fact.*") (emphasis added and internal quotations omitted). Thus, lay witness testimony that there was no "agreement" under antitrust laws does not end the inquiry.

152. Complaint Counsel did not introduce evidence sufficient to show that (i) there was a prior understanding between Schein and any other Respondent; (ii) Schein made any commitment to any other Respondent to refrain from doing business with, or offer discounts to, buying groups; or (iii) felt a restricted sense of freedom, or an obligation to any other Respondent, with respect to Schein's dealings with buying groups.

Response to Proposed Conclusion of Law No. 152

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

To the extent this proposed conclusion suggests Complaint Counsel must prove all three of these elements to establish an agreement, it is contrary to law. Rather, this is a list of alternative ways to establish an agreement. *In re McWane*, Docket No. 9351, 2013 WL 8364918, at *245 (FTC May 1, 2013) (Initial Decision). Nonetheless, Complaint Counsel introduced evidence that Respondents entered into an unlawful agreement through evidence of a prior understanding or commitment, as well as a sense of obligation that restricts freedom of action. *See, e.g.*, Complaint Counsel's Post-Tr. Br. §§ I-IV; *see also* Complaint Counsel's Reply to Benco Post-Tr. Br. §§ I-II; Complaint Counsel's Reply to Patterson Post-Tr. Br. §§ I-III; Complaint Counsel's Reply to Schein Post-Tr. Br. § III.

153. Complaint Counsel did not introduce evidence sufficient to show that (i) there was a prior understanding between Patterson and any other Respondent; (ii) Patterson made any commitment to any other Respondent to refrain from doing business with, or offer discounts to, buying groups; or (iii) felt a restricted sense of freedom, or an obligation to any other Respondent, with respect to Patterson's dealings with buying groups.

Response to Proposed Conclusion of Law No. 153

See Response to Proposed Conclusion of Law No. 152.

154. Complaint Counsel did not introduce evidence sufficient to show that (i) there was a prior understanding between Benco and any other Respondent; (ii) Benco made any commitment to any other Respondent to refrain from doing business with, or offer discounts to, buying groups; or (iii) felt a restricted sense of freedom, or an obligation to any other Respondent, with respect to Benco's dealings with buying groups.

Response to Proposed Conclusion of Law No. 154

See Response to Proposed Conclusion of Law No. 152.

155. There is substantial evidence in the record that Schein acted inconsistently with any alleged agreement to not do business with, or offer discounts to, buying groups. Such evidence negates any inference of a conspiracy. Such evidence, including evidence that Schein did business with a number of buying groups during the alleged conspiracy period, and that it devoted substantial resources to evaluating and negotiating with other buying groups, refutes, rather than supports, any assertion that Schein had an understanding with, made commitments to, or felt a restricted sense of freedom or an obligation to, any other Respondent.

Response to Proposed Conclusion of Law No. 155

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

This proposed conclusion is misleading as to the facts to the extent it suggest Schein did not conform its conduct to the conspiracy. *See, e.g.*, Complaint Counsel's Reply to Schein Post-Tr. Br. §§ II.A ("Schein Worked With Buying Groups Prior to the Conspiracy, and Adopted a Policy of Not Working With Buying Groups During the Conspiracy."), III.B.1 ("Schein's Policy of Categorically Rejecting Buying Groups Shows Parallel Conduct."). Moreover, it is misleading on the facts to the extent that it mischaracterizes its history with buying groups. *See, e.g.*, Complaint Counsel's Reply to Schein Post-Tr. Br. § II.B. ("Schein Obfuscates its Relationship With Buying Groups in its 'Chronological History of Schein's Buying Group Interactions.'").

156. There is substantial evidence in the record that Patterson acted inconsistently with any alleged agreement not to do business with, or offer discounts to, buying groups. Patterson did do business with at least two buying groups during its alleged participation in a conspiracy to boycott buying groups. Patterson also met with and evaluated numerous buying groups during its alleged participation in a conspiracy to boycott

buying groups – a waste of time and effort if it was bound by agreement not to work with buying groups.

Response to Proposed Conclusion of Law No. 156

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3, and should be disregarded.

Moreover, the proposed conclusion is factually inaccurate to the extent that it claims that Patterson evaluated buying groups on their merits and made one-by-one determinations to reject them during the conspiracy period. Indeed, the excuses Patterson offers for not dealing with buying groups during the conspiracy were merely pretext, as the record evidence reveals that Patterson declined these groups because they were buying groups. *See, e.g.*, Complaint Counsel's Reply to Patterson Post-Tr. Br. § III (Facts). And the weight of the evidence, shows that Patterson acted in parallel to carry out Respondents' agreement. *See, e.g.*, Complaint Counsel's Reply to Benco Post-Tr. Br. § I.B.4.

To the extent that Patterson claims to have done business with two buying groups during the conspiracy period, that is simply false. Though the proposed conclusion does not name the two buying groups, Patterson's other advocacy suggests that it did business with Jackson Health and OrthoSynetics, which Patterson claims "it thought" were buying groups. *See* Patterson Post-Tr. Br. at 16. The factual record undermines this assertion, and reveals that Patterson's employees knew that neither of these entities were buying groups. Rogan testified that Jackson Health is a hospital system, and contemporaneous documents confirm that Patterson viewed it as such in 2014. CCFF ¶ 656 (citing Rogan, Tr. 3534; CX0107 at 001; RX0270 at 001). Likewise, Patterson's contemporaneous documents indicate that it viewed OrthoSynetics as a DSO, not a buying group,

in 2013 and 2014 (CCFF ¶¶ 611, 654-55 (citing CX3014 at 023-24; RX0342 at 001)), and McFadden testified that OrthoSynetics is a specialty group for orthodontists that is "not like a buying group." CCRF ¶ 174 (quoting RX0342; citing McFadden, Tr. 2728-2730).

Finally, the statement that Patterson "met with and evaluated numerous buying groups" during the conspiracy is unsupported by the factual record and should be disregarded.

157. The evidence of competitor communications cited by Complaint Counsel, either by itself or in conjunction with other record evidence, does not give rise to an inference of a conspiracy.

Response to Proposed Conclusion of Law No. 157

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

Nonetheless, as explained in Complaint Counsel's Post Trial Brief and Reply Briefs, the evidence of competitor communications, in combination with the totality of the evidence, establishes a *per se* unlawful agreement by a preponderance of the evidence. *See* Complaint Counsel's Post-Tr. Br. §§ I-IV; *see also* Complaint Counsel's Reply to Benco Post-Tr. Br. §§ I-II; Complaint Counsel's Reply to Patterson Post-Tr. Br. §§ Introduction, I-II (Argument); Complaint Counsel's Reply to Schein Post-Tr. Br. § III

158. The majority of competitor communications cited by Complaint Counsel relate to legitimate or irrelevant topics, such as sports, social commentary, or unrelated business dealings or disputes. Such evidence is not probative, and is entitled to little or no weight.

Response to Proposed Conclusion of Law No. 158

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

As explained in Complaint Counsel's Post Trial Brief and Reply Briefs, the evidence of competitor communications, in combination with the totality of the evidence, establishes a *per se* unlawful agreement by a preponderance of the evidence. *See, e.g.*, Complaint Counsel's Post-Tr. Br. §§ I-IV; *see also* Complaint Counsel's Reply to Benco Post-Tr. Br. §§ I-II; Complaint Counsel's Reply to Patterson Post-Tr. Br. §§ Introduction, I-II (Argument); Complaint Counsel's Reply to Schein Post-Tr. Br. § III.

This proposed conclusion is misleading to the extent that it claims inter-firm communications are not probative of agreement. While opportunity evidence on its own may not be definitive evidence of an agreement, considered in the context of the totality of the evidence, it may further corroborate other evidence of agreement and provide probative value. *See, e.g.*, *C-O-Two Fire Equip. Co. v. United States*, 197 F.2d 489, 493 (9th Cir. 1952) (finding evidence of defendants' membership in same association and resulting opportunity for meeting, without evidence of what occurred at meeting, contributed to evaluation of plus factors leading to conclusion of conspiracy). Moreover, to the extent this proposed conclusion attempts to portray all competitor communications as opportunity to collude evidence, it is misleading. As discussed in Response to Proposed Conclusion No. 18, where competitor communications rise to the level of documenting an exchange of assurances, meeting of the minds, or conscious commitment to a common scheme, they may provide unambiguous evidence of the conspiracy, and may alone be sufficient to prove a plaintiff's case. *See United States v. Apple Inc.*, 952 F.

Supp. 2d 638, 689 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015) ("'Unambiguous evidence of an agreement to fix prices . . . is all the proof a plaintiff needs' to establish a violation of Section 1.").

Furthermore, the proposed conclusion of law is misleading because the evidence reflects at least 15 competitor communications on the subject matter of the conspiracy. *See, e.g.*, CCFF ¶¶ 474-502, 564-588, 661-684, 955-1100, 1123-1138; Complaint Counsel's Post-Tr. Br. §§ I-IV; *see also* Complaint Counsel's Reply to Benco Post-Tr. Br. §§ I-II; Complaint Counsel's Reply to Patterson Post-Tr. Br. §§ Introduction, I-II (Argument); Complaint Counsel's Reply to Schein Post-Tr. Br. § III.

159. The competitor communications cited by Complaint Counsel that are devoid of content or only ambiguously refer to buying groups (or a specific buying group) also do not give rise to an inference that Respondents' conduct was more likely than not the product of an agreement. Absent additional circumstances surrounding a specific communication, it would be improper to speculate that an agreement was reached during any such communication. Nor did Complaint Counsel adduce evidence of suspicious circumstances surrounding such communications to support an inference of a conspiracy.

Response to Proposed Conclusion of Law No. 159

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

As explained in Complaint Counsel's Post Trial Brief and Reply Briefs, the evidence of competitor communications, in combination with the totality of the evidence, establishes a *per se* unlawful agreement by a preponderance of the evidence. *See, e.g.*, Complaint Counsel's Post-Tr. Br. §§ I-IV; *see also* Complaint Counsel's Reply to Benco Post-Tr. Br. §§ I-II; Complaint Counsel's Reply to Patterson Post-Tr. Br. §§ Introduction, I-II (Argument); Complaint Counsel's Reply to Schein Post-Tr. Br. § III.

Moreover, to the extent this proposed conclusion attempts to portray all competitor communications as opportunity to collude evidence, it is misleading. As discussed in Response to Proposed Conclusion No. 18, where competitor communications rise to the level of documenting an exchange of assurances, meeting of the minds, or conscious commitment to a common scheme, they may provide unambiguous evidence of the conspiracy, and may alone be sufficient to prove a plaintiff's case. *See United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015) ("'Unambiguous evidence of an agreement to fix prices . . . is all the proof a plaintiff needs' to establish a violation of Section 1.") The record contains fifteen direct competitor communications that require no inferences or surrounding "suspicious circumstances" to understand Respondents' agreement. *See* CCFF ¶¶ 474-502, 564-588, 661-684, 955-1100, 1123-1138. Moreover, Respondents' exchange of assurances are direct and unambiguous evidence of the agreement and require no "speculat[ion]" to find an agreement was reached. *See* CCFF ¶¶ 483, 498-90, 495, 500, 564-577, 580-581, 661-664, 679.

By requiring "additional circumstances surrounding a specific communication" or "suspicious circumstances around such communications," this proposed conclusion is misleading as it suggests a test for inferring agreement from circumstantial evidence that finds no support in the law. "As Judge Posner notes, evidence that is 'susceptible of differing interpretations' is not 'devoid of probative value' . . . and it is the role of the jury to determine 'whether, when the evidence is considered as a whole, it is more likely that the defendants had conspired to fix prices than that they had not conspired to fix prices." *In re Ethylene Propylene Diene Monomer Antitrust Litig. ("EPDM I")*, 681 F. Supp. 2d 141, 168 (D. Conn. 2009) (quoting *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655-56 (7th Cir. 2002)).

160. Complaint Counsel did not show any rapid or abrupt change in conduct that would give rise to an inference of a conspiracy.

Response to Proposed Conclusion of Law No. 160

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

While evidence of changed conduct is not required where, as here, the evidence goes beyond parallel conduct, the evidence of Respondents' changes in conduct also leads to the conclusion that there was an unlawful agreement. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 n.4 (2007); *In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1092-95 (N.D. Cal. 2007) (finding that when allegations of parallel conduct are the basis of a Section 1 claim, plaintiff must allege facts to suggest preceding agreement, such as unprecedented change in behavior); *see also United States v. Champion Int'l Corp.*, 557 F.2d 1270, 1272 (9th Cir. 1977) ("[D]espite the innocent beginnings of the noncompetitive bidding, the trial court found collusion in its continuation."); *United States v. N.D. Hosp. Ass'n*, 640 F. Supp. 1028, 1036-37 (D.N.D. 1986) (Even though the defendants did not change their preexisting policies after entering into the agreement, the court nonetheless found the existence of an agreement and a meeting of the minds.); *see also* Response to Proposed Conclusion of Law No. 44.

Additionally, this proposed conclusion of law is misleading because courts have repeatedly found a conspiracy where a defendant acted the same before and after joining the conspiracy. *Champion*, 557 F.2d at 1274; *Advert. Specialty Nat. Ass'n v. FTC*, 238 F.2d 108, 117 (1st Cir. 1956)*; United States v. N.D. Hosp. Ass'n*, 640 F. Supp. 1028, 1036-37 (D.N.D. 1986).

Further, this proposed conclusion is factually incorrect to the extent it claims Complaint Counsel did not produce evidence of Respondents' change in conduct. *See, e.g.*, Complaint Counsel's Reply to Schein Post-Tr. Br. §§ II.A, III.B.2.d; Complaint Counsel's Reply to Benco Post-Tr. Br. § I.B.8; Complaint Counsel's Reply to Patterson Post-Tr. Br. § II.B.1 (Argument); Complaint Counsel's Post-Tr. Br. § II.I.2.

161. There is no evidence that Patterson made any "radical" or "abrupt" changes with respect to buying groups. Instead, Complaint Counsel's evidence only showed that Patterson was generally skeptical of buying groups before and after the alleged conspiracy period, as well as during. Complaint Counsel also showed that, two years after the alleged conspiracy ended, Patterson sought to work with Smile Source and was working with a couple of buying groups. Finally, though Dr. Marshall "presume[d]" it without evidence, there is no evidence that Patterson's approach to New Mexico Dental Cooperative changed after Patterson allegedly entered the conspiracy – the evidence is instead that Patterson's approach changed before it is alleged to have joined. This "plus factor" therefore does not support a reasonable inference of a conspiracy; instead it weighs against the existence of a conspiracy.

Response to Proposed Conclusion of Law No. 161

See Response to Proposed Conclusion of Law No. 160.

Further, this proposed conclusion is factually incorrect to the extent it claims Complaint Counsel did not produce evidence of Patterson's change in conduct. That Patterson's policy on buying groups changed from one-by-one evaluation to a blanket rejection during the conspiracy is probative evidence of the agreement. *Compare* CCFF ¶¶ 498-499 (quoting, inter alia, CX8023 (Guggenheim, Dep. at 134 (Q. "At the time you received Mr. Cohen's e-mail on February 8, 2013, did Patterson have a company policy with respect to buying groups? A. No. Each of these evaluated individually, largely in the markets with the salespeople and the managers in those branches."))), *with* Patterson Post-Tr. Br. at 37 ("Guggenheim's statement, 'we feel the same about these' shared Patterson's existing feeling or policy," meaning, like Benco, Patterson

had a policy against working with buying groups). Moreover, after the conspiracy, Patterson began discounting working with buying groups. PFF ¶ 761; CCFF ¶¶ 1343-1345.

Other examples of Patterson's changes in conduct include the NMDC and ADC episodes, as well as buying groups that Patterson rejected during the conspiracy period and pursued after the conspiracy ended, such as Smile Source and Dentistry Unchained. *See* Complaint Counsel's Reply to Patterson Post-Tr. Br. § II.B.1 (Argument); *see also, e.g.*, Complaint Counsel's Reply to Benco Post-Tr. Br. § I.B.8; Complaint Counsel's Post-Tr. Br. § II.I.2.

162. Complaint Counsel did not show that Benco changed its conduct as a result of any communications with any other Respondent. As noted above, Benco did not change its conduct from 1996 – when it formally articulated its policy of not dealing with middlemen that come between it and its customers – until 2015. For 19 years, it did not bid for the business of or offer discounts to buying groups. And since 2015, it has offered discounts to a buying group on only one occasion – the Elite Dental Alliance.

Response to Proposed Conclusion of Law No. 162

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

While evidence of changed conduct is not required where, as here, the evidence goes beyond parallel conduct, the evidence of Respondents' changes in conduct also leads to the conclusion that there was an unlawful agreement. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 n.4 (2007); *In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1092-95 (N.D. Cal. 2007) (finding that when allegations of parallel conduct are the basis of a Section 1 claim, plaintiff must allege facts to suggest preceding agreement, such as unprecedented change in behavior); *see also United States v. Champion Int'l Corp.*, 557 F.2d 1270, 1272 (9th Cir. 1977) ("[D]espite the innocent beginnings of the noncompetitive bidding, the trial court found

collusion in its continuation."); *United States v. N.D. Hosp. Ass'n*, 640 F. Supp. 1028, 1036-37 (D.N.D. 1986) (Even though the defendants did not change their preexisting policies after entering into the agreement, the court nonetheless found the existence of an agreement and a meeting of the minds.). As explained fully in Complaint Counsel's Post-Trial Brief, Benco changed its conduct following the collapse of the agreement and began discounting to a buying group (Elite Dental Alliance) in late 2015 or early 2016. *See, e.g.*, Complaint Counsel's Post-Tr. Br. § II.I.2 ("The Big Three Changed Their Conduct."); *see also* Complaint Counsel's Reply to Benco Post-Tr. Br. §§ I.B.7-I.B.8.

Additionally, this proposed conclusion of law is misleading because courts have repeatedly found a conspiracy where a defendant acted the same before and after joining the conspiracy. *Champion*, 557 F.2d at 1274; *Advert. Specialty Nat. Ass'n v. FTC*, 238 F.2d 108, 117 (1st Cir. 1956)*; United States v. N.D. Hosp. Ass'n*, 640 F. Supp. 1028, 1036-37 (D.N.D. 1986).

163. In the latter half of 2015, Benco's long-time Success Partner Cain Watters proposed to Benco that they establish a jointly-controlled buying group. As an experimental exception to its policy, Benco agreed with Cain Watters to form Elite Dental Alliance. This arrangement did not represent a change in Benco's conduct; rather, Benco was willing to enter into this relationship because unique features of Elite Dental Alliance set it apart from typical buying groups and resolved many of the concerns that Benco had with buying groups. Because Cain Watters wielded considerable influence over member dentists and dentists would qualify for discounts only if they met minimum purchase commitments, EDA could drive additional volume. Because Benco had exclusive rights to serve as distributor to EDA and could control the selection of manufacturers, Benco had no concern that EDA would steer members to another distributor or source of supply. And because Benco would share in the profits of EDA, the cost of the discounts offered to EDA would be offset. These unique features of EDA made it more like a DSO than a buying group, and they were the only reason Benco was willing to offer discounts to EDA.

Response to Proposed Conclusion of Law No. 163

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

While evidence of changed conduct is not required where, as here, the evidence goes beyond parallel conduct, the evidence of Respondents' changes in conduct also leads to the conclusion that there was an unlawful agreement. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 n.4 (2007); *United States v. Champion Int'l Corp.*, 557 F.2d 1270, 1272 (9th Cir. 1977) ("[D]espite the innocent beginnings of the noncompetitive bidding, the trial court found collusion in its continuation."); *In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1092-95 (N.D. Cal. 2007) (finding that when allegations of parallel conduct are the basis of a Section 1 claim, plaintiff must allege facts to suggest preceding agreement, such as unprecedented change in behavior); *United States v. N.D. Hosp. Ass'n*, 640 F. Supp. 1028, 1036-37 (D.N.D. 1986) (Even though the defendants did not change their preexisting policies after entering into the agreement, the court nonetheless found the existence of an agreement and a meeting of the minds). As explained fully in Complaint Counsel's Post-Trial Brief, Benco changed its conduct following the collapse of the agreement and began discounting to a buying group (Elite Dental Alliance) in late 2015 or early 2016. *See, e.g.*, Complaint Counsel's Post-Tr. Br. § II.I.2 ("The Big Three Changed Their Conduct."); *see also* Complaint Counsel's Reply to Benco Post-Tr. Br. §§ I.B.7-I.B.8.

Finally, this proposed conclusion of law is misleading because Benco admits that EDA is a buying group. *See, e.g.*, Respondents' Joint Proposed Conclusion of Law ¶ 162 ("And since 2015, it has offered discounts to a buying group on only one occasion – the Elite Dental

Alliance."). Benco's assertion that EDA is not a buying group is contradicted by contemporaneous documents, as well as the testimony of its own witnesses. *See* Complaint Counsel's Reply to Benco Post-Tr. Br. § I.B.7 ("Complaint Counsel Established that Benco Began Working With a Buying Group After the Agreement Began to Fall Apart."). Finally, Benco's attempt to distinguish EDA from other buying groups is irrelevant; EDA is significant because (1) throughout the conspiracy period, Benco rejected all buying groups as a matter of policy, regardless of whether any buying group had "unique" characteristics, then (2) in late 2015, for the first time, Benco evaluated the individual characteristics of the EDA buying group, and entered into a discounting arrangement.

164. Complaint Counsel did not show that Schein changed its conduct following any communication between Schein and any other Respondent. Complaint Counsel's citation to a March 27, 2013 text from Mr. Cohen to Mr. Sullivan, in which Mr. Cohen indicated that it was going to bid for ADC because it was not a buying group, suggests, at most, a one-way information exchange from Benco to Schein. It does not suggest the existence of a pre-existing agreement, or even an invitation to collude. To draw the inference from this fact that Schein conspired with Benco – let alone that it did so from some undefined point in 2011 – would be impermissible speculation.

Response to Proposed Conclusion of Law No. 164

See Response to Proposed Conclusion of Law No. 160.

Further, this proposed conclusion is factually incorrect to the extent it claims Complaint Counsel did not produce evidence of Schein's change in conduct. Prior to the conspiracy, Schein discounted to buying groups. Indeed, Sullivan approved buying groups like Smile Source in 2010, even though he was concerned about it leading to a "huge price war," because of the opportunity to gain incremental profits. CCFF ¶¶ 432-439 (quoting CX2113 at 001). Beginning in 2011, Sullivan and other Schein executives began instructing Schein's sales force to reject buying groups categorically. *See, e.g.*, Complaint Counsel's Reply to Schein Post-Tr. Br. §§

II.A.1, III.B.1. After the conspiracy, Schein returned to discounting to buying groups, and even won back Smile Source as a customer. *See, e.g.*, CCFF ¶¶ 1319-1320, 1681, 1722-1725.

165. The fact that Schein also bid on the ADC group in 2013 also does not show a *change* in conduct. Rather, the evidence shows that Schein continued to evaluate *whether* to submit a bid both before and after Mr. Cohen's texts, and that it did so based on legitimate, independent business reasons. Even if, as Complaint Counsel argues, Schein knew of Benco's plans, as a result of Mr. Cohen's text and factored that into its calculus on whether to bid for the ADC business, such communication does not show that Schein agreed to *refrain* from doing business with, or offering discounts to, buying groups.

Response to Proposed Conclusion of Law No. 165

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

This proposed conclusion is misleading, as it is factually incorrect. The record does not contain evidence that Schein evaluated whether to bid for ADC prior to Cohen's text message informing Sullivan that Benco would bid for ADC. Instead, prior to receiving Cohen's text message, Sullivan viewed ADC as nothing more than a buying group and planned to "walk away." CCFF ¶ 1097 (quoting CX2021). After receiving Cohen's text message that ADC was not a buying group, Sullivan attempted to reach Cohen by phone unsuccessfully. CCFF ¶ 1079. His next call was to the relevant Schein zone manager to start to put together a bid for ADC. CCFF ¶¶ 1082-1087. Ultimately, Schein bid for ADC—a change in conduct from its initial response of walking away from what it thought was a buying group. CCFF ¶¶ 1097, 1093.

The proposed conclusion misleadingly suggests that Schein's bid on ADC does not show that Schein agreed to refrain from doing business with buying groups, yet it does precisely that. While believing ADC to be a buying group, Schein planned to refrain from bidding, and thus

conformed its conduct to the conspiracy. It was only after an inter-firm communication relieved Schein of its obligations to the conspiracy that Schein competed for ADC.

166. Complaint Counsel also failed to show that Schein rapidly or abruptly changed its conduct at the start or at the end of the alleged conspiracy, or in relation to any alleged conspiratorial communication. As an initial matter, Complaint Counsel failed to satisfy its burden of establishing the beginning and endpoint of the alleged conspiracy through probative and credible extrinsic evidence. As such, Complaint Counsel failed to provide the Court with a basis for comparing Schein's conduct before and after any particular point in time.

Response to Proposed Conclusion of Law No. 166

See Responses to Proposed Conclusions of Law Nos. 160, 164-165.

167. The Court rejects Complaint Counsel's assertion that structural changes should be measured against the conspiracy start and end dates that Complaint Counsel *alleges*. To do so, would require engaging in improper post-hoc rationalization of the evidence, and to improperly assume the existence of the conspiracy when interpreting the relevant evidence. Additionally, Complaint Counsel's allegations of the start date have been a moving target. Such inconsistencies only highlight the ambiguity of the record, which Complaint Counsel has not overcome. *See Anderson News, L.L.C.*, 899 F.3d at 105 n.4 (affirming summary judgment for defendants where plaintiff "shifts away from the [alleged start date] when it is convenient ... [and] these inconsistencies highlight the fundamental ambiguity of the record....").

Response to Proposed Conclusion of Law No. 167

This proposed conclusion is misleading and factually inaccurate to the extent that it claims the start date of the conspiracy has been a moving target. Complaint Counsel has established that Benco and Schein entered into the unlawful agreement in 2011, and Patterson joined in 2013. CCFF ¶¶ 483, 495, 661-684, 687-732, 958-968. This is consistent with the opening allegations that "Benco and Schein entered into an agreement to refuse to provide discounts to or compete for Buying Groups no later than July 2012" (Compl. ¶ 32), and "Patterson joined the agreement to refuse to provide discounts to or otherwise compete for Buying Groups no later than February 2013" (Compl. ¶ 36).

The proposed conclusion's references to the "ambiguity of the record," and the need for "post-hoc rationalization of the evidence" are unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3, and should be disregarded.

168. Even if the Court were to accept Complaint Counsel's *allegations* for purposes of determining the endpoints of the conspiracy, Complaint Counsel failed to show that Schein's conduct changed. The evidence shows that Schein negotiated and did business with, and offered discounts to, buying groups before, after, and during the alleged conspiracy period. The evidence also shows that Schein had a consistent, and justifiable, skepticism of buying groups that long pre-dated the alleged conspiracy period and continued long after. The evidence also shows that Schein continued to do business with buying groups, and even entered into new buying groups, during the alleged conspiracy period. The evidence also shows that Schein took steps, and invested resources, to improve its ability to identify the buying groups that made business sense for it, and to deal with such groups in a fair and consistent manner. Such evidence refutes, rather than supports, Complaint Counsel's claim that there were structural breaks indicative of a conspiracy.

Response to Proposed Conclusion of Law No. 168

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3.

While evidence of changed conduct is not required where, as here, the evidence goes beyond parallel conduct, the evidence of Schein's changes in conduct also leads to the conclusion that there was an unlawful agreement. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 n.4 (2007); *United States v. Champion Int'l Corp.*, 557 F.2d 1270, 1272 (9th Cir. 1977) ("[D]espite the innocent beginnings of the noncompetitive bidding, the trial court found collusion in its continuation."); *In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1092-95 (N.D. Cal. 2007) (finding that when allegations of parallel conduct are the basis of a Section 1 claim, plaintiff must allege facts to suggest preceding agreement, such as

unprecedented change in behavior); *United States v. N.D. Hosp. Ass'n*, 640 F. Supp. 1028, 1036-37 (D.N.D. 1986) (Even though the defendants did not change their preexisting policies after entering into the agreement, the court nonetheless found the existence of an agreement and a meeting of the minds).

The proposed conclusion is misleading and factually incorrect because it claims that Schein's conduct never changed and that Schein continued to evaluate buying groups during the conspiracy period. As explained fully in Complaint Counsel's Post-Trial Brief, Schein stopped pursuing new buying groups after communications with Benco in 2011, even though it profited from prior buying group partnerships. CCFF ¶¶ 441-452, 717-727; *see also* Complaint Counsel's Post-Tr. Br. § I.G.2. ("Schein Complied with the Agreement Internally"). In fact, Schein instructed its sales representatives to categorically reject buying groups during the conspiracy period. *See, e.g.*, Complaint Counsel's Reply to Schein Post-Tr. Br. §§ II.A.1-II.A.2, III.B.1. After the conspiracy ended, Schein began working with several buying groups, including Teeth Tomorrow in 2017, Mastermind Group in 2017, and Klear Impakt in 2015. CCFF ¶¶ 1317-1318, 1710-1712. It also won back the valuable Smile Source account in 2017. CCFF ¶¶ 1319-1320, 1722-1725, 1681.

169. To the extent the record evidence does support an inference of a conspiracy, contrary to the Court's findings, the Court further finds that Schein has introduced sufficient evidence to rebut any such presumption. For the reasons cited above, the preponderance of the evidence, viewed in its totality, shows that Schein acted independently, and that it did not enter into or participate in any agreement with any other Respondent to not do business with, or offer discounts to, buying groups.

Response to Proposed Conclusion of Law No. 169

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as

required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3, and should be disregarded. Nonetheless, as explained in Complaint Counsel's Post Trial Brief and Reply Briefs, Complaint Counsel introduced sufficient evidence to support a conspiracy amongst Respondents and that weighs against finding that Schein acted independently. *See, e.g.*, Complaint Counsel's Post-Tr. Br. §§ I-IV; *see also* Complaint Counsel's Reply to Benco Post-Tr. Br. §§ I-II; Complaint Counsel's Reply to Schein Post-Tr. Br. §§ II-III.

Further, this proposed conclusion misleadingly implies that Schein has introduced any evidence to rebut a presumption of agreement. The record contains no procompetitive justifications for Respondents' illegal agreement nor for their suspicious inter-firm communications. *See, e.g.*, CCFF ¶¶ 1078, 1167-1177.

170. To the extent the record evidence does support an inference of a conspiracy, contrary to the Court's findings, the Court further finds that Patterson has introduced sufficient evidence to rebut any such presumption. For the reasons cited above, the preponderance of the evidence, viewed in its totality, shows that Patterson acted independently, and that it did not enter into or participate in any agreement with any other Respondent to not do business with, or offer discounts to, buying groups.

Response to Proposed Conclusion of Law No. 170

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3, and should be disregarded. Nonetheless, as explained in Complaint Counsel's Post Trial Brief and Reply Briefs, Complaint Counsel introduced sufficient evidence to support a conspiracy amongst Respondents and that weighs against finding that Patterson acted independently. *See, e.g.*, Complaint Counsel's Post-Tr. Br. §§ I-IV; *see also* Complaint Counsel's Reply to Benco Post-

Tr. Br. §§ I-II; Complaint Counsel's Reply to Patterson Post-Tr. Br. §§ Introduction, III (Facts), I-II (Argument).

Further, this proposed conclusion misleadingly implies that Patterson has introduced any evidence to rebut a presumption of agreement. The record contains no procompetitive justifications for Respondents' illegal agreement nor for their suspicious inter-firm communications. *See, e.g.*, CCFF ¶¶ 1167-1177.

171. To the extent the record evidence does support an inference of a conspiracy, contrary to the Court's findings, the Court further finds that Benco has introduced sufficient evidence to rebut any such presumption. For the reasons cited above, the preponderance of the evidence, viewed in its totality, shows that Benco acted independently, and that it did not enter into or participate in any agreement with any other Respondent to not do business with, or offer discounts to, buying groups.

Response to Proposed Conclusion of Law No. 171

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3, and should be disregarded. Nonetheless, as explained in Complaint Counsel's Post Trial Brief and Reply Briefs, Complaint Counsel introduced sufficient evidence to support a conspiracy amongst Respondents (including Benco) and that weighs against finding that Benco acted independently. *See* Complaint Counsel's Post-Tr. Br. §§ I-IV; *see also* Complaint Counsel's Reply to Benco Post-Tr. Br. §§ I-II.

Further, this proposed conclusion misleadingly implies that Patterson has introduced any evidence to rebut a presumption of agreement. The record contains no procompetitive justifications for Respondents' illegal agreement nor for their suspicious inter-firm communications. *See, e.g.*, CCFF ¶¶ 1167-1177.

172. Finally, the record contains no evidence that the alleged agreement not to work with buying groups could recur. Rather, Complaint Counsel claims that Respondents' alleged unlawful conduct ended *four years ago*, and the record shows that Patterson, Schein, and Benco today work with buying groups.

Response to Proposed Conclusion of Law No. 172

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3. Consequently, it should be disregarded. Nonetheless, the remedy that Complaint Counsel seeks is proper. *See* Complaint Counsel's Post-Trial Reply, Section VI; *see also* Complaint Counsel's Post Trial Brief (April 11, 2019). Abandonment or voluntary cessation of the unlawful conduct does not foreclose the Court's discretion to fashion the relief necessary to eliminate future similar conduct. *See ITT Cont'l Baking Co. v. FTC*, 532 F.2d 207, 222 n.22 (2d Cir. 1976) (It is "the general rule that voluntary cessation of an illegal practice is no bar to a Commission cease and desist order."); *In re Richard S. Marcus Trading as Stanton Blanket Co.*, 1964 WL 73139, at *10 (FTC Dec. 18, 1964) ("In any case of the discontinuance of a practice, the Commission is vested with a broad discretion in the determination of whether the practice has been surely stopped and whether an order to cease and desist is proper."), *rev'd on other grounds sub nom.*, *Marcus v. FTC*, 354 F.2d 85 (2d. Cir. 1965); *see also FTC v. Goodyear Tire & Rubber Co.*, 304 U.S. 257, 260 (1938) ("Discontinuance of the practice which the Commission found to constitute a violation of the Act did not render the controversy moot.") (internal citations omitted). Moreover, "all doubts as to the remedy are to be resolved in [Complaint Counsel's] favor." *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961).

Accordingly, no remedy in this case is warranted, and all Counts against Schein, Patterson, and Benco are dismissed.

Response to Proposed Conclusion of Law Statement (Unnumbered)

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's February 21, 2019 Order on Post-Trial Briefs, at 2-3. Consequently, it should be disregarded. Nonetheless, the remedy that Complaint Counsel seeks is proper. *See* Complaint Counsel's Post-Trial Reply, Section VI; *see also* Complaint Counsel's Post Trial Brief (April 11, 2019). Abandonment or voluntary cessation of the unlawful conduct does not foreclose the Court's discretion to fashion the relief necessary to eliminate future similar conduct. *See ITT Cont'l Baking Co. v. FTC*, 532 F.2d 207, 222 n.22 (2d Cir. 1976) (It is "the general rule that voluntary cessation of an illegal practice is no bar to a Commission cease and desist order."); *In re Richard S. Marcus Trading as Stanton Blanket Co.*, 1964 WL 73139, at *10 (FTC Dec. 18, 1964) ("In any case of the discontinuance of a practice, the Commission is vested with a broad discretion in the determination of whether the practice has been surely stopped and whether an order to cease and desist is proper."), *rev'd on other grounds sub nom.*, *Marcus v. FTC*, 354 F.2d 85 (2d. Cir. 1965); *see also FTC v. Goodyear Tire & Rubber Co.*, 304 U.S. 257, 260 (1938) ("Discontinuance of the practice which the Commission found to constitute a violation of the Act did not render the controversy moot.") (internal citations omitted). Moreover, "all doubts as to the remedy are to be resolved in [Complaint Counsel's] favor." *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961).

COMPLAINT COUNSEL'S STATEMENT REGARDING RESPONDENTS' JOINT EXHIBIT INDEX

Complaint Counsel makes the following statement with regard to the description and use of certain documents listed on Respondents' Joint Exhibit Index, attached to Respondents' Joint Proposed Findings of Fact and Conclusions of Law.

1. Documents from JX0002a, Attachment 3 ("Respondents' Exhibits Admitted For Non-Hearsay Purposes Only").

   Pursuant to the Joint Stipulations on Admissibility of Exhibits (December 19, 2018) at ¶ 2 and this Court's order (Tr. 4504), documents listed on JX0002a at 225-232, Attachment 3 (third party websites) are admitted into evidence for "any non-hearsay purpose." To the extent that Respondents have cited documents listed in JX0002a, Attachment 3 for other purposes (including for the truth of the statements therein), those citations are in conflict with the Joint Stipulation and should be disregarded. For reference, a copy of JX0002a, Attachment 3 is attached hereto listing the documents that were admitted only for limited non-hearsay purposes.

2. Respondents' Demonstrative Exhibits.

   Pursuant to this Court's order (Tr., 5663), "the parties may enter into the record marked demonstratives that were referred to in testimony and only those that were referred to in testimony." Pursuant to the Court's Order on Post-Trial Briefs ("Order"), at 3, the parties have been instructed, "Do not cite to demonstratives exhibits as substantive evidence." To the extent that Respondents have cited demonstratives as substantive evidence, those citations should be disregarded.

3. Demonstrative Exhibits Designated As "Summary Exhibits."

   In Respondents' Joint Exhibit Index, they have described their demonstrative exhibits as summaries of other exhibits in the record. See Respondents' Joint Exhibit Index column entitled, "Summary Exhibits." Although Respondents' demonstrative exhibits have been entered into the record as described in Complaint Counsel's Statement 2, above, Respondents' demonstratives do not comport with the definition and requirements of "Summaries to Prove Content" pursuant to Fed. R. Evid. 1006. Accordingly, these documents do not qualify as Summary Exhibits and their designation as such is improper. To the extent that Respondents have cited demonstratives as accurate summaries of underlying documents, those citations should be disregarded.

Respectfully submitted,

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JX0002a
Attachment 3

ATTACHMENT 3: RESPONDENTS' EXHIBITS ADMITTED FOR NON-HEARSAY PURPOSES ONLY October 16, 2018					
RX Number	**Description**	**Date**	**Beg Bates**	**End Bates**	**Admissibility**
RX1108	"Benco Dental to Relocate Corporate HQ to CenterPoint East," Press Release dated July 1, 2009. (http://www.mericle.com/press-releases/benco-dental-to-relocate-corporate-hq-to-centerpoint-east/, viewed on December 10, 2017.)	7/1/2009			3.43(b)
RX1109	"Benco Dental Opens State-of-the-Art Design Showroom in California," Press Release dated June 21, 2012. (http://www.prweb.com/releases/2012/6/prweb9627597.htm, viewed on December 10, 2017.)	6/21/2012			3.43(b)
RX1111	"Benco Opens Third CenterPoint." (http://www.firstimpressionsmag.com/benco-opens-third-centerpoint.html, viewed on December 10, 2017.)	12/1/2015			3.43(b)
RX1114	https://thedailyfloss.com/2015/03/12/been-to-disneyland-try-a-free-visit-to-the-disneyland-of-dentistry				3.43(b)
RX1115	https://www.atlantadental.com/about-us/locations, last accessed September 2, 2018.				3.43(b)
RX1116	http://www.iq dentalsupply.com/Contact-Us_2, last accessed April 3, 2017.				3.43(b)
RX1117	https://www.dhpionline.com/information/locations, last accessed March 19, 2017.				3.43(b)
RX1118	https://www.voco.dental/us/the-company/the-dentalists/about-voco.aspx last accessed Sept. 14, 2017				3.43(b)
RX1119	https://www.cainwatters.com/about-cwa/, last accessed September 3, 2018.				3.43(b)
RX1120	"Sitting down with Benco Dental managing directors Chuck and Rick Cohen," http://www.dentistryiq.com/articles/2013/06/sitting-down-with-benco-dental-managing-directors-chuck-and-rick.html, last accessed April 5, 2017				3.43(b)
RX2795	CCPA Purchasing Partners Vaccine Contracting & Compliance Form https://www.ccpapp.org/assets/1/7/7._2016_Vaccine_Contracting_and_Compliance_Form_Fillable1.pdf	2016			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2796	Breakaway Practice - About Us Webpage, http://breakawaypractice.com/about-us	2017			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2797	Breakaway Practice - Preferred Savings Club Webpage, http://breakawaypractice.com/files/landing/PreferredSavingsClubPackage.pdf	2017			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2798	Colorado Community Health Network - About CCHN Webpage, http://cchn.org/about-cchn/	2017			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)

RX Number	Description	Date	Beg Bates	End Bates	Admissibility
RX2799	OrthoSynetics - Services Webpage, https://www.orthosynetics.com/services/	2017			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2800	Fair Advantage Consortium Webpage - Frequently Asked Questions http://www.fairadvantageconsortium.com/frequentlyasked.html	7/9/1905			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2801	National Discount Vaccine Alliance Membership Agreement http://nebula.wsimg.com/79e43736b37bf4e496ee7e8d092d1404?AccessKeyId=178AB8FC86C5F686B8A4&disposition=0&alloworigin=1	2/1/2009			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2802	Minnesota Multistate Contracting Alliance for Pharmacy Eligibility & Benefits Webpage https://web.archive.org/web/20120120230031/http://www.mmd.admin.state.mn.us/MMCAP/background/Benefits.aspx	1/20/2012			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2803	United Dental Alliance Frequently Asked Questions Webpage https://web.archive.org/web/20120914010526/http://uniteddentalalliance.com/faqs/	9/14/2012			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2805	Unified Smiles Frequently Asked Questions Webpage https://web.archive.org/web/20140402164037/http://www.unifiedsmiles.com/faq	4/2/2014			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2806	Synergy Dental Partners Frequently Asked Questions Webpage https://web.archive.org/web/20140810010108/http://www.thesynergydentalpartners.com:80/faqs/	8/10/2014			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2809	Dental Peers Buying Group Frequently Asked Questions Webpage https://web.archive.org/web/20150811230111/http://dentalpeers.ca/about/faqs/	8/11/2015			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2813	Dental Purchasing Group - Frequently Asked Questions Webpage https://web.archive.org/web/20161102053802/http://www.dentalpurchasinggroup.com:80/faqs/	11/2/2016			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2815	PedsPal Group Purchasing Program Participation Application http://www.pedspal.org/SiteCollectionDocuments/Join/PEDSPAL-JoinNow.pdf	4/1/2017			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2817	CCPA Purchasing Partners, LLC Vaccine Contracting Guide https://www.ccpapp.org/file.aspx?DocumentId=351	7/28/2017			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2818	Commonwealth Purchasing Group GPO Frequently Asked Questions Webpage https://web.archive.org/web/20171106093352/http://www.cwpurchasing.com:80/about/faqs	11/6/2017			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2822	CASA Physicians Alliance Webpage - Join https://www.casaalliance.net/join	7/26/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)

RX Number	Description	Date	Beg Bates	End Bates	Admissibility
RX2825	Unified Smiles Frequently Asked Questions Webpage http://www.unifiedsmiles.com/faqs/	9/3/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2826	Synergy Dental Partners Frequently Asked Questions Webpage, https://www.thesynergydentalpartners.com/faqs/	9/3/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2827	Unified Smiles Frequently Asked Questions Webpage, http://www.unifiedsmiles.com/faqs/	9/3/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2828	Corydon Palmer Dental Society Endorsed Partners Webpage, http://www.corydonpalmerdental.org/member-center/benefits-of-membership/endorsed-companies	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2829	Commonwealth Purchasing Group GPO Frequently Asked Questions Webpage http://www.cwpurchasing.com/about/faqs	9/5/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2830	Dental Purchasing Group - Frequently Asked Questions Webpage http://www.dentalpurchasinggroup.com/faqs/	9/5/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2831	Dentistry Unchained - Frequently Asked Questions Webpage https://dentistryunchained.com/faqs/	9/5/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2835	Dental Peers Buying Group Frequently Asked Questions Webpage, http://dentalpeers.ca/faq/	9/6/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2836	CNTECT GPO - CNECT to our Suppliers Webpage, http://cnectgpo.com/cnect-to-our-suppliers/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2837	CNECT GPO - Our Services Webpage, http://cnectgpo.com/our-services/#gpo-services	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2838	Dental Gator - Our Story Webpage (v.2), http://dentalgator.com/our-story/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2839	Dental Gator - Services Webpage, http://dentalgator.com/services/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2840	Dental Partners of Georgia - Benefits of Membership, http://dentalpartnersga.com/bencard.pdf	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2841	Infinity Dental - Management Webpage, http://infinitydentalusa.com/management.php	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2842	Infinity Dental - Story Webpage, http://infinitydentalusa.com/story.php	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2844	Intermountain Dental Association - Welcome Page, http://teamida.com/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2845	Intermountain Dental Association - About Our Network, http://teamida.com/about-our-network	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2846	Intermountain Dental Association - Business Services, http://teamida.com/business-services	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2847	Intermountain Dental Association - Offices and Locations, http://teamida.com/offices-and-locations	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2848	Denali Group - About Us Webpage, http://thedenaligroup.net/about-us/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2849	Denali Group - Services Webpage, http://thedenaligroup.net/services/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)

RX Number	Description	Date	Beg Bates	End Bates	Admissibility
RX2850	Alpha Omega - About Us Webpage, http://www.ao.org/about/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2851	Alpha Omega - Membership Webpage,http://www.ao.org/membership/join-ao/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2852	Corydon Palmer - Learn More Webpage, http://www.corydonpalmerdental.org/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2853	Corydon Palmer - Membership Benefits Webpage, http://www.corydonpalmerdental.org/member-center/benefits-of-membership	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2854	CommonWealth Purchasing Group - About Us Webpage, http://www.cwpurchasing.com/about-us	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2855	CommonWealth Purchasing Group - Join Now Webpage, http://www.cwpurchasing.com/join-now	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2856	Dentists for a Better Huntington - Who We Are, http://www.dds4huntington.org/about-us/who-we-are/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2857	Dental Co-op - Homepage Webpage, http://www.dentalcoop.com/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2858	Dental Co-op - About Us Webpage, http://www.dentalcoop.com/aboutus/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2859	Dental Co-op - Programs Webpage, http://www.dentalcoop.com/programs/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2860	Dental Co-op - Purchasing Programs Webpage, http://www.dentalcoop.com/programs/purchasing/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2861	Dental Co-op - Where We Operate Webpage, http://www.dentalcoop.com/whereweoperate/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2862	Mid-Atlantic - About Us Webpage, http://www.mid-atlanticdental.com/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2863	Mid-Atlantic Dental - Montco DSO Ahead of Schedule Webpage, http://www.mid-atlanticdental.com/drilling-montco-dso-ahead-schedule-eight-dental-practice-deals-first-year/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2864	Mid-Atlantic - $15M Support for Regional Dental Practices Webpage, http://www.mid-atlanticdental.com/madp-launch-release/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2865	Mid-Atlantic - Management Services, http://www.mid-atlanticdental.com/services/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2866	Minnesota Multistate Contracting Alliance for Pharmacy - About Us webpage, http://www.mmd.admin.state.mn.us/mmcap/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2867	MMCAP - Government Serving Government Presentation, http://www.mmd.admin.state.mn.us/MMCAP/News/DataFile.aspx?fid=3374&pcid=10	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2868	CNECT GPO_Council Connections Reveals New Brand for Group Purchasing Services, CNECT, http://www.multivu.com/players/English/7958451-council-connections-rebrands-as-cnect/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)

RX Number	Description	Date	Beg Bates	End Bates	Admissibility
RX2869	Sunrise Dental - About Webpage, http://www.sunrisedentalsolutions.com/about-sunrise/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2870	Sunrise Dental - Our Services Webpage, http://www.sunrisedentalsolutions.com/about-sunrise/our-services/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2871	WACMHC - About Us, http://www.wacmhc.org/about-us	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2872	WACMHC - Group Purchasing Program, http://www.wacmhc.org/programs/group-purchasing-program	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2873	WACMHC - Oral Health, http://www.wacmhc.org/programs/oral-health	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2874	WACMHC - Oral Health Care in the CHCs, http://www.wacmhc.org/programs/oral-health/item/51-community-oral-health-in-washington	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2875	Ascension - The Resource Group Receives No. 12 Ranking webpage, https://ascension.org/News/News-Articles/2016/03/10/12/04/The-Resource-Group-Receives-No-12-Ranking	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2876	CNECT GPO - Homepage webpage, https://cnectgpo.com/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2877	Comfort Dental - Partnerships webpage, https://comfortdental.com/comfortdentalpartnerships/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2878	Dental Partners of Georgia - About DPG webpage, https://dentalpartnersga.com/aboutDPG.htm	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2879	Dental Partners of Georgia - DPG Members webpage, https://dentalpartnersga.com/alphalist.htm	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2880	Dental Partners of Georgia - Frequently Asked Questions webpage, https://dentalpartnersga.com/faqs.htm	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2881	KlearImpact - Welcome webpage, https://klearimpakt.com/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2882	Smile Source - About webpage, https://smilesource.com/about/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2883	Smile Source - Vision/Mission webpage, https://smilesource.com/about/vision-mission/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2884	Smile Source - Unsurpassed Buying Power webpage, https://smilesource.com/doctors/membership-benefits/unsurpassed-buying-power/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2885	Steadfast Medical - Why Steadfast webpage, https://steadfastmedical.com/why-steadfast/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2886	Teeth Tomorrow - Member Successes webpage, https://teethtomorrow.com/for-doctors/member-successes/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)

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RX2887	Teeth Tomorrow - Top Network of Advanced Implant Dentists Fastest Growing webpage, https://teethtomorrow.com/press-releases/top-network-advanced-implant-dentists-fastest-growing/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2888	The Resource Group - About Us webpage, https://theresourcegroup.com/About/About-Us	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2889	The Resource Group - History webpage, https://theresourcegroup.com/About/History	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2890	The Resource Group - Participants webpage, https://theresourcegroup.com/Participants	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2891	The Resource Group - Solutions webpage, https://theresourcegroup.com/Solutions	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2892	Arizona Association of Community Health Centers About Us webpage https://www.aachc.org/about-us/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2893	Acurity - About Us webpage, https://www.acurity.com/about/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2894	Acurity - Our Model webpage, https://www.acurity.com/our-model/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2896	American Dental Association - Health Policy Institute Supply and Profile of Dentists webpage, https://www.ada.org/en/science-research/health-policy-institute/data-center/supply-and-profile-of-dentists	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2897	Advantage Dental - About Us webpage, https://www.advantagedental.com/about-us.html	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2898	Advantage Dental - Welcome webpage, https://www.advantagedental.com/welcome.html	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2899	Advantage Dental - What's the Advantage webpage, https://www.advantagedental.com/whats-the-advantage.html	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2902	Children's Hospital Association - About the Association webpage, https://www.childrenshospitals.org/About-Us/About-the-Association	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2903	Children's Hospital Association - Membership webpage, https://www.childrenshospitals.org/About-Us/Membership	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2904	Dental Economics - Why Use a GPO Versus a Traditional Dental Dealer webpage, https://www.dentaleconomics.com/articles/print/volume-106/issue-4/practice/supply-chain-management-why-use-a-gpo-versus-a-traditional-dental-dealer.html	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2905	E&I Cooperative Services - About Us webpage, https://www.eandi.org/company/about-us/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)

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RX2908	Louisiana Primary Care Association - Overview webpage https://www.lpca.net/main/about-lpca/overview	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2910	Oral Health - Schein Special Markets Celebrates its 10th National Sales Meeting webpage, https://www.oralhealthgroup.com/oralhealth/1003920803-1003920803/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2911	Stark County Dental Society - About Stark webpage, https://www.starkcountydentalsociety.org/history	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2912	Texas Association of Community Health Centers - About TACHC webpage, https://www.tachc.org/about-tachc	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2913	Texas Association of Community Health Centers - Join TACHC webpage, https://www.tachc.org/join	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2914	Texas Association of Community Health Centers - Group Purchasing webpage, https://www.tachc.org/programs-services/group-purchasing/dental-services/merchandise	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2915	Texas Association of Community Health Centers - Merchandise webpage, https://www.tachc.org/programs-services/group-purchasing/dental-services/merchandise	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2916	Tralongo - About Us webpage, https://www.tralongo.net/about/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2917	Tralongo - How it Works webpage, https://www.tralongo.net/opportunity/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2918	Tralongo Merges with Dental Whale to Expand Opportunities for Dental Entrepreneurs webpage, https://www.tralongo.net/tralongo-merges-dental-whale-expand-opportunities-dental-entrepreneurs/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2919	The Resource Group - Homepage webpage, https://theresourcegroup.com/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2920	Advantage Dental Welcome Webpage, https://www.advantagedental.com/welcome.html	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2921	Illinois Primary Health Care Association - About Us Webpage, http://www.iphca.org/AboutUs.aspx	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2922	Illinois Primary Health Care Association - Group Purchasing Webpage, http://www.iphca.org/MemberCenter/GroupPurchasing.aspx	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2923	Minnesota Multistate Contracting Alliance for Pharmacy - About Us webpage, http://www.mmd.admin.state.mn.us/mmcap/	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)

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RX2924	Main Street Vaccines Webpage - Main Street Rewards program http://www.mainstreetvacs.com/index.php/pages/main-street-rewards-program	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2925	National Discount Vaccine Alliance Webpage - Frequently Asked Questions http://www.nationaldiscountvaccinealliance.com/faqs.html	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2926	United Dental Alliance Member Portal - Frequently Asked Questions Webpage, http://uniteddentalalliance.com/faqs/	9/3/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2927	CaDA - The Dentists Supply Company Frequently Asked Questions Webpage https://www.tdsc.com/faq	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2928	Kois Buyers Group - Members and Alumni Webpage https://www.koiscenter.com/kois-buyers-group/	9/5/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX2929	Mari's List - Frequently Asked Questions Webpage https://www.marislist.com/faqs	9/13/2018			16 C.F.R. § 3.43(b); 16 C.F.R. § 3.43(f)
RX3067	OrthoSynthetics - The Hidden Soft Costs of Supplies Webpage, https://www.orthosynthetics.com/hidden-soft-costs-supplies/	9/29/2018			16 C.F.R. § 3.43(b)

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:

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The Honorable D. Michael Chappell
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I further certify that I delivered via electronic mail a copy of the foregoing document to:

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June 13, 2019

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CERTIFICATE OF ELECTRONIC FILING

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

June 13, 2019

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