Public

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

In the Matter of

BENCO DENTAL SUPPLY CO.,
a corporation,

HENRY SCHEIN, INC.,
a corporation, and

PATTERSON COMPANIES, INC.,
a corporation.

Docket No. 9379

RESPONDENT BENCO DENTAL SUPPLY CO.'S
[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW

April 11, 2019

TABLE OF CONTENTS

I. OVERVIEW AND BACKGROUND OF BENCO DENTAL SUPPLY CO. 1

A. BENCO BASICS 1

B. BENCO CO-MANAGING DIRECTOR, CHUCK COHEN 3

C. BENCO BEGINNINGS....................4

D. BENCO'S RAPID NATIONAL EXPANSION 4

E. COMPETITIVE HIRING AGREEMENT BETWEEN BENCO AND SCHEIN 6

F. BENCO AS MARKET INNOVATOR AND DISRUPTOR 8

G. BENCO'S PRICING 11

H. BENCO'S DISTRIBUTION AGREEMENT WITH A-DEC 14

II. BENCO'S NO-MIDDLEMAN POLICY WAS DEVELOPED AND APPLIED UNILATERALLY AND CONSISTENTLY BEFORE, DURING AND AFTER THE ALLEGED CONSPIRACY PERIOD....................15

A. BENCO'S NO-MIDDLEMAN POLICY 15

B. APPLICATION OF BENCO'S NO-MIDDLEMAN POLICY TO A BUYING GROUP - THE KOIS BUYERS GROUP....................18

C. CORPORATE DENTAL PRACTICES AND DSO'S....................19

D. BENCO'S STRATEGIC MARKETS DIVISION....................19

E. BENCO'S JOINT VENTURE WITH CAIN WATTERS - ELITE DENTAL ALLIANCE....................22

III. BENCO ACTED IN ITS OWN ECONOMIC INTEREST AND CONSISTENT WITH ITS NO-MIDDLEMAN POLICY IN ITS DEALING WITH THE KOIS CENTER & THE KOIS BUYERS GROUP 26

A. DR. KOIS & THE KOIS CENTER....................26

B. THE KOIS BUYERS GROUP 27

C. BENCO'S RELATIONSHIP WITH DR. KOIS AND THE KOIS CENTER....................30

IV. BENCO UNILATERALLY DETERMINED NOT TO DO BUSINESS WITH SMILE SOURCE UNDER ITS NO-MIDDLEMAN POLICY....................35

A. SMILE SOURCE'S FIRST APPROACH TO BENCO – SEPTEMBER 26, 2011....................35

B. SMILE SOURCE'S SECOND APPROACH TO BENCO – JULY 25, 2012....................36

C. THE OCTOBER 1, 2013 PHONE CALL FROM MR. RYAN TO MR. FOLEY....................37

D. BENCO'S 2014 MEETING WITH SMILE SOURCE 37

V. THE ALLEGED INTERFIRM COMMUNICATIONS ARE NOT EVIDENCE OF AN AGREEMENT INVOLVING BENCO 38

A. THE SINGLE E-MAIL EXCHANGE BETWEEN BENCO AND PATTERSON REGARDING THE NEW MEXICO DENTAL COOPERATIVE IS NOT EVIDENCE OF AN AGREEMENT AMONG RESPONDENTS 38

B. THE COMMUNICATIONS BETWEEN BENCO AND SCHEIN REGARDING ATLANTIC DENTAL CARE ARE NOT EVIDENCE OF AN AGREEMENT AMONG RESPONDENTS. 41

1. Benco and Schein's Proposals to ADC in April 2013 Are Not Evidence of an Agreement. 41

2. Benco's Analysis of ADC 43

3. Communications Between Benco and Schein Relating to ADC Are Not Evidence of an Agreement. 44

4. Benco Independently Bid For – And Won – The Business of ADC 47

5. Patterson's June 6, 2013 E-Mail Is Not Evidence of Any Alleged Conspiracy Regarding ADC 48

VI. VERY FEW OF THE COMMUNICATIONS IDENTIFIED BY COMPLAINT COUNSEL, WERE RELATED TO BUYING GROUPS 49

A. THE VAST MAJORITY OF COHEN AND SULLIVAN'S COMMUNICATIONS BETWEEN 2011 AND 2016 WERE ABOUT THE COMPETITIVE HIRING AGREEMENT BETWEEN BENCO AND SCHEIN 49

VII. NON-BUYING GROUP COMMUNICATIONS ARE NOT EVIDENCE OF AN AGREEMENT AMONG RESPONDENTS 53

A. COMMUNICATIONS REGARDING THE TDA ARE NOT EVIDENCE OF A CONSPIRACY REGARDING BUYING GROUPS 53

B. NON-BUYING GROUP COMMUNICATIONS ARE NOT EVIDENCE OF A CONSPIRACY 54

VIII. COMMUNICATIONS BETWEEN BENCO AND BURKHART ARE NOT EVIDENCE OF AN INVITATION TO COLLUDE 57

IX. DR. MARSHALL'S METHODOLOGY AND CONCLUSIONS ARE UNRELIABLE 58

X. DR. MARSHALL OFFERED NO OPINION REGARDING THE APPLICABLE LEGAL STANDARD 60

XI. DR. MARSHALL FAILED TO CONDUCT HIS ANALYSIS IN A PROPERLY DEFINED RELEVANT MARKET 60

A. DR. MARSHALL FAILED TO DEFINE LOCAL RELEVANT GEOGRAPHIC MARKETS 60

1. The Relevant Geographic Markets Are Local in Nature 60

2. Dr. Marshall Failed to Define or Apply Local Geographic Markets in His Analysis 61

B. DR. MARSHALL FAILED TO PROPERLY DEFINE THE RELEVANT PRODUCT MARKET 62

1. Dr. Marshall Erred By Failing to Include Direct-Selling Manufacturers in the Relevant Product Market 62

2. Dr. Marshall Erred By Combining Equipment and Consumables in a Single Relevant Product Market 64

3. Dr. Marshall Erred By Failing to Include Non-Full-Service Distributors in the Relevant Product Market 65

4. Dr. Marshall's Purported SSNIP Tests Contain Multiple Flaws and Fail To Support His Conclusions 67

a. Errors With Dr. Marshall's SSNIP Tests In General 67

b. Errors With Dr. Marshall's "Smile Source" SSNIP Test 68

c. Errors With Dr. Marshall's "Southern California" SSNIP Test 69

5. Dr. Marshall's Failure to Properly Define the Relevant Market Rendered His Other Opinions in this Matter Unreliable 73

XII. DR. MARSHALL ERRED IN CONCLUDING THAT MARKET STRUCTURE WAS CONDUCIVE TO EFFECTIVE COLLUSION 73

A. CONSPIRACY CANNOT BE INFERRED FROM INDUSTRY CHARACTERISTICS 73

B. DR. MARSHALL'S EVALUATION OF INDUSTRY CHARACTERISTICS IS FUNDAMENTALLY FLAWED 74

XIII. DR. MARSHALL'S ASSERTION THAT BENCO, SCHEIN AND PATTERSON ENGAGED IN PARALLEL CONDUCT IS UNSUPPORTED BY HIS ANALYSIS AND CONTRARY TO THE EVIDENCE 76

A. BENCO HAD A CONSISTENT POLICY NOT TO DO BUSINESS WITH BUYING GROUPS 77

B. PATTERSON GENERALLY DID NOT DO BUSINESS WITH BUYING GROUPS, BUT ITS REGIONAL OFFICES COULD DO SO IF THEY CHOSE 77

C. SCHEIN EVALUATED BUYING GROUP OPPORTUNITIES ON A CASE BY CASE BASIS, AND SOMETIMES BID FOR BUYING GROUP BUSINESS 77

XIV. CONTRARY TO DR. MARSHALL'S ASSERTIONS, BENCO, SCHEIN AND PATTERSON EACH ACTED CONSISTENTLY WITH ITS UNILATERAL ECONOMIC SELF-INTEREST 81

A. BENCO'S UNILATERAL ECONOMIC SELF-INTEREST WAS BASED ON ITS VALUE PROPOSITION AND ITS BUSINESS STRATEGY 82

1. Benco's Value Proposition Was To Offer Its Customers The Best Possible Support At a Reasonable Price 82
2. Benco Did Business With DSOs Because They Permitted Benco To Reduce Its Costs 82
3. Benco's Unilateral Economic Self-Interest Was Not To Do Business With Buying Groups Because They Came Between Benco and Its Customers and Didn't Permit Benco To Reduce Its Costs 84

B. DR. MARSHALL ABANDONED HIS GENERAL ASSERTION THAT BENCO ACTED CONTRARY TO ITS UNILATERAL ECONOMIC SELF-INTEREST BY NOT BIDDING FOR THE BUSINESS OF BUYING GROUPS IN GENERAL 86

1. Dr. Marshall's Initial Position Was Contrary To The Factual Record and to Common Sense 86
2. Dr. Marshall Admitted That He Had No Knowledge Regarding Any of the 36 Other Buying Groups Upon Which His Opinion Was Based 89
3. Dr. Marshall Abandoned His General Assertion That Benco Acted Contrary To Its Unilateral Economic Self-Interest By Not Dealing With Buying Groups 91

C. DR. MARSHALL'S PROFITABILITY STUDIES OF DEALING WITH THE KOIS AND SMILE SOURCE BUYING GROUPS WERE DEEPLY FLAWED AND FAIL TO SUPPORT HIS CONCLUSIONS 92

1. Dr. Marshall's Theoretical Basis For His Analysis Is Incorrect 92
2. Dr. Marshall's Profitability Studies Followed No Accepted Methodology and Included Multiple Fundamental Flaws 94
   a. Dr. Marshall's Profitability Studies Did Not Follow Any Accepted Method of Economic Analysis 94
   b. Dr. Marshall's Profitability Studies Included Only a Tiny Fraction of Dentists 95
   c. Dr. Marshall's Profitability Studies Focused On Only Two Buying Groups, Neither of Which Was Representative 96
      i. The Kois Buyers Group Was Not Representative of Buying Groups In General 96
      ii. The Smile Source Buying Group Was Not Representative of Buying Groups In General 97

d. Dr. Marshall's Profitability Studies Focused On Only Three Distributors, None of Which Was Benco 98

e. Dr. Marshall Conducted An "After-The-Fact" Review That Failed To Account For Risk and Uncertainty 99

f. Dr. Marshall Limited His Analysis To Only Those Dentists Who Made Purchases From the Contracting Distributor............101

g. Dr. Marshall Improperly Mixed Data From Different Years 101

h. Dr. Marshall Failed to Consider the Cost to Distributors of Paying Administrative Fees and Rebates....................................103

i. Dr. Marshall Relied On Unsupported Assumptions 103

j. Dr. Marshall Failed To Control For Other Factors 104

k. Dr. Marshall Failed To Perform a Counter-Factual Analysis of Any Respondent's Actual Customer Gains, Costs, Cannibalization, or Expected Profit or Loss of Dealing With the Kois or Smile Source Buying Groups...........................105

l. Dr. Marshall Failed To Perform a Counter-Factual Analysis, and Thus Failed to Consider Benco's Alternatives to Dealing With Buying Groups 107

D. THE DATA UNDERLYING DR. MARSHALL'S KOIS AND SMILE SOURCE STUDIES, PROPERLY ANALYZED, CONFIRM THAT BENCO ACTED CONSISTENTLY WITH ITS UNILATERAL ECONOMIC SELF-INTEREST..108

1. Benco Acted Consistently With Its Unilateral Economic Self-Interest By Pursuing Its Existing Strategy and Its Own Business Opportunities Rather Than Offering Discounts To Buying Groups........108

2. Dr. Marshall's Burkhart-Smile Source Study Confirms That Benco's Unilateral Economic Self-Interest Was To Use Its Resources To Pursue Business Opportunities Other Than Buying Groups...109

3. Dr. Marshall's Burkhart-Kois Buyers Group Study Confirms That Benco's Unilateral Economic Self-Interest Was To Use Its Resources To Pursue Business Opportunities Other Than Buying Groups...110

4. Dr. Marshall's Atlanta Dental-Smile Source Study Confirms That Benco's Unilateral Economic Self-Interest Was To Use Its Resources To Pursue Business Opportunities Other Than Buying Groups...111

5. Dr. Marshall's First Schein-Smile Source Study Confirms That Benco's Unilateral Economic Self-Interest Was To Use Its

Resources To Pursue Business Opportunities Other Than Buying Groups 112

6. Dr. Marshall's Second Schein-Smile Source Study Confirms That Benco's Unilateral Economic Self-Interest Was To Use Its Resources To Pursue Business Opportunities Other Than Buying Groups 113

XV. DR. MARSHALL'S ASSERTION OF A "STRUCTURAL BREAK" IS WRONG ON THE ECONOMICS AND ON THE FACTS 114

A. DR. MARSHALL MISAPPLIED THE ECONOMIC CONCEPT OF STRUCTURAL BREAK 114

B. DR. MARSHALL'S OWN METHOD OF ANALYSIS, IF APPLIED CONSISTENTLY, WOULD PROVE THE ABSENCE OF ANY CONSPIRACY 114

C. DR. MARSHALL MISINTERPRETED THE FACTS TO CREATE IMAGINARY "STRUCTURAL BREAKS" 115

1. Schein's Decision Not to Bid for the Business of Unified Smiles and the Termination of Its Agreement With Smile Source in 2011-2012 Did Not Constitute a "Structural Break" 115

2. Benco's Decision To Partner With Cain Watters to Form Elite Dental Alliance Was Not a "Structural Break" 117

a. Benco Did Not Change Its Approach To Buying Groups 117

b. Dr. Marshall's Claim of a "Structural Break" Ignored the Unique Structure and Terms of Elite Dental Alliance That Set It Apart from Other Buying Groups and Made It Worthwhile For Benco To Agree With Cain Watters to Form EDA 118

3. Smile Source's Acceptance of Schein's Offer in 2017 Did Not Constitute A Structural Break 121

XVI. DR. MARSHAL'S ASSERTION THAT RESPONDENTS' CONDUCT CAUSED HARM TO COMPETITION IS FUNDAMENTALLY FLAWED AND CONTRADICTED BY THE EVIDENCE 122

A. DR. MARSHALL FAILED TO FIND ANTICOMPETITIVE HARM IN ANY RELEVANT MARKET 122

B. THE RECORD EVIDENCE CONTRADICTS DR. MARSHALL'S ASSERTION THAT RESPONDENTS' CONDUCT CAUSED ANTICOMPETITIVE HARM 122

REFERENCES TO THE RECORD

RECORD REFERENCES

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

CX# - Complaint Counsel Exhibit

RX# - Respondent Exhibit

CXD# - Complaint Counsel Demonstrative Exhibit

RXD# - Respondent Demonstrative Exhibit

Name of Witness, Tr. xx -Trial Testimony

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

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

JSLF ¶ x - Joint Stipulations of Law and Fact

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

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

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

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

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

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

{ bold } - *In Camera* Material

I. OVERVIEW AND BACKGROUND OF BENCO DENTAL SUPPLY CO.

A. BENCO BASICS

1. Benco is a privately-owned distributor of dental supplies and equipment headquartered in Pittston, Pennsylvania. (Cohen, Tr. 400).

2. Benco has over 50 showrooms and 5 distribution centers located across the United States, and, in 2016 sold over 62,000 distinct dental products. (Cohen, Tr. 408; RX1140).

3. Benco employs over 400 sales representatives (including territory representatives, equipment specialists, and regional managers) and 300 service technicians. (Cohen, Tr. 408).

4. Benco 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. 404; 601).

5. Benco sells all of the supplies, equipment and services that are essential to running a dental practice. (Cohen, Tr. 600).

6. [redacted]

7. Benco organizes its sales representatives into regions, many of which span portions of multiple states. (CX0301).

8. Benco's customers include independent dentists, dental laboratories, corporate dentistry, institutions, and dental service organizations ("DSO's"). (Cohen, Tr. 600-601).

9. Dental supplies, or consumables, are the products that dentists use to provide services to patients, including gloves, fillings, amalgam, anesthetic, and instruments. (Cohen, Tr. 601).

10. Dental equipment are large items within a dental office, including chairs, lights, cabinets, and x-ray machines. (Cohen, Tr. 601).

11. Benco distributes dental supplies and equipment supplied by various manufacturers. (CX0301).

12. Manufacturers that supply Benco with dental supplies and equipment for distribution include household names such as Proctor & Gamble or 3M, large dental-only manufacturers like Dentsply, Kavo-Kerr, and Ivoclar, and smaller vendors such as GC America, Butler Sunstar, and Premier Dental. (Cohen, Tr. 602).

13. Some manufacturers sell directly to dentists. (Cohen, Tr. 602).

14. Some manufacturers sell exclusively through only one distributor. (Cohen, Tr. 602).

15. Benco does not have, and does not believe in, exclusive distribution relationships with manufacturers.

16. Benco distributes dental supplies and equipment from "thousands" of manufacturers. (Cohen, Tr. 603).

17. Some of Benco's relationships with manufacturers have existed for decades, whereas for others, Benco must consistently work hard to build and maintain its relationships with manufacturers. (Cohen, Tr. 605).

18. Chuck Cohen believes that Benco's sterling reputation is a critical factor to developing manufacturer relationships and representing the manufacturer's products that Benco distributes. (Cohen, Tr. 605).

19. By consolidating products from various manufacturers for distribution, Benco provides its customers with a one-stop shopping experience for the entire market basket of goods required to operate and run a dental practice. (Cohen, Tr. 605-606).

20. Benco's sales force is comprised of territory representatives and equipment specialists. Benco service technicians also visit dental offices. (Cohen, Tr. 608).

21. Territory representatives make regular visits to dental offices and serve as the primary point of contact between Benco and its customers. (Cohen, Tr. 608).

22. Benco currently has approximately 400 territory representatives throughout the United States. (Cohen, Tr. 612).

23. Equipment specialists focus solely on selling equipment to dental practices and often work closely with territory representatives in connection with equipment sales. (Cohen, Tr. 608).

24. Benco currently has 68 equipment specialists throughout the United States. (Cohen, Tr. 408).

25. Benco also has service technicians that install dental equipment, repair equipment if it breaks down, or otherwise provide required maintenance. (Cohen, Tr. 608).

26. Benco currently has approximately 300 service technicians throughout the United States. (Cohen, Tr. 408).

27. Benco today has approximately 1,500 employees and generated approximately $800M in revenue in 2018. (Cohen, Tr. 612).

28. [redacted]

29. Benco does not allow any thing or any entity to come between Benco and its customers. (RX1127-486).

30. Benco competes with Schein, Patterson and any other seller of dental supplies and equipment through its value proposition. Benco competes and distinguishes itself from its competitors by relying upon the exceptional service provided by its sales force, better selection of products, better delivery of products, better pricing, and better overall value. (RX1127-486).

B. BENCO CO-MANAGING DIRECTOR, CHUCK COHEN

31. Charles F. Cohen ("Chuck Cohen" or "Cohen") and Richard S. Cohen ("Rick Cohen") are Co-Managing Directors of Benco. (Cohen, Tr. 400).

32. Chuck Cohen and Rick Cohen have been Co-Managing Directors of Benco since around 1998 or 1999. (Cohen, Tr. 401).

33. Chuck Cohen and Rick Cohen are the Co-Owners of Benco. (Cohen, Tr. 400).

34. Between 1984 and 1989, Chuck Cohen had various part-time roles working at Benco. (Cohen, Tr. 401-402).

35. Chuck Cohen joined Benco full-time in 1989 as a Territory Representative in New York visiting independent dentists and other Benco customers. (Cohen, Tr. 402).

36. In 1994, Chuck Cohen assumed a larger role within Benco, taking over various responsibilities from his father, Larry Cohen. (Cohen, Tr. 402).

37. Chuck Cohen assumed a leadership role at Benco in 1996, taking over day-to-day management of Benco from Larry Cohen. (Cohen, Tr. 400).

38. As Co-Managing Director, Chuck Cohen, along with Rick Cohen and Benco's management team, oversees Benco's business strategy, including its strategy for growth, development, and expansion. (Cohen, Tr. 401).

39. As Co-Managing Director, Chuck Cohen also directly manages Benco's human resource, finance, sales, marketing, and business development functions. (Cohen, Tr. 401).

C. BENCO BEGINNINGS

40. Benco was founded in 1924 by a 19-year old Russian immigrant, Ben Cohen, who started selling dental products out of his suitcase door-to-door throughout Pennsylvania and New York. (RX1099-003; Cohen, Tr. 618).

41. In 1930, Ben Cohen opened a small office in downtown Wilkes-Barre, Pennsylvania, a small city in the coal-mining region of Northeastern Pennsylvania. At the time, many small towns and cities in the United States had a single, small dental distributor like Benco. (RX1099-003; Cohen, Tr. 618).

42. Ben Cohen ran Benco as a small, "mom-and-pop" business from its inception into the 1960's. (RX1099-003; Cohen, Tr. 618-19).

43. Ben Cohen's son, Larry Cohen, joined Benco in 1959. During the 1960's, Larry Cohen assumed control of Benco's day-to-day operations. (RX1099-003; Cohen, Tr. 619).

44. Larry Cohen began to expand Benco by making it a full-service distributor, selling dental equipment and hiring service technicians to install and service dental equipment. (RX1099-003).

45. Larry Cohen established relationships with key manufacturers of dental supplies, was an early adopted of UPS, and began building Benco's distribution network. As a result, Benco expanded beyond Wilkes-Barre and Northeastern Pennsylvania to become a dental distributor that serviced the entire Mid-Atlantic Region of the United States. (RX1099-003-005; Cohen, Tr. 619-20).

46. In 1993, Benco had just expanded into New England with the opening of a Boston office. Thereafter, Benco opened in Ohio and Richmond, Virginia. In 1993, Benco's territory was from Boston to Cleveland to Richmond, with the center still located in Wilkes-Barre, Pennsylvania. (RX1127-473).

47. Larry Cohen ran Benco until 1996, when Chuck and Rick Cohen assumed day-to-day management of the business. (Cohen, Tr. 400).

D. BENCO'S RAPID NATIONAL EXPANSION

48. When Chuck Cohen assumed control of Benco, the company had 538 employees and generated $116M in revenue in 1995. (RX1099-005).

49. At this time, Patterson was the largest full-service dental distributor in the United States, followed by Henry Schein, Sullivan Dental and Meer Dental. Benco was the fifth largest dental distributor. (Cohen, Tr. 623-24).

50. In 1998, Henry Schein merged with Sullivan Dental and Meer Dental, creating the largest full-service dental distributor in the United States. Following this merger, Patterson

dropped to second and Benco – through no actions of its own – became the third largest full-service dental distributor in the United States. (Cohen, Tr. 625).

51. Chuck Cohen and Rick Cohen had an ambitious expansion plan; they wanted to grow Benco into a national, full-service dental distributor. (RX1127-473; Cohen, Tr. 628).

52. Benco sought to grow region-by-region across the nation, because Chuck Cohen saw an opportunity in the market for a national independent, family-owned dental distributor to compete with the publicly-traded Schein and Patterson. (RX1127-473-74).

53. Benco's strategy was to become the first independent dental distributor to have nationwide coverage. It aimed to accomplish this strategy by offering a better customer experience, a passion for innovation, and a caring family culture. (Cohen, Tr. 628).

54. Benco expanded market-by-market and region-by-region across the country by hiring new sales employees, building a national distribution infrastructure, and scaling up its business operations. (Cohen, Tr. 629).

55. Pat Ryan was heavily involved in Benco's national expansion, leading the opening of many new markets for Benco in the Southeast, Southwest, Midwest, and West regions of the United States. (Ryan, Tr. 1149-50).

56. In 1996, Benco had only one distribution center in Wilkes-Barre, Pennsylvania. (Cohen, Tr. 629).

57. At the beginning of Benco's rapid national expansion, Benco started out as a regional distributor within a 150-mile radius of Northeastern Pennsylvania. Benco had only one warehouse that it leveraged well to grow as far from that warehouse as it could before opening another warehouse. (RX1127-479).

58. Benco proceeded to add four additional distribution centers in the next fifteen years: Jacksonville, Florida (1998); Ft. Wayne, Indiana (2003); Dallas, Texas (2004); and Reno, Nevada (2011). (Cohen, Tr. 630-31).

59. Benco acquired and opened its distribution centers in various way, but each one was part of the overall strategy to expand Benco's geographic coverage from the east coast to the west coast across the country. (RX1127-479).

60. Benco sells a lots of products that are heavy and thus have high shipping costs and times relative to the price of the product. Benco, like any dental distributor, cannot ship heavy boxes at a reasonable price from one central location around the country. Benco needed to establish a distribution network with warehouses in different regions across the country to serve customers quickly, cheaply, and efficiently. (RX1127-479-80).

61. Each distribution center allowed Benco to ship products overnight or via or 2-day shipping to dentists within the surrounding states. Quick shipping times are a critical component of providing a premium, full-service experience to a dentist. (RX1127-479-80).

62. [redacted]

63. [redacted]

64. In 2010, Benco moved into a new headquarters in Pittston, Pennsylvania. CenterPoint East, with approximately 272,800 square feet of space, housed Benco's corporate offices, a distribution center and warehouse, and the largest dental equipment showroom in North America – including 24 operatories of dental equipment from all major vendors in standard configurations. (RX1108).

65. In addition to building a national distribution infrastructure, Benco also set about to expand its sales force into new markets across the country. (RX1127-480).

66. Through a combination of mergers and acquisitions activity, competitive hiring, hiring rookies sales employees, and organic growth, Benco methodically expanded one local region and market at a time westward from its prior Mid-Atlantic footprint. (Cohen, Tr. 629-36).

67. To enter a new market, Benco hired territory representatives, equipment specialists, and service technicians, opened an office, often opened a showroom, established local customer relationships, and competed aggressively by lowering its prices. (Cohen, Tr. 629-36).

68. Many of the new sales employees that Benco hired were hired away from competitors Schein and Patterson. (Cohen, Tr. 636).

69. Pat Ryan was responsible for and involved in the hiring of many new sales employees by Benco, as Benco opened new markets and expanded west across the country. (Ryan, Tr. 1150-51).

70. Between two-thirds and three-quarters of all experienced sales employees that Benco hired during its rapid national expansion were hired away from Henry Schein. (Ryan, Tr. 1151).

E. COMPETITIVE HIRING AGREEMENT BETWEEN BENCO AND SCHEIN

71. In about 1998, after Schein had merged with a company called Meer Dental, Schein had too many sales representatives in certain markets, so Benco had opportunities to hire people who could not find a place in Schein's new organization. (Cohen, Tr. 637).

72. It was a significant part of Benco's growth strategy to hire people from Schein and other competitors. (Cohen, Tr. 637).

73. Many of the sales representatives that Benco hired from Schein and other companies had non-compete agreements, which caused problems for Benco, because it is expensive to litigate non-compete agreements and it distracted attention away from focusing on the customers. (Cohen, Tr. 638).

74. Benco's hiring of Schein employees who had non-compete agreements led to litigation between Schein and Benco. (Cohen, Tr. 638).

75. In 1998, after Benco had hired an office of former Meer Dental employees in Pittsburgh who did not want to work for Schein, Schein sued Benco. After several months, the litigation was settled. (Cohen, Tr. 638-639).

76. Part of the settlement included an agreement between Benco and Schein that established rules for the orderly movement of sales reps with non-compete agreements between the companies (the "Competitive Hiring Agreement"). (Cohen, Tr. 639-640; Sullivan, Tr. 4265-66).

77. The Competitive Hiring Agreement provided the fuel that allowed Benco to grow its business over the next decade and execute its national expansion strategy. (Cohen, Tr. 640).

78. As Benco proceeded to hire approximately 120 Schein sales employees over the next decade plus, Benco never again had to face a lawsuit from Schein over non-compete issues stemming from Benco's hiring of Schein sales employees. (RX1127-476-77).

79. Non-compete litigation is expensive, it distracts from running the business, and slows the ability to hire employees from competitors. (Sullivan, Tr. 4265).

80. The Competitive Hiring Agreement allowed Benco to hire sales representatives who did not want to work at Schein but had non-competes. Without litigation, or the prospect of litigation, it lowered Benco's costs and uncertainty of hiring Schein employees and expedited Benco's hiring. (Cohen, Tr. 640-641).

81. The Competitive Hiring Agreement allowed sales representatives hired by the other company to "sit out" – or not call on their existing customers, for a period of 90 days, rather than a full year under a non-compete contract. Sales representatives could call on new customers during those 90 days. (Cohen, Tr. 641-642).

82. Benco also knew that expenses for hiring a Schein employee would be minimal because it would not have to go to court over the hired ex-Schein employees. (Cohen, Tr. 641).

83. The Competitive Hiring Agreement made Benco's hiring of Schein employees predictable, and, thus easier. It provided timing and cost certainty without the hassle and expense of non-compete litigation with Schein. (RX1127-477).

84. Once the Competitive Hiring Agreement was in place, it increased the number of Schein representatives that Benco hired. Since 1998, Benco has hired over 120 sales

representatives from Schein, while Schein has hired only about 60 sales representatives from Benco. (Cohen, Tr. 642-643; Sullivan, Tr. 4266-67).

85. The Competitive Hiring Agreement was integral and essential to Benco's rapid national expansion. Without the Competitive Hiring Agreement, Benco could not have hired experienced sales employees from Schein and would have had to have grown much more slowly. (Cohen, Tr. 643-644).

86. Due to the Competitive Hiring Agreement, Benco would often hire Schein employees in areas and new markets where Benco was seeking to open or expand. (RX1127-477).

87. The predictability and certainty provided by the Competitive Hiring Agreement, allowed Benco to compete better against Schein, Patterson and other dental distributors. As the primary enabler of Benco's rapid national expansion, the Competitive Hiring Agreement allowed Benco to offer customers greater choice and price competition in new markets against Schein, Patterson and other distributors already entrenched in those markets. (RX1127-478).

88. The Competitive Hiring Agreement with Schein was in place from 1998 until 2016. Benco entered the Pacific Northwest market in 2015, so the term of the Competitive Hiring Agreement matches the period of Benco's national expansion. (Cohen, Tr. 646; Sullivan, Tr. 4266-67).

89. The Competitive Hiring Agreement never prevented Benco from hiring any Henry Schein sales reps that it wanted to hire. (Ryan, Tr. 1154).

F. BENCO AS MARKET INNOVATOR AND DISRUPTOR

90. Benco's quest to provide dentists with an exceptional customer experience includes moving dentistry forward through innovation. (RX1105).

91. Benco, as a family-owned private company, has long been an innovator in the dental distribution market. (Cohen, Tr. 613).

92. Benco prides itself on having the largest product offering among dental distributors. (RX1099-001).

93. Benco is constantly looking for new and innovative products to distribute. Often, Benco has brought new products to market that could not find an avenue to market through Schein or Patterson. (Cohen, Tr. 613-14).

94. Vatech was a company based in South Korea that was one of the world's leaders in imaging technology. Vatech had a fabulous line of products that they could not bring into the United States market because they could not find a dental distributor to work with them. (Cohen, Tr. 614)

95. Benco eagerly brought Vatech's products to the United States market and they are now one of the imaging leaders within the United States. As a result, they have lower the price that consumers pay and increased the quality of x-ray products sold in dentistry today. (Cohen, Tr. 614-15).

96. Benco is the only United States distributor for Herman Miller's office furniture, including Herman Miller's medical-grade reception desks and business furniture. (Cohen, Tr. 615-16).

97. Benco embraces innovative products sold by traditional manufacturers. (Cohen, Tr. 613-16; 649).

98. Straumann is one of the largest dental manufacturers in the world. Benco sought out and developed an innovator partnership with Straumann that allows Benco to distribute Straumann's most innovative products. (Cohen, Tr. 615).

99. Benco has a reputation in the market for jumping on innovative products earlier than its competitors. (Cohen, Tr. 649).

100. Benco continually seeks to innovate its own services and product offerings to dentists. (RX1105).

101. In 1968, Benco was the first company to hire equipment specialists to help dentists integrate new technologies into their dental offices. (RX1105).

102. In 1974, Benco was the first dental distributor to leverage United Parcel Services to deliver dental supplies quickly through the mail. (RX1105).

103. In 1978, Benco was the first dental distributor to add a dental space planner, resulting in the creation of the industry's leading dental office design team. (RX1105).

104. In 1988, Benco was the first dental distributor to offer dentists electronic ordering. (RX1105).

105. In 1995, Benco was the first dental distributor to offer dentists Windows-based dental supplies ordering platform, which Benco called Painless®. (RX1105).

106. In 1996, Benco was the first dental distributor to offer a customer loyalty program, called Bluchips. (RX1105).

107. In 2003, Benco became the first dental distributor to measure customer satisfaction using Net Promoter Score. (RX1105).

108. In 2010, Benco became the first dental distributor to launch a complete dental design, equipment showroom, called CenterPoint. (RX1105).

109. In 2011, Benco became the first dental distributor to harness the power of women in dentistry through The Lucy Hobbs Project®. (RX1105).

110. Benco was the first independent dental distributor to establish nationwide coverage, from the Atlantic to the Pacific. (RX1105).

111. In 2014, Benco was the first dental distributor to launch an open, in-office CAD-CAM digital impression milling system. (RX1105).

112. Today, Benco's online and mobile ordering system, Painless®, allows dentists to streamline not only their ordering of dental supplies, but also helps dentists control their inventory management process. (Cohen, Tr. 648-49).

113. Benco brings innovative products to market via its Pro Sys and other private label products. For example, Benco recently launched a brand-new sonic toothbrush called the VarioSonic. It is similar to Philips' SonicCare, but much less expensive. (Cohen, Tr. 616).

114. For most of the last three decades, the two leading brands of core equipment were A-dec and Pelton & Crane. From the mid-1990s through 2013, Benco was the only dental distributor authorized to sell both brands. (Cohen, Tr. 650-51).

115. Through Benco's innovation in securing supply relationships with both A-dec and Pelton & Crane, Benco provided dentists a one-stop source to compare and purchase both brands of core equipment. (Cohen, Tr. 650-51).

116. Benco's national expansion during the 1990s and 2000s was aided by the fact that Benco offered both A-dec and Pelton & Crane, whereas Schein and Patterson did not. Thus, Benco had a competitive advantage that allowed it to provide greater customer choice, open new markets, and grow its sales. (Cohen, Tr. 651).

117. During Benco's national expansion, Benco opened new markets where dentists previously only had the option of Schein and Patterson as full-service dental distributors. (Cohen, Tr. 644).

118. Benco gave dentists greater choice. Benco's presence increased competition in these markets, thus providing consumers with lower prices. (Cohen, Tr. 644-45).

119. Often, Benco entered a new market by lowering price as a strategy to win customer from Schein and Patterson and gain market share from its competitors. (Cohen, Tr. 644-45).

120. A majority of the customers that Benco gained in new markets as its expanded came directly from Schein and Patterson. (Cohen, Tr. 644-45).

G. BENCO'S PRICING

121. Every year, Benco publishes a catalog with prices for the dental supplies that Benco sells. The prices for supplies published in Benco's catalog are referred to as Benco's catalog price. (Cohen, Tr. 414).

122. Benco sets prices based on its overall value proposition that it offers to its customers. Benco's goal is to justify a value-added relationship whereby dentists and other customers will pay the catalog price for dental supplies. Nonetheless, due to a multi-factor pricing and discounting strategy, the large majority of Benco's customers pay less than catalog price for dental supplies. (Cohen, Tr. 414; 671).

123. Benco's pricing philosophy is called "Hug Pricing." It means that every customer receives the best price, with the best discount, that they have earned – without asking. (RX1113).

124. Benco's caring family culture is reflected in its pricing, where Benco strives to deliver an exceptional customer experience by "hugging" its customers so that they can best experience the value that Benco delivers to their dental practice. (Cohen, Tr. 671-73).

125. Benco delivers its value proposition through its "Hug Pricing" by delivering to its customers concierge free goods, Elite Dental Alliance, 5% Solution, Painless® value shopper, customer reviews, and Bluchips. (RX1113).

126. Benco provides customers with access to concierge free goods via an integrated process for maximizing and tracking manufacturer coupons and offers. (RX1113).

127. Benco provides customers with access to Elite Dental Alliance, dentistry's largest group purchase organization. (RX1113).

128. Benco provides customers with a 5% solution by guaranteeing supply costs that are 20% less than the national average. (RX1113).

129. Benco provides customers with access to Painless® value shopper, which shows customers better-value alternatives, item-by-item, for products displayed while using Benco's Painless® online ordering system. (RX1113).

130. Benco provides customers with access to customer reviews, which are a suite of reports used by Benco's territory representatives to examine and improve the profitability of a dentist's practice. (RX1113).

131. Benco provides customers with access to Bluchips, which is dentistry's original and still most rewarding frequent buyer club. (RX1113).

132. Benco's pricing strategy chart is meaningfully entitled as "Fair & Flexible." (CX1100-001).

133. Benco's pricing includes several categories or "Price Tiers" available to independent dentists. These include Tier 1, Tier 2, Tier 4 and Tier 6. (CX1100-001).

134. Benco's Tier 1 pricing is available to independent dentists who value the Benco buying experience. It includes daily pricing that is at least 2% lower than Patterson's catalog price. (CX1100-001).

135. Benco's Tier 2 pricing is available to independent dentists who are more price-conscious and would prefer to receive a greater discount and less BluChips than Tier 1 customers. (CX1100-001).

136. Benco's Tier 4 pricing is available to independent dentists that are most price-conscious and would prefer to receive a greater discount than Tier 2, but do not receive any BluChips. (CX1100-001).

137. Benco's Tier 6 pricing is available to independent dentists that are new customers and do not yet understand the full value proposition that Benco provides to their practice. (CX1100-001).

138. The discounts received by customers at Tier 2, Tier 4 and Tier 6 are measured a percentage off of Benco's catalog price. (CX1100-001).

139. The BluChip program is Benco's frequent buyer program. BluChips are points that are awarded to Benco's loyal customers that are earned when customers purchase products, services and other activities from Benco. Customers that purchase through Painless®, Benco's internet and mobile ordering system, receive a 100% BluChip bonus. (Cohen, Tr. 654-55; CX1100).

140. Customers can redeem BluChips for account credits, discounts, and practice-oriented products and services. (Cohen, Tr. 655).

141. Benco's pricing philosophy takes into consideration the level of discount and amount of BluChips at each Price Tier. As independent dentists pay less in price on dental supplies, via a larger percentage discount off of Benco's catalog price, the amount of BluChips awarded goes down. (Cohen, Tr. 655-56; CX1100-001).

142. In addition to the discount level and BluChips, independent dentists also receive a discount from Benco in the form of free goods. Dental manufacturers often offer free goods or specials that result in free goods depending on purchase volumes or other criteria. Benco has the best computerized tracking system in dentistry to ensure that every customer receives all of the free goods that they are entitled to based on their purchase history and purchase volumes. (Cohen, Tr. 657).

143. Benco's free goods tracking system goes a step farther than its competitors. Whereas other distributors make dentists handle the collection of free goods that are earned, via coupons and applications, Benco's system automatically prints the free good coupons and the

Benco territory representatives redeem the coupons and deliver the free goods directly to the dentists. Benco's free goods system saves independent dentists money and, more importantly, time that would otherwise be spent tracking and collecting the free goods. (Cohen, Tr. 657).

144. Benco's territory representatives have pricing authority to offer customers further price discounts on some, or all, dental supply purchases. Territory representatives have the authority to, and often do, provide additional discounts to Benco's customers. (Cohen, Tr. 414; 661-62).

145. Even though Benco's Hug Pricing philosophy ensures that its customers receive the best deal that they have earned without asking for it, if independent dentists ask their territory representative for a lower price than what they have earned, the territory representative has the ability to lower the price even further. (Cohen, Tr. 673-74).

146. Benco's territory representatives have unilateral authority to discount dental supplies all the way down to cost, if they feel they need to do so to win business and to compete. (Cohen, Tr. 415-16, 610).

147. Approximately 30% of Benco's sales to customers involve some level of discount applied by a Benco territory representative. (Cohen, Tr. 418).

148. Dentists all have a different pricing mix, because they all have a different product mix. Dentists have different free goods rules, based on their purchase history, product mix, and volumes. (Cohen, Tr. 658).

149. Prices paid by independent dentists vary greatly even within each Price Tier. Despite the Price Tier, or target price, Benco's multi-factor discounting strategy results in independent dentists paying highly individualized prices based on their Price Tier allocation, product mix, purchase history, purchase volume, BluChips earned, free goods rules, and territory representative discounts. Benco is committed to using all of the discounting tools and strategies available to effectively compete for, and win, the business of independent dentists. (Cohen, Tr. 658).

150. As a result of Benco's Hug Pricing philosophy and Fair and Flexible pricing strategy, labels and generalizations regarding the prices paid by independent dentists to Benco for dental supplies are meaningless. To ultimately determine the level of discount that an independent dentist receives from Benco, you would need to look directly at Benco's transactional-level data for that particular dentist and then account for, at least, the following factors: Price Tier, product mix, purchase history, purchase volume, BluChips earned, free goods rules, and territory representative discounts. (Cohen, Tr. 653-58; 661-62).

151. In addition to the Price Tiers for independent dentists, Benco's Fair & Flexibile pricing strategy included price codes for other categories of Benco customers. Benco had pricing categories for certain specialties, such as dental laboratories, oral surgery, and partner sharing. Benco also had categories for customers that were handled by its Special Markets division. Special Markets customers included institutions and non-profits, community health centers,

dental schools, government entities and corporate accounts (which includes DSOs). (Cohen, Tr. 653; CX1100).

152. [redacted] (CX1100; [redacted]).

153. Corporate accounts receive cost-plus pricing. Benco calculates the corporate account customer's price from the cost Benco pays and adds a set margin, rather than calculating a discount off of catalog price, as Benco does for Price Tiers applicable to independent dentists. (Cohen, Tr. 653-54; CX1100).

154. Benco's corporate account codes are listed as CA 1, CA 2, and CA 3. (Cohen, Tr. 654; CX1100).

155. Since Benco's corporate account pricing is cost-plus, the prices paid by Benco's corporate account customers, including DSOs, fluctuate based on changes in manufacturer's price to Benco. This fluctuation occurs on a customer-by-customer basis, due to the differences in product mix and volume across customers. (Cohen, Tr. 654; CX1100).

156. The impact of changes in a manufacturer's price can cut both ways for a Benco corporate account customer. If a manufacturer increases a price on a product purchased by Benco's customer, that price increase is passed on by Benco to the customer through Benco's cost-plus pricing. But if a manufacturer lowers a price or offers a discount, Benco passes that price reduction or discount on to the customer so that customer receives the discount. (Cohen, Tr. 654).

157. Passing on manufacturer discounts to corporate account customers is consistent with Benco's Hug Pricing philosophy. When Benco does not have to spend as much to service a corporate account customer, Benco can pass those savings on to the customer. (Cohen, Tr. 690-91).

H. BENCO'S DISTRIBUTION AGREEMENT WITH A-DEC

158. From the mid-1990's through the 2000's there were two main brands of core dental equipment, A-dec and Pelton & Crane. (Cohen, Tr. 650-651).

159. Until 2014, A-dec was sold by Benco and Patterson, while Pelton & Crane was sold by Benco & Schein. (Cohen, Tr. 651). Benco's ability to sell both A-dec and Pelton & Crane, where neither Patterson nor Schein could, was a significant advantage in its expansion strategy to grow into a national distributor. (Cohen, Tr. 651).

160. A-dec was Benco's number one brand of operatory equipment. (Cohen, Tr. 650).

161. At the DTA meeting in October 2013, A-dec told Benco that it wanted to cancel its distribution agreement with Benco. (Cohen, Tr. 663).

162. The cancellation of Benco's distribution of A-dec products was announced to the market on January 1, 2014. (Cohen, Tr. 662:20-25 (Cohen).

163. At the time Benco announced the loss of the A-dec business, Benco and Schein were in the middle of discussions about a merger. (Sullivan, Tr. 4081). Benco's loss of A-dec's business was a significant potential impact to that deal, and Tim Sullivan reached out to Chuck Cohen to discuss it. (Sullivan, Tr. 4081; RX2756).

164. When Benco lost the line of A-dec products, it was a stressful and traumatic event for Benco. As a result, Benco had to reshuffle its vendors, and change its entire business strategy, which had been based on being a national distributor for A-dec. (Cohen, Tr. 665).

165. It took Benco two years to retool its core equipment line, and figure out how to continue its growth without one of the major brands of dental equipment in the industry. (Cohen, Tr. 666).

II. BENCO'S NO-MIDDLEMAN POLICY WAS DEVELOPED AND APPLIED UNILATERALLY AND CONSISTENTLY BEFORE, DURING AND AFTER THE ALLEGED CONSPIRACY PERIOD.

A. BENCO'S NO-MIDDLEMAN POLICY

166. Benco has a policy, going back to mid-1990's that it does not recognize or work with middlemen that come between it and its customers. Among the middlemen that Benco does not recognize or work with are buying groups. (Cohen, Tr. 445).

167. Although it had the same policy prior to that time, Cohen first clearly articulated it in 1996. (Cohen, Tr. 693).

168. Before groups of independent dentists started to approach Benco, other companies, such as dental insurance companies and dental laboratories, would call and ask if Benco would offer a discount on supplies to dental practices that accepted their insurance or used their laboratory services. Benco would decline, because it did not put anyone between Benco and its customer. (Cohen, Tr. 693-694; RX1127-486).

169. The policy was based upon Cohen's own experience as a territory representative at Benco and his vision of the kind of company that he wanted Benco to be. (Cohen, Tr. 694:3-15).

170. The policy determines who Benco considers its customer and which entities Benco will sell to as a single customer. It is important for Benco to determine who the customer is because Benco's belief is that no one should come between Benco and its customers. (Cohen, Tr. 679).

171. The customer is the person who makes the purchasing decisions and then pays the bills at the end. (Cohen, Tr. 679-680).

172. There are five rules under Benco's "Group Practice Engagement Rules" to determine when a group will be recognized as a single customer:

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

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

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

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

(e) Any group combinations of (a) through (d). (RX1143-047)

173. Rules 1 through 4 of the Benco policy describe different forms of common ownership, which is critically important to Benco because common ownership results in common control. Only those who have control over the dental practices can compel compliance in purchasing decisions. (Cohen, Tr. 684).

174. Benco believes that there must be common ownership of separate dental practices in order for Benco to sell to a group as a single customer. (RX1127-486; Ryan, Tr. 1165-66).

175. "Compliance" means that someone can make a commitment for purchasing and then actually deliver on that commitment. For example, if a group has 100 locations, and the group says that all 100 are going to buy their products from Benco, the group can "flip a switch" and all 100 do in fact buy their products from Benco. (Cohen, Tr. 684-685; RX1127-487-88).

176. If only 30 of those 100 offices purchased from Benco, that would cause problems for Benco. First, Benco would have priced the product based upon a projected volume of sales to 100 offices. Second, if the 30 offices that take advantage of the lower prices are already Benco customers, then Benco would have offered a discount to existing customers without adding new customers – in effect cannibalizing its existing customers. (Cohen, Tr. 685-686).

177. The rationale for Benco's policy is that where Benco can be assured that compliance will happen, Benco can lower its costs to serve and lower pricing to the customer without anyone coming between Benco and the customer. (Cohen, Tr. 692; Ryan, Tr. 1166-67).

178. Groups that lack common ownership cannot compel compliance at all. (Ryan, Tr. 1166-67).

179. Groups that lack common ownership offer Benco only a "hunting license," meaning that they can only provide Benco an opportunity to pursue its members as customers,

but cannot promise that those members will actually buy from Benco or what volume they might buy from Benco. (Ryan, Tr. 1166-67).

180. A buying group that offers only a "hunting license" offers the opposite of compliance ("you have a right to shoot a deer, but you may not see a deer" or "you may see a deer, but you may miss the deer"). Such an offer promises no compliance at all, only the opportunity to sell to independent dentists – which is what Benco does everyday without needing to make any meaningless deal with a middleman offering only a "hunting license." (Ryan, Tr. 1179-80).

181. In the past, it was Pat Ryan's job to figure out what a group actually is. The usual approach was that a group would approach a territory representative, who would pass it along to Ryan. Ryan would have a conversation with the group to ask how it was structured, where it operated, and how large it was. (Cohen, Tr. 681).

182. When a group approaches Benco, Pat Ryan will discuss with the group its ownership structure. In addition to gathering information directly from the group, Pat Ryan would look at the group's website, talk to other Benco sales employees, and conduct other independent research on the group's ownership structure. (Ryan, Tr. 1167).

183. When a group approaches Benco, the name of the group or what it may call itself does not impact Benco's evaluation of the group's ownership structure and application of Benco's policy. (Ryan, Tr. 1168-69).

184. In some instances, Benco would ask for documentation or visit some of the locations to verify information the group provided. (Cohen, Tr. 681-682).

185. It is sometimes very difficult to figure out what kind of group it is, because there are a lot of different forms a group may take when aggregating dental practices. (Cohen, Tr. 682).

186. There is radical variation in the structures of the groups that approach Benco. Pat Ryan and others have a saying, "if you've seen one DSO, you've seen one DSO." (Ryan, Tr. 1169).

187. Benco considers buying groups to be middlemen between Benco and its customers, and therefore, pursuant it its policy, it has turned down opportunities to recognize buying groups as a single customer. (Cohen, Tr. 446).

188. Benco provides discounts to individual customers, and those customers may or may not also be a member of a buying group, but it does not offer a discount to a dentist because it is a member of a buying group. (Cohen, Tr. 445-46).

189. Benco's business strategy is that it does not participate in buying groups. Benco believes its business strategy is in its own unilateral economic interest. (Ryan, Tr. 1216-17).

B. APPLICATION OF BENCO'S NO-MIDDLEMAN POLICY TO A BUYING GROUP - THE KOIS BUYERS GROUP

190. Applying Benco's policy to the Kois Buyers Group, as Benco understands it, the Kois Buyers Group does not check any of the boxes under Benco's policy to determine whether it is a single customer:

(a) The Kois Buyers Group members' offices are not owned by a single entity;

(b) There is no entity that owns the hard assets of the members of the Kois Buyers Group;

(c) There is no entity that owns a majority ownership in the members' practices;

(d) There is no management company that can compel purchasing decisions by members. (Cohen, Tr. 683-684).

191. Under Benco's policy, therefore, Benco's customers are the individual dentists who are members of the Kois Buyers Group – not the Kois Buyers Group itself. (Cohen, Tr. 684).

192. Applying Benco's policy to another customer, Affordable Care, which is a DSO, demonstrates why Affordable care is considered a single customer. Affordable Care has 250 offices, and is Benco's largest customer. Affordable Care's offices are controlled, although they are not all owned, by a central office that determines the purchasing decisions for all 250 offices. (Cohen, Tr. 686-687).

193. Afforable Care's central office owns all of, or a portion of, all of the offices, and Affordable Care either buys products directly from Benco or directs the offices to place orders with Benco. Therefore, Affordable Care delivers compliance by all 250 offices. (Cohen, Tr. 687-688).

194. Benco does not send territory representatives to the individual offices of Affordable Care, because it offers them a lower price, and in return they get a lower level of service. (Cohen, Tr. 688-689).

195. Not providing territory representatives' service to Affordable Care offices lowers Benco's costs to serve Affordable Care, because Benco does not have to pay commission to its territory representatives, which are 25% of the gross margin dollars of sales. (Cohen, Tr. 689).

196. Since Affordable Care lowers Benco's cost to serve, Benco is able to offer Affordable Care lower prices. Consistent with Benco's Hug Pricing philosophy, Affordable Care has earned that lower price. (Cohen, Tr. 688-89; RX1113).

C. CORPORATE DENTAL PRACTICES AND DSO'S

197. A corporate dental practice, also called a DSO, is, in general, a group of dental practices that have one common ownership structure and operates in multiple locations, usually multiple cities and multiple states. The dentists who work for these corporate dental practices are employees, sometimes small or minority owners, but not the majority owners and not the decision makers. (Cohen, Tr. 412).

198. In a DSO, the different locations are not independently owned. However, certain states have regulated the ownership of dental practices, so there are creative ways that some DSOs get around those regulations. (Cohen, Tr. 412-413).

199. With a DSO there is common, centralized ownership over all individual locations and common control over business decisions. (Cohen, Tr. 413).

200. Before Benco had a national infrastructure, serving DSOs that operated on a national level presented problems. Ultimately, Benco had to grow a national footprint in order to better compete for the business of corporate dental practices. (Cohen, Tr. 808-809).

201. After 2004, when Benco opened its distribution center in Dallas, Texas, but prior to achieving a national footprint, Benco would compete for the business of national DSO's. For customers on the West Coast, where Benco did not have a distribution center or service operation, Benco would farm out the service operation to a third party or ship product second-day air at Benco's expense. (Cohen, Tr. 809).

202. During that time period, for DSO customers west of the Rocky Mountains, Benco would find independent independent service technicians to whom it could outsource the service of those customers' equipment. Pat Ryan would identify a good independent service technician to perform service work for those offices, and Benco would pay that service technician. (Cohen, Tr. 809-810).

D. BENCO'S STRATEGIC MARKETS DIVISION

203. Benco's Strategic Markets division includes any customer segment that goes beyond an independent dental practice, including DSOs, dental laboratories, institutions, such as prisons and the federal government, community health centers, universities and schools. (Cohen, Tr. 802-803).

204. The Strategic Markets division did not have a name when it was developed, it was then called "Special Markets," and ultimately the name was changed to "Strategic Markets." (Cohen, Tr. 805).

205. Benco changed the name of its Special Markets division in 2013 or 2014 to Strategic Markets. It has been called Strategic Markets since that time. (Ryan, Tr. 1154-55).

206. The Strategic Markets division does not have a separate profit and loss statement, but it does have a separate sales team that pursues Strategic Markets' customers and the salespeople have a different compensation structure. (Cohen, Tr. 803).

207. Benco uses the same service technicians and distribution centers to service the customers of the Strategic Markets division. (Cohen, Tr. 803).

208. Pat Ryan started building the Strategic Markets business around 2004, when Benco saw a market opportunity and hired an experienced employee from Schein. (Ryan, Tr. 1155; Cohen, Tr. 803-804).

209. At its inception, Strategic Markets focused only on DSOs. (Ryan, Tr. 1157).

210. Prior to the creation of the Strategic Markets division, Benco had no targeted strategy to sell to DSOs. (Cohen, Tr. 806).

211. At that time, Benco had an internal conversation around the consolidation of dental practices and the growth of DSOs, and saw that there was a consolidation movement in the market. And although Strategic Markets are a lower-margin market and requires a different go-to-market strategy, Benco decided that it could not ignore that market. (Cohen, Tr. 804).

212. Benco was convinced that ignoring the Strategic Markets segment of the market would be like Kellogg saying it would not sell to Walmart. (Cohen, Tr. 804).

213. Benco hired Johnny Bunn away from Schein, who was by far the biggest player in the DSO space at the time with a greater than a 90% market share. (Ryan, Tr. 1156).

214. Johnny Bunn had significant experience with DSO's from his time at Schein and at a prior dental distributor. (Ryan, Tr. 1156-57).

215. Before adding Johnny Bunn to Benco's Strategic Markets division, Benco only had one DSO customer. (Ryan, Tr. 1157).

216. Bunn immediately brought three more DSOs to Benco from Schein. (Ryan, Tr. 1158).

217. Benco's entry into the DSO market was warmly received, as many DSOs were looking for an alternative to Schein. (Ryan, Tr. 1158-59).

218. Some DSOs, however, regarded Benco as too small of a company and were concerned that Benco's lack of a national footprint would impact service. (Ryan, Tr. 1159).

219. As a regional dental distributor at the time, Benco did not have any service technicians, service van, or any service infrastructure in large regions of the country, specifically west of the Mississippi River. (Ryan, Tr. 1159-60).

220. To address the concerns raised by national DSOs, Pat Ryan assembled a network of outsourced service technicians in the markets where Benco lacked a physical presence. As a result, Benco's DSO customers enjoyed a seamless customer experience. (Ryan, Tr. 1159-60).

221. As a result of Ryan's creation of Benco's outsourced service network, Benco was able to provide seamless customer service to national DSOs, even in markets where Benco had no physical presence. Ryan's ingenuity allowed Benco to compete directly with Schein for national DSO accounts and was critical in launching the success of Benco's Strategic Markets division. (Ryan, Tr. 1159-61).

222. The DSO customers that Benco gained almost all came from Schein. (Ryan, Tr. 1161).

223. Affordable Dentures was the second large national DSO that Benco landed as a Strategic Markets customer. They were significant to Benco for many reasons. Affordable Dentures was one of the top ten largest DSOs in the nation and left Schein to come to Benco. (Ryan, Tr. 1161-62).

224. Affordable Dentures becoming a Benco customer opened the floodgates for Benco in the national DSO market. Landing such an important national DSO customer significantly enhanced Benco's credibility in the market for national DSO customers. It signaled to the market that Benco was not too small to provide exceptional, national service to national DSOs, giving that customer segment a legitimate alternative to Schein. (Ryan, Tr. 1161-62).

225. During Benco's rapid national expansion, Benco's Strategic Markets was posting approximately 20% growth per year. (Ryan, Tr. 1161).

226. The main difference in developing Strategic Markets was that Benco decided to go after the DSO market without its traditional sales representatives and determined that it needed a separate sales team, with a separate compensation structure and separate go-to-market strategy to address the growing DSO segment of the market. (Cohen, Tr. 806).

227. By the time Benco created the Strategic Markets division, Schein had dominated the DSO segment of the market for many years with an estimated 85-90% share of that market. (Cohen, Tr. 806-807).

228. Benco estimates that today, Schein as above a 50% share of the DSO market, and that Benco has between 15% and 20% of that market. (Cohen, Tr. 807).

229. Benco's Strategic Market division has had a significant impact on Benco's growth and expansion. In 2007, Benco generated approximate $2M a year from Strategic Markets, and by 2017, Strategic Markets' revenue had grown to over $100M a year, representing about 17% or 18% of Benco's overall revenue. (Cohen, Tr. 807-808).

230. The growth of Benco's Strategic Markets was critically important to Benco's overall rapid national expansion. By "riding the DSO wave," Benco was able to attract national

DSO customers that facilitated infrastructure development and growth in new markets across the country. (Cohen, Tr. 808).

231. All requests to Benco from buying groups would be sent to Pat Ryan, as the head of Strategic Markets. Ryan would do the vetting, and he would make a decision, along with Chuck Cohen, on how Benco would handle the request. (Cohen, Tr. 810).

E. BENCO'S JOINT VENTURE WITH CAIN WATTERS - ELITE DENTAL ALLIANCE

232. Benco's no-middlemen policy still remains in place today, but Benco has made an exception to its policy to accommodate Elite Dental Alliance ("EDA"), which is a joint venture between Cain Watters and Benco. (Cohen, Tr. 451; 814; 819; 824).

233. Although Benco may consider EDA an exception to Benco's no-middleman policy, Benco belives that EDA – due to Benco's direct involvement in EDA and EDA's unique characteristics – is not inconsistent with Benco's policy. (Cohen, Tr. 816-24; Ryan, Tr. 1228-29).

234. Cain Watters is the largest financial services company dealing with independent dentists and dental practices. It provides services such as accounting services, bill paying, and financial planning for dentists. (Cohen, Tr. 814-815).

235. Since the mid-2000's, long before the formation of EDA, Cain Watters had been one of Benco's Success Partners. Benco developed an exclusive cross-referral working relationship with Cain Watters, where Benco would recommend Cain Watters' services to its clients, and Cain Watters would recommend Benco as a distributor to its clients. (Cohen, Tr. 815-816).

236. Although Benco does not have an ownership interest in EDA, it has an agreement with Cain Watters that the companies will work together to grow EDA, and if there are profits, those profits are split 50/50 between Benco and Cain Watters. (Cohen, Tr. 816).

237. Cain Watters, not Benco, drove the timing of EDA. (Cohen, Tr. 827).

238. Benco first learned of Cain Watters' potential interest in finding a dental supplier to provide volume discounts to Cain Watters clients on June 8, 2015. (CX1280; Cohen, Tr. 827).

239. After learning of Cain Waters' interest from a Benco territory representative, Chuck Cohen reached out to Brian Bortz of Cain Watters who told Chuck Cohen that Cain Watters was looking to form a venture with a supplier to provide discounted dental supplies to Cain Watters clients. (Cohen, Tr. 818; 827; CX1280).

240. Benco is always interested in exploring ways to build and deepen its relationships with its Success Partners. (Cohen, Tr. 815-16).

241. After that initial contact, in June 2015, Benco had regular dicussions with Cain Watters as they negotiated what became the EDA. (Cohen, Tr. 828).

242. In evaluating whether to enter into the EDA relationship with Cain Watters, Benco considered the rationales underlying its non-middlemen policy and assessed whether EDA was in Benco's unilateral economic interest. (Cohen, Tr. 818).

243. It only made sense to move forward with Cain Watters, if EDA could solve the core structural problem that plagued all other buying groups and made them unattractive to Benco's unilateral economic interests. (Cohen, Tr. 818-23).

244. Benco and Cain Watters were faced with the challenge of driving compliance among EDA members, securing volume commitments from EDA members, and ensuring that Benco would receive increased revenue in exchange for lowering its margins on dental supplies sold to EDA members. (Cohen, Tr. 818-21).

245. EDA is structurally different than any buying group Benco has ever seen. It is more like a DSO, but without common ownership. (Cohen, Tr. 818-22; Ryan, Tr. 1228).

246. EDA's unique characteristics include:

A. <u>Membership</u>. Members of EDA need to be either:

   i. Cain Watters clients who have an in-person meeting at least once a year to discuss the financial health and business planning for their dental practice. The Cain Watters' account planner has significant control over directing the financial decisions of the dental practice; (Cohen, Tr. 819-21); or

   ii. Dentists with over $2M in revenue who are very large independent dental practices that would qualify for significant discounts under Benco's Price Tiers, specifically, Benco's Profit Sharing (PS) Tier. (Cohen, Tr. 818; 820-22).

B. <u>Firm Purchase Commitment</u>. Members of EDA make a firm purchase commitment to Benco. Every EDA member practice must make a minimum purchase commitment, which is factored into the discount they receive from Benco. (Cohen, Tr. 468; 817).

C. <u>Profit Sharing</u>. As partner in the joint venture, Benco receives 50% of the profits from EDA, which helps offset the discounts provided to EDA members. (Cohen, Tr. 816).

D. <u>Control</u>. Benco has absolute control over the selection of members and vendors of EDA. (Cohen, Tr. 817; 820-21).

247. Based on EDA's wholly unique characteristics, which were different than any other buying group, Benco determined that it was in its own unilateral economic interest to partner with Cain Watters on EDA. (Cohen, Tr. 469; 820-23)

248. In some ways, EDA is similar to a buying group, and other ways EDA is different from a buying group. (Cohen, Tr. 818-819).

249. Benco determined that, at least on a trial basis, that participation in EDA would result in an increase in volume and therefore more margins dollars coming in to make up for any margin dollars lost by giving discounts to existing Benco customers who joined EDA. (Cohen, Tr. 820).

250. Benco determined that it was in its economic interests to partner with Cain Watters and EDA. (Cohen, Tr. 823-824), and decided to partner with Cain Watters on EDA on a one-year trial basis, and when the trial worked out well, Benco decided to continue on. (Cohen, Tr. 463; 823).

251. Benco announced its partnership with Cain Watters and EDA at its sales meeting in early 2016. (Cohen, Tr. 823).

252. Under the agreement with Cain Watters, Benco is the exclusive dental distributor for the EDA, 817:14-15 (Cohen), but there are also direct sellers of products that are vendor partners of EDA. (Cohen, Tr. 817).

253. Benco has veto power over proposed vendors for the EDA program. (Cohen, Tr. 817).

254. In order to qualify for discounts from Benco, EDA members must purchase a minimum volume of products from Benco. (Cohen, Tr. 817).

255. Benco also looked at the relationship between the dentists and Cain Watters and determined that because Cain Watters meets with its clients once a year for an in-depth conversation on financial planning and other issues, that that would help Benco because there would be a reason for the clients to listen to the story about EDA and want to participate. (Cohen, Tr. 819).

256. Because Benco was a partner in EDA, it had the ability to restrict the growth of EDA. As a result, Benco could be confident that it understood EDA's strategy going forward (Cohen, Tr. 821).

257. Benco also has control over the rules for admitting members into EDA, and membership is restricted to clients of Cain Watters or large dental practices with more than $2 million in gross revenue. (Cohen, Tr. 821).

258. Looking at the issue of compliance, or whether EDA members would actually purchase from Benco, Benco believed there would be a good measure of compliance by EDA members about buying from Benco. (Cohen, Tr. 820).

259. For EDA, Benco looked at the entirety of the situation, and combined that with Benco's ability to have some measure of control over EDA and how it markets, and Benco

decided that it would make an exception to its policy by working with Cain Watters to develop EDA. (Cohen, Tr. 463; 819).

260. Whereas, on the one hand, Benco considers EDA an exception to its no-middlemen policy, because EDA is an entity positioned between Benco and its customers – the independent dentist members of EDA, on the other hand, no exception is required because Benco is a partner in the joint venture of EDA and has a 50% stake in the profits of EDA. (Cohen, Tr. 816-24).

261. The structure of EDA is closer to a GPO than a buying group, because there are services that are handled by EDA that go beyond just a membership and access to specials – like financial services and discounts on products and services beyond the dental supplies and equipment. (Cohen, Tr. 822).

262. Benco's role in EDA is not inconsistent with its policy and does not represent any change in behavior by Benco. (Cohen, Tr. 816-24; 863).

263. Benco's policy remains in place and Benco still believes that buying groups provide no economic value to Benco because they cannot drive compliance or deliver volume commitments. (Cohen, Tr. 445; 451; 816-24; 863).

264. EDA has been in operation for nearly two years and Benco believes that EDA has been successful. (Cohen, Tr. 471; 824).

265. Through EDA, Benco has added new customers and EDA has almost 1,000 members. (Cohen, Tr. 824).

266. [redacted]

267. In addition to the financial gain that Benco has realized from EDA through its 50% profit-sharing with Cain Watters, Benco has realized other benefits from EDA that would not have been possible through any other buying group that did not possess the unique characteristics of EDA. (Cohen, Tr. 824-25).

268. Due to the control over EDA that Benco has through its agreement with Cain Watters and due to the 50% profit-sharing agreement, Benco has been able to use EDA as a controled testing laboratories for new product offerings and new go-to-market strategies. (Cohen, Tr. 824-26).

269. In particular, Benco has tested various shipping plans and strategies directed at increasing incremental customer acquisitions. (Cohen, Tr. 824-26).

270. Most importantly, Benco has used EDA as a testing ground for rethinking its overall go-to-market strategy and its customer value proposition. It has tested the behavior of dentists and responses of dentists who are members of EDA. The information learned through

member testing in EDA has directly impacted Benco's new strategy, which it intends to introduce to the market in 2019. (Cohen, Tr. 824-26).

III. BENCO ACTED IN ITS OWN ECONOMIC INTEREST AND CONSISTENT WITH ITS NO-MIDDLEMAN POLICY IN ITS DEALING WITH THE KOIS CENTER & THE KOIS BUYERS GROUP

A. DR. KOIS & THE KOIS CENTER

271. Dr. John Kois is a dentist and director of the Kois Center. (Kois, Sr., Tr. 161).

272. The Kois Center is a private teaching center for practicing dentists located in Seattle, Washington. (Kois, Sr., Tr. 163; Cohen, Tr. 788).

273. Dr. Kois founded the Kois Center in 1994 to help practicing dentists further their education and improve their delivery of healthcare to their patients. (Kois, Sr., Tr. 164).

274. There are nine courses in the Kois Center curriculum, involving many fields of dentrist, all taught by Dr. Kois. Each course runs from three to five days, and the Kois Center offers over 30 courses per year. (Kois, Sr., Tr. 164-165).

275. There are about 40 students in each course, who come from all over the world. (Kois, Sr., Tr. 165).

276. Approximately 4,000 dentists have taken course at the Kois Center, and approximately 900 dentists have completed all of the courses. (Kois, Sr., Tr. 165).

277. Students of the Kois Center are nicknamed "The Tribe." (Kois, Sr., Tr. 165).

278. In Dr. Kois's private practice, he purchased most of his dental products from Burkhart, and the remainder are supplied through separate individual companies. (Kois, Sr., Tr. 168).

279. Kois estimated that for his own practice, he purchased 75 percent of disposables through dental distributors and 25 percent from direct vendors. (Kois, Sr., Tr. 285).

280. Burkhart was the original supply company that Dr. Kois started working with in 1985. It provided all the equipment that was necessary to build his office and it continues to supply many of the supply items that he uses on a daily basis in practice. (Kois, Sr., Tr. 169).

281. Burkhart also provides services to Dr. Kois's dental practice. Burkhart has a representative that informs Dr. Kois of new products and helps control some of his inventory by making sure he has the right stock of equipment and doesn't run out of anything. (Kois, Sr., Tr. 169-170).

282. The Burkhart sales representative comes to Dr. Kois's office once every two weeks. (Kois, Sr., Tr. 170).

283. When placing orders with Burkhart, Dr. Kois's staff record items that are needed, and they provide that information to the Burkhart sales representative when he comes in. (Kois, Sr., Tr. 171). If there is something more important, they would call or get in touch with the Burkhart sales representative. (Kois, Sr., Tr. 171).

284. Dr. Kois considers Burkhart to be a full-service distributor, meaning it not only sell supplies, but also services the equipment and provides instruction or training on equipment that it sells to Dr. Kois. (Kois, Sr., Tr. 170-171).

285. When Dr. Kois's staff needs to be trained on new equipment, some of the training comes directly from the supply company [Burkhart]. For other types of equipment, they depend on the actual company [the manufacturer] to supply training. (Kois, Sr., Tr. 171).

286. Burkhart services his equipment, and when equipment needs servicing, his staff calls Burkart directly. (Kois, Sr., Tr. 171-172).

287. Dr. Kois has also purchased from Benco, Schein and Patterson. (Kois, Sr., Tr. 168-169).

288. When Dr. Kois purchases products from Benco, Schein and Patterson, he receives discounts. (Kois, Sr., Tr. 231; 286-287).

289. Price is a factor "many times" for disposable products the Dr. Kois purchases for his practice. (Kois, Sr., Tr. 176-177).

B. THE KOIS BUYERS GROUP

290. Dr. Kois started the Kois Buyers Group in 2014, and anyone that has come to the Kois Center for a course has access to the Kois Buyers Group. (Kois, Sr., Tr. 23).

291. The Kois Buyers Group is managed by Dr. Kois' son, John C. Kois, Jr. ("Johnny Kois"), who is the CEO of the Kois Center. (Kois, Jr., Tr. 305).

292. Members pay a $299 yearly fee, and the Kois Buyers Group does all of the research on the products and provides training for products that it recommends. *(*Kois, Sr., Tr. 24).

293. Dr. Kois does not know how much of a percentage volume discount members of the Kois Buyers Group receive. (Kois, Sr., Tr. 24).

294. All students of the Kois Center ("The Tribe") are eligible to be a member of the Kois Buyers Group, but not every member of The Tribe is a member of the Kois Buyers Group. (Kois, Sr., Tr. 234- 235; Kois, Jr., Tr. 308).

295. Kois Buyers Group fee structure was originally for members to pay an initial deposit of between $398 and $998 dollars, and to pay a monthly fee ranging from $199 to $299

depending upon how much the dentist would spend per month on inventory. (Kois, Sr., Tr. 238-239; CX 290).

296. That fee structure was way too expensive, and the Kois Buyers Club did not get enough people that would follow that kind of purchase agreement. (Kois, Sr., Tr. 239).

297. The original fee schedule was in effect for less than a year, and then the fee was changed to $299 per year. Any dentist who had paid the initial deposit of almost a thousand dollars got a three-year membership in the Kois Buyers Club. (Kois, Sr., Tr. 240).

298. The Kois Buyers Group changed the fee to $299 per year after Qadeer Ahmed was no longer part of the buying group. (Kois, Sr., Tr. 241).

299. There are members of the Kois Buyers Group that do not purchase from the buying group vendors. (Kois, Sr., Tr. 2460).

300. Johnny Kois is surprised there have not been more dentists sign up, and does not know why there have not been more sign-ups. (Kois, Sr., Tr. 254).

301. Burkhart has an exclusive agreement with the Kois Buyers Group, meaning that for the United States Burkhart is the only distributor that offers a discount specifically through the Kois Buyers Group. (Kois, Jr., Tr. 322; 324).

302. The Kois Buyers Group agreement with Burkhart provides for a 15% discount off of retail prices. (Kois, Jr., Tr. 335).

303. A dentist may already be getting a better price than retail, so those dentists may not actually see a 15% discount off of what they are currently paying. (Kois, Jr., Tr. 335).

304. Johnny Kois does not know the difference between the 15% discount off of retail prices the Kois Buyers Group members receive and what discounts the members might receive on purchases outside of the Kois Buyers Group. (Kois, Jr., Tr. 359).

305. The Kois Buyers Group agreement with Burkhart was signed in November 2014. (CX 1032).

306. Johnny Kois's responsibilities as manager of the Kois Buyers Group is to manage and maintain the relationships with its vendors, assist members that have any issues when they sign up, and manage the membership and the website. (Kois, Jr., Tr. 309).

307. Johnny Kois is the only employee of the Kois Buyers Group. (Kois, Jr., Tr. 313-314).

308. For Burknart, the margin that Burkhart receives on sales of supplies to Kois Buyers Group members is blended, between members west of the Mississippi, where Burkhart acts as a full service distributor, and east of the Mississippi, where Burkhart does not offer a full suite of services. (Kois, Jr., Tr. 357-357).

309. Johnny Kois does not know what discounts members of the Kois Buyers Group might receive from Schein, Patterson or Benco for purchases they make outside of the Kois Buyers Group program. (Kois, Jr., Tr. 357-358).

310. The contract that Mr. Ahmed negotiated with Burkhart was a two-year contract that would end in 2016. (CX1032).

311. Johnny Kois negotiated a renewal contract for the Kois Buyers Group to last from January 2016 through the end of 2017. (Kois, Jr., Tr. 341; RX1078).

312. Johnny Kois did not contact Patterson about becoming a supplier for the Kois Buyers Group when he renegotiated the contract that was to begin in January 2016. (Kois, Jr., Tr. 382-383).

313. Johnny Kois has not reached out to Schein regarding the Kois Buyers Group in the United States since he took over in October 2015, (Kois, Jr., Tr. 362), including when he was negotiating the renewed contracts with Burkhart. (Kois, Jr., Tr. 362).

314. In the fall of 2015, at the time of the negotiations for the 2016 Kois Buyers Group contract, Johnny Kois had discussions with Burkhart and Benco. (Kois, Jr., Tr. 342).

315. Kois asked both Burhart and Benco if they would both be interested in being dental supply companies for the Kois Buyers Group. (Kois, Jr., Tr. 342).

316. Neither Burkhart nor Benco was interested in having another distributor in the Kois Buyers Group. (Kois, Sr., Tr. 352-353).

317. Johnny Kois did not ask for bids for the 2016 contract. When Burkhart said it did not want to be in the group with another distributor, Johnny Kois continued the negotiation process with Burkhart alone because he already had an agreement with Burkhart. (Kois, Jr., Tr. 343).

318. Dr. Kois made the decision to move forward with Burkhart as the distributor for the Kois Buyers Group around October 30, 2014. (Kois, Sr., Tr. 302-303; CX4251).

319. Dentists who have taken a course at the Kois Center have the ability to get a membership code, and Burkhart acknowledges and recognizes the code and passes on a negotiated discount for those purchases. (Kois, Sr., Tr. 184-185).

320. A student at the Kois Center, Dr. Robert Cappell of Toronto, Canada, told Dr. Kois that he had a friend, named Qadeer Ahmed, who had some ability to make contacts on behalf of the Kois Center in connection with the proposed Kois Buyers Group. (Kois, Sr., Tr. 187-188; 212-213).

321. Mr. Ahmed had a company called Procare Services in Canada. In August or September 2014, Dr. Kois asked Ahmed to reach out to companies and see who might be interested in working with the still unformed Kois Buyers Group. (Kois, Sr., Tr. 188; 189).

322. Mr. Ahmed was a consultant to the Kois Buyers Group, and was never an employee. (Kois, Sr., Tr. 189).

323. Neither Mr. Ahmed nor ProCare Dental Services had any experience in the dental industry, or setting up buying groups or arranging distribution in the medical field. (Kois, Sr., Tr. 217-218).

324. It was Dr. Kois's decision to select Burkhart as the distributor for the Kois Buyers Group. (Kois, Sr., Tr. 196).

325. Dr. Kois does not know anything about Mr. Ahmed's discussion with Schein, Patterson and Benco other than what Mr. Ahmed told him. (Kois, Sr., Tr. 196).

326. There was not a Kois Buyers Group prior to October 2014. (Kois, Sr., Tr. 202).

327. Kois Buyers Group members are free to purchase from whomever they want. (Kois, Sr., Tr. 247-248).

328. The Kois Buyers Group is not a centralized purchaser and does not make any purchases itself. Every individual dental practice that is a member makes its own purchases. (Kois, Sr., Tr. 248-249).

329. The Kois Buyers Group has no buying power. (Kois, Sr., Tr. 249-250).

330. Johnny Kois negotiates the discounts offered to Kois Buyers Group members with Burkhart. (Kois, Sr., Tr. 27-28).

331. Burkhart is the distributor for the Kois Buyers Group, but there are also manufacturers who are part of the buying group. (Kois, Sr., Tr.25).

332. Johnny Kois is the chief executive officer for the Kois Center and has been since March 2015. (Kois, Jr., Tr. 305).

333. Johnny Kois is also the manager Kois Tribal Management, the company that runs the Kois Buyers Group. (Kois, Jr., Tr. 305; 307).

C. BENCO'S RELATIONSHIP WITH DR. KOIS AND THE KOIS CENTER

334. The Kois Center has been one of Benco's Success Partners. (Cohen, Tr. 567-68; 789; Kois, Sr., Tr. 270).

335. Dr. Kois is one of the most respected dentists, clinicians, researchers, and dental education lecturers in the United States. (Cohen, Tr. 568; 788).

336. Chuck Cohen held Dr. Kois in high regard, believing that Dr. Kois ran a terrific operation, and considers him a friend from a business perspective. (Cohen, Tr. 568; 788).

337. Dr. Kois, both at the onset of The Kois Center's relationship with Benco and today, views Benco as an East Coast dental supply company and not as national distributor. (Kois, Sr., Tr. 268-69).

338. The Kois Center is a one-of-a-kind teaching facility for dentists and the quality of the education it provides to dentists is top notch. (Cohen, Tr. 790-91).

339. Benco formed a Success Partner relationship with The Kois Center due to Dr. Kois' reputation and the preeminence of The Kois Center. The agreement between Benco and The Kois Center was dated June 8, 2012. (Kois, Sr., Tr. 269).

340. Benco had an agreement with Dr. Kois and the Kois Center whereby Benco representatives would help promote the activities of the Kois Center. (Cohen, Tr. 789; Kois, Sr., Tr. 269-71).

341. Benco would market Dr. Kois's courses in its magazines. And at different times Dr. Kois came and spoke to Benco sales representatives and attended Benco's sales meetings to educated Benco's team on the value of The Kois Center's educational programs. (Cohen, Tr. 790).

342. Prior to its agreement with Benco, The Kois Center had a policy that it did not advertise, instead relying on word of mouth to promote itself. (Kois, Sr., Tr. 270).

343. Benco's advertising and promotion of The Kois Center was the first and only time The Kois Center advertised its courses. Benco did not receive any compensation for its marketing and advertising of The Kois Center. (Kois, Sr., Tr. 270-71).

344. Benco's agreement with The Kois Center lasted for a few years from approximately 2012 to 2015. (Cohen, Tr. 790).

345. Benco's relationship with The Kois Center and Dr. Kois was positive because it allowed Benco to partner with one of the most respected names in dentistry. (Cohen, Tr. 790).

346. Dr. Kois wrote an e-mail to Chuck Cohen on October 21, 2014, noting that he "had been approached by a company to organize our members for group purchase opportunities," and that he wanted Cohen to "talk to him to see if their [sic] would be an opportunity to work with your company." (RX1039).

347. In this e-mail, Dr. Kois provided Chuck Cohen with the name of Qadeer Ahmed and an e-mail address for Mr. Ahmed @proequalizerservices.com. Dr. Kois also copied Mr. Ahmed on his e-mail to Chuck Cohen. (RX1039).

348. Prior to receiving Dr. Kois's October 21, 2014 e-mail, Chuck Cohen had no understanding that Dr. Kois or The Kois Center was seeking to form a buying group. (Cohen, Tr. 791).

349. Dr. Kois' October 21, 2014 e-mail is the first and only approach that The Kois Buyers Club made to Benco. (Kois, Sr., Tr. 273).

350. Benco and Chuck Cohen had never heard of Qadeer Ahmed or ProEqualizer Services before receiving this e-mail from Dr. Kois. Qadeer Ahmed and ProEqualizer Services were not known or credible entities in the dental industry. (Cohen, Tr. 792).

351. Dr. Kois wrote this e-mail for the purpose of trying to introduce Qadeer Ahmed to Benco and Chuck Cohen because Dr. Kois knew that Mr. Ahmed "was not known in the dental industry." (Kois, Sr., Tr. 273).

352. Chuck Cohen responded to the e-mail from Dr. Kois, his longtime Success Partner whom he respected greatly, later the same day on October 21, 2014. (Cohen, Tr. 792; RX1039).

353. Chuck Cohen responds to Dr. Kois that Benco is confidentially looking at buying club options and should have some ideas to discuss with Dr. Kois in early 2015. (RX1039; Cohen, Tr. 793).

354. Chuck Cohen further responds to Dr. Kois that "whatever we do, I don't think that we'll need to involve an outside company like Equalizer Pro Services or anyone else, they'll just take a cut of the savings." (RX1039; Cohen, Tr. 793).

355. Chuck Cohen testified that this sentence meant what it said, elaborating that if Benco and Dr. Kois were going to discuss a buying club arrangement for Kois Tribe members, they did not need any unknown entity in the middle making money or taking a cut of the savings that should instead flow to Kois Tribe members. Instead, Benco could offer savings directly to dentists that were Kois Tribe members. (Cohen, Tr. 793; RX1039).

356. For this reason, Chuck Cohen advises Dr. Kois that he will "reconnect on this issue [with Dr. Kois] sometime in early 2015. (RX1039; Cohen, Tr. 794).

357. Dr. Kois understood Chuck Cohen's e-mail to mean that Chuck Cohen and Benco were interested in having the proposed discussion about formation of a buying group with Dr. Kois, Benco's Success Partner, but were not interested in involving Qadeer Ahmed, an unnecessary middleman that was not known in the dental industry. (Kois, Sr., Tr. 275-76).

358. Dr. Kois understood Chuck Cohen's e-mail to mean that Chuck Cohen would reconnect with Dr. Kois sometime in early 2015. (Kois, Sr.,Tr. 275).

359. Based on his positive relationship with Chuck Cohen, Dr. Kois believed Chuck Cohen when he promised to get back to him in early 2015. (Kois, Sr., Tr. 276).

360. Consistent with his advice to Dr. Kois that Benco did not need a middleman to blunt any future discounts Benco would offer to Kois Tribe members, Chuck Cohen advises Dr. Kois that he intends to "politely" tell Mr. Ahmed thanks, but no thanks. (RX1039; Cohen, Tr. 793).

361. Chuck Cohen did not intend in his October 21, 2014 e-mail response to Dr. Kois to communicate to Dr. Kois that Benco was not interested in talking to Dr. Kois about the formation of a buying group. Exactly the opposite, Chuck Cohen intended to convey to Dr. Kois that Benco **was** interested in talking to Dr. Kois about the formation of buying group, but simply did not want to involve Qadeer Ahmed, an unknown and unnecessary middleman, in that conversation. (Cohen, Tr. 794; RX1039).

362. Chuck Cohen's response to Dr. Kois was wholly consistent with Benco's no middlemen policy in that Benco would not allow any independent entity to come between Benco and its customers. Chuck Cohen's response to Dr. Kois was also wholly consistent with his respect, admiration, and long-term business friendship with Dr. Kois in that Benco was open to working with Dr. Kois on the formation of a buying group comprised of Kois Tribe members. (RX1039).

363. Even though Chuck Cohen had dropped Qadeer Ahmed from his October 21, 2014 response to Dr. Kois, Dr. Kois – unbeknownst to Chuck Cohen – forwarded Chuck Cohen's e-mail to Qadeer Ahmed. (Kois, Sr. Tr. 276-77).

364. Dr. Kois forwarded Chuck Cohen's e-mail to Qadeer Ahmed "just to let him know about how Chuck felt." (Kois, Sr., Tr. 277).

365. Qadeer Ahmed responds to Dr. Kois within hours, writing "Well I guess Chuck knowns our secret plans better than you and I do. Anyway, life is too short to deal with guys who believe they know everything. Appreciate the intelligence, we'll proceed with people who want to make a difference and make money too." (RX1040; Kois, Sr., Tr. 279).

366. Dr. Kois understood from Qadeer Ahmed's e-mail that he "was upset with Chuck wanting to work with me directly and not work with him." (Kois, Sr., Tr. 279).

367. Consistent with his commitment to Dr. Kois, Chuck Cohen wrote an e-mail to Qadeer Ahmed politely telling him thanks, but no thanks. (RX1042; Cohen, Tr. 794-95).

368. At no time did Chuck Cohen intend for his e-mail to Qadeer Ahmed to indicate that he and Benco were not interested in talking to Dr. Kois directly. They unequivocally were. (Cohen, Tr. 795; RX1039; RX1042).

369. Qadeer Ahmed responds to Chuck Cohen's e-mail by saying that his concept – which is not even close to being formed at this time – is not a buying group and that over time members would pay more margin for dental supplies. (RX1042).

370. Chuck Cohen responds to Qadeer Ahmed hours later, inviting him to "Please help me understand how your plan for a buying group is different." (RX1042; Cohen, Tr. 796).

371. Even though Chuck Cohen had already told Qadeer Ahmed politely, thanks, but no thanks, Chuck Cohen was still open to further discussion with Qadeer Ahmed about how his concept might be different. (Cohen, Tr. 796; RX1042).

372. In response to Chuck Cohen's invitation, Qadeer Ahmed writes back and advises that "[b]etween my first note to you and your reply, we have introduced our plan and have received, or are about to receive, written offers from various parties." (RX1042).

373. Qadeer Ahmed further advises Chuck Cohen that he is no longer interested in talking to Benco, writing "I hope we'll find something in the future we can do together." (RX1042).

374. Chuck Cohen testified that he understand Qadeer Ahmed's response to mean that he was getting a lot of attention from others and really did not need Benco. (Cohen, Tr. 797).

375. Chuck Cohen believed that there was no doubt as to Qadeer Ahmed's intention as he clearly ended the conversation in the final sentence of his e-mail. (Cohen, Tr. 797; RX1042).

376. Chuck Cohen believed that he had given Qadeer Ahmed a chance to have a conversation and it was Qadeer Ahmed's decision not to have that conversation with Benco. (Cohen, Tr. 797; RX1042).

377. Qadeer Ahmed confirmed that it was the Kois Buyers Club that turned down Benco in 2014. (RX1040 ("**<u>we</u>** avoided these guys").

378. As he had promised, Chuck Cohen reconnected with Dr. Kois in early 2015 to explore the potential formation of a buying group. (Cohen, Tr. 797-98; Kois, Sr., Tr. 279-80).

379. Dr. Kois, however, did not wait for Chuck Cohen to reconnect with him as promised. Instead, in November 2014, Dr. Kois and Qadeer Ahmed had signed an agreement with Burkhart to supply the Kois Buyers Group. (CX1032).

380. Ultimately, due to the relationship that the Kois Buyers Club already had with Burkhart, Dr. Kois told Chuck Cohen that he was no longer interested in talking to Benco about the Kois Buyers Club. (Cohen, Tr. 800-801).

381. Dr. Kois told Chuck Cohen that the Kois Buyers Club's agreement with Burkhart was the reason he did not want to move forward with Benco. (Cohen, Tr. 800-801).

382. Benco's Success Partner agreement with The Kois Center ended around 2016. (Cohen, Tr. 801).

383. Benco has, and continues to, aggressively compete for the business of the dentists that are Kois Tribe members and members of the Kois Buyers Club. (Cohen, Tr. 801-802).

384. One of the ways that Benco tries to compete for the members of the Kois Buyers Club is by offering lowers prices and discounts to Kois Buyers Club members. (Cohen, Tr. 802).

385. Benco also competes by matching the prices offered by Burkhart to Kois Buyers Club members. (Cohen, Tr. 802).

386. Dr. Kois himself received a discount from Benco when he purchased dental supplies from Benco for his own practice as an independent dentist. (Kois, Sr., Tr. 287).

387. Beyond the Kois Buyers Club, for any buying groups that have approached Benco, Benco has never stopped competing for the business of the independent dentists who are members of a buying group. (Cohen, Tr. 802).

388. The record does not support a finding of any agreement concerning Benco's and Schein's or Patterson's interactions with the Kois Buyers Group.

IV. BENCO UNILATERALLY DETERMINED NOT TO DO BUSINESS WITH SMILE SOURCE UNDER ITS NO-MIDDLEMAN POLICY

389. The record does not support a finding of any agreement concerning Benco's and Schein's interactions with Smile Source.

A. SMILE SOURCE'S FIRST APPROACH TO BENCO – SEPTEMBER 26, 2011

390. Smile Source has approached Benco on several occasions and, consistent with its no-middlemen policy, each time Benco has responded that it does not do business with buying groups like Smile Source. (Ryan, Tr. 1181-82).

391. On September 26, 2011, Dr. Andrew Goldsmith e-mailed Benco as President of Smile Source, in a cold solicitation, stating that Smile Source operated in 8 states and had 40 practices. The e-mail stated that Smile Source currently used Henry Schein for its services, but wanted to see what kind of relationship it could establish with Benco. (CX1333).

392. That e-mail was routed to Pat Ryan at Benco. On September 30, 2011, consistent with Benco's no-middlemen policy, Ryan e-mailed Dr. Goldsmith with four clarifying questions about Smile Source: (1) "Smile Source has no ownership stake in the offices, is that correct?"; (2) "Can Smile Source control and direct the [sic] who the offices purchase from?"; (3) "Who places the orders?"; and (4) "Who pays the bills?" (CX1138-02).

393. Dr. Goldsmith responded that: (1) "Smile takes 1% of the collections of the practice as a fee, but has no ownership"; (2) "We direct the formulary and the products"; (3) The orders are still placed by the individual practices"; and (4) The practices are responsible for all their bills…" (CX1138).

394. Ryan forwarded Dr. Goldsmith's response to Chuck Cohen, stating that Smile Source "smells like a GPO to me" but questioned whether it was a GOP if "they are in control of purchasing" or whether "the fact that the individual office paying negate that?" (CX0004). Cohen responded that "It's a GPO, no central ownership or bill paying. Please pass." (CX0004).

395. Ryan responded back to Dr. Goldsmith that "Your structure meets our definition of GPO, and Benco does not participate in group purchasing organizations. Thanks for thinking of us. I wish you the best." (CX1138; Ryan, Tr. 1183).

396. Dr. Goldsmith had no reason to doubt that Ryan was telling the truth when he said that Benco does not participate in group purchasing organizations. (Goldsmith, Tr. 2180-2181).

397. Ryan had no idea whether or not Smile Source was, in fact, working with Schein and did not investigate the issue because it did not matter to Benco. (Ryan, Tr. 1190).

398. There is no evidence that anyone from Benco contacted anyone from Schein about Smile Source or buying groups in general during this time frame. Mr. Cohen had no communications with Mr. Sullivan between September 26, 2011 to October 6, 2011, when there was a communication about a former employee of Schein that Benco had hired. (CX6027-006; Cohen, Tr. 750-751).

B. SMILE SOURCE'S SECOND APPROACH TO BENCO – JULY 25, 2012

399. Dr. Goldsmith approached Benco again via e-mail on July 25, 2012. (CX1220).

400. In his July 25, 2012 e-mail to Benco, Dr. Goldsmith wrote that "in the past we were in Special Markets division of Henry Schein and worked directly with Tim Sullivan. We would like to explore a relationship with you instead…" (CX10018).

401. Pat Ryan responded to Dr. Goldsmith's e-mail that same day, saying "If I recall correctly, and please correct me if I am wrong, Smile Source, for the purposes of dental supplies and equipment, is essentially a group purchasing organization. f this is indeed how Smile Source functions (management/purchasing services with no ownership stake in the individual practices), Benco Dental doesn't recognize GOPs as a single customer." (CX1220).

402. Ryan also forwarded his response to Chuck Cohen with a note "Better tell your buddy Tim to knock this shit off." (CX0018). Although Cohen responded requesting that Ryan forward the e-mail chain to him without Ryan's off-color comment so that he could send it to Tim, there is no evidence that Ryan ever re-forwarded the e-mail to Cohen. Instead, Ryan responded to Cohen by e-mailing back that Dr. Goldsmith described Smile Source as a 'franchise', and not a GPO. (CX1147). That was the end of Ryan's e-mail exchange with Cohen concerning Smile Source. (Ryan, Tr. 1193-1194).

403. There is no evidence in the record that Mr. Cohen ever sent Mr. Ryan's e-mail to Mr. Sullivan at Schein, Mr. Cohen does not recall ever sending it, and Mr. Sullivan did not receive any note from Mr. Cohen about Smile Source or buying groups generally. (Cohen, Tr. 885-886; Sullivan, Tr. 4252-53).

404. The communications log prepared by Complaint Counsel does not reflect any text or telephone communication between Mr. Sullivan and Mr. Cohen between July 25, 2012 and January 2, 2013. (CX6027-25-26). Complaint Counsel also failed to introduce any evidence of any change in conduct by either Schein or Benco that could reasonably be tied to any such communication in July 2012.

C. THE OCTOBER 1, 2013 PHONE CALL FROM MR. RYAN TO MR. FOLEY

405. On October 1, 2013, Mr. Ryan called Randy Foley, the head of Schein's special markets division. Mr. Ryan called to discuss a change in DSO pricing that one of Benco's manufacturing partners, Dentsply, was making. (Ryan, Tr. 1222-24).

406. Prior to Dentsply's change, a customer purchasing $5 million of one product would get a certain level of discount, and after the change, that same customer would get a significantly smaller discount unless they started purchasing more categories of products from Dentsply. (Ryan, Tr. 1223).

407. Because Benco provides cost-plus pricing to DSO's and passes manufacturer discounts on to its DSO customers, Dentsply's policy change did not affect Benco's margins, but it would matter greatly to the customer. (Ryan, Tr. 1224).

408. At that time, Benco and Schein were basically the only dental distributors serving DSO's. Because it was such a big change for DSO customers, Mr. Ryan wanted to talk to Mr. Foley about what he thought of it and get a gut check reaction to see if Mr. Foley understood the ramifications of Dentsply's change to customers the same way Mr. Ryan did. (Ryan, Tr. 1225-1226).

409. Although Mr. Foley later reported that Mr. Ryan discussed Smile Source during that call, Mr. Ryan does not recall discussing Smile Source or buying groups during that call. (Ryan, Tr. 1226). At that time, Smile Source fell under Henry Schein Dental, not under Schein's Special Markets division, the division headed by Mr. Foley. (Foley, Tr. 4590).

410. The October 1, 2013 phone call was the only conversation that Mr. Ryan had with Mr. Foley. (Ryan, Tr. 1242), and Mr. Foley never told Mr. Ryan about Schein's position on buying groups or discounts to buying groups. (Ryan, Tr. 1243). The call did not include any agreement of any kind between Mr. Ryan and Mr. Foley. (Ryan, Tr. 1243-1244).

D. BENCO'S 2014 MEETING WITH SMILE SOURCE

411. On January 30, 2014 Trevor Mauer, who had become the president of Smile Source, e-mailed Chuck Cohen to set up a meeting between Benco and Smile Source. (RX1022).

412. The Smile Source meeting with Benco involved Mr. Cohen, Mr. Ryan and Mr. Mauer, and it took place during the Chicago Midwinter dental meeting in February 2014. (Ryan, Tr. 1188-1189).

413. In that conversation, Benco advised Mr. Mauer about its policy of not putting anyone between Benco and its customers, and informed Mr. Mauer that Benco would not do business with Smile Source as a single customer. (Cohen, Tr. 787:9-718:15; Ryan Tr. 1189).

414. The application of Benco's no-middlemen policy to Smile Source was consistent with the policy and was Benco's own decision based on its unilateral economic interests. (Cohen, Tr. 781).

415. If a buying group approaches Benco, and Benco declines, Benco retains its pre-existing customers who may be in the buying group at the same rate that it retains customers in general. (Ryan, Tr. 1187-1188).

416. Chuck Cohen has never had any discussions with Tim Sullivan or anyone at Schein, or anyone at Patterson, about Smile Source. (Cohen, Tr. 779; 788).

V. THE ALLEGED INTERFIRM COMMUNICATIONS ARE NOT EVIDENCE OF AN AGREEMENT INVOLVING BENCO

417. Chuck Cohen never formed or sought to form any agreement with Patterson or Schein about buying groups. (Cohen, Tr. 705).

418. Chuck Cohen did not engage in frequent or repeated communications with Patterson or Schein about buying groups. (Cohen, Tr. 705).

419. The only communications that Chuck Cohen has ever even had with anyone at Patterson about buying groups is limited to two brief e-mail exchanges with Paul Guggenheim, neither of which come close to forming any type of agreement. (Cohen, Tr. 705).

420. The only communications that Chuck Cohen has ever even had with anyone at Schein about buying groups is limited to one exchange with Tim Sullivan regarding Atlantic Dental Care. (Cohen, Tr. 705-706).

A. THE SINGLE E-MAIL EXCHANGE BETWEEN BENCO AND PATTERSON REGARDING THE NEW MEXICO DENTAL COOPERATIVE IS NOT EVIDENCE OF AN AGREEMENT AMONG RESPONDENTS

421. On February 8, 2013, Chuck Cohen sent an e-mail to Paul Guggenheim with the subject line of "Fwd: New Mexico Dental Cooperative purchasing." It was a forward of a longer, underlying e-mail chain. (CX0056).

422. Prior to this February 8, 2013 e-mail, Chuck Cohen had never had any communications with Paul Guggenheim about buying groups. (Cohen, Tr. 706).

423. Prior to this February 8, 2013 e-mail, Chuck Cohen had never had any communications with Tim Sullivan about buying groups. (Cohen, Tr. 706).

424. Chuck Cohen did not write the February 8, 2013 e-mail for the purpose of forming any agreement with Paul Guggenheim or with Patterson. (Cohen, Tr. 707).

425. The first e-mail in the e-mail chain was written by Brenton Mason on February 4, 2013, with the subject line of "New Mexico Dental Cooperative." (CX0056).

426. On February 4, 2013, the New Mexico Dental Cooperative's ("NMDC") Brenton Mason sent a New Mexico industry-wide e-mail blast to dental manufacturers setting a meeting for March 13, 2013 at Patterson's Albuquerque branch office. (CX0090-04).

427. In his e-mail, Dr. Mason wrote "We have partnered with Patterson." (CX0090-04; Mason, Tr. 2340).

428. Dr Mason cannot recall any specific conversation that supports the statement in CX0090 that NMDC "had partnered with Patterson." (Mason, Tr. 2374-76).

429. Dr. Mason's February 4, 2013 e-mail caused "quite a stir." (Mason, Tr. 2376 ("Q. You would agree with me that the e-mail you sent out on February 4 to a number of manufacturers and some distributors and others in New Mexico entitled New Mexico Dental Cooperative Purchasing created quite a stir. A. Yes, it did.")).

430. Chuck Cohen recalls focusing his attention on the claims in Dr. Mason's e-mail that the NMDC had "partnered with Patterson" and that the location for the NMDC's meeting was Patterson's Albuquerque, New Mexico office. (Cohen, Tr. 707-708).

431. At that time, Chuck Cohen was not aware that Patterson had any Special Markets Division or any business operations focused on DSOs. (Cohen, Tr. 708).

432. At that time, Chuck Cohen had not seen any evidence in the marketplace of Patterson selling to DSOs or any kind of group. (Cohen, Tr. 708).

433. Chuck Cohen's reaction to receiving Dr. Mason's e-mail was surprise to learn of the suggestion that Patterson was entering the DSO or group market because this would have been a significant shift in Patterson's business strategy. Accordingly, Chuck Cohen was "skeptical" of the truth of this information. (Cohen, Tr. 708-709).

434. Initially, Dr. Mason's e-mail is forwarded by Michael Stanislawski, a Territory Manager for Midmark Corporation, a manufactuers of dental products. (CX0056).

435. The e-mail chain is then forwarded to Stewart Hanley, a former Benco Territory Representative in the New Mexico market. (CX0056; Cohen, Tr. 709-10).

436. Stewart Hanley then forwards the e-mail chain to Mike Trimble, a Benco Equipment Specialist in the New Mexico market. (CX0056; Cohen, Tr. 709-10).

437. Mike Trimble then forwards the e-mail chain to Don Taylor, a former Benco Regional Manager responsible for the New Mexico market. (CX0056; Cohen, Tr. 710).

438. Don Taylor then forwards the e-mail chain to Chuck Cohen, Pat Ryan, and Brian Evans of Benco. Brian Evans was Benco's Sales District Manager for the West Region, whose responsibility included the New Mexico market. (CX0056; Cohen, Tr. 710-11).

439. Don Taylor forwards the e-mail chain with a note that, in part, says: "I'd like to connect for just a couple if [sic] minutes to get your feedback and coaching on this." (CX0056; Cohen, Tr. 711).

440. Chuck Cohen understood Don Taylor's request to mean that he was looking for help on what to do to compete in the New Mexico market in light of the new information that Patterson had partnered with the NMDC. (CX0056; Cohen, Tr. 711).

441. Chuck Cohen did not take Don Taylor's e-mail as a question about Benco getting involved with the NMDC. (Cohen, Tr. 711).

442. Chuck Cohen then forwarded Don Taylor's e-mail and the underlying e-mail starting with Dr. Mason's e-mail to Paul Guggenheim. (CX0056).

443. Chuck Cohen's rationale for forwarding the e-mail chain to Paul Guggenheim was that Cohen wanted to let Guggenheim know about a some noise about one of Patterson's branches that he might not have heard about and might want to know. (Cohen, Tr. 712-15).

444. Chuck Cohen thought that Paul Guggenheim might not have known the information contained in Dr. Mason's e-mail, and if the shoe had been on the other foot, hoped that Guggenheim would have let him know of information about Benco that he might not have known. (Cohen, Tr. 712-13).

445. It was not Chuck Cohen's intent to form any kind of agreement with Paul Guggenheim about anything. (Cohen, Tr. 713).

446. Chuck Cohen's e-mail did not ask Paul Guggenheim to do anything. (Cohen, Tr. 714).

447. Chuck Cohen did not expect Paul Guggenheim to do anything. (Cohen, Tr. 714).

448. Chuck Cohen never followed up with Paul Guggenheim about his e-mail. (Cohen, Tr. 714).

449. Chuck Cohen did not recall why he included an FYI about Benco's policy in his e-mail to Paul Guggenheim. ("It seemed to be germane to the topic, but no special reason."). (Cohen, Tr. 714).

450. Benco's policy had been in place since 1996. (Cohen, Tr. 714).

451. Benco's policy was not confidential and it was not a secret. (Cohen, Tr. 714).

452. Chuck Cohen believed that Benco's policy was widely known in the dental industry. (Cohen, Tr. 714).

453. Benco had shared its policy with many others in the dental industry. (Cohen, Tr. 714).

454. By sharing an FYI about Benco's policy with Paul Guggenheim, Chuck Cohen was not telling him anything that Benco had not over the prior two decades already told many others within the dental industry. (Cohen, Tr. 714).

455. Schein was the dental distributor working with the Utah Dental Cooperative. (Mason, Tr. 2362).

456. Dr. Mason and the New Mexico Dental Cooperative did business with Schein through the Utah Dental Cooperative, of which it was a branch. (Mason, Tr. 2391).

457. There is insufficient evidence to find that Chuck Cohen's February 8, 2013 e-mail had any impact on Patterson's decision with respect to the yet unformed "New Mexico Dental Cooperative."

458. The February 8, 2013 e-mail from Chuck Cohen to Paul Guggenheim, and Guggenheim's response, is not probative evidence of any alleged conspiracy between Benco and Patterson.

B. THE COMMUNICATIONS BETWEEN BENCO AND SCHEIN REGARDING ATLANTIC DENTAL CARE ARE NOT EVIDENCE OF AN AGREEMENT AMONG RESPONDENTS.

459. Chuck Cohen never formed or sought to form any agreement with Schein about buying groups. (Cohen, Tr. 705; 715).

460. Chuck Cohen never communicated with Tim Sullivan or anyone at Schein about Smile Source. (Cohen, Tr. 715).

461. Chuck Cohen never communicated with Tim Sullivan or anyone at Schein about The Kois Buyers Group. (Cohen, Tr. 715).

462. The only communications that Chuck Cohen has ever even had with anyone at Schein about buying groups is limited to one exchange with Tim Sullivan about Atlantic Dental Care ("ADC"), which was not actually a buying group. (Cohen, Tr. 715).

1. **Benco and Schein's Proposals to ADC in April 2013 Are Not Evidence of an Agreement.**

463. ADC was not a buying group. (Cohen, Tr. 715-16).

464. ADC was a DSO or Large Group with common ownership. (Cohen, Tr. 715-16).

465. In 2013, Benco competed with Schein for the business of ADC. Benco won the business of ADC. (Cohen, Tr. 715-16).

466. The Complaint alleges that, "[i]n late February 2013, pursuant to the agreement, each of the Respondents refused to submit a bid for a customer called Atlantic Dental Care ..., as each of the Distributors believed it to be a Buying Group." (Complaint, ¶ 42).

467. Complaint Counsel asserts that Respondents' conduct relating to the buying group ADC demonstrates the existence of an agreement among Respondents to boycott buying groups. (CC Pretrial Br. 27-32). The evidence does not support that allegation.

468. Complaint Counsel did not introduce any evidence that Schein or Benco refused to submit a bid for ADC in late February 2013, nor did Complaint Counsel present any communications among respondents in late February 2013 concerning ADC.

469. Schein did not receive ADC's RFP until March 22, 2013, and Schein timely submitted a proposal by the RFP's April 8, 2013 deadline (extended from April 5, 2013). (CX2019).

470. Benco timely submitted a proposal in response to the RFP, and was ultimately awarded the contract. (Cohen, Tr. 724).

471. As to Patterson, the record shows that ADC sent Patterson a draft of the RFP in late February 2013, and that Patterson unilaterally decided not to bid for the business. Specifically, on or about February 27, 2013, ADC sent Patterson a copy of a draft RFP that ADC intended to send out. (CX0092). The same day, Patterson decided not to submit a bid because Patterson does not "currently … participate with group purchasing organizations. (CX0093; CX0092).

472. Complaint Counsel did not introduce any evidence that Patterson communicated with Benco or Schein about its decision not to submit a bid for ADC. Complaint Counsel's summary exhibit and communications log also does not reflect any phone call or text message during this period. (CX6027).

473. The preponderance of the evidence does not support the conclusion that Schein, Patterson, and Benco conspired to refuse to submit a bid for ADC.

474. The Complaint alleges that following Patterson's decision not to bid for ADC, Benco, Schein, and Patterson executives then began communicating about whether ADC was, in fact, a buying group." (Complaint ¶ 44).

475. Complaint Counsel has not identified any communication between Schein and Patterson about ADC.

476. Complaint Counsel has also failed to identify any communication between Patterson and Benco prior to Benco's submission of a bid in April 2013 about whether ADC was a buying group.

477. The communications about ADC that Complaint Counsel has identified do not show the existence of an agreement among the Respondents.

2. Benco's Analysis of ADC

478. When a group like ADC approaches Benco, Benco must gather information about the group so that it can apply its policy. (Cohen, Tr. 716-17).

479. Benco must determine whether the group is a single group of dental practices with common ownership and control or whether it's a collection of independent dental practices without common ownership or common control. (Cohen, Tr. 716-717).

480. When assessing groups, Benco's focus is always on the ownership structure and the control of the purchasing decisions of the dental practices. (Cohen, Tr. 717).

481. The groups that approach Benco tend to be very different when its comes to the ownership structure. (Cohen, Tr. 717).

482. It is often a challenge for Benco to determine the ownership structure and control structure of a group. (Cohen, Tr. 717).

483. Pat Ryan is a long-time Benco employee, who at the time of the events at issue here, was Benco's Director of Special Markets. (Cohen, Tr. 717-18).

484. Pat Ryan's job was to serve as the point of contact for groups approaching Benco and was the first person tasked with determining the ownership and control structure of a group. (Cohen, Tr. 717-18).

485. In situations where Pat Ryan was unable to determine the ownership or control structure of a group, Chuck Cohen would get involved to help Pat Ryan reach a determination so that Benco could apply its policy. (Cohen, Tr. 718).

486. In addition to discussing the group's structure with Chuck Cohen, Pat Ryan would also ask the group for documentation and conduct independent research regarding the group. (Cohen, Tr. 718).

487. Benco's evaluation of ADC was the most difficult and longest evaluation of a group that Benco had ever conducted. (Cohen, Tr. 718-19; Ryan, Tr. 1199).

488. Benco was confused by ADC's ownership structure because it was a collection of 35-50 independent dental practices that had merged together to form a single entity. (Cohen, Tr. 716-19).

489. Benco had never before seen an ownership structure like ADC. (Cohen, Tr. 719).

490. Pat Ryan and Benco's Strategic Markets team spent months assessing ADC. (Cohen, Tr. 719; Ryan, Tr. 1199).

491. Benco tried several sources to obtain additional information regarding ADC, including asking ADC itself for documentation, consulting with Benco's local sales team,

conducting independent research, and ultimately consulting with others in the dental industry. (Cohen, Tr. 719-20).

492. Chuck Cohen eventually reached out to Tim Sullivan to see if Mr. Sullivan had any additional information on the structure of ADC that Benco might be able to use in its independent evaluation of ADC. (Cohen, Tr. 719-20).

493. Chuck Cohen's intent in reaching out to Tim Sullivan regarding ADC was to gather facts that might help Benco make its own independent evaluation of ADC. Chuck Cohen did not intend to make any collective decision with Tim Sullivan about ADC. (Cohen, Tr. 719-20).

3. Communications Between Benco and Schein Relating to ADC Are Not Evidence of an Agreement.

494. On March 25, 2015, Mr. Cohen received an internal e-mail from Mr. Ryan, attaching an article about ADC's recent securities offering, and noting that he could not "figure out if [ADC] is a buying group or not." (CX0020). Mr. Ryan then discussed the issue with Mr. Cohen. (Ryan, Tr. 1199).

495. Following that discussion, Mr. Cohen sent a text message to Mr. Sullivan at 3:13 pm on March 25, 2013, asking if Mr. Sullivan is "[a]vailable to talk." (CX6027-027).

496. In his text message, Mr. Cohen did not indicate the subject matter he wished to talk about, and Mr. Sullivan testified that he did not know what Mr. Cohen wanted to talk about. (CX6027-027; Sullivan, Tr. 4187-88).

497. Mr. Sullivan responded to Mr. Cohen's text message that he was available at 5:00 pm eastern, and he called Mr. Cohen at that time. (CX6027-027).

498. Call records show that the call lasted 8 minutes and 35 seconds, but the records do not reveal the content of the call. (CX6027-027). Both Mr. Cohen and Mr. Sullivan testified about the call.

499. Mr. Cohen did not recall what was said on the March 25, 2013 call. (Cohen, Tr. 721).

500. The purpose of Mr. Cohen's call was to find out if Mr. Sullivan had any information about ADC, since Benco could not determine whether it was a buying group or DSO. (Cohen, Tr. 719-20).

501. Mr. Cohen denied having reached any agreement with Mr. Sullivan about ADC, or discussing Benco's no middlemen policy on that call. (Cohen, Tr. 705; 715).

502. Mr. Cohen also stated he does not recall Mr. Sullivan revealing any information about Schein's policies, plans, or practices concerning ADC or buying groups generally. (Cohen, Tr. 848-50; 899).

503. Mr. Sullivan testified that Mr. Cohen asked about ADC on the March 25, 2013 call, and that Mr. Sullivan did not know anything about ADC at the time of the call. (CX8025; Sullivan, Dep. at 345, 402).

504. Mr. Sullivan also denied reaching any agreement with Mr. Cohen, and did not disclose any information to Mr. Cohen, about ADC or any buying group. (Sullivan, Tr. 4190).

505. Immediately following the call, at 5:09 pm on March 25, 2013, Mr. Sullivan sent Mr. Cohen a text stating, "Yes, I am good with the terms we discussed and I look forward to joining Team Benco! Ps. Want to confirm that the Benco tooth logo will include a picture of me. :)" (CX6027-027).

506. Both Mr. Sullivan and Mr. Cohen testified that Mr. Sullivan's text message referred to a long-running joke between the two about who was going to work for whom in the event that ongoing merger discussions came to fruition. (Cohen, Tr. 722; 897-98; Sullivan, Tr. 3955-56).

507. Regarding the ongoing merger discussions between Schein and Benco, a few days earlier Mr. Cohen and his brother had finalized arrangements to meet with Schein's CEO, Stanley Bergman, and its head of Business Development, Mark Mlotek, to explore M&A opportunities, the following Monday, April 1, 2013, in New York. (Cohen, Tr. 892-95; Sullivan, Tr. 4185-87; CX1476).

508. Mr. Sullivan testified that the ongoing merger discussions between Schein and Benco impacted his interactions with Mr. Cohen. He wanted to be cordial and treat Mr. Cohen with respect because they might working for one another if a merger went through. (Sullivan, Tr. 4260-61).

509. Mr. Sullivan's and Mr. Cohen's joke about who would work for whom is consistent with a discussion on the March 25, 2013 call about this upcoming meeting, as are follow-up texts between Mr. Cohen and Mr. Sullivan that continued to joke. (CX 6026-027).

510. Later that evening on March 25, 2013, Mr. Cohen forwarded a link to an article reporting on ADC's financing. (CX 6026-028).

511. In response, Mr. Sullivan simply wrote, "unusual." (CX 6026-028). Mr. Sullivan did not provide any information about ADC. Nor did Mr. Sullivan reveal Schein's plans about ADC.

512. The preponderance of the evidence thus does not support the allegation that Schein and Benco reached any agreement concerning ADC or buying groups on the March 25, 2013 call.

513. Two days later, on March 27, 2017, Mr. Cohen sent Mr. Sullivan another text, saying that he "[d]id some additional research on the Atlantic Care deal, seems like they have

actually merged ownership of all practices. So it's not a buying group, it's a big group. We're going to bid. Thanks." (CX6027-029).

514. The first part of Mr. Cohen's text message – whether ADC is or is not a buying group – is not competitively sensitive information; it simply reflects market research that Benco had performed. (CX6027-029).

515. The last sentence of Mr. Cohen's text message – that Benco is going to bid – did reveal Benco's plans. However, it does not evince a pre-existing agreement between the two companies not to do business with buying groups. The text does not reference any pre-existing agreement and does not discuss any information about Schein's plans, policies, or practices. (CX6027-029).

516. While Complaint Counsel asserts that Mr. Cohen's March 27, 2017 text message can be interpreted as an effort to seek clarity as to application of a pre-existing agreement to ADC, such an assertion would require the fact finder to first assume the existence of a conspiracy. The Court declines to make such an assumption.

517. The Complaint also alleges that "Cohen and Sullivan [later] exchanged additional text messages and phone calls, culminating in a 5.5 minute phone call on April 3, 2013," and that "[f]ollowing these communications, both Schein and Benco changed course and submitted a bid for ADC." (Complaint ¶ 47; see also CX6027). Complaint Counsel asserts that such communications support an inference that Schein and Benco reached an unlawful agreement. The Court disagrees.

518. Mr. Sullivan placed a phone call to Mr. Cohen before receiving Mr. Cohen's text message that said Benco had determined ADC was not a buying group and that it was going to bid for the business. (CX 6027-028).

519. Mr. Sullivan's April 3, 2013 call was the first time Mr. Sullivan and Mr. Cohen actually connected after playing phone tag. As such, the evidence does not support an inference that the purpose of the April 3, 2013 call was to discuss express assent to Benco's plan to bid for ADC. (CX6027-028).

520. The record evidence does not indicate any further communications between Mr. Cohen and Mr. Sullivan about any customer or any buying group following the April 3, 2013 call. (CX6027).

521. Complaint Counsel also failed to show that Benco changed course and submitted a bid for ADC following the April 3, 2013 call. Mr. Cohen's March 27, 2013 text message states that Benco was going to submit a bid. (CX6027-029). It was a declarative statement, and Mr. Cohen neither asked for Mr. Sullivan's assent nor suggested that Benco's decision was contingent on Mr. Sullivan's views. Thus, Benco cannot be said to have changed course following the April 3, 2013 call.

522. The evidence also does not support an inference that Mr. Sullivan and Mr. Cohen reached an agreement during the March 25, 2013 or April 3, 2015 phone calls. Rather, the evidence shows that that Mr. Cohen inquired about ADC and that Mr. Sullivan revealed no information about Schein's policies, practices, or plans relating to ADC or buying groups generally.

523. Accordingly, the evidence does not support an inference of a conspiracy among Respondents.

4. Benco Independently Bid For – And Won – The Business of ADC

524. Benco made its own independent decision to bid for the business of ADC. (Cohen, Tr. 724).

525. On March 27, 2013, after speaking with outside counsel, Mr. Ryan was able to determine that ADC had common ownership. Therefore, under Benco's policy, ADC was a single customer and Benco made the decision to bid on ADC. (Ryan, Tr. 1201-1202).

526. Benco won the business of ADC and ADC has remained a customer of Benco from that time through the present. (Cohen, Tr. 724).

527. Benco considers ADC a DSO because it has common ownership and control of its member dental practices. (Cohen, Tr. 724; Ryan, Tr. 1202).

528. During the five-plus years that ADC has been a Benco customer, the group has performed "excellently." ADC has delivered on its volume commitments to Benco and purchases almost all of its dental supplies from Benco. (Cohen, Tr. 724-25; Ryan, Tr. 1202).

529. Consistent with DSOs, Benco's conversion rate with ADC has been 90% plus. Conversion rate means the percentage of customers within a group that are converted to Benco customers. Conversion rate is a measure of the level of compliance exhibited by a DSO or Large Group. (Ryan, Tr. 1203-1205).

530. ADC's common ownership allowed it to drive compliance among its member practices and has converted new customers to Benco. These new customers were previously Schein and Patterson customers. (Cohen, Tr. 726-28; Ryan, Tr. 1202).

531. ADC's performance validates Benco's determination that ADC was, in fact, a DSO, as ADC's performance is consistent with a DSO and inconsistent with a buying group. (Cohen, Tr. 726-27; Ryan, Tr. 120-1203).

532. It was worth the effort for Benco to spend the time to properly evaluate ADC under Benco's policy and it was in Benco's unilateral economic interest to have taken the time necessary, gathered whatever information was available, to have properly evaluated ADC so that Benco could add ADC to its significant portfolio of DSO accounts. (Cohen, Tr. 726-27; RX1127-500; Ryan, Tr. 1202-1203).

5. Patterson's June 6, 2013 E-Mail Is Not Evidence of Any Alleged Conspiracy Regarding ADC

533. On June 6, 2013, Guggenheim sent an e-mail to Cohen concerning ADC. (CX0062). Guggenheim wrote his e-mail on top of the February 8, 2013 e-mail from Cohen. (CX0062).

534. Guggenheim's e-mail asked, "Reflecting back on our conversation earlier this year, could you shed some light on your business agreement with Atlantic Dental Care? I understand they are a group of 55 dentists in and around Chesapeake Va. Being led by a practice management consultant that your team has signed a supply agreement with. I'm wondering if your position on buying groups is still as you articulated back in February? Let me know your thoughts….Sometimes these things grow legs without our awareness." (CX0062).

535. Guggenheim testified that he had sent the e-mail to gain business intelligence. (CX0314 (Guggenheim, IHT at 299, 300–03)). He did this because he had been approached by the Patterson local branch manager, Devon Nease, at the end of May 2013 concerning Benco winning the ADC bid. (Guggenheim, Tr. 1622; CX0094 at 1). Guggenheim's purpose was to see what he "could learn in terms of field intelligence about what we might be missing here." (CX0314 (Guggenheim, IHT at 285)). Guggenheim was attempting to gain information that would better allow Nease to compete for this business. (CX0314 (Guggenheim, IHT at 287) ("I wanted to see what intelligence I could find out to help Devon get back in there and compete.").

536. Specifically, Chuck Cohen testified that Paul Guggenheim asked him if Benco's position on buying groups was the same as it had been in February 2013. (Cohen, Tr. 733).

537. Chuck Cohen testified that it was an easy question to answer because the ADC contract had already been awarded to Benco, and there was no harm in sharing Benco's thinking regarding the ownership structure of ADC. (Cohen, Tr. 733-35).

538. Cohen responded to Guggenheim with an explanation of why ADC was a large group practice, and not a buying group. (CX0062).

539. Guggenheim then responded with a polite reply. (CX3301) ("Sounds good Chuck. Just wanted to clarify where guys stand.").

540. Both Guggenheim and Cohen deny that this e-mail constituted enforcement of an agreement not to work with buying groups. (Guggenheim, Tr. 1871-72 ("Q. And again, just so the record is crystal clear on this, by this e-mail, did you believe that you were enforcing any agreement between Patterson and Benco not to do business with buying groups? A. Absolutely not. Q. And by this e-mail, did you intend to enforce any such agreement? A. No.")); (Cohen, Tr. 918–19 ("Q. Is there a secret code that you and Mr. Guggenheim worked out where one of these terms means enforce or enforcement? A. No. Q. Was there ever -- when you were a kid, did you ever use lemon juice to create invisible ink and then you put it over a candle or something and it appears? Did you ever do when you were a kid? A. Yes. Q. Is there -- was there lemon juice with a secret code that's invisible to the rest of us that has 'enforce' or 'enforcement' in there? A. No.

Q. I mean, you'd pretty much have to make that up if you were interpreting this to contain the word "enforce" or "enforcement," wouldn't you, sir? A. The answer is no, and Paul ran at that point a much larger operation than Benco did. I'm not in the business of telling him how to run his business. It would not be something I would say even in jest. Q. All right. And just so we're clear, you'd pretty much have to make it up to think that this e-mail thread between you and Mr. Guggenheim somehow had the word "enforce" or "enforcement" in it, wouldn't you? A. I would think so.")).

541. Guggenheim testified that his June 2013 e-mail was not related to any buying group conspiracy. (Guggenheim, Tr. 1696 ("Q. And that's it, you asked two questions; is that right? A. Right. Q. Did you tell him about your bid or not to bid or Atlantic Dental Care? A. I did not. Q. Did you commit to him about anything you and your company were going to do with regard to Atlantic Dental Care going forward? A. Never. Q. Did you commit to him anything you or Patterson Dental were going to do with regard to any buying group going forward? A. Absolutely not.")).

542. Guggenheim did not change Patterson's business strategy following the June 2013 e-mail exchange with Cohen. (Guggenheim, Tr. 1697 ("Q. After that, did you change the company's strategy? A. No.")).

543. Complaint Counsel alleges that, due to the June 2013 e-mail between Guggenheim and Cohen, Patterson "ultimately competed for ADC's business despite previously notifying ADC that it would not submit a bid." (Compl. ¶ 50).

544. But there is no evidence in the record that the ADC business was available for bid in June 2013, because Benco had **already won** ADC's business in **May** 2013. (CX0094 at 1).

545. Indeed, Benco's having **already won** ADC's business was the reason for Guggenheim's June 2013 e-mail. (CX0094 at 1).

VI. VERY FEW OF THE COMMUNICATIONS IDENTIFIED BY COMPLAINT COUNSEL, WERE RELATED TO BUYING GROUPS

A. THE VAST MAJORITY OF COHEN AND SULLIVAN'S COMMUNICATIONS BETWEEN 2011 AND 2016 WERE ABOUT THE COMPETITIVE HIRING AGREEMENT BETWEEN BENCO AND SCHEIN

546. Complaint Counsel contends that Chuck Cohen had a large number of communications with Tim Sullivan during the time period at issue in this case. (CX6027).

547. The vast majority of communications between Chuck Cohen and Tim Sullivan between 2011 and 2016 were about the Competitive Hiring Agreement. (Sullivan, Tr. 4268).

548. Chuck Cohen testified that there were pro-competitive, business reasons for communicating with Tim Sullivan during this time period. (Cohen, Tr. 735-779).

549. As part of the 1998 settlement of the lawsuit between Benco and Schein, Benco and Schein entered into a Competitive Hiring Agreement that allowed for the orderly movement of sales personnel subject to non-compete agreements without the need for expensive litigation. (Cohen, Tr. 735).

550. Maintaining the Competitive Hiring Agreement over the long-term was critical to Benco's growth and success from 1998 through 2016. (Cohen, Tr. 735).

551. Chuck Cohen unequivocally believes that the Competitive Hiring Agreement benefitted Benco dramatically more than it benefitted Schein. (Cohen, Tr. 735-36).

552. During the time that the Competitive Hiring Agreement was in place, Benco hired over 120 sales employees from Schein, whereas Schein only hired about 60 from Benco. (Cohen, Tr. 736).

553. Chuck Cohen was regularly concerned that Schein might terminate the Competitive Hiring Agreement. It was important for Benco to maintain the Competitive Hiring Agreement with Schein. (Cohen, Tr. 736).

554. The terms of the Competitive Hiring Agreement changed over time, leading to frequent negotiations between Chuck Cohen and Tim Sullivan. Chuck Cohen and Tim Sullivan had frequent calls and communications regarding the Competitive Hiring Agreement. (Sullivan, Tr. 4267-68; Ryan, Tr. 1152-53).

555. The Competitive Hiring Agreement required frequent negotiation and regular communications between Benco and Schein. Chuck Cohen and Tim Sullivan were the primary points of contact for the other regarding the Competitive Hiring Agreement. (Cohen, Tr. 736-37; Sullivan, Tr. 4267-68).

556. Chuck Cohen and Tim Sullivan communicated several times a year regarding discrepancies in the way that the two sides were interpreting the Competitive Hiring Agreement and its application to certain employees or employee groups. (Cohen, Tr. 737).

557. Chuck Cohen believed it to be one of Benco's highest priorities to maintain the Competitive Hiring Agreement with Schein for as long as possible. (Cohen, Tr. 737).

558. Pat Ryan became aware of the existence of the Competitive Hiring Agreement shortly after its formation. In opening new markets for Benco, and leading Benco's hiring of Schein sales employees, Ryan became familiar with the terms of the Competitive Hiring Agreement and its application to Benco's national expansion. (Ryan, Tr. 1148-54).

559. Chuck Cohen wanted to maintain a positive, professional relationship with Tim Sullivan, including maintaining his credibility with Tim Sullivan, for purposes of maintaining the Competitive Hiring Agreement with Schein for as long as possible. (Cohen, Tr. 550; 737-38).

560. Because Chuck Cohen was frequently negotiating different issues with Tim Sullivan under the Competitive Hiring Agreement, he believed that it was critical for Tim

Sullivan to regard him as honest and able to deliver on his word. If not, Chuck Cohen believes that Tim Sullivan would have cancelled the Competitive Hiring Agreement. (Cohen, Tr. 738).

A. UNIFIED SMILES

561. Chuck Cohen has never had any communications with Tim Sullivan or anyone else at Schein regarding an entity called Unified Smiles. (Cohen, Tr. 738).

562. Complaint Counsel cites an unsolicited text message from Mr. Cohen to Mr. Sullivan on January 12, 2012, and a follow-up call on January 13, 2012 as evidence that "Benco enforced agreement with Schein" and "monitored and continually confronted Schein on suspicions of cheating." (FTC Opening, Slide 16; Opening, Tr. 43; CC Pretrial Br. at 14; CX2347; CX1118).

563. There is no record of what was discussed on this call. (CC Pretrial Br. at 14-15).

564. Neither Mr. Sullivan nor Mr. Cohen testified that their January 13, 2012 call was about Unified Smiles. (Cohen, Tr. 747; Sullivan, Tr. 4218-4219). Rather, both Mr. Cohen and Mr. Sullivan testified that they discussed employment issues in California relating to certain employees recruited by Benco. (Cohen, Tr. 747; Sullivan, Tr. 4218-4219).

565. Nevertheless, Complaint Counsel argues that an inference can be made that Unified Smiles was discussed on the January 13, 2012 call, from an internal Benco document. (CX1062). The Court declines to draw such an inference, not only because the testimony is to the contrary, but because the sequence of events does not support such an inference.

566. Unified Smiles approached Benco and Schein demanding DSO-level discounted pricing. (CX2062; CX1145).

567. Pat Ryan has never had any communications with anyone at Schein or Patterson regarding an entity called Unified Smiles. (Ryan, Tr. 1172).

568. Pat Ryan evaluated Unified Smiles' ownership structure, applied Benco's policy, and informed Unified Smiles that Benco would not do business with Unified Smiles as a single customer. (Ryan, Tr. 1172-73).

569. Pat Ryan independently made Benco's decision on Unified Smiles by applying Benco's policy and reaching a decision that was in Benco's unilateral economic interest. Any involvement that Schein may, or may not have had, with Unified Smiles played absolutely no role in Ryan's decision. (Ryan, Tr. 1172-73).

570. For Schein, Mr. Foley had the authority to approve or disapprove Unified Smiles. (Foley, Tr. 4692-4693; CX2062).

571. Mr. Foley independently made the decision to turn down Unified Smiles' for DSO pricing and communicated this to Unified Smiles' Ms. Kynsz via e-mail on December 21, 2011. (Foley, Tr. 4692-4693; CX2062).

572. Mr. Foley never communicated with anyone at Benco or Patterson regarding Unified Smiles. (Foley Tr. 4696).

573. On January 5, 2012 – a few weeks after Schein declined to extend Unified Smiles DSO pricing – Unified Smiles announced the group's launch via a letter. (CX1145).

574. On January 11, 2012, a local Benco representative forwarded the letter to Benco's Patrick Ryan, adding that Schein was likely involved. (CX1144).

575. Patrick Ryan responded "We've already spoken to them and turned them down" and later that day, Mr. Ryan forwarded the letter to Chuck Cohen, also noting, "For Timmy Conversation." (CX1144; CX1145).

576. Though Schein and Benco had already each independently declined to do business with Unified Smiles, Complaint Counsel contends Mr. Ryan's suggested conversation regarding Unified Smiles took place on January 13, 2012. (FTC Opening, Slide 16; Opening Tr. 43; CC Pretrial Br. at 14). The evidence does not support that contention.

577. In late October, 2011, Benco recruited four or five Schein employees from the Fresno, California area. (CX4412; Sullivan, Tr. 4272).

578. Pat Ryan was involved in the recruitment of the Fresno, California group from Schein, as he was responsible for the California market at that time. (Ryan, Tr. 1173-75).

579. Benco's hiring of the Fresno, California group was especially problematic for Schein because it was effectively a "group hiring event" and there were other "idiosyncrasies of California employment law." (Sullivan, Tr. 4270).

580. The leader of the group in Fresno that Benco hired was Bill Rotert. (Cohen, Tr. 742).

581. There were several issues surrounding Benco's hiring of the Rotert Group from Schein. Moreover, the issues raised by the Rotert Group's hiring led to a global renegotiation of the Competitive Hiring Agreement. (Cohen, Tr. 742-43; Ryan, Tr. 1174-75).

582. These issues caused Mr. Sullivan and Mr. Cohen to have several discussions over several months about these issues. (Sullivan, Tr. 4270-4271).

583. Benco's Pat Ryan was involved and aware of these discussions between Mr. Cohen and Mr. Sullivan concerning these issues. (Ryan, Tr. 1175-1176).

584. When Mr. Ryan received the January 11, 2012 e-mail from the field providing the Unified Smiles launch letter, he was aware that Mr. Cohen and Mr. Sullivan would be having a conversation concerning the Fresno recruits in the coming days. (Ryan, Tr. 1176).

585. On January 12, 2012, Chuck Cohen texted Tim Sullivan on January 12, 2012 to set up a call, and the two spoke the next day. (CX2347).

586. On January 13, 2012, Mr. Cohen called Mr. Sullivan and the two spoke for 11 minutes and 34 seconds. (CX1118; Cohen, Tr. 741).

587. Mr. Cohen's review of employment records refreshed his recollection concerning the substance of the January 13, 2012 phone call. (CX1118; Cohen, Tr. 741).

588. Mr. Cohen "can say with confidence that Tim and I were discussing some employee issues that started in – with the movement of reps – some reps in California and resulted in a renegotiation of the Competitive Hiring Agreement. (Cohen, Tr. 741-42).

589. The context around the January 13, 2012 phone call supports Mr. Cohen's testimony. (CX1118; Cohen, Tr. 746-50).

590. The morning before the call, at 7:39am, Mr. Cohen spoke with his attorney, Joe Dougherty, who was handling the employment matters for Benco. (CX1118; Cohen, Tr. 749).

591. Immediately after the call with Mr. Sullivan, Mr. Cohen again spoke to Mr. Doughtery. (CX1118; Cohen, Tr. 749).

592. Mr. Sullivan does not recall the details of the January 13, 2012 call, but he is certain Unified Smiles was not discussed. (Sullivan, Tr. 4218-19).

593. Based on the text messages around the time of the call, Mr. Sullivan believes they discussed Kent Hayes (a Fresno recruit) and employment related issues. (Sullivan, Tr. 4218-4219).

594. The evidence at trial and context around the January 13, 2012 phone call conclusively demonstrate that the phone call concerned hiring issues, and there is no support for Complaint Counsel's suggestion that the conversation reflects the existence of an agreement regarding Unified Smiles or any other buying group.

VII. NON-BUYING GROUP COMMUNICATIONS ARE NOT EVIDENCE OF AN AGREEMENT AMONG RESPONDENTS

A. COMMUNICATIONS REGARDING THE TDA ARE NOT EVIDENCE OF A CONSPIRACY REGARDING BUYING GROUPS

595. While Complaint Counsel does "not allege a group boycott of the [TDA] trade show," they allege "inter-firm communications" about the TDA "are evidence of [Respondents'] conscious commitment to coordinate their respond to the threat of Buying Groups." (Opening, Tr. 52; Complaint ¶ 74).

596. Each Respondent made its own unilateral decision regarding attendance at the 2014 TDA Trade Show. (RX0198; RX1028; Cavaretta, Tr. 5613-18).

597. On December 18, 2013, Patterson unilaterally decided that it would not attend the 2014 TDA Trade Show. (RX0198).

598. On April 8, 2014, the TDA removed Schein from the public floorplan for the 2014 TDA Trade Show, thus effectively making the decision for Schein that it would not be attending the 2014 TDA Trade Show. (Cavaretta, Tr. 5613-18).

599. On April 9, 2014, Benco unilaterally decided that it would not attend the 2014 TDA Trade Show. (RX1028).

600. Complaint Counsel introduced evidence of an April 16, 2014 e-mail that Mr. Cohen sent to Mr. Sullivan and Mr. Guggenheim. (CX1062).

601. Mr. Cohen’s April 16, 2014 e-mail is dated one week after Benco made its unilateral decision not to attend the 2014 TDA Trade Show. (CX1062; RX1028).

602. Mr. Cohen’s April 16, 2014 e-mail is also dated after Schein and Patterson both made their own unilateral decisions not to attend the 2014 TDA Trade Show. (CX1062; Cavaretta, Tr. 5613-18; RX0198).

603. Mr. Cohen’s April 16, 2014 e-mail simply passes along an article that the TDA sent to its members approximately six months prior, in November 2013, discussing the TDA Perks Supplies program. It does not mention the TDA tradeshow or the Respondents’ plans concerning attendance at the show. The e-mail reflects a lawful exchange of public information, and is not suggestive of a conspiracy to boycott the TDA. (CX1062).

604. Mr. Cohen’s April 16, 2014 e-mail is not evidence of any agreement, or any conscious commitment, among Respondents.

B. NON-BUYING GROUP COMMUNICATIONS ARE NOT EVIDENCE OF A CONSPIRACY

605. Complaint Counsel cites to communications between Benco and Schein that are unrelated to buying groups in support of their alleged conspiracy. (<u>See, e.g.</u>, CX6027-023 (“Tim: You asked me to let you know re Anne Cox. We are hiring her, starts next week. Thanks. Cfc”), CX6027-026-027 (A-dec “divorces” Benco), CX6027-__ (“Thanks for Amazon change.”), CX6027-010 (“"BTW, I love the way that the Sullivan Foundation/DTAF joint scholarship has turned out. …Thank you for helping to set the standard."), CX6027-039 (“Ok. I've got Badgers. You've got Harvard. For a beer. 👍👍👍👍"), CX6027-021 (“"Must have had great snow day yesterday!! We had to leave early for airport to get out ahead of it!!") CX6027-019 (“Just wrapped up. They boo'd me off the stage. Threw fruit. Ornery crowd. I'm sure you'll do great!!”).

606. Non-buying group communications, however, are not probative of a conspiracy not to do business with buying groups but rather are innocuous communications related to hiring issues, manufacturers, Amazon, charity, sports, niceties, and jokes. <u>Id</u>.

607. Notably, Complaint Counsel did not identify any communications between Benco and Schein relating to buying groups at the time the alleged conspiracy supposedly began in December 2011. (CX6027-018).

608. At trial, Complaint Counsel introduced two December 2011 e-mails sent by Mr. Cohen – one to Mr. Sullivan and a second to Mr. Guggenheim – about Procter & Gamble. (Guggenheim, Tr. 1547; Sullivan, Tr. 3890-93; Cohen, Tr. 488; CX2422, CX1049, CX3067.)

609. Procter & Gamble is a manufacturer of dental products; not a buying group. (Cohen, Tr. 832-33; Sullivan, Tr., 3891; Guggenheim, Tr. 1692).

610. The Procter & Gamble e-mails had "nothing to do with buying groups." (Cohen, Tr. 833; Sullivan, 4262; Guggenheim, Tr. 1692).

611. Legitimate interfirm communications about manufacturer issues cannot support the alleged conspiracy regarding buying groups, or an inference that Respondents communicated about buying groups at this time.

612. Complaint Counsel introduced an exchange of calls between Mr. Cohen and Mr. Sullivan on January 8, 2013. (CX6027-026-027).

613. The testimony at trial established that these January 8, 2013 calls were also about a manufacturer issue: A-dec's announcement of its "divorce" from Benco. (Cohen, Tr. 770-71 ("January of 2013 was when A-dec and Benco announced that we were getting divorced."), Sullivan, Tr. 4081-82; <u>see also</u> RX2756 ("Chuck and I finally hooked up today after a few days of failed attempts… Chuck would not make changes Adec requested so they terminated.")).

614. "A-dec is a dental equipment company. It stands for Austin Dental Equipment Company out of Oregon. And it is considered to be the top-of-the-line dental chair and dental unit and dental light and cabinetry." (McFadden, Tr. 2752).

615. The loss of A-dec was "traumatic" to Benco and flattened Benco's expansion and growth. (Cohen, Tr. 665-667)

616. In January 2013, Schein and Benco had been discussing the sale of Benco to Schein. (Sullivan, Tr. 4081 ("We were surprised to hear that A-dec cut off Benco, and we're actually in the midst of discussions with them about a merger.")).

617. Benco's loss of A-dec was "a big deal to – a potential impact to [the] deal" with Schein. (Sullivan Tr. 4081; <u>see also</u> RX2756).

618. The evidence thus indicates that the January 2013 calls stemmed from Schein-Benco merger talks and concerned Benco losing a major vendor. (Sullivan, Tr. 4081, RX2756).

619. There is no indication that buying groups were discussed or mentioned on the January 2013 calls. (Sullivan, Tr. 4081, Cohen, Tr. 770-71). The calls thus cannot support Complaint Counsel's allegations.

620. Complaint Counsel introduced a series of communications between Mr. Cohen and Mr. Sullivan on March 16, 2010 as evidence of an alleged buying group conspiracy. (CX6027-001-002).

621. The March 16, 2010 communications occur more than a year before Complaint Counsel claims the alleged conspiracy began.

622. Moreover, the March 16, 2010 communications had nothing to do with buying groups, but rather an issue with KaVo' s new handset program. (Sullivan, Tr. 4076, CX2346, CX2452).

623. Benco and Schein had distributor agreements with KaVo. (Sullivan, Dep. at 354).

624. KaVo was offering sample handsets, but "[t]he problem was with their keeping them, it wasn't like they would then choose the dealer that they want this to be billed through. They were billing the customers directly, which goes against [the distributor] agreement with them." (Sullivan, Tr. 4075).

625. There is no evidence that the March 16, 2010 communications had anything to do with buying groups and predated the alleged conspiracy by more than a year. They thus cannot support Complaint Counsel's claims. (Sullivan, Tr. 4261-62).

626. The fact that Mr. Sullivan and Mr. Cohen communicated about legitimate business issues provides no support to Complaint Counsel's allegation that Schein later agreed to behave in a certain way with regard to buying groups at Benco's behest.

627. Complaint Counsel also introduced a series of communications from Mr. Cohen to Mr. Guggenheim and Mr. Sullivan that related to end-user data that distributors provide to manufacturers. (CX1054; CX1055).

628. On June 12, 2013 Mr. Cohen separately sent e-mails to Mr. Sullivan and Mr. Guggenheim regarding formalizing industry practice of supplying end-user data to suppliers such as Dentsply, 3M, Hu Friedy, and Ivoclar. (CX1054; CX1055).

629. Mr. Cohen's e-mails reflect his concern that "manufacturers receive data feeds from [distributors] about sales of their products to end users" without restrictions. (CX8023 (Guggenheim, Dep. at 81), CX2337, CX1055).

630. Mr. Sullivan did not reply to Mr. Cohen's e-mail or ever discuss the issue with Mr. Cohen. (Sullivan, Tr. 4080).

631. Mr. Guggenheim told Mr. Cohen that Patterson had already formalized their end user data sharing in their vendor agreements. (CX1055, CX3070, CX3071, CX3222).

632. The communications concerning end-user data sharing with suppliers have nothing to do with buying groups. (Sullivan, Tr. 4262). They are not evidence of the alleged buying group conspiracy; nor can they support an inference of such a conspiracy.

633. Complaint Counsel introduced a December 2013 task list entry by Mr. Cohen and an April 16, 2014 telephone call between Mr. Sullivan and Mr. Cohen regarding Amazon. (CX0065; Cohen, Tr. 834; Sullivan, Tr. 4015, 4246 ("A. You'll see a couple texts later about,

you know, thanks for the Amazon change … So at that time, he had called me about -- he thought he saw Henry Schein products on Amazon. We don't sell to Amazon.”)).

634. Amazon is not a buying group. (Cohen, Tr. 834; [redacted]). Communications about Amazon do not support Complaint Counsel’s alleged buying group conspiracy, or an inference of such a conspiracy.

635. Complaint Counsel introduced communications related to charitable work and organizations. (Cohen, Tr. 773-774; Sullivan, Tr. 4280; CX6027-010 (“the Sullivan Foundation/DTAF joint scholarship”); CX6027-012 (“DTAF fund”), CX6027-043 (“[Sullivan] family foundation”)).

636. Communications related to charity work are not evidence of an alleged buying group conspiracy, nor do they support an inference of one.

637. Similarly, banter about sports and jokes cannot support Complaint Counsel alleged conspiracy, or an inference of it. (CX6027-038 (“Good pick, #2 seed. They'll have to get past Creighton & McDermott, will be tough.”); CX6027-007 (“I'm going to Yankee Stadium for game 5 tomorrow nite. Go Yanks!”); CX6027-043 (“Weekend lacrosse tourny here at St. Thomas academy…”); CX6027-027 (“Problem with this joke is if Stan says 'Great!' It's a risk…”); CX6027-051 (“Teasing and jokes are always welcome!! :-)”).

VIII. COMMUNICATIONS BETWEEN BENCO AND BURKHART ARE NOT EVIDENCE OF AN INVITATION TO COLLUDE

638. Mike McElaney, a Benco employee, had previously worked at Burkhart with Jeff Reece. McElaney had left Burkhart around 2011. (Reece, Tr. 4376; Cohen, Tr. 828-29).

639. After he left Burkhart, McElaney remained friends with Reece, and they exchanged occasional personal communications. (Reece, Tr. 4376).

640. In October 2013, McElaney had a conversation with Mr. Reece concerning buying groups, in which Reece claimed that McElaney said that buying groups were “not good for the medical industry” because of “declining margins.” (Reece, Tr. 4378).

641. At the time, Reece believed that Benco was working with buying groups, and when Reece asked McElaney whether Benco was working with buying groups, McElaney declined to answer. (Reece, Tr. 4377-78 (“I said, so you're not working in this space. Is that correct? And he never answered.”).

642. Reece found the conversation with McElaney “a little perplexing” because Reece believed that Benco was working with group purchasing organizations. (Reece, Tr. 4377-78).

643. In a second call that Reece claims occurred between him and McElaney a few weeks later, Reece again asked McElaney if Benco was working with buying groups, and McElaney again did not again give a clear response. (Reece, Tr. 4380-81).

644. There is no evidence that McElaney discussed Benco's policy, or Schein's or Patterson's view of buying groups, during those calls. (Reece, Tr. 4375-81).

645. Cohen never instructed McElaney to ask Reece to do anything, and it does not matter to Benco what Burkhart does with buying groups or affect what Benco does with respect to buying groups. (Cohen, Tr. 829-30).

646. Reece has testified inconsistently with regard to an alleged conversation he supposedly had with Cohen. Reece first testified that his only interactions with Cohen were an "informal passing in the hallway," or "maybe just an acknowledgement". (RX1135; Reece, Dep., at 17:25-18:1). At trial, Reece testified that he had a conversation with Cohen and McElaney at the DTA meeting in Florida in the fall of 2013, which was the "really the first time [he] had met" Cohen. (Reece, Tr. 4382-84).

647. Cohen does not recall any discussion with Reece about buying groups at the DTA meeting and Cohen's contemporaneous notes from the meeting do not reflect any discussion or meeting with Reece. (Cohen, Tr. 828-30).

648. In none of the conversations identified by Reece did Benco ever suggest how Burkhart should conduct its business. (Reece, Tr. 4389 (" Q. Over the course of those three conversations with Benco about buying groups, was there any suggestion of how Burkhart should conduct its business? A. No.")).

649. Reece's perception was that Benco was doing business with buying groups at that time or was willing to do business with buying groups. (Reece, Tr. 4445).

650. Reece was never told that there was any agreement between Benco and any other company not to do business with buying groups or dentist groups, and was not invited to join such an agreement. (Reece, Tr. 4445-46).

651. Burkhart did not change or modify any policy, including any policy to do business with buying groups, as a result of any communication with Benco. (Reece, Tr. 4446).

IX. DR. MARSHALL'S METHODOLOGY AND CONCLUSIONS ARE UNRELIABLE

624. Dr. Marshall's economic methodology is inherently unreliable. (J. Johnson, Tr. 4784-86).

625. Dr. Marshall's analyses are fundamentally flawed as a matter of economics. (J. Johnson, Tr. 4873-4875).

626. At each step of his analyses, Dr. Marshall makes mistakes that render his analyses unreliable. (J. Johnson, Tr. 4873-4875).

627. Dr. Marshall didn't apply his own geographic markets in his analysis; he improperly combined consumables and equipment in the same product market; he excluded other

sources of competition, including manufacturer direct sales and non-full-service distributors; he relied on a limited sample and erroneous assumptions in his SSNIP tests; he improperly assessed the market structure because he ignored key economic evidence about actual economic characteristics; his reliance on industry characteristics to determine likelihood of collusion is suspect; his analysis of unilateral economic self-interest is improper because he failed to conduct a counterfactual analysis and he made a series of unsupported assumptions; he relied on a flawed assessment of a "structural break" driven in part by his misunderstanding of the salient features of the Elite Dental Alliance partnership; and he made unsupported assertions that the alleged conduct resulted in anticompetitive harm. (J. Johnson, Tr. 4873-4875).

628. As a result of Dr. Marshall's errors, his analysis is not reliable as a matter of economics. (J. Johnson, Tr. 4873-4875).

629. Dr. Marshall failed to follow appropriate economic practice or methods to draw his conclusions. (J. Johnson, 4882).

630. Because Dr. Marshall failed to follow appropriate economic practice or methods, it is inappropriate for Dr. Marshall as a professional economist to draw the conclusions that he did. (J. Johnson, 4882).

631. Dr. Marshall's opinions in this matter don't meet the accepted scientific practices that economists apply. (J. Johnson, Tr. 4883).

632. Dr. Marshall relied in part on his interpretation of e-mails and communications to reach his opinion that Respondents' conduct was consistent with coordinated action. (Marshall, Tr. 2885-2886 (interfirm communications, together with his five case studies, "are leading me to the conclusion that we have coordinated action."); CX7100 at 123-127, ¶¶ 309-327).

633. Inferring an agreement from e-mails and communications is outside of any training, accepted methodology, or competence of an economist. (J. Johnson, Tr. 4817-4818; J. Johnson, Tr. 4863-4864; RX2832 at 63, ¶ 94 ("an economist is not qualified to form a legal conclusion about whether companies have formed an agreement."); Carlton, Tr. 5421-5422; Wu, Tr. 5035 ("As an economist, I cannot possibly presume to divine what someone may have meant or intended in an e-mail."); Gregory J. Werden, "Economic Evidence of the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory," Antitrust Law Journal 71, No. 3 719 at 747 (2004) ("as a general matter, economic expertise cannot contribute to drawing [an] inference" of an agreement forming a cartel)).

634. Dr. Marshall failed to offer a persuasive explanation of how his interpretation of the "economic content" of e-mails and communications assists the trier of fact in this matter. (Marshall, Tr. 2880 ("JUDGE CHAPPELL: I'm trying to figure out why you think there's a need for an expert opinion in here other than bill the government $2.5 million. Why can't a layperson look at the facts in this case and make a determination on their own? THE WITNESS: Your Honor, I think that in terms of the economic content of what is being offered in these communications, I don't think it's reasonable to think that a layperson can look at that information on their own.")).

635. The only previous time Dr. Marshall testified in a trial was on behalf of the United States in an antitrust conspiracy case. (Marshall, Tr. 3179-3180; Marshall, Tr. 3184.) In that case, the court excluded Dr. Marshall's testimony because, in part, "Dr. Marshall's opinions don't 'fit' the evidence in this case." (Marshall, Tr. 3181; Marshall, Tr. 3184-3186; see also RXD0222; United States ex rel. Bunk v. Birkart Globistics GmbH & Co., 89 F.Supp.3d 778 (E.D. Va. 2014) at 800 ("Having now considered [Dr. Marshall's] testimony based on all the evidence in the case, the Court concludes that Dr. Marshall's testimony should have been excluded under Daubert.").

X. DR. MARSHALL OFFERED NO OPINION REGARDING THE APPLICABLE LEGAL STANDARD

636. Dr. Marshall did not offer any opinion as to whether the conduct alleged in this matter should be treated as per se unlawful. (Marshall, Tr. 3331; RX2964 (Marshall, Dep. 140-141)).

637. Dr. Marshall did not offer any opinion as to whether the conduct alleged in this matter should be characterized as inherently suspect. (Marshall, Tr. 3331-3332; RX2964 (Marshall, Dep. 141)).

638. Dr. Marshall did not offer any opinion as to whether the conduct alleged in this matter should be analyzed pursuant to a truncated rule of reason analysis. (Marshall, Tr. 3332; RX2964 (Marshall, Dep. 141)).

XI. DR. MARSHALL FAILED TO CONDUCT HIS ANALYSIS IN A PROPERLY DEFINED RELEVANT MARKET

A. DR. MARSHALL FAILED TO DEFINE LOCAL RELEVANT GEOGRAPHIC MARKETS

1. The Relevant Geographic Markets Are Local in Nature

639. The relevant geographic markets for the distribution of dental supplies are local. (CX7100 at 10, ¶ 11; CX7100 at 90, heading III.B; RX2834 at 13 ¶ 17; J. Johnson, Tr. 4788-4789).

640. The relevant geographic markets for the distribution of dental supplies are local because there are numerous dental product distributors in the United States, many of which operate on a regional or local level. ([redacted]; J. Johnson, Tr. 4788-4789).

641. The relevant geographic markets for the distribution of dental supplies are local because prices and discounting are determined at a local level. (RX2834 at 13 ¶ 18; J. Johnson, Tr. 4788-4789).

642. The relevant geographic markets for the distribution of dental supplies are local because timeliness of deliveries of some products can be affected by shipping distances. (J. Johnson, Tr. 4788-4789).

2. Dr. Marshall Failed to Define or Apply Local Geographic Markets in His Analysis

643. Dr. Marshall failed to consider the implications of local markets in his analysis. (RX2834 at 13, ¶ 17; J. Johnson, Tr. 4790-4791).

644. Dr. Marshall did not define relevant geographic markets in this matter. (J. Johnson, Tr. 4790-91).

645. Dr. Marshall did not know how many relevant markets there are in the United States. (Marshall, Tr. 3370).

646. Dr. Marshall did not define the markets in which most major American cities would be located.

647. Dr. Marshall did not define the relevant market that would include some or all of Houston. (Marshall, Tr. 3371).

648. Dr. Marshall did not define the relevant market that would include some or all of Chicago. (Marshall, Tr. 3371-3372).

649. Dr. Marshall did not define the relevant market that would include some or all of Miami. (Marshall, Tr. 3372).

650. Dr. Marshall did not define the relevant market that would include some or all of Denver. (Marshall, Tr. 3372).

651. Dr. Marshall did not define the relevant market that would include some or all of St. Louis. (Marshall, Tr. 3372).

652. Dr. Marshall did not define the relevant market that would include some or all of Boston. (Marshall, Tr. 3372).

653. Dr. Marshall did not define the relevant market that would include some or all of Washington D.C. (Marshall, Tr. 3372-3373).

654. Dr. Marshall failed to evaluate the differences in competitive options available to dentists in the different regions of the United States. (RX2834 at 13, ¶ 17; J. Johnson, Tr. 4790-4791; *see also* RX1140 at 20, Exhibit 2).

655. Dr. Marshall's failure to properly apply his conclusion that relevant markets in this matter are local, and his failure to define relevant local markets, rendered unreliable his subsequent opinion in Section IV of his expert report that the industry is susceptible to collusion. (J. Johnson, Tr. 4791-4792; J. Johnson, Tr. 4821-4822).

656. Dr. Marshall's failure to properly apply his conclusion that relevant markets in this matter are local, and his failure to define relevant local markets, rendered unreliable his

subsequent opinion in Section III of his report that Benco, Schein and Patterson acted contrary to their unilateral economic self-interest. (J. Johnson, Tr. 4791-4792).

657. Dr. Marshall's failure to properly apply his conclusion that relevant markets in this matter are local, and his failure to define relevant local markets, rendered unreliable his subsequent opinion in Section VI of his expert report that the alleged conduct caused harm to competition. (J. Johnson, Tr. 4791-4792; J. [redacted]).

658. Dr. Marshall's failure to properly define relevant geographic markets and to analyze competitive conditions and effects in properly defined local markets fatally undermined his overall conclusions in this matter. (J. Johnson, Tr. 4873-4875).

B. DR. MARSHALL FAILED TO PROPERLY DEFINE THE RELEVANT PRODUCT MARKET

659. Dr. Marshall made multiple errors in his definition of the relevant product market. (J. Johnson, Tr. 4790-91).

660. Dr. Marshall's errors in defining the relevant product market in this matter rendered unreliable his opinions regarding whether the industry is conducive to collusion, the assessment of the unilateral self-interest of Benco and other distributors, and the assessment of competitive impact. (J. Johnson, Tr. 4811-4812; 4815-4816).

661. Dr. Marshall's errors in defining the relevant product market in this matter fatally undermined his overall conclusions in this matter. (J. Johnson, Tr. 4811-4812; 4815-4816).

1. **Dr. Marshall Erred By Failing to Include Direct-Selling Manufacturers in the Relevant Product Market**

662. Dr. Marshall opined that "direct sales from manufacturers" were not in the relevant market. (CX7100 at 10.)

663. Dentists purchase dental products through two channels: (1) through distributors of dental products; and (2) directly from manufacturers. (RX2834 at 16, ¶ 24 and Exhibit 1; J. Johnson, Tr. 4796-4799; *see also* RXD0105-008).

664. Dentists purchase as much as 25 percent of dental products directly from manufacturers. (CX3285 at 24; CX7100 at 15, ¶ 20; J. Johnson, Tr. 4799-4800; Kois, Sr. Tr. 285).

665. Dentists regularly purchase dental products from multiple sources. (RX2834 at 19, ¶ 27; RX2834 at 20, Exhibit 2; J. Johnson, Tr. 4799-4800; J. Johnson, Tr. 4802-4803; RX2967 (Wu, Dep. 240-241)).

666. The seven independent dentists named as plaintiffs in the class litigation each purchased from a combination of distributors and direct-sale manufacturers. (RX2834 at 20-21, Exhibit 2; J. Johnson, Tr. 4799-4800; J. Johnson, Tr. 4803-4804 (" . . . dentists do, all of them,

regularly source across multiple suppliers, including both distributors and direct-selling manufacturers.”).

667. In total, the seven independent dentists named as plaintiffs in the class litigation purchased products directly from over 40 different direct-sale manufacturers, dental labs, and independent suppliers of products and services. (RX2834 at 20-21, Exhibit 2; J. Johnson, Tr. 4799-4800).

668. Independent dentists purchased products directly from substantial manufacturers of dental product such as Procter and Gamble, Dentsply Sirona, and Brasseler, as well as smaller manufacturers and suppliers of services. (RX2834-020 – 021 at Exhibit 2).

669. These seven dentists studied by Dr. Johnson can be expected to be representative of dentists in general because they were selected to represent the large class of dentists in the class litigation. (J. Johnson, Tr. 4906).

670. Dentists that purchase dental products from direct-selling manufacturers do not have to forego value-added services because there are independent companies that provide such services. (J. Johnson, Tr. 4804-4805).

671. Dentists that purchase dental products from direct-selling manufacturers do not have to forego value-added services because they can purchase repair and other services from full-service distributors without also purchasing consumables or equipment from them. (RX2833 at 45, ¶ 107).

672. Patterson had up to 10,000 customers, over 95% of whose purchases were services. (RX2833 at 45, ¶ 107).

673. Customers that purchased almost exclusively services from Patterson included Dental Dreams, Ocean Dental, Dr. Zachary Lechner (Root River Dental), Dr. Howard Henry (Arizona Orthodontics Exclusively), and JT Herres Dental Association. (RX2833 at 45-46, ¶ 108).

674. Benco and other distributors regard direct-sale manufacturers as competitors. (CX0311 (Sullivan, Dep. 53 (“ . . . some of our manufacturers we partner with, but they also have a direct selling component to their business . . . so those segments we view as competitors.”)); CX0314 (Guggenheim, Dep. 48-49 (“There’s hundreds of competitors, including manufacturers, who sell direct, compete with us.”)); J. Johnson, Tr. 4799-4800; RX2834 at 18, ¶ 25).

675. Many dentists who are members of buying groups purchase dental supplies from direct-selling manufacturers. (Kois, Sr. Tr. 174-77; J. Johnson, Tr. 4800-4801; [redacted]).

676. Many buying groups partner with direct-selling manufacturers. (RX1100 (listing multiple direct-selling manufacturers among the vendors participating in the Kois Buyers Group); J. Johnson, Tr. 4800-4802; RX2834 at 18, ¶ 26).

677. Many of the Kois Tribe members didn't see the value of the buyers club until the Kois Buyers Group enlisted direct-selling manufacturers to participate. (CX8007 (J. Kois, Sr., Dep. 74-75).

678. Many buying groups view it as important to include direct-selling manufacturers among the suppliers that they offer to their members. (J. Johnson, Tr. 4800-4801).

679. Kois and Smile Source, the two buying groups that Dr. Marshall chose to study, each partner with direct-selling manufacturers. (Kois, Sr., Tr. 174-77; J. Johnson, Tr. 4799-4800; Maurer, IHT at 66-67; RX2834 at 18, ¶ 26).

680. Dr. Marshall never considered whether direct-selling manufacturers are in the relevant market. (J. Johnson, Tr. 4799-4800 ("So Dr. Marshall starts from a position that direct-selling manufacturers aren't even considered in his relevant market."); RX2833 at 54, ¶ 135).

681. Dr. Marshall never tested whether direct-selling manufacturers are in the relevant market. (J. Johnson, Tr. 4799-4800 (" . . . none of his testing involves direct selling. He just rules them out of hand in his analysis."); RX2833 at 54, ¶ 135; *see also* [redacted]; Marshall, Tr. 3356-3357).

682. Dr. Marshall's exclusion of direct-selling manufacturers from the relevant market does not make sense as a matter of economics. (J. Johnson, Tr. 4800-4801).

2. Dr. Marshall Erred By Combining Equipment and Consumables in a Single Relevant Product Market

683. Dr. Marshall opined that the relevant product market is the "full line of dental products and services" sold through full-service distributors to independent dentists. (CX7100 at 10.)

684. Dr. Marshall erred in lumping together the distribution of dental equipment and the distribution of dental consumables. (J. Johnson, Tr. 4812-4815; [redacted]).

685. Dental consumables consist of the products that dentists use in treating their patients every day and need constant replacement, such as anesthetics, fillings, fluoride, and cotton swabs. (Cohen, Tr. 601; J. Johnson, Tr. 4812-4815; [redacted]; RX1140 at 20, ¶ 24).

686. Dental equipment consists of large, expensive products that are purchased occasionally and often require skilled installation and service, such as dental chairs and x-ray equipment. (Cohen, Tr. 601; J. Johnson, Tr. 4812-4815; [redacted]; RX1140 at 20, ¶ 24).

687. Distribution of dental equipment and distribution of dental consumables are governed by very different conditions of demand; dentists purchase dental consumables frequently, but they purchase dental equipment only very rarely. (J. Johnson, Tr. 4812-4815; [redacted]).

688. Distribution of dental equipment and distribution of dental consumables are governed by different shipping considerations; dental consumables generally can be shipped much farther economically than can dental equipment, which has a much more local distribution pattern. (J. Johnson, Tr. 4812-4815; [redacted]).

689. The sales representatives who sell dental consumables are different from the sales representatives who sell dental equipment. (J. Johnson, Tr. 4812-4815; [redacted]; RX1140 at 23-24,¶¶ 30-32).

690. Benco uses different models of pricing and negotiates prices with customers differently for dental consumables and dental equipment. (J. Johnson, Tr. 4812-4815; [redacted]).

691. Different companies compete for the sale of dental consumables and the sale of dental equipment. (J. Johnson, Tr. 4812-4815). [redacted]

692. Sales of dental consumables don't have the same competitive conditions as sales of dental equipment. (J. Johnson, Tr. 4812-4815; [redacted]).

693. Distribution of dental consumables and distribution of dental equipment are not in the same relevant product market. (J. Johnson, Tr. 4812-4815; [redacted]).

694. Dr. Marshall erred in including in a single product market the distribution of dental equipment and the distribution of dental consumables. (J. Johnson, Tr. 4812-4815; [redacted]).

695. Dr. Marshall's failure properly to distinguish between distribution of dental consumables and distribution of dental equipment rendered unreliable his subsequent opinions. (J. Johnson, Tr. 4815).

3. Dr. Marshall Erred By Failing to Include Non-Full-Service Distributors in the Relevant Product Market

696. Dr. Marshall opined that the relevant product market is the full line of dental products and services "sold through full-service distributors" to independent dentists. (CX7100 at 10.)

697. Dr. Marshall erred in excluding non-full-service distributors from the relevant product market. (J. Johnson, Tr. 4805-4807).

698. Non-full-service distributors include distributors that focus on mail-order, phone-order or internet business. (J. Johnson, Tr. 4805). Examples of non-full-service distributors include Darby Dental Supply, Safco, Scott's Dental, and Net32. (J. Johnson, Tr. 4805; *see also* RXD0105 at 12).

699. Darby Dental Supply ("Darby") is an on-line distributor of over 40,000 dental products; in 2016, it had over $250 million in sales. (CX7100 at 51-52).

700. [redacted]

701. In 2016, Darby supplied over 24% of all purchases of dental supplies made by Smile Source members. (RX2833 at 49 ¶ 18).

702. Four of the seven individual dentists named as plaintiffs in the class litigation purchased dental supplies from Darby. (RX2834 at 20-21).

703. Dentists almost never purchase dental supplies exclusively from Darby; this is consistent with Darby being in the same relevant market as full-service distributors. (RX2833 at 49, ¶ 119).

704. The dental supplies that Darby sells overlap to a significant degree with the dental supplies sold by full-service distributors; this is consistent with Darby being in the same market as full-service distributors. (RX2833 at 49, ¶ 119).

705. Safco is a limited service distributor. (J. Johnson, Tr. 4805; RX2833 at 15 n.51).

706. Scott's Dental is a limited service distributor. (J. Johnson, Tr. 4805).

707. Three of the seven individual dentists named as plaintiffs in the class litigation purchased dental supplies from Scott's Dental. (RX2834 at 20-21).

708. Net32 is a limited service distributor. (J. Johnson, Tr. 4805).

709. Three of the seven individual dentists named as plaintiffs in the class litigation purchased dental supplies from Net32. (RX2834 at 20-21).

710. Dentists that purchase dental products from non-full-service distributors do not have to forego value-added services because there are independent companies and full-service distributors that provide such services. (J. Johnson, Tr. 4804-4806).

711. [redacted]; J. Johnson, Tr. 4805-4807).

712. In at least some markets, Benco uses "selective price overrides to make Benco's prices competitive with low-priced competitors like Darby and Safco." (CX1100 at 3; [redacted]).

713. Schein and Patterson regard Darby and other non-full-service distributors to be significant competitors. (RX2833 at 47, ¶¶ 112-113).

714. Patterson price change class forms list Darby and Safco as both offensive and defensive reasons to grant discounts. (RX2833 at 47, ¶ 112).

715. The data show that online distributors are effective in taking sales away from full-service distributors. (RX2833 at 48, ¶ 115).

716. Darby's share of sales to 137 Smile Source dentists increased from 2.5% in 2013 to 8.9% in 2015. (RX2833 at 48, ¶ 115).

717. There is substantial diversion of sales from the full-service distributors to Darby, indicating that online distributors could be a competitive constraint on the full-service distributors. (RX2833 at 48, ¶ 117).

718. Non-full-service distributors should be included in the relevant product market. (J. Johnson, Tr. 4805-4807; RX2833 at 46-47, ¶ 111).

719. Dr. Marshall erred in excluding non-full-service distributors from the relevant market. (J. Johnson, Tr. 4805-4807).

[redacted]

721. Dr. Marshall's failure properly to distinguish between distribution of dental consumables and distribution of dental equipment rendered unreliable his subsequent opinions. (J. Johnson, Tr. 4811-4812).

4. Dr. Marshall's Purported SSNIP Tests Contain Multiple Flaws and Fail To Support His Conclusions

722. Dr. Marshall claims to have based his opinion on "[e]mpirical evidence." (CX7100 at 76). The "empirical evidence" on which Dr. Marshall purports to rely consists of two SSNIP tests, one based on purchases of Smile Source members from Darby, and one based on Benco's entry into Southern California. (CX7100 at 85 ¶ 214; CX7100 at 78 ¶ 196; Tr. 3333).

a. <u>Errors With Dr. Marshall's SSNIP Tests In General</u>

723. Dr. Marshall made multiple errors in conducting each of his SSNIP tests, and neither constitutes a reliable basis to draw any conclusions regarding the relevant product market. (J. Johnson, Tr. 4808-4810).

724. A SSNIP test assumes a hypothetical monopolist in a candidate market, and then assumes that the hypothetical monopolist imposes a 5-10% price increase on products in the candidate market. (Marshall, Tr. 3338-3339; *see also* RXD0102).

725. Diversion refers to customers' substitution away from products that are subject to the price increase to other products. (Marshall, Tr. 3340; *see also* RXD0102).

726. Critical loss is the break-even point in terms of whether a price increase is or is not profitable, or "the amount of business the hypothetical monopolist would lose from a price increase such that they're exactly indifferent between implementing the price increase and not implementing the price increase." (Marshall, Tr. 3342).

727. Assuming a margin of approximately 30% and a 5% price increase on all products in the candidate market, Dr. Marshall calculated a critical loss of approximately 14%. (Marshall, Tr. 3344-3345). According to Dr. Marshall's calculation, diversion of 14% or more of sales from full-service distributors to *all* other suppliers – direct-selling manufacturers, non-full-service distributors, and others – in response to a 5% price increase would defeat Dr. Marshall's proposed relevant product market. (RX1139 at 8-9, § 4.1.3).

728. Dr. Marshall never tested diversion to all other suppliers in response to a SSNIP; in his SSNIP tests, Dr. Marshall looked only at diversion to a single alternate supplier – Darby. (CX7100 at 78, ¶ 198; CX7100 at 86, ¶ 215; Marshall, Tr. 3356-3357).

729. Dr. Marshall's SSNIP tests ignored competition from all other non-full-service distributors (J. Johnson, Tr. 4808-4810).

b. Errors With Dr. Marshall's "Smile Source" SSNIP Test

730. Dr. Marshall conducted one purported SSNIP test with respect to Darby becoming a supplier to Smile Source in 2014. (CX7100 at 85, ¶ 214).

731. Dr. Marshall's purported SSNIP test with respect to Smile Source considered purchases of a total of only 137 dentists. (CX7100 at 86, ¶ 216).

732. Dr. Marshall's purported SSNIP test with respect to Smile Source relied on an artificially small and unreliable data sample. ([redacted]; J. Johnson, Tr. 4808-4810; *see also* RXD0105 at 13).

733. Dr. Marshall's SSNIP test was strongly influenced by his decision to examine only 137 Smile Source dentists. (RX2833 at 50, ¶ 121).

734. Dr. Marshall looked only at diversion to a single alternate supplier – Darby. Dr. Marshall never tested diversion to all other suppliers in response to a SSNIP. (CX7100 at 86, ¶ 215; Marshall, Tr. 3356-3357 ("Q. . . . So then you also did consider diversion to the other suppliers that are marked in blue here; correct? A. Yes. To Darby. Q. . . . You considered diversion only to Darby; is that correct? A. The test that I conducted – the empirical test I conducted was only to Darby, that's correct.")).

735. [redacted]

736. Dr. Marshall cut off his SSNIP test in 2015, thereby failing to consider the substantial continuing growth of Darby's share of supply to Smile Source members. (CX7100 at 87, ¶ 218).

737. The results of Dr. Marshall's purported SSNIP tests are contradicted by Dr. Marshall's own data showing that Darby's share of sales to active Smile Source members grew from 2% in 2013 and 9% in 2014, to 19% in 2015 and 24% in 2016. ([redacted]; J. Johnson, Tr. 4808-4810).

738. Applying the SSNIP test to all Smile Source members, from 2013 to 2016 full-service distributors experienced a loss of sales share of 22.1 percent. (RX2833 at 50, ¶ 121).

739. Dr. Marshall calculated the critical loss as 17%. (CX7100 at 88, ¶ 219).

740. Applying the SSNIP test to all Smile Source members from 2013 to 2016 results in an actual loss greater than Dr. Marshall's critical loss, which suggests that Darby is likely to be in the relevant product market. (RX2833 at 50, ¶ 121).

c. Errors With Dr. Marshall's "Southern California" SSNIP Test

741. Dr. Marshall applied a different test with respect to Benco's entry into Southern California. (Marshall, Tr. 3346). That test contained additional errors. (J. Johnson, Tr. 4808-4812).

742. Dr. Marshall excluded Los Angeles and Orange counties from his test with respect to Benco's entry into Southern California. (Marshall, Tr. 3346; J. Johnson, Tr. 4808-4810; RX2833 at 51-52, ¶ 127.) Dr. Marshall did not know the relative size of the areas of Southern California that he excluded from his study. (Marshall, Tr. 3347-3348).

743. Within Kern, Riverside and San Diego counties, Dr. Marshall considered only a subset of Benco's customers. (Marshall, Tr. 3348.)

744. [redacted]

745. Dr. Marshall improperly assumed that purchases by a limited number of dentists in selected counties in Southern California could be extended generally. (J. Johnson, Tr. 4808-4810; [redacted]).

746. Dr. Wu found that Dr. Marshall's results were "strongly influenced" by his decision to eliminate much of the distributor sales from Southern California. (RX2833 at 53, ¶ 131).

747. Rather than considering a price increase by a hypothetical monopolist, Dr. Marshall examined entry by Benco into Southern California. (Marshall, Tr. 3346).

748. Benco was not a hypothetical monopolist; indeed, it had only a tiny share of distribution of dental products in Southern California. (CX7101 at 142, Figure 16 (during the relevant time period, Benco had a 5% share of full-service distributor sales in California)).

749. Benco did not increase prices in Southern California; rather, it lowered its prices over time. (Marshall, Tr. 3346.)

750. Dr. Marshall hypothesized Benco's entry in reverse to treat Benco's entry as an exit. (Marshall, Tr. 3346.) Trying to test a hypothetical price increase by a hypothetical monopolist on Benco's entry doesn't make economic sense. (J. Johnson, Tr. 4808-4810).

751. Dr. Marshall never tested diversion to all other suppliers in response to a SSNIP; in his Southern California SSNIP test, Dr. Marshall looked only at diversion to a single alternate supplier – Darby. (CX7100 at 78, ¶ 198; Marshall, Tr. 3356-3357; RX2833 at 51, ¶ 125).

752. Dr. Marshall failed to properly distinguish between symmetric and asymmetric SSNIP tests. As a result, he failed to determine whether the factual preconditions were satisfied before applying an asymmetric SSNIP test, and then improperly applied a symmetric formula for critical loss to the results of his asymmetric SSNIP test, yielding a nonsensical result. (J. Johnson, Tr. 4804-4812).

753. For the structure of his analysis, Dr. Marshall relied upon an article published by Joseph Farrell and Carl Shapiro, "Improving Critical Loss Analysis," The Antitrust Source 1 (February 2008). (Marshall, Tr. 3362; CX7100 at 89, fn. 390).

754. The source that Dr. Marshall relied upon for the methodology of his Southern California SSNIP test referred to a SSNIP imposed on all the products in a candidate market as a "symmetric" test. (Marshall, Tr. 3365-3366; J. Farrell & C. Shapiro, "Improving Critical Loss Analysis," The Antitrust Source 1 (February 2008) at p. 5; *id*. fn. 17; *see also* RXD0104 at p. 5.)

755. Dr. Marshall replicated a price increase by Benco only. (Marshall, Tr. 3354.) Dr. Marshall's test was not the equivalent of a SSNIP imposed by a hypothetical monopolist on all products in a candidate market. (Marshall, Tr. 3354; *see also* RXD0103.)

756. The "symmetric" SSNIP test described in the first sentence of footnote 17 of Farrell & Shapiro does not apply to the SSNIP that Dr. Marshall hypothesized with respect to Benco's entry into Southern California. (Marshall, Tr. 3369; *see also* RXD0103.)

757. The source that Dr. Marshall relied upon for the methodology of his Southern California SSNIP test referred to a SSNIP imposed by a hypothetical monopolist on just one product line in a candidate market as an "asymmetric" test. (Marshall, Tr. 3366-3367; J. Farrell & C. Shapiro, "Improving Critical Loss Analysis," The Antitrust Source 1 (February 2008) at p. 5 fn. 17; *see also* RXD0104 at p. 5.)

758. Dr. Marshall replicated a price increase by Benco only. (Marshall, Tr. 3354.) Dr. Marshall's test was the equivalent of a SSNIP imposed by a hypothetical monopolist on only one product line out of multiple product lines in a candidate market. (Marshall, Tr. 3354; Marshall, Tr. 3366; *see also* Tr. 3354:18-25; RXD0103.)

759. Although Dr. Marshall applied an asymmetric SSNIP test as described by Farrell & Shapiro, he did not understand the test and mistakenly believed he had applied a symmetric SSNIP test. (Marshall, Tr. 3367-3368; *see also* RXD0103.)

760. Dr. Marshall recognized that the "symmetric" SSNIP test described in the first sentence of footnote 17 of Farrell & Shapiro does not apply to the SSNIP that Dr. Marshall hypothesized with respect to Benco's entry into Southern California. (Marshall, Tr. 3369; *see also* RXD0103.) Nevertheless, Dr. Marshall did not understand that he had applied an asymmetric SSNIP test. (Marshall, Tr. 3367-3369).

761. As stated by the source relied upon by Dr. Marshall for the structure of his analysis, an asymmetric SSNIP test is appropriate if, but only if, "an asymmetric SSNIP is more apt to be profitable than is a symmetric one." (J. Farrell & C. Shapiro, "Improving Critical Loss Analysis," The Antitrust Source 1 (February 2008) at p. 5 fn. 17).

762. Dr. Marshall never tested to determine whether a hypothetical monopolist in Southern California would find a price increase on only Benco's sales to be more profitable than a price increase on the combined sales of Schein, Patterson, Burkhart and Benco. (Marshall, Tr. 3367; CX7100 at 88-90, ¶¶ 220-226). Dr. Marshall had no basis for applying the SSNIP test that he did. ." (J. Farrell & C. Shapiro, "Improving Critical Loss Analysis," The Antitrust Source 1 (February 2008) at p. 5 fn. 17).

763. Dr. Marshall applied a formula for critical loss taken from Farrell & Shapiro. (CX7100 at 89, ¶ 222). The formula applies only "in the symmetric case." (J. Farrell & C. Shapiro, "Improving Critical Loss Analysis," The Antitrust Source 1 (February 2008) at p. 5.) "A different condition" diagnoses whether a hypothetical monopolist would find a SSNIP imposed on just one product to be profitable. (J. Farrell & C. Shapiro, "Improving Critical Loss Analysis," The Antitrust Source 1 (February 2008) at p. 5 fn. 17.) Dr. Marshall erroneously applied a formula for critical loss intended for symmetric case to the results of an asymmetric SSNIP test. *Id*.

764. Incorrectly analyzing a symmetric case using an asymmetric SSNIP test or vice versa "will likely result in an incorrect conclusion." (CX7101 at 19, ¶ 40).

765. Dr. Marshall's SSNIP test relating to Benco's entry into Southern California is internally inconsistent and fatally flawed, and the results of that test are inherently unreliable. (J. Johnson, Tr. 4808-4812).

766. Dr. Marshall's own data shows that there was significant diversion of sales from Darby to Benco following Benco's entry in Southern California. (RX2833 at 52, ¶ 129).

767. Dr. Marshall's own data shows that, following Benco's entry into Southern California, Darby lost 37.7% of its 2012 sales by 2015. (RX2833 at 52, ¶ 129).

768. From 2010 to 2015, when Benco increased its share in Southern California, no full-service distributor experienced a percentage decrease in sales as dramatic as Darby. (RX2833 at 50, ¶ 124).

769. From 2010 to 2015, when Benco increased its share in Southern California, Schein was the only full-service distributor to experience a loss of sales as great as Darby's in percentage point terms. (RX2833 at 50, ¶ 124).

770. If Darby were not in the same relevant product market, an economist would not expect to see such a large diversion of sales from Darby to Benco. (RX2833 at 52, ¶ 129; RX2833 at 50, ¶ 124).

771. The results of Dr. Marshall's SSNIP test are inconsistent with the evidence of diversion from Darby to Benco in Dr. Marshall's own data. (RX2833 at 52, ¶¶ 128-129; RX2833 at 50, ¶ 124).

772. The results of Dr. Marshall's SSNIP test are inconsistent with other evidence of competition between Benco and Darby. (J. Johnson, Tr. 4808-4810; [redacted]).

773. When Dr. Wu repeated the analysis of Benco's entry into Southern California using all of the available data for Southern California, he concluded that 22 percent of Benco's new business came from Darby. (RX2833 at 53, ¶ 131).

774. Given Dr. Marshall's estimated critical loss of 12 percent, Dr. Wu's calculation that 22 percent of Benco's new business came from Darby suggests that Darby is in the relevant product market. (RX2833 at 53, ¶ 131).

775. In his rebuttal report, Dr. Marshall asserted that Dr. Wu should have used the "second type" of SSNIP test, in which the hypothetical monopolist increases price for only one product in a candidate relevant market. (CX7101 at 20, ¶¶ 44-45). But Dr. Marshall failed to establish that the conditions for application of this type of SSNIP test are satisfied.

776. In his rebuttal report, Dr. Marshall also responded to Dr. Wu's conclusions by asserting that "the recapture rate (78%) is greater than the critical loss (12%)," which shows that Darby is not in the relevant market. (CX7101 at 20, ¶ 46).

777. The U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (2010) describe a "critical loss analysis" to determine whether a SSNIP would increase or reduce a hypothetical monopolist's profits. (RX1139 at 9, § 4.1.3). The Horizontal Merger Giudelines state that a SSNIP is profitable "if the *predicted loss* is less than the critical loss." (RX1139 at 9, § 4.1.3 (emphasis added)).

778. In his rebuttal report, Dr. Marshall incorrectly compared the *recapture rate* to the critical loss. (CX7101 at 20, ¶ 46).

779. Dr. Marshall's calculation in his rebuttal report is inconsistent with the Horizontal Merger Guidelines and is incorrect. (RX2967 (Wu, Dep. 229)).

780. Dr. Wu properly compared the predicted loss (based on the actual loss experienced by Darby when Benco entered in Southern California) to the critical loss. (RX1139 at 9, § 4.1.3; RX2833 at 53, ¶ 131; RX2967 (Wu, Dep. 229-231)).

5. Dr. Marshall's Failure to Properly Define the Relevant Market Rendered His Other Opinions in this Matter Unreliable

781. Dr. Marshall's failure to properly define the relevant product market rendered unreliable his subsequent opinion in Section IV of his expert report that the industry is susceptible to collusion. (J. Johnson, Tr. 4811-4812; J. Johnson, Tr. 4815-4816; J. Johnson, Tr. 4821-4822).

782. Dr. Marshall's failure to properly define the relevant product market rendered unreliable his subsequent opinion in Section V of his report that Benco, Schein and Patterson acted contrary to their unilateral economic self-interest. (J. Johnson, Tr. 4811-4812; J. Johnson, Tr. 4815-4816).

783. Dr. Marshall's failure to properly define the relevant product market, rendered unreliable his subsequent opinion in Section VI of his expert report that the alleged conduct caused harm to competition. (J. Johnson, Tr. 4811-4812; J. Johnson, Tr. 4815-4816; [redacted]).

784. Dr. Marshall's failure to properly define the relevant product market and to analyze competitive conditions and effects in properly defined markets fatally undermined his overall conclusions in this matter. (J. Johnson, Tr. 4873-4875).

XII. DR. MARSHALL ERRED IN CONCLUDING THAT MARKET STRUCTURE WAS CONDUCIVE TO EFFECTIVE COLLUSION

785. Dr. Marshall opined that the structure of the market for the distribution of dental products and services was "conducive to effective collusion." (CX7100 at 11, ¶ 12; CX7100 at 111, ¶ 281).

786. Dr. Marshall's conclusion is flawed for multiple reasons. (J. Johnson, Tr. 4817-4818).

A. CONSPIRACY CANNOT BE INFERRED FROM INDUSTRY CHARACTERISTICS

787. To the extent that Dr. Marshall suggests that a conspiracy can be inferred from industry characteristics, that is wrong. (Carlton, Tr. 5382-5383).

788. The existence of a conspiracy can't be inferred from industry characteristics. (Carlton, Tr. 5382-5383; RX2832 at 65, ¶ 98).

789. Oligopolistic interdependence explains why there may be parallel behavior that has nothing to do with conspiracy. (Carlton, Tr. 5383; RX2832 at 66, ¶ 99).

790. Dr. Marshall failed to distinguish between oligopolistic interdependence and conspiracy. (Carlton, Tr. 5383-5384).

B. DR. MARSHALL'S EVALUATION OF INDUSTRY CHARACTERISTICS IS FUNDAMENTALLY FLAWED

791. The very set of characteristics that Dr. Marshall cited as conducive to collusion are also the very same characteristics that would undermine the ability of a cartel to form at all. (J. Johnson, Tr. 4817-4818).

792. The characteristics that Dr. Marshall relied upon as conducive to collusion don't apply uniformly to the dental distribution industry. (J. Johnson, Tr. 4817-4818).

793. Dr. Marshall ignored important competitive constraints in the dental distribution industry. (J. Johnson, Tr. 4818-4820; RX2834 at 25, ¶ 36).

794. Because he ignored direct-selling manufacturers and partial-line distributors, because he omitted mail-order and on-line distributors from the market, and because he combined distribution of consumables and equipment in a single market, Dr. Marshall is unable to determine whether or not the market structure actually would be conducive to collusion. (J. Johnson, Tr. 4818-4820; J. Johnson, Tr. 4821-4822).

795. Because he excluded significant potential competitive constraints, Dr. Marshall was unable to draw a meaningful conclusion about the likelihood of collusion in the industry. (J. Johnson, Tr. 4818-4820; J. Johnson, Tr. 4821-4822).

796. Because Dr. Marshall did not properly define local relevant markets, he is not in a position to know whether industry concentration is high. (J. Johnson, Tr. 4820-4821; J. Johnson, Tr. 4822-4823; RX2834 at 25, ¶ 37).

797. Benco has relatively small sales in certain regions. (Cohen, Tr. 631-33; J. Johnson, Tr. 4822-4823; RX2834 at 25, ¶ 38; CX7100 at 107-08, ¶¶ 273-74).

798. Benco had a share of only about ½ of one percent in Seattle in 2014. (J. Johnson, Tr. 4822-4823; RX2834 at 25, ¶ 38; CX7100 at 107-08, ¶¶ 273-74).

799. Dr. Marshall improperly ignored the fact that other distributors, such as Burkhart and Darby, might have a larger presence in various local areas. (J. Johnson, Tr. 4822-4823).

800. Benco generally represents only a small portion of most manufacturers' [redacted]. (J. Johnson, Tr. 4824-4826; [redacted]

[redacted]

802. Some manufacturers have entered into exclusive agreements with either Schein or Patterson. (J. Johnson, Tr. 2824-2826; [redacted]). [redacted]

803. Manufacturers of key brands or unique products have higher bargaining power. (J. Johnson, Tr. 4824-4826).

804. Dentsply, a leading manufacturer of false teeth, is an example of a manufacturer with higher bargaining power. (J. Johnson, Tr. 4824-4826).

805. A-dec, a manufacturer of dental chairs, pushed very hard on Benco, and ultimately took away its business. (Cohen, Tr. 662-63; J. Johnson, Tr. 4824-4826).

806. There is ample economic evidence of manufacturers pushing back on distributors. (J. Johnson, Tr. 4824-4826).

807. Dr. Marshall's conclusion that manufacturer bargaining power could not discipline the respondents is inconsistent with the economic evidence. (J. Johnson, Tr. 4824-4826).

808. Dr. Marshall responded to Dr. Johnson's conclusions by asserting that, based on a series of unsupported assumptions, that Benco's lack of bargaining power over manufacturers is "even stronger evidence of Benco acting against its own unilateral self-interest" by not agreeing to offer discounts to buying groups. (CX7101 at 31, ¶ 77). Dr. Marshall assertion simply adds more unsupported assumptions to the litany of errors in his assessment of Benco's unilateral economic self-interest. (J. Johnson, Tr. 4820-22).

809. Benco successfully completed its expansion to the west coast and into the Pacific Northwest during the time period in question. (RX1105; Cohen, Tr. 628-34).

810. Dr. Marshall's opinion that barriers to entry are high ignores Benco's experience of successfully expanding and entering new markets. (J. Johnson, Tr. 4820-4821; J. Johnson, Tr. 4823-4824; TRX2834 at 26, ¶ 39).

811. Benco successfully entered the Seattle region during the time period in question. (Cohen, Tr. 632-33; J. Johnson, Tr. 4820-4821; J. Johnson, Tr. 4823-4824).

812. Benco successfully entered the Los Angeles region during the time period in question. (Cohen, Tr. 632-33; J. Johnson, Tr. 4820-4821; J. Johnson, Tr. 4823-4824).

813. Dr. Marshall responded by citing Benco's growth in *national* share over the past 25 years, since the early 1990s. (CX7101 at 30, ¶ 75). By citing to national shares, Dr. Marshall deliberately obscures the point. Looking at *individual regions*, Benco was able to enter a series

of regions and, within each region, increase its share from zero to a significant presence in just a short period of time. (Cohen, Tr. 628-34).

814. Dr. Marshall ignored certain characteristics of the dental distribution industry that would make the alleged conspiracy less likely to succeed. (RX2832 at 67, ¶ 100).

815. Dr. Marshall ignored certain characteristics of the dental distribution industry that would make it difficult to detect any cheating from the alleged conspiracy. (RX2832 at 67, ¶ 100).

816. Dr. Marshall ignored the fact that nothing would prevent an alleged co-conspirator from offering a discount directly to buying group members, which would undercut the purpose of the alleged agreement. (RX2832 at 67, ¶ 101).

817. Dr. Marshall noted, but failed to consider, that individual dentists purchase large bundles of different products, and pricing is not transparent. (RX2832 at 67, ¶ 102).

818. Dr. Marshall noted, but failed to consider, that dental distributors offer a multitude of services, which is another mechanism with which a distributor could effectively lower prices to individual dentists. (RX2832 at 101-102, ¶ 102).

819. Dr. Marshall failed to identify any mechanism by dental distributors to enforce any conspiracy. (RX2832 at 68, ¶ 103).

820. The various factors cited by Dr. Marshall don't support his conclusion that the structure of the dental products distribution business is conducive to collusion. (J. Johnson, Tr. 4826).

821. Dr. Marshall's conclusion that conditions in the dental products distribution business are conducive to effective collusion is inconsistent with the competitive dynamics found in the industry. (RX2834 at 25, ¶ 42).

XIII. DR. MARSHALL'S ASSERTION THAT BENCO, SCHEIN AND PATTERSON ENGAGED IN PARALLEL CONDUCT IS UNSUPPORTED BY HIS ANALYSIS AND CONTRARY TO THE EVIDENCE

822. Dr. Marshall opined that Benco, Schein and Patterson engaged in parallel conduct with respect to buying groups. (CX7100 at 121-122, ¶¶ 304-306).

823. Dr. Marshall made multiple economic mistakes and erroneous factual assumptions in connection with his assertion that Benco, Schein and Patterson engaged in parallel conduct with respect to buying groups. (Carlton, Tr. 5359-5360; Carlton, Tr. 5364).

824. In fact, Benco, Schein and Patterson did not engage in parallel conduct, but rather pursued fundamentally different strategies with respect to buying groups. (Carlton, Tr. 5359-5360; Carlton, Tr. 5364).

A. BENCO HAD A CONSISTENT POLICY NOT TO DO BUSINESS WITH BUYING GROUPS

825. Benco had a policy of not doing business with buying groups since 1996. (Cohen, Tr. 445).

826. During the alleged conspiracy period from 2011 to 2015, Benco continued its policy of not doing business with buying groups. (Cohen, Tr. 445; 684).

B. PATTERSON GENERALLY DID NOT DO BUSINESS WITH BUYING GROUPS, BUT ITS REGIONAL OFFICES COULD DO SO IF THEY CHOSE

827. Patterson generally did not do business with buying groups before 2013, but Patterson's regional offices were free to deal with buying groups if they chose. (Guggenheim, Tr. 1601-02).

828. During the alleged conspiracy period from 2013 to 2015, Patterson continued its policy of generally not doing business with buying groups, but permitting its regional offices to deal with buying groups if they chose. (Guggenheim, Tr. 1601-04).

C. SCHEIN EVALUATED BUYING GROUP OPPORTUNITIES ON A CASE BY CASE BASIS, AND SOMETIMES BID FOR BUYING GROUP BUSINESS

829. Schein evaluated the opportunity to bid for buying group business on a case by case basis between 2011 and 2015; sometimes Schein bid for buying group business, and sometimes Schein decided not to bid for buying group business, between 2011 and 2015. (Titas, Tr. 5280; RX2957 at 12-13).

830. Dr. Marshall observed instances in which Schein bid for the business of buying groups between 2011 and 2015. (Carlton, Tr. 5366-67).

831. Dr. Carlton reviewed Schein's sales data and determined that Schein was making sales to buying groups before the alleged conspiracy, during the alleged conspiracy, and after the alleged conspiracy. (Carlton, Tr. 5365).

832. [redacted]

833. [redacted]

834. [redacted]

835. [redacted]

836. [redacted]

837. [redacted]

838. Dr. Carlton's calculations of Schein's business with buying groups was conservative and tend to understate Schein's business with buying groups. (Carlton, Tr. 5371).

839. Even if one adopted different definitions of buying groups, it would not change Dr. Carlton's conclusions. (Carlton, Tr. 5456-5457).

840. If the buying groups that are in Dr. Carlton's group B or group C change, the exact numbers would change, but there is no evidence that it would undermine Dr. Carlton's conclusions. (Carlton, Tr. 5457).

841. [redacted]

842. [redacted]

843. [redacted]

844. [redacted]

845. [redacted]

846. [redacted]

847. [redacted]

848. [redacted]

849. [redacted]

850. [redacted]

851. [redacted]

852. [redacted]

853. [redacted]

854. [redacted]

855. [redacted]

856. [redacted]

857. [redacted]

858. [redacted]

859. [redacted]

860. [redacted]

861. [redacted]

862. [redacted]

863. [redacted]

864. [redacted]

865. [redacted]

866. [redacted]

867. [redacted]

868. [redacted]

869. Dr. Marshall conceded that Schein submitted a bid for the business of Smile Source in 2014. (Marshall, Tr. 2954).

870. Dr. Marshall opined that Schein's bid for Smile Source's business in 2014 was "nonserious." (Marshall, Tr. 2954-2955, 2956).

871. The record evidence confirms that Schein's bid for Smile Source's business in 2014 was serious and sincere. (Maurer, Tr. 4942-46).

872. Even Complaint Counsel concedes that Schein's bid for Smile Source business in 2014 was serious, but describe it as an attempt to cheat. (Marshall, Tr. 2957; *see also* RXD 17 ("Schein Attempted To Cheat.").

873. Dr. Marshall opined that making a high offer to a buying group is different from making no offer. (CX7101 at 7, ¶ (6)C ("Making no offer to a buying group is not the same, from an economic perspective, as making a high offer.")). Thus, Schein's conduct of bidding for Smile Source's business in 2014, regardless of whether it was serious, was not parallel to the conduct of Benco and Patterson, which did not bid for the Smile Source business. (CX7101 at 7, ¶ (6)C).

874. Dr. Marshall conceded that if Schein's bid to Smile Source in 2014 was serious and one does not assume the existence of a conspiracy, its conduct was not parallel to that of Benco and Patterson. (Marshall, Tr. 2958).

875. [redacted]

876. [redacted]

877. [redacted]

878. Dr. Marshall's analysis is circular and internally inconsistent: he assumes parallel conduct as evidence of conspiracy, and assumes conspiracy to explain away evidence of non-parallel conduct. (Marshall, Tr. 2889 ("Q. . . . Did you begin with an assumption of a conspiracy in this case? THE WITNESS: Oh, no, sir."); Marshall, Tr. 2952-2953 ("Q. . . . It's important when you're trying to determine whether there is a conspiracy first to have parallel conduct and then to determine whether that parallel conduct can be explained by unilateral behavior or whether it is a result of collusive behavior; is that right? A. Sure."); Marshall, Tr. 2959 ("Q. Okay. So if complaint counsel is right, that Schein actually did intend to win the Smile Source business in 2014, then you would have nonparallel conduct if you don't assume the existence of a conspiracy; fair? A. Well, again, you're saying if you don't assume the existence of a conspiracy. Within the assumption of the existence of a conspiracy, it's a legitimate interpretation of cheating, which happens all the time in conspiracies.")).

XIV. CONTRARY TO DR. MARSHALL'S ASSERTIONS, BENCO, SCHEIN AND PATTERSON EACH ACTED CONSISTENTLY WITH ITS UNILATERAL ECONOMIC SELF-INTEREST

A. BENCO'S UNILATERAL ECONOMIC SELF-INTEREST WAS BASED ON ITS VALUE PROPOSITION AND ITS BUSINESS STRATEGY

1. **Benco's Value Proposition Was To Offer Its Customers The Best Possible Support At a Reasonable Price**

879. Benco's value proposition was to offer customers the best value based on a combination of price and customer support. (RX1113; Cohen, Tr. 671-77; J. Johnson, Tr. 4829-4831; [redacted]).

880. Benco was focused on providing customers with the best possible customer experience. (RX1113; Cohen, Tr. 628-29; J. Johnson, Tr. 4829-4831).

881. Benco has a very "high-touch" sales model. (Cohen, Tr. 675-77; J. Johnson, Tr. 4829-4831).

882. Benco's sales representatives are a very important part of Benco's value proposition. (Cohen, Tr. 675-77; J. Johnson, Tr. 4829-4831; [redacted]).

883. Benco encourages its representatives to develop one-on-one relationships with their dentist customers. (Cohen, Tr. 675-77; J. Johnson, Tr. 4829-4831).

884. Benco has invested heavily in it distribution network. (Cohen, Tr. 629-32; J. Johnson, Tr. 4829-4831; [redacted]).

885. Because Benco's "high-touch" sales method and its representatives' relationships with customers were so important to Benco's business model, Benco did not want any entity to come between it and its customers. (Cohen, Tr. 445; 671-77).

886. Benco's long-standing policy was not to let any entity come between it and its customers. (Cohen, Tr. 445).

2. **Benco Did Business With DSOs Because They Permitted Benco To Reduce Its Costs**

887. Dental service organizations, or DSOs, are corporate dental customers. (Cohen, Tr. 675-77; J. Johnson, Tr. 4832; RX2834 at 34, ¶ 54).

888. Because a DSO is the customer, Benco maintains direct contact and communication with the customer. (Ryan, Tr. 1166). Dealing with DSOs is consistent with Benco's policy of not letting any entity come between Benco and its customers. (Ryan, Tr. 1165).

889. Because DSOs are under a single corporate umbrella, they centralized decision makers and centralized purchasing agents. (Puckett, Tr. 2205-06; Ryan, Tr. 1166; J. Johnson, Tr. 4832; CX8033 (Cavaretta, Dep. at 42-45); CX8010 (Titus, Dep. at 26, 255-56; CX8005 (Muller, Dep. at 94-95); *see also* RX2832 at 41, ¶ 58).

890. When purchasing products, DSOs can agree to volume commitments and drive compliance. (Ryan, Tr. 1166-1167; J. Johnson, Tr. 4832; CX8033 (Cavaretta, Dep. at 42-45); CX8010 (Titus, Dep. at 255-256); [redacted]; *see also* RX2832 at 41, ¶ 58; RX2833 at 19-20, ¶ 33).

891. [redacted]

892. [redacted]

893. DSOs can agree to purchase specific baskets of products, which lowers costs for manufacturers. (J. Johnson, Tr. 4832; RX2833 at 19-20, ¶ 33 CX0309 (Muller, IHT at 59-60)).

894. When DSOs commit to purchase certain volumes of specific products from Benco, Benco is able to negotiate discounted prices from upstream manufacturers. (J. Johnson, Tr. 4833; CX0309 (Muller, IHT at 59-60); Meadows, Tr. 2491-92; Foley, Tr. 4687-88; *see also* Ryan, Tr. 1166 (explaining that DSOs can say what "spend … will be delivered," which makes it easy to "base pricing" on such volume commitments)). RX2832 at 33, ¶ 48; RX2833 at 19-20, ¶ 33).

895. DSOs can place large consolidated orders, which reduces distributors' shipping costs. (J. Johnson, Tr. 4832-4833; *see also* RX2833 at 19, ¶ 33).

896. DSOs generally place orders electronically, which also reduces distributors' selling costs. (J. Johnson, Tr. 4832).

897. Because DSOs have centralized decision makers and purchasing agents, a distributor doesn't need a hundred sales representatives to service a hundred dentists employed by a DSO. (J. Johnson, Tr. 4833; Meadows, Tr. 2523-24; CX8016 (Meadows, Dep. at 271-72); CX8010 (Titus, Dep. at 26); CX0309 (Muller, IHT at 59-60, 63); *see also* RX2832 at 41, ¶ 58; RX2833 at 19-20, ¶ 33).

898. Because DSOs have centralized decision makers and purchasing agents, a distributor can service DSO customers with a much smaller sales force. (J. Johnson, Tr. 4833; Meadows, Tr. 2523-24; CX8016 (Meadows, Dep. at 271-72); CX8010 (Titus, Dep. at 26); CX0309 (Muller, IHT at 59-60, 63); [redacted]; *see also* RX2832 at 41, ¶ 58).

899. DSOs often purchased dental supplies at lower prices than those paid by individual dentists. (Cohen, Tr. 423-424; RX2834 at 34, ¶ 54).

900. Benco did business with DSO customers between 2011 and 2015 because they permitted Benco to realize cost savings that offset the lower prices. (Cohen, Tr. 689-690; J. Johnson, Tr. 4833; [redacted]).

901. Schein was willing to offer discounts to DSOs because DSOs could move the collective volume of purchases of their members and could generate lower costs for the distributor. (RX2832 at 41, ¶ 58).

902. Patterson offered discounts to DSOs on a case-by-case basis; these discounts were possible because DSOs reduced Patterson's costs. (RX2833 at 19-20, ¶ 33).

3. Benco's Unilateral Economic Self-Interest Was Not To Do Business With Buying Groups Because They Came Between Benco and Its Customers and Didn't Permit Benco To Reduce Its Costs

903. Buying groups are not customers. (Cavaretta, Tr. 5568-69; Cohen, Tr. 861; Ryan, Tr. 1034-36; see also RX2928 (member "[p]urchases are made directly from the vendor"); Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65).

904. Buying groups don't decide what to order. (Cavaretta, Tr. 5568-69; Cohen, Tr. 861; Ryan, Tr. 1034-36; see also RX2928 (member "[p]urchases are made directly from the vendor"); Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65).

905. Buying groups don't place orders. (Cavaretta, Tr. 5568-69; Cohen, Tr. 861; Ryan, Tr. 1034-36; see also RX2928 (member "[p]urchases are made directly from the vendor"); Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65).

906. Buying groups don't take delivery of orders. (Cavaretta, Tr. 5568-69; Cohen, Tr. 861; Ryan, Tr. 1034-36; see also RX2928 (member "[p]urchases are made directly from the vendor"); Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65).

907. Buying groups don't receive invoices for products ordered. (Cavaretta, Tr. 5568-69; Cohen, Tr. 861; Ryan, Tr. 1034-36; see also RX2928 (member "[p]urchases are made directly from the vendor"); Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65).

908. Buying groups don't pay for any products ordered by their members. (Cavaretta, Tr. 5568-69; Cohen, Tr. 861; Ryan, Tr. 1034-36; see also RX2928 (member "[p]urchases are made directly from the vendor"); Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65).).

909. Buying groups are "middle men" between distributors and the ultimate customers – individual dentists. (Cohen, Tr. 444-45).

910. Individual dentists who are members of buying groups decide what to purchase, place orders, take delivery and pay for the products ordered. They perform the functions of customers. (Cavaretta, Tr. 5568-69; Ryan, Tr. 1034-36; Kois Jr., Tr. 312-13).

911. Benco believed that buying groups interfered with Benco's relations with its individual dentist customers. (Cohen, Tr. 444-45).

912. Buying groups did nothing to permit Benco to reduce its costs to serve buying group members. (Ryan, Tr. 1082; J. Johnson, Tr. 4836-4837; [redacted]).

913. Benco believed that buying groups could not ensure compliance by their members. (Ryan, Tr. 1166-67, 1179-80; J. Johnson, Tr, 4834-4835).

914. Buying groups could not guarantee that their members would change their purchasing behavior. (Ryan, Tr. 1166-67, 1179-80; Meadows, Tr. 2491-92; J. Johnson, Tr. 4834-4835; *see also* RX2832 at 41-42, ¶ 59; RX2833 at 21-22, ¶ 39).

915. Buying groups could not guarantee that their members would buy any particular volume of products from Benco. (Ryan, Tr. 1166-67, 1179-80; Meadows, Tr. 2491-92; J. Johnson, Tr. 4834-4835; *see also* RX2832 at 41-42, ¶ 59; RX2833 at 21-22, ¶ 39).

916. [redacted]

917. [redacted]

918. [redacted]

919. Without product or volume commitments, Benco could not negotiate lower prices from manufacturers. (J. Johnson, Tr. 4836-4837; [redacted]; *see also* RX2833 at 21, ¶ 37).

920. Buying groups required Benco to continue to ship products separately to all individual members. (J. Johnson, Tr, 4834-4835; [redacted]; *see also* RX2832 at 43, ¶ 62; RX2833 at 20-21, ¶¶ 36, 39).

921. Buying groups did not permit Benco to reduce its shipping costs. (J. Johnson, Tr. 4836-4837; [redacted]; *see also* RX2832 at 43, ¶ 62; RX2833 at 20-21, ¶¶ 36, 39).

[redacted]

925. Benco concluded that buying groups demanded lower prices but gave nothing in return. (Cohen, Tr. 685; J. Johnson, Tr. 4834-4835; J. Johnson, Tr. 4836-4837).

926. Without the ability to achieve cost savings, it wouldn't make business sense to offer discounts to a buying group. (Cohen, Tr. 685; J. Johnson, Tr. 4836-4837; [redacted]; RX2833 at 24, ¶ 45).

927. [redacted]

928. Benco concluded that buying groups were inconsistent with Benco's value proposition and its business model.

B. DR. MARSHALL ABANDONED HIS GENERAL ASSERTION THAT BENCO ACTED CONTRARY TO ITS UNILATERAL ECONOMIC SELF-INTEREST BY NOT BIDDING FOR THE BUSINESS OF BUYING GROUPS IN GENERAL

1. **Dr. Marshall's Initial Position Was Contrary To The Factual Record and to Common Sense**

929. Initially, Dr. Marshall asserted that Benco (and Schein and Patterson) acted contrary to its unilateral economic self-interest by deciding not to bid for the business of buying groups in general between 2011 and 2015. (CX7100 at 151, ¶ 352 ("I conclude that . . . Benco's conduct of not bidding for buying group business was inconsistent with acting in their own unilateral economic self-interest.")).

930. Initially, Dr. Marshall asserted, broadly and without limitation, that "It was in each Respondent's unilateral economic self-interest to discount to buying groups . . ." and that "Respondents' conduct toward dental buying groups was inconsistent with acting in their own unilateral economic self-interest . . ..")." (CX7100 at 11, ¶ 13).

931. Initially, Dr. Marshall claimed, again broadly and without limitation, that "the loss from not winning the buying group contract given that the buying group exists . . . will *always* result in a decrease in profits."). (CX7100 at 150, ¶ 349 (emphasis added)).

932. Dr. Marshall's assertions were overly broad, internally inconsistent, contrary to the factual record, and could not be sustained.

933. Benco had a policy of not doing business with buying groups since 1996. (Cohen, Tr. 445, 569). Dr. Marshall understood that Benco had a policy of not dealing with buying groups before 2011. (Marshall, Tr. 3391).

934. Dr. Marshall did not opine that Benco acted contrary to its unilateral economic self-interest by declining to do business with buying groups before 2011. (Marshall, Tr. 3391 ("Q. Now, you don't conclude that Benco acted contrary to its unilateral economic self-interest before 2011, do you? A. No. I'm making no such representation.")).

935. Dr. Marshall did nothing to investigate why Benco declined to offer discounts to buying groups before 2011. (Marshall, Tr. 3391).

936. Dr. Marshall offered no explanation for why Benco declined to offer discounts to buying groups before 2011. (Marshall, Tr. 3391 ("I'm not offering any explanation of that, no. That's not part of the analysis.")).

937. If Dr. Marshall's initial opinion were correct – that it was contrary to Benco's unilateral economic self-interest not to bid for buying group business – Benco would have been acting contrary to its own unilateral economic self-interest consistently for a period of 15 years, from 1996 to 2011. Yet Dr. Marshall did *not* opine that Benco acted contrary to its economic self-interest between 1996 and 2011. (Marshall, Tr. 3391).

938. Dr. Marshall has no explanation for why Benco would have acted contrary to its unilateral economic self-interest for 15 years, from 1996 to 2011. (Marshall, Tr. 3391).

939. Dr. Marshall did not observe any change in behavior regarding Benco in 2011 or 2012. (Marshall, Tr. 3391-3392). Dr. Marshall observed that Benco continued to decline to offer discounts to buying groups from 2011 to 2015, as it had from 1996 to 2011. (Marshall, Tr. 3392).

940. Conversely, if Benco acted consistently with its unilateral economic self-interest from 1996 to 2011, Dr. Marshall had no explanation for why the identical conduct – declining to do business with buying groups – was in Benco's unilateral economic self-interest from 1996 to 2011, but contrary to Benco's unilateral economic self-interest from 2011 to 2015.

941. Patterson generally did not do business with buying groups before 2013, but Patterson's regional offices were free to deal with buying groups if they chose. (Guggenheim, Tr. 1601-02).

942. [redacted]

943. [redacted]

944. Dr. Marshall admitted that his analysis showed the exact same action by Patterson, supposedly contrary to its unilateral economic self-interest, before 2013 and after 2015. (Marshall, Tr. 3240 ("Q. . . . So your analysis if we take out the period that my client allegedly conspired, February 2013 to April 2015, . . . your analysis shows in the but-for world the exact same action supposedly contrary to self-interest by Patterson Companies in the period before and the period after; correct? A. Yeah. . . .")).

945. [redacted]

946. [redacted]

947. [redacted]

948. Schein evaluated the opportunity to bid for buying group business on a case by case basis before 2011; sometimes Schein bid for buying group business, and sometimes Schein decided not to bid for buying group business, before 2011. (Titas, Tr. 5192-94; RX2957 at 12-13).

949. Dr. Marshall did not review the entire record to determine whether Schein ever said no to buying groups before it said no to Unified Smiles in 2011. (Marshall, Tr. 2949).

950. Dr. Marshall didn't know whether Schein said no to buying groups before Unified Smiles in 2011. (Marshall, Tr. 2949).

951. Both before and after 2011, Schein bid for the business of those buying groups that offered Schein a value proposition and the potential for increased sales, and declined to bid for the business of buying groups that didn't. (Cavaretta, Tr. 5568-5570, 5574-5576, 5607-5608; Titus, Tr., 5199, 5201-5202, 5207-5208, 5251-5253).

952. If Dr. Marshall's were correct that Schein acted contrary to its unilateral economic self-interest by not bidding for buying group business, Schein would have acted contrary to its unilateral economic self-interest on multiple occasions before 2011.

953. Because he was unaware that Schein had said no to some buying groups before 2011, Dr. Marshall offered no explanation for why Schein sometimes did not bid for buying group business before 2011. (Marshall, Tr. 2949).

954. Because he was unaware that Schein had said no to some buying groups before 2011, Dr. Marshall offered no explanation for why Schein would have acted contrary to its unilateral economic self-interest before 2011. (Marshall, Tr. 2949).

955. Conversely, if Schein acted consistently with its unilateral economic self-interest before 2011, Dr. Marshall had no explanation for why the identical conduct – sometimes declining to do business with buying groups – was in Schein's unilateral economic self-interest before 2011, but contrary to Schein's unilateral economic self-interest from 2011 to 2015. (Marshall, Tr. 2949; [redacted]).

2. Dr. Marshall Admitted That He Had No Knowledge Regarding Any of the 36 Other Buying Groups Upon Which His Opinion Was Based

956. Dr. Marshall listed 38 buying groups that he claims approached Schein, Patterson or Benco between 2011 and 2015 and were turned down by at least one of them. (Marshall, CX7100 at 209, ¶ 491).

957. [redacted]

958. With the exception of Kois and Smile Source, Dr. Marshall did not perform any factual analysis of the other 36 buying groups that he included in his report. (Marshall, Tr. 3387).

959. Dr. Marshall had no knowledge of most of the other buying groups that he included in his report. He was unable to answer even the most basic questions about many of the buying groups that he included in his report.

960. Dr. Marshall included Dental Gator among the buying groups listed in paragraph 491 of his report. (CX7100 at 209, 213, ¶ 491).

961. [redacted]

962. [redacted]

963. Dr. Marshall included New Mexico Dental Cooperative among the buying groups listed in paragraph 491 of his report. (CX7100 at 209, 210, ¶ 491).

964. Schein did business with the New Mexico Dental Cooperative through the Dental Co-op of Utah. (Mason, Tr. 2391).

965. [redacted]

966. Dr. Marshall included Merit Dental among the buying groups listed in paragraph 491 of his report. (CX7100 at 209, 213, ¶ 491).

967. Schein entered into a contract with Merit Dental Group. (Sullivan, Tr. 4243-44; RX2393).

968. [redacted]

969. [redacted]

970. [redacted]

971. Dr. Marshall included the Schulman Group among the buying groups listed in paragraph 491 of his report. (CX7100 at 209, 212, ¶ 491).

972. Schein did business with the Schulman Group. (CX2047).

973. [redacted]

974. Dr. Marshall included Dr. Stephen Sebastian among the buying groups listed in paragraph 491 of his report. (CX7100 at 209, 211, ¶ 491).

975. Dr. Marshall was unable to say anything about Dr. Stephen Sebastian's buying club other than three citations in a footnote. (Marshall, Tr. 3262). He could not say whether Dr. Stephen Sebastian's buying club made a coherent proposal to Patterson. (Marshall, Tr. 3263-3264).

976. Dr. Marshall included Nexus Dentistry among the buying groups listed in paragraph 491 of his report. (CX7100 at 209, 211, ¶ 491).

977. Dr. Marshall was unable to say anything about Nexus Dentistry other than the single citation in a footnote. (Marshall, Tr. 3264). He could not say whether Nexus Dentistry approached Patterson or whether it made a coherent business proposal to Patterson. (Marshall, Tr. 3264-3265).

978. Dr. Marshall included Catapult among the buying groups listed in paragraph 491 of his report. (CX7100 at 209, 211, ¶ 491).

979. Dr. Marshall was unable to say anything about Catapult other than the single citation in a footnote. (Marshall, Tr. 3265). He could not say whether Catapult made a coherent proposal to Patterson. (Marshall, Tr. 3265).

980. Dr. Marshall included Dental Purchasing Group among the buying groups listed in paragraph 491 of his report. (CX7100 at 209, 212, ¶ 491).

981. Dr. Marshall was unable to say anything about Dental Purchasing Group other than the single citation in a footnote. (Marshall, Tr. 3265-3266). He could not say whether Dental Purchasing Group made a coherent proposal to Patterson. (Marshall, Tr. 3267). He was unaware that the doctor was a veterinarian, not a dentist. (CX3080; Guggenheim, Tr. 1657; Marshall, Tr. 3269-3270).

982. Dr. Marshall included Dentistry Unchained among the buying groups listed in paragraph 491 of his report. (CX7100 at 209, 211, ¶ 491).

983. Dr. Marshall was unable to say anything about Dentistry Unchained other than three citations in a footnote. (Marshall, Tr. 3272-3273). He was unaware that Dentistry Unchained was not formed until after the end of the alleged conspiracy period. (Marshall, Tr. 3273-3274).

984. Dr. Marshall included Stratus Dental among the buying groups listed in paragraph 491 of his report. (CX7100 at 209, 212, ¶ 491).

985. Dr. Marshall was unable to say anything about Stratus other than the single citation in a footnote. (Marshall, Tr. 3274-3275). He could not say whether Stratus made a coherent proposal to Patterson. (Marshall, Tr. 3275).

986. Dr. Marshall included XYZ Dental among the buying groups listed in paragraph 491 of his report. (CX7100 at 209, 210, ¶ 491).

987. Dr. Marshall knew nothing about XYZ Dental other than that Benco considered it to be a buying group. (Marshall, Tr. 3383). He did nothing to investigate the business opportunity that XYZ Dental presented to Benco. (Marshall, Tr. 3383). Dr. Marshall offered no opinion as to whether it was in Benco's unilateral economic self-interest to decline to do business with XYZ Dental. (Marshall, Tr. 3385).

988. Dr. Marshall included DDS Group among the buying groups listed in paragraph 491 of his report. (CX7100 at 209, 210, ¶ 491).

989. Dr. Marshall knew nothing about DDS Group other than that it was a buying group and the single citation in a footnote. (Marshall, Tr. 3385-3386). Although the document cited by Dr. Marshall in his report indicates that DDS Group falsely listed Benco as a "featured sponsor" without Benco's permission, Dr. Marshall conducted no investigation. (CX1200; Marshall, Tr. 3386-3387). Dr. Marshall offered no opinion as to whether Benco acted contrary to its unilateral economic self-interest by deciding not to do business with DDS Group. (Marshall, Tr. 3387).

3. Dr. Marshall Abandoned His General Assertion That Benco Acted Contrary To Its Unilateral Economic Self-Interest By Not Dealing With Buying Groups

990. Initially, Dr. Marshall asserted, generally and without limitation, that it was in Benco's unilateral economic self-interest to discount to buying groups, that the loss from not winning the buying group contract will *always* result in a decrease in profits, and that Benco's conduct of not bidding for buying group business was inconsistent with acting in their own unilateral economic self-interest.

991. At trial, Dr. Marshall opined only that Benco acted contrary to its unilateral economic self-interest by not bidding for the business of the Kois and Smile Source buying groups. (Marshall, Tr. 3387-3388).

992. At trial, Dr. Marshall offered no opinion as to whether Benco's conduct of not bidding for the business of the other 36 buying groups identified in his expert report was inconsistent with Benco's own unilateral economic self-interest. (Marshall, Tr. 3387-3388).

993. At trial, Dr. Marshall confirmed that he was not offering an opinion, one way or the other, as to whether it was in Benco's unilateral self-interest to decline to do business with XYZ Dental. (Marshall, Tr. 3385).

994. At trial, Dr. Marshall confirmed that he had not done any empirical analysis necessary to determine whether it was consistent with Benco's unilateral economic self-interest to decline to do business with XYZ Dental. (Marshall, Tr. 3384-3385).

995. At trial, Dr. Marshall confirmed that he was not offering any opinion, one way or the other, that Benco acted contrary to its unilateral self-interest by deciding not to do business with DDS Group. (Marshall, Tr. 3387).

996. At trial, Dr. Marshall confirmed that he had not done any specific data analysis regarding the DDS Group, and therefore was not offering any opinion, one way or the other, as to whether Benco acted contrary to its unilateral self-interest by deciding not to do business with DDS Group. (Marshall, Tr. 3387).

997. At trial, Dr. Marshall confirmed that he hadn't done a specific data analysis with regard to the other 36 buying groups identified in his expert report. (Marshall, Tr. 3387-3388).

998. At trial, Dr. Marshall confirmed that he was not offering an opinion as to whether it was contrary to Benco's unilateral self-interest to decline to do business with the 36 buying groups that he had not studied. (Marshall. Tr. 3387-3388).

999. At trial, Dr. Marshall confirmed that he was arguing that Benco acted contrary to its unilateral self-interest only from the Kois and Smile Source analyses. (Marshall, Tr. 3387-3388).

C. DR. MARSHALL'S PROFITABILITY STUDIES OF DEALING WITH THE KOIS AND SMILE SOURCE BUYING GROUPS WERE DEEPLY FLAWED AND FAIL TO SUPPORT HIS CONCLUSIONS

1. Dr. Marshall's Theoretical Basis For His Analysis Is Incorrect

1000. Dr. Marshall's theory behind his analysis is wrong. (Carlton, Tr. 5384; Carlton, Tr. 5386-5387; RX2832 at 45, ¶ 65; RX2832 at 48-49, ¶¶ 70-71).

1001. The economic construct of Dr. Marshall's analysis conflates conspiratorial behavior with non-conspiratorial oligopolistic behavior. (RX2832 at 48, ¶ 71).

1002. The flaws in Dr. Marshall's analysis render it lacking in any theoretically valid foundation for reaching any conclusions about whether a distributor's behavior can be explained by a conspiracy. (RX2832 at 48, ¶ 70).

1003. There are many potential disadvantages of dealing with buying groups. (Cavaretta, Tr. 5568-69; Cohen, Tr. 444-45, 861; Ryan, Tr. 1034-36, 1166-67; see also RX2928; Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65).

1004. Potential disadvantages of dealing with buying groups include the fact that buying groups cannot ensure compliance by their members, interfered with Benco's relations with its individual dentist customers, and did not create efficiencies for Benco. (Ryan, Tr. 1082, 1166-67, 1179-80; Cohen, Tr. 444-45, 780).

1005. From an economic point of view, there are many reasons why a distributor might not want to deal with a particular buying group. (Carlton, Tr. 5387).

1006. From an economic point of view, reasons why a distributor might not want to deal with a particular buying group include the lower price to customers who otherwise would have bought from the distributor, the possibility of inducing other customers to join the buying group, and the possibility of other customers learning of the discounts and inducing salespeople to offer them similar discounts. (Carlton, Tr. 5387-5390).

1007. Other factors that might affect whether a distributor chooses to deal with buying groups include whether selling to buying groups aligns with the strategic objectives of the distributor. (Carlton, Tr. 5387-5390).

1008. Dealing with a buying group might reduce the money or commissions that a distributor's field service consultants or sales consultants make, which can create internal conflict. (Carlton, Tr. 5387-5390).

1009. There could be costs associated with dealing with a buying group; for example, a buying group may charge a distributor a fee for dealing with the buying group. (Carlton, Tr. 5387-5390).

1010. All of these factors matter when a distributor is trying to decide whether to deal with a buying group. (Carlton, Tr. 5387-5390).

1011. Dr. Marshall did not consider any disadvantages of dealing with buying groups other than cannibalization. (Marshall, Tr. 3380).

1012. Dr. Marshall did not account for the various factors affecting whether a distributor chooses to deal with a buying group. (Carlton, Tr. 5390).

1013. Dr. Carlton summarized the factors that influence a distributor's decision whether to do business with a buying group in an equation. (Carlton, Tr. 5390-5392).

1014. Dr. Marshall agreed that Dr. Carlton's equation was the right equation to determine whether a distributor acted contrary to its self-interest. (Carlton, Tr. 5392).

1015. Dr. Marshall did not attempt to apply Dr. Carlton's equation. (Carlton, Tr. 5392-5393).

1016. Although Dr. Marshall says it's difficult to apply Dr. Carlton's equation, businesses make judgments every day based on factors like those described by Dr. Carlton. (Carlton, Tr. 5393).

1017. Dr. Carlton's discussions with Schein's executives confirm that the formula is what the business executives are trying to implement in their own business judgment. (Carlton, Tr. 5393; Carlton, Tr. 5460-5461).

1018. Dr. Marshall's analysis doesn't consider the right factors and so doesn't implement the right calculation. (Carlton, Tr. 5393-5395).

1019. The fact that Dr. Marshall's analysis ignores many factors that influence the decision to discount, combined with his assumption that buying groups can deliver sufficient incremental volume to make discounting profitable, renders his analysis unreliable. (RX2832 at 44, ¶ 64).

2. Dr. Marshall's Profitability Studies Followed No Accepted Methodology and Included Multiple Fundamental Flaws

1020. Setting aside the fact that the theory is wrong, Dr. Marshall's empirical study of the Kois and Smile Source buying groups is wrong. (Carlton, Tr. 5384; Carlton, Tr. 5386-5387; J. Johnson, Tr. 4828-4829).

1021. Dr. Marshall's empirical analyses of the Kois and Smile Source buying groups are flawed and do not provide a reliable basis for his assertions. (RX2832 at 44, ¶ 64).

1022. The collective significance of Dr. Marshall's errors in his Kois and Smile Source studies is that they don't tell us anything about Benco's unilateral self-interest. (J. Johnson, Tr. 4856).

a. <u>Dr. Marshall's Profitability Studies Did Not Follow Any Accepted Method of Economic Analysis</u>

1023. Dr. Marshall's analysis of respondent's business opportunities with the Kois and Smile Source buying groups failed to follow any recognized method of economic analysis. (J. Johnson, Tr. 4837-38).

1024. Dr. Marshall's expert report did not cite to a single academic, peer-reviewed study endorsing the type of analysis he performed to evaluate respondent's business opportunities with the Kois and Smile Source buying groups. (Marshall, Tr. 3241; [redacted]).

1025. Dr. Marshall couldn't remember whether he cited to a single academic, peer-reviewed study endorsing the type of analysis he performed to evaluate respondent's business opportunities with the Kois and Smile Source buying groups. (Marshall, Tr. 3241).

b. Dr. Marshall's Profitability Studies Included Only a Tiny Fraction of Dentists

1026. Dr. Marshall's analysis of respondent's business opportunities with the Kois and Smile Source buying groups studied only a tiny fraction of the approximately 200,000 dentists in the United States. (Marshall, Tr. 3219-3220).

1027. [redacted]

1028. There was a total of 621 dentists in Dr. Marshall's first three studies in sections V.D.a, 2 and 3 of Dr. Marshall's report, which amounted to only three-tenths of one percent of all dentists in the United States. (Marshall, Tr. 3219-3220).

1029. [redacted]

1030. [redacted]

1031. [redacted]

1032. [redacted]

1033. [redacted]

1034. [redacted]

1035. [redacted]

1036. [redacted]

c. Dr. Marshall's Profitability Studies Focused On Only Two Buying Groups, Neither of Which Was Representative

1037. Dr. Marshall based his opinion that Benco acted against its unilateral economic self-interest on a total of five case studies. (Marshall, Tr. 3373).

1038. Dr. Marshall's five case studies involved only two buying groups: Kois and Smile Source. (Marshall, Tr. 3373).

1039. A study based only on two buying groups can only possibly make sense if the two selected buying groups are representative of other buying groups. (Wu, Tr. 5037; Wu, Tr. 5039).

1040. Dr. Marshall claimed that Kois and Smile Source were representative of buying groups in general. (Marshall, Tr. 3244-3245). But what Dr. Marshall meant was simply that members could choose to buy from the selected distributor or not. (Marshall, Tr. 3247).

1041. In fact, Kois and Smile Source were highly unusual, and were not representative of buying groups in general. (Wu, Tr. 5039; Wu, Tr. 5040-5041; Wu, Tr. 5044).

1042. Buying groups differ tremendously from one another. (Cohen, Tr. 682-83; CX8004 (McFadden, Dep. 119-120)).

1043. Buying groups differ in many important ways that affect whether they are likely to be a profitable opportunity or not. (Wu, Tr. 5040-5041; Wu, Tr. 5045-5046; RX2833 at 10, ¶ 13).

1044. Buying groups differ in how they are organized. (Wu, Tr. 5040-5041; RX2833 at 10, ¶ 13).

1045. Buying groups differ in terms of the services they provide to their members; some provide services, but others don't provide any services at all. (Wu, Tr. 5040-5041; RX2833 at 10, ¶ 13).

1046. Buying groups differ in terms of membership; some have many members, but others have no members at all. (Wu, Tr. 5040-5041; RX2833 at 10, ¶ 13).

1047. Given how different buying groups are, it is not reasonable as a matter of economics to infer from two buying groups that it would have been profitable to work with buying groups. (Wu, Tr. 5043; Wu, Tr. 5037).

i. The Kois Buyers Group Was Not Representative of Buying Groups In General

1048. The Kois Buyers Group claimed to be profoundly different from other buying groups. (CX4060 ("This is not a standard BUYING GROUP. . . . We are profoundly different."); Rogan, Tr. 3754-55).

1049. Dr. Marshall was aware of the unique aspects of the Kois Buyers Group but chose to ignore them. (Marshall, Tr. 3255).

1050. A distributor had legitimate reasons to view the initial pitch by the Kois Buyers Group with suspicion. (Cohen, Tr. 792).

1051. The Kois Buyers Group was initially represented by an individual named Qadeer Ahmed of a company named ProService. (Cohen, Tr. 792; RX1039).

1052. ProService was run out of Qadeer Ahmed's house. (Reese, Tr. 4493-95; RXD0211).

1053. Qadeer Ahmed had no prior experience in the dental industry. (Cohen, Tr. 792; Kois, Sr., Tr. 273).

1054. Qadeer Ahmed contacted prospects using his personal e-mail, qudeerahmed@hotmail.com. (RX1042).

1055. Qadeer Ahmed sent a proposal to Patterson stating that Kois Buyers Group had 1,700 members, when in fact it had none. (CX4060; Wu, Tr. 5057-58).

1056. Dr. Marshall admitted that the proposal sent by Qadeer Ahmed would start a conversation in which the distributor would ask Mr. Ahmed exactly what he had in mind, and that he could understand if a distributor concluded that the Kois Buyers Group had incoherent management and walked away from the Kois Buyers Group proposal. (Marshall, Tr. 3260 ("I understand that if the conclusion is incoherent management, I can understand someone walking away from that.")).

1057. The differences between the Kois Buyers Group and other buying groups matter because they shape whether a buying group is going to be a profitable opportunity or not. (Wu, Tr. 5044-5045).

ii. The Smile Source Buying Group Was Not Representative of Buying Groups In General

1058. [redacted]

1059. [redacted]

1060. Dr. Marshall was unaware of any other buying group that required a dentist to sign a franchise agreement to become a member. (Marshall, Tr. 3256).

1061. Dr. Marshall considered Smile Source to be representative of other buying groups only because at least one of the respondents recognized it to be a buying group. (Marshall, Tr. 3256).

1062. The differences between Smile Source and other buying groups matter because they shape whether a buying group is going to be a profitable opportunity or not. (Wu, Tr. 5044-5045).

d. Dr. Marshall's Profitability Studies Focused On Only Three Distributors, None of Which Was Benco

1063. Dr. Marshall's five studies focused on the dealings of three distributors: Burkhart, Atlanta Dental and Schein. (Marshall, Tr. 3373).

1064. None of Dr. Marshall's five case studies focused on Benco. (Marshall, Tr. 3373).

1065. Burkhart, Atlanta Dental and Schein are not representative of Benco.

1066. Burkhart and Schein are very different companies, and there is no reason to think that what is true for Burkhart is necessarily true for Schein. (Carlton, Tr. 5396).

1067. Burkhart and Schein are very different companies; just because it's profitable for Burkhart doesn't mean it would be profitable for Schein. (Carlton, Tr. 5396).

1068. Patterson's economics are completely different from those of Burkhart, Atlanta Dental and Schein. (Wu, Tr. 5046).

1069. Whether Burkhart, Atlanta Dental and Schein are representative of other distributors depends in part on their business models. (Wu, Tr. 5051).

1070. Whether Burkhart, Atlanta Dental and Schein are representative of other distributors depends in part on whether the distributor is already doing work with the dentists in the area. (Wu, Tr. 5051).

1071. [redacted]

1072. [redacted]

1073. [redacted]

1074. [redacted]

1075. On the basis of his studies focused on *Burkhart*, *Atlanta Dental* and *Schein*, Dr. Marshall concluded that *Benco's* decision not to bid for buying group business was inconsistent with acting in its own economic self-interest. (Marshall, Tr. 3374).

1076. Burkhart, Atlanta Dental and Schein also were not representative of Patterson. (Wu, Tr. 5046-5055).

1077. For example, Schein had a division in place to deal with sizeable customers; Patterson viewed buying groups as a potentially costly opportunity because they weren't set up to deal with sizeable customers, and might have to make investments in infrastructure. (Wu, Tr. 5051-5053).

1078. If Patterson had to make investments to serve a large group, that would make an opportunity with a buying group a less profitable opportunity than for Schein. (Wu, Tr. 5053).

1079. Because the economics for Schein were different from the economics for Patterson, the contention that working with buying groups may have been a good profit opportunity for Schein does not imply that it also would have been a good opportunity for Patterson. (Wu, Tr. 5054).

e. <u>Dr. Marshall Conducted An "After-The-Fact" Review That Failed To Account For Risk and Uncertainty</u>

1080. Distributors had to evaluate buying groups at the time buying groups approached them. (Wu, Tr. 5055-5056).

1081. Distributors faced considerable uncertainty when evaluating whether a buying group would generate incremental revenues. (Wu, Tr. 5055-5056).

1082. Distributors faced considerable uncertainty when evaluating what costs they would incur to serve a buying group. (Wu, Tr. 5055-5056).

1083. When Qadeer Ahmed approached Patterson on behalf of the Kois Buyers Group in 2013, the Kois Buyers Group did not have any members. (Wu, Tr. 5057-5058).

1084. When Qadeer Ahmed approached Patterson on behalf of the Kois Buyers Group in 2013, he claimed that the Kois Buyers Group had 1,700 members, and made other claims that Patterson couldn't verify. (Guggenheim, Tr. 1822-29; Wu, Tr. 5057-5058).

1085. [redacted]

1086. [redacted]

1087. [redacted]

1088. [redacted]

1089. [redacted]

1090. [redacted]

1091. Smile Source had between 100 and 200 members when it approached Patterson in 2013. (CX7100 at 67 ¶ 160; Wu, Tr. 5058-5059).

1092. Smile Source grew to about 566 members by 2017. (CX7100 at 67 ¶ 160; Wu, Tr. 5058-5059).

1093. Dr. Marshall performed an after-the-fact analysis to try to show that it would have turned out to be profitable for Patterson, Benco and Schein to do business with the Kois Buyers Group and Smile Source. (Wu, Tr. 5056-5057).

1094. Dr. Marshall's analysis is like Monday morning quarterbacking; he judges the decisions of Patterson, Benco and Schein at the time based on later outcomes. (Wu, Tr. 5056-5057).

1095. Dr. Marshall's analysis ignored the changes that took place in the marketplace between the time that Patterson, Benco and Schein decided whether to do business with the Kois Buyers Group and Smile Source and the time that Dr. Marshall's studies concluded. (Wu, Tr. 5056-5057).

1096. Dr. Marshall's analysis ignored changes in distributors over time and changes in buying groups over time. (Wu, Tr. 5056-5057).

1097. Dr. Marshall's analysis ignored the factors that were relevant at the time that the distributors were making the decisions whether to do business with buying groups. (Wu, Tr. 5056-5057; Wu, Tr. 5060).

f. <u>Dr. Marshall Limited His Analysis To Only Those Dentists Who Made Purchases From the Contracting Distributor</u>

1098. Dr. Marshall limited his analysis to only those dentists who made purchases from the buying group's contracting distributor. (RX2833 at 43, ¶ 98).

1099. For example, Dr. Marshall excluded from his analysis Kois Buyers Group members that did not purchase from Burkhart after the first quarter of 2014. (RX2833 at 43, ¶ 98).

1100. Dr. Marshall's limitation of his analysis to only those dentists who made purchases from the buying group's contracting distributor exaggerated both the amount of switching to, and the share of sales won, by the buying group's contracting distributor. (RX2833 at 43, ¶ 98).

g. <u>Dr. Marshall Improperly Mixed Data From Different Years</u>

1101. [redacted]

1102. [redacted]

1103. [redacted]

1104. [redacted]

1105. [redacted]

1106. [redacted]

1107. [redacted]

1108. [redacted]

1109. [redacted]

1110. [redacted]

1111. [redacted]

1112. [redacted]

1113. [redacted]

1114. [redacted]

1115. [redacted]

1116. [redacted]

1117. [redacted]

1118. [redacted]

h. Dr. Marshall Failed to Consider the Cost to Distributors of Paying Administrative Fees and Rebates

1119. [redacted]

1120. Buying groups often require distributors to pay rebates as a condition of entering into an agreement. (Steck, Tr. 3789).

1121. [redacted]

1122. [redacted]

1123. [redacted]

1124. [redacted]

1125. [redacted]

1126. [redacted]

1127. Dr. Marshall's failure to account for the costs of administrative fees and rebates renders his results unreliable.

i. Dr. Marshall Relied On Unsupported Assumptions

1128. Dr. Marshall assumed that no additional dentists would have become buying group members had a different distributor entered into an agreement with the buying group. (RX2832 at 54, ¶ 81).

1129. In particular, Dr. Marshall assumed that no additional Schein customers would have become Kois Buyers Group members had Schein entered into an agreement with the buyers group. (RX2832 at 54, ¶ 81).

1130. Dr. Marshall also provided no explanation for his assumption that, had Schein provided a discount to Kois Buyers Group, not only the buying group's members, but also their purchases, would have remained unchanged. (RX2832 at 54, ¶ 81).

1131. Dr. Marshall assumed that the entirety of any changes he observed in sales shares were due to partnering with a buying group. (J. Johnson, Tr. 4838-4840; [redacted]).

1132. Dr. Marshall performed no assessment of whether anything else would have changed the behavior of member dentists. (J. Johnson, Tr. 4838-4840).

1133. Dr. Marshall performed no assessment of whether there was any other reason why any of the member dentists would have bought more product from one of the distributors versus another. (J. Johnson, Tr. 4838-4840).

1134. Dr. Marshall assumed that no other economic factors would cause the sale shares to change. (J. Johnson, Tr. 4838-4840; [redacted]).

1135. Dr. Marshall assumed that nothing else changed during the five-year time period of his studies. (J. Johnson, Tr. 4838-4840; [redacted]).

1136. Dr. Marshall assumed that the margin for the limited number of dentists in those groups represented the profitability trade-offs that Benco was actually facing. (J. Johnson, Tr. 4838-4840; [redacted]).

1137. Dr. Marshall assumed that the treatment-period margin for a limited set of buying group customers was representative of the profitability that Benco would have earned had it bid for the business of the buying groups. (J. Johnson, Tr. 4838-4840; [redacted]).

1138. None of the assumptions made by Dr. Marshall in his profitability analyses were realistic. (J. Johnson, Tr. 4838-4840; [redacted]).

1139. As a result of his unsupported assumptions, Dr. Marshall cannot tie his calculations to doing business with buying groups. (J. Johnson, Tr. 4838-4840).

1140. Dr. Marshall simply assumes his result, that discounting to Kois Buyers Group would have been profitable to Schein. (RX2832 at 54-55, ¶82).

j. <u>Dr. Marshall Failed To Control For Other Factors</u>

1141. When economists try to attribute causality to a given phenomenon, they must make sure that nothing else was changing at the same time. (J. Johnson, Tr. 4855-4856).

1142. Dr. Marshall ignored several factors that would affect his share calculations and his margin calculations in his five studies. (J. Johnson, Tr. 4855-4856).

1143. If product mix across regions changed during the years of Dr. Marshall's five studies, that would affect margins. (J. Johnson, Tr. 4855-4856).

1144. If product makes changed over time, that would affect margins. (J. Johnson, Tr. 4855-4856).

1145. If any sources of local competition changed at all over time, that would affect margins. (J. Johnson, Tr. 4855-4856).

1146. Sales and margins to non-buying group dentists could also have changed over time. (J. Johnson, Tr. 4855-4856).

1147. Dr. Marshall failed to control for any of these economic factors that could have changed. (J. Johnson, Tr. 4837-4838).

1148. Without doing that analysis, Dr. Marshall can't draw conclusions regarding the what the effects of doing business with buying groups would have been to Benco or anyone else. (J. Johnson, Tr. 4855-4856).

k. Dr. Marshall Failed To Perform a Counter-Factual Analysis of Any Respondent's Actual Customer Gains, Costs, Cannibalization, or Expected Profit or Loss of Dealing With the Kois or Smile Source Buying Groups

1149. In the field of economics, a counterfactual analysis is understood to mean an assessment of the alternative to the conduct studied or a but-for world absent the conduct. (J. Johnson, Tr. 4842-4843).

1150. Counterfactual analyses are used every day in the field of economics; they are the "bread and butter" of what economists do. (J. Johnson, Tr. 4843).

1151. Assuming that the other flaws inherent in Dr. Marshall's five case studies could have been resolved and proper studies structured, a counterfactual analysis would have been the appropriate method of analysis. (J. Johnson, Tr. 4843-4844).

1152. [redacted]

1153. Dr. Marshall did not do a counterfactual analysis of what a distributor's profits would be if they had made an offer to a buying group compared to what they would have been if they didn't make an offer to the buying group. (Carlton, Tr. 5393-5395).

1154. [redacted]

1155. [redacted]

1156. [redacted]

1157. [redacted]

1158. Dr. Marshall didn't consider who would have belonged to the Kois Buyers Group if Schein had won the Kois bid. (Carlton, Tr. 5395-5396).

1159. [redacted]

1160. [redacted]

1161. [redacted]

1162. [redacted]

1163. In his study of Smile Source, Dr. Marshall didn't study how many members of Smile Source were already customers of Patterson in December 2013 and how much they were buying from Patterson. (Marshall, Tr. 3289).

1164. Dr. Marshall did not perform a counterfactual analysis of Benco winning any of his five case studies. (Marshall, Tr. 3375 ("I did not perform a counterfactual exercise."); J. Johnson, Tr. 4842).

1165. Dr. Marshall did a calculation, but he didn't implement the right calculation. (Carlton, Tr. 5393-5395).

1166. Because he did not perform a counter-factual analysis, Dr. Marshall "didn't do the full work he needed to do" to reach his conclusions. (J. Johnson, Tr. 4844).

1167. Because he did not perform a counter-factual analysis, Dr. Marshall "has no basis to draw the conclusions he has." (J. Johnson, Tr. 4844).

l. Dr. Marshall Failed To Perform a Counter-Factual Analysis, and Thus Failed to Consider Benco's Alternatives to Dealing With Buying Groups

1168. Assuming that the other flaws inherent in Dr. Marshall's five case studies could have been resolved and proper studies structured, a counterfactual analysis would have been the appropriate method of analysis. (J. Johnson, Tr. 4843-4844).

1169. A counterfactual analysis would have been appropriate because it considers the "alternative world" to doing business with buying groups. (J. Johnson, Tr. 4843-4844).

1170. Benco's resources were limited. (Marshall, Tr. 3375; [redacted]).

1171. Dr. Marshall admitted that Benco's resources were limited. (Marshall, Tr. 3375).

1172. All companies have limited resources. (Marshall, Tr. 3375).

1173. Dr. Marshall admitted that all companies have limited resources. (Marshall, Tr. 3375).

1174. Because its resources were limited, Benco had to decide how to allocate its resources. (Marshall, Tr. 3375-3376; [redacted]).

1175. Dr. Marshall admitted that because its resources were limited, Benco had to decide how to allocate its resources. (Marshall, Tr. 3375-3376).

1176. Dr. Marshall admitted that, because all companies have limited resources, every firm has to decide how to allocate its resources. (Marshall, Tr. 3375-3376).

1177. Dr. Marshall completely ignored any trade-offs that occurred as a result of partnering with buying groups rather than pursuing an independent customer base. (J. Johnson, Tr. 4840-4842).

1178. Dr. Marshall ignored the fact that Benco has to choose how to use its limited resources to grow most profitably. (J. Johnson, Tr. 4840-4842).

1179. Apart from Benco's entry into Southern California, Dr. Marshall did not undertake any analysis of the alternatives available to Benco between 2011 and 2015 when it was deciding how to allocate its resources. (Marshall, Tr. 3376).

1180. Apart from Benco's entry into Southern California, Dr. Marshall did not analyze Benco's strategy objectives between 2011 and 2015. (Marshall, Tr. 3377).

1181. Apart from Benco's entry into Southern California, Dr. Marshall did not know what strategic goals Benco was pursuing between 2011 and 2015. (Marshall, Tr. 3377).

1182. Dr. Marshall did not undertake any analysis of how much profit Benco could have earned by deploying its resources to alternatives other than serving Kois or Smile Source. (Marshall, Tr. 3376-3377).

1183. Dr. Marshall did not undertake any study to determine what impact it would have had on Benco's strategy of nationwide expansion if Benco had promised to use its resources to support buying groups. (Marshall, Tr. 3380).

1184. Dr. Marshall did not perform a counterfactual analysis of Benco winning any of his five case studies. (Marshall, Tr. 3375 ("I did not perform a counterfactual exercise."); J. Johnson, Tr. 4842).

1185. [redacted]

D. The Data Underlying Dr. Marshall's Kois and Smile Source Studies, Properly Analyzed, Confirm That Benco Acted Consistently With Its Unilateral Economic Self-Interest

1. **Benco Acted Consistently With Its Unilateral Economic Self-Interest By Pursuing Its Existing Strategy and Its Own Business Opportunities Rather Than Offering Discounts To Buying Groups**

1186. Benco successfully pursued its business plan before, during and after the alleged conspiracy period. (Cohen, Tr. 401, 637-29)

1187. Benco successfully pursued its business plan from 2011 to 2015. (Cohen, Tr. 823-34).

1188. Benco successfully completed its expansion into Southern California. (Cohen, Tr. 632-33).

1189. Benco successfully completed its expansion into the Pacific Northwest. (Cohen, Tr. 632-33).

1190. [redacted]

1191. [redacted]

1192. [redacted]

1193. [redacted]

2. **Dr. Marshall's Burkhart-Smile Source Study Confirms That Benco's Unilateral Economic Self-Interest Was To Use Its Resources To Pursue Business Opportunities Other Than Buying Groups**

1194. [redacted]

1195. [redacted]

1196. [redacted]

1197. [redacted]

1198. [redacted]

1199. [redacted]

1200. [redacted]

1201. [redacted]

1202. [redacted]

1203. [redacted]

3. **Dr. Marshall's Burkhart-Kois Buyers Group Study Confirms That Benco's Unilateral Economic Self-Interest Was To Use Its Resources To Pursue Business Opportunities Other Than Buying Groups**

1204. [redacted]

1205. [redacted]

1206. [redacted]

1207. [redacted]

1208. [redacted]

1209. [redacted]

1210. [redacted]

1211. [redacted]

1212. [redacted]

1213. [redacted]

4. **Dr. Marshall's Atlanta Dental-Smile Source Study Confirms That Benco's Unilateral Economic Self-Interest Was To Use Its Resources To Pursue Business Opportunities Other Than Buying Groups**

1214. [redacted]

1215. [redacted]

1216. [redacted]

1217. [redacted]

1218. [redacted]

1219. [redacted]

1220. [redacted]

1221. [redacted]

1222. [redacted]

1223. [redacted]

5. **Dr. Marshall's First Schein-Smile Source Study Confirms That Benco's Unilateral Economic Self-Interest Was To Use Its Resources To Pursue Business Opportunities Other Than Buying Groups**

1224. [redacted]

1225. [redacted]

1226. [redacted]

1227. [redacted]

1228. [redacted]

1229. [redacted]

1230. [redacted]

1231. [redacted]

1232. [redacted]

1233. [redacted]

6. **Dr. Marshall's Second Schein-Smile Source Study Confirms That Benco's Unilateral Economic Self-Interest Was To Use Its Resources To Pursue Business Opportunities Other Than Buying Groups**

1234. [redacted]

1235. [redacted]

1236. [redacted]

1237. [redacted]

1238. [redacted]

1239. [redacted]

1240. [redacted]

1241. [redacted]

1242. [redacted]

XV. DR. MARSHALL'S ASSERTION OF A "STRUCTURAL BREAK" IS WRONG ON THE ECONOMICS AND ON THE FACTS

A. DR. MARSHALL MISAPPLIED THE ECONOMIC CONCEPT OF STRUCTURAL BREAK

1243. "Structural break" is a statistical concept from the field of econometrics. (J. Johnson, Tr. 4858-4859). The term "structural break" represents a method of empirical testing to determine if the fundamentals in the data have changed. (J. Johnson, Tr. 4858-4859).

1244. Structural break uses statistical testing on a model to show whether the various factors in the model have changed. (J. Johnson, Tr. 4859).

1245. The point of the economic definition is to have an objective standard by which to judge whether there has been a structural break. (J. Johnson, Tr. 4859).

1246. Dr. Marshall did not use the term "structural break" in accordance with its econometric meaning. (J. Johnson, Tr. 4859).

1247. Dr. Marshall did not perform any statistical testing with respect to his asserted "structural breaks." (J. Johnson, Tr. 4858-4859). Dr. Marshall did not perform any objective, measurable test. (J. Johnson, Tr. 4858-4859).

1248. Dr. Marshall gave a subjective assessment of some characteristics of behavior and said he had determined that it was a structural break. (J. Johnson, Tr. 4858-4860).

1249. Dr. Marshall did not review characteristics of behavior in a complete fashion; he ignored critical factors. (J. Johnson, Tr. 4859-4860).

1250. Dr. Marshall did not perform an appropriate analysis. (J. Johnson, Tr. 4859-4860).

B. DR. MARSHALL'S OWN METHOD OF ANALYSIS, IF APPLIED CONSISTENTLY, WOULD PROVE THE ABSENCE OF ANY CONSPIRACY

1251. Dr. Marshall did not apply any recognized methodology to his structural break analysis. (J. Johnson, Tr. 4858-4860).

1252. Dr. Marshall's "analysis" can't be replicated; it is just his subjective assessment. (J. Johnson, Tr. 4858-4860).

1253. Dr. Marshall's method of analysis, if applied consistently, would establish a "structural break" by Benco to start dealing with buying groups in 2013, contrary to the terms of the alleged conspiracy, in the middle of the alleged conspiracy period. (Marshall, Tr. 3395-96).

1254. For purposes of his analysis, Dr. Marshall identified as a buying group any entity or individual (1) that was recognized as a buying group by at least one of the respondents, and (2) for whose business at least one of the respondents did not bid. (Marshall, Tr. 3393-3394; *see also* Marshall, Tr. 3256; Marshall, Tr. 3260-3261).

1255. Patterson considered Atlantic Dental Care to be a buying group, and Patterson did not bid for the business of Atlantic Dental Care. (Guggenheim, Tr. 1616-17).

1256. If Dr. Marshall had applied his own definition consistently, he would have defined Atlantic Dental Care as a buying group. (Marshall, Tr. 3394).

1257. Dr. Marshall deviated from his own definition, and considered Atlantic Dental Care to be a DSO rather than a buying group, because he accepted Benco's factual assessment and its view that Atlantic Dental Care was a DSO. (Marshall, Tr. 3395).

1258. Dr. Marshall admitted that the facts relating to Atlantic Dental Care were important. (Marshall, Tr. 3396).

1259. If Dr. Marshall had applied his own definition consistently, he would have found a change of behavior by Benco, contrary to the terms of the alleged conspiracy, in the middle of the alleged conspiracy period. (Marshall, Tr. 3395).

1260. If Dr. Marshall had not deviated from his own definition, and instead had applied his own "methodology" consistently, he would have found a "structural break" by Benco in 2013 that would have proven the allegation of conspiracy to be false. (Marshall, Tr. 3395).

C. Dr. Marshall Misinterpreted the Facts To Create Imaginary "Structural Breaks"

1. **Schein's Decision Not to Bid for the Business of Unified Smiles and the Termination of Its Agreement With Smile Source in 2011-2012 Did Not Constitute a "Structural Break"**

1261. Before 2011, Schein evaluated the opportunity to bid for buying group business on a case by case basis; sometimes Schein bid for buying group business, and sometimes Schein decided not to bid for buying group business. (Titas, Tr. 5192-94; RX2957 at 12-13).

1262. Between 2011 and 2015, Schein evaluated the opportunity to bid for buying group business on a case by case basis; sometimes Schein bid for buying group business, and sometimes Schein decided not to bid for buying group business. (Titas, Tr. 5192-94; RX2957 at 12-13).

1263. Dr. Marshall opined that Schein's decision not to bid for the business of Unified Smiles in 2011 constituted a "structural break." (CX7100 at 190, ¶ 428).

1264. Dr. Marshall didn't know whether Schein said no to buying groups before Unified Smiles in 2011. (Marshall, Tr. 2949).

1265. Dr. Marshall didn't review the entire record before 2011. (Marshall, Tr. 2950-2951).

1266. [redacted]

1267. Dr. Marshall ignored the instances between 2011 and 2015 when Schein bid for the business of buying groups. (Carlton, Tr. 5366-67).

1268. Even if Schein said no to some buying groups before Unified Smiles in 2011 and said yes to some buying groups after Unified Smiles in 2011, Dr. Marshall opined that Schein's statement that it would not bid for the business of Unified Smiles would be a structural change "in terms of the characterization that was offered by Schein as to why they were turning down Unified Smiles." (Marshall, Tr. 2950). But Dr. Marshall didn't know whether Schein articulated its reasons for turning down Unified Smiles differently than it articulated its reasons for turning down other buying groups before that. (Marshall, Tr. 2950).

1269. Dr. Marshall hadn't reviewed the entire record before 2011, but he opined that Schein's statement that it would not bid for the business of Unified Smiles was a structural change merely because it was "the first piece of evidence that I have in my possession of that kind of communication from Schein to a buying group." (Marshall, Tr. 2950-2951).

1270. Dr. Marshall's assertion that Schein's behavior at the beginning of the alleged conspiracy period constituted a structural break was "just wrong." (Carlton, Tr. 5372-5373).

1271. Schein's sales data indicate that there was no break. (Carlton, Tr. 5373-5374; *see also* RX2832 at 22).

1272. Schein's sales data do not show that Schein's sales to buying groups were zero in the alleged conspiracy years 2013, 2014 and 2015. (Carlton, Tr. 5373-5374; Carlton, Tr. 5376-5379; *see also* RX2832 at 22).

1273. Schein's sales data indicate that Schein's business with buying groups remained high, and in fact was even higher during the alleged conspiracy period than it was in the non-conspiratorial period. (Carlton, Tr. 5373-5374; *see also* RX2832 at 22).

1274. Dr. Marshall asserted that the end of the Schein-Smile Source relationship in early 2012 was a structural break. (CX7100 at 192, ¶ 434).

1275. In fact, Schein sought to continue its relationship with Smile Source in 2012.

1276. Schein offered discounts to Smile Source in an effort to win Smile Source's business.

1277. Smile Source decided to discontinue its relationship with Schein.

1278. In order to portray the end of the relationship as a "structural break," Dr. Marshall asserted that Schein constructively ended the relationship with Smile Source by reducing the amounts of discounts and the services offered. (CX7100 at 193, ¶ 439).

1279. Dr. Marshall's assertion that Schein terminated its relationship with Smile Source is contrary to the evidence.

1280. Schein executives sought to continue Schein's relationship with Smile Source.

1281. Schein offered discounts to Smile Source that were competitive and in line with the expectations of Smile Source representatives.

1282. The data confirm that Schein's discounts to Smile Source were consistent in 2010, all four quarters of 2011, and the first quarter of 2012. (Carlton, Tr. 5380-5381).

1283. The data refute Dr. Marshall's assertion that Schein reduced its discounts in order to induce a change in its dealings with Smile Source. (Carlton, Tr. 5381-5382).

1284. Schein executives and contemporaneous documents confirm that Smile Source terminated its relationship with Schein.

2. Benco's Decision To Partner With Cain Watters to Form Elite Dental Alliance Was Not a "Structural Break"

a. Benco Did Not Change Its Approach To Buying Groups

1285. Since 1996, Benco had a policy of not doing business with buying groups that could not guarantee volume or help Benco reduce its costs to serve. (Cohen, Tr. 692-94).

1286. Benco did not offer discounts to any buying groups between 1996 and 2011. (Cohen, Tr. 445-45).

1287. Dr. Marshall understood that Benco had a policy of not dealing with buying groups before 2011. (Marshall, Tr. 3391).

1288. With the possible exception of Atlantic Dental Care, Benco did not offer discounts to any buying groups between 2011 and 2015. (Cohen, Tr. 444-45; 451; 570).

1289. Dr. Marshall continued to observe Benco declining to offer discounts to buying groups during the time period from 2011 to 2015. (Marshall, Tr. 3392).

1290. Apart from its arrangement with Cain Watters to form Elide Dental Alliance, Dr. Marshall never observed Benco dealing with a buying group after 2015. (Marshall, Tr. 3398).

1291. Benco's arrangement with Cain Watters to form Elite Dental Alliance was consistent with Benco's unilateral business objectives, its policy with respect to buying groups, and its course of behavior from 1996 to the present. (Cohen, Tr. 445; 451; 816-24; 863).

b. Dr. Marshall's Claim of a "Structural Break" Ignored the Unique Structure and Terms of Elite Dental Alliance That Set It Apart from Other Buying Groups and Made It Worthwhile For Benco To Agree With Cain Watters to Form EDA

1292. Dr. Marshall concluded that Benco changed its behavior with respect to buying groups based solely on Benco's arrangement with Cain Watters to form Elite Dental Alliance. (Marshall, Tr. 3397-3399; Marshall, Tr. 3405-3406).

1293. Elite Dental Alliance was newly formed in 2016. (Cohen, Tr. 823).

1294. Dr. Marshall acknowledged that Elite Dental Alliance was newly formed in 2016. (Marshall, Tr. 3397).

1295. Although Benco could not have changed its conduct with respect to Elite Dental Alliance because it was a brand-new entity, Dr. Marshall concluded that supplying a buying group was a change in Benco's conduct. (Marshall, Tr. 3397).

1296. Dr. Marshall did not undertake any investigation to determine if Elite Dental Alliance was representative of buying groups in general. (Marshall, Tr. 3399).

1297. The Elite Dental Alliance arrangement had critical attributes that, from Benco's perspective, set it apart from other buying groups and resolved many of Benco's concerns about doing business with buying groups. (Cohen, Tr. 818-23).

1298. From an economic perspective, the specific features of the Elite Dental Alliance arrangement made it fundamentally more attractive than most buying groups. (J. Johnson, Tr. 4862).

1299. From an economic perspective, the specific features of the Elite Dental Alliance arrangement made it a unique business opportunity for Benco. (J. Johnson, Tr. 4860-4862).

1300. The unique attributes of the arrangement regarding Elite Dental Alliance made Benco willing to enter into the agreement with Cain Watters. (Cohen, Tr. 469; 820-23).

1301. The specific characteristics of Elite Dental Alliance are pretty important if one is going to try to determine whether doing business with it represented a change in behavior. (J. Johnson, Tr. 4860-4862).

1302. Dr. Marshall was unaware of, forgot, or chose to ignore critical attributes that set Elite Dental Alliance apart from other buying groups. (Marshall, Tr. 3399-3406).

1303. Benco partnered with its trusted partner Cain Watters to form Elite Dental Alliance. (Cohen, Tr. 814-16).

1304. Dr. Marshall was unaware of, forgot, or chose to ignore that Benco partnered with Cain Watters to form Elite Dental Alliance. (Marshall, Tr. 3400).

1305. Benco viewed Elite Dental Alliance as equivalent to a joint venture between Cain Watters and Benco. (Cohen, Tr. 814-16).

1306. The partnership with Cain Watters, which could encourage customers to purchase from Benco during their annual financial counseling, provided Benco with additional assurance that EDA could actually drive compliance. (J. Johnson, Tr. 4860-4862).

1307. Dr. Marshall was unaware of, forgot, or chose to ignore that Elite Dental Alliance was equivalent to a joint venture between Cain Watters and Benco. (Marshall, Tr. 3401).

1308. The membership of Elite Dental Alliance was limited to practices that were clients of Cain Watters or had more than $2 million in gross revenues. (Cohen, Tr. 818-22).

1309. From an economic perspective, the fact that Elite Dental Alliance members were larger practices addressed Benco's concerns regarding the cost to serve individual members of most buying groups. (J. Johnson, Tr. 4860-4862). It put Benco in a better position to be able to negotiate discounts from manufacturers. (J. Johnson, Tr. 4862).

1310. Dr. Marshall was unaware of, forgot, or chose to ignore that the membership of Elite Dental Alliance would be limited to practices that were clients of Cain Watters or had more than $2 million in gross revenues. (Marshall, Tr. 3401).

1311. Benco was entitled to 50 percent of any profits earned by Elite Dental Alliance. (Cohen, Tr. 816).

1312. Dr. Marshall was unaware of, forgot, or chose to ignore that Benco was entitled to 50 percent of any profits earned by Elite Dental Alliance. (Marshall, Tr. 3401-3402).

1313. Benco was the sole distributor to Elite Dental Alliance. (Cohen, Tr. 817).

1314. From an economic perspective, Benco knew that it was the exclusive distributor to Elite Dental Alliance, so it resolved Benco's concern that a buying group could set up another favored distributor. (J. Johnson, Tr. 4860-4862).

1315. Dr. Marshall remembered, but apparently chose to ignore, that Benco was the sole distributor to Elite Dental Alliance. (Marshall, Tr. 3402).

1316. Elite Dental Alliance members had to satisfy minimum volume commitments to qualify for discounts from Benco. (Cohen, Tr. 468; 817).

1317. From an economic perspective, Elite Dental Alliance's minimum purchase requirements in order to qualify for a discount addressed Benco's concerns regarding the absence of minimum volume guarantees with most buying groups. (J. Johnson, Tr. 4860-4862). Benco knew that it would have guaranteed volume for the discounts it gave. (J. Johnson, Tr. 4862).

1318. Dr. Marshall was unaware of, forgot, or chose to ignore that Elite Dental Alliance members had to satisfy minimum volume commitments to qualify for discounts from Benco. (Marshall, Tr. 3402).

1319. Benco had a say in the selection of direct manufacturers that were included in the arrangement. (Cohen, Tr. 817; 820-21).

1320. From an economic perspective, Benco actually had some control over the development of the program, which helped set it apart from other buying groups. (J. Johnson, Tr. 4860-4862).

1321. Dr. Marshall was unaware of, forgot, or chose to ignore that Benco had a say in the selection of direct manufacturers that were included in the arrangement. (Marshall, Tr. 3402).

1322. Benco believed that the specific attributes of the Elite Dental Alliance arrangement made it more likely that members of Elite Dental Alliance would comply with the program and Benco would actually realize incremental revenue from the arrangement. (Cohen, Tr. 463; 818-23).

1323. From an economic perspective, Elite Dental Alliance was a different type of organization which addressed many of Benco's concerns about the buying group model. (J. Johnson, Tr. 4863-4864).

1324. Dr. Marshall was unaware of, forgot, or chose to ignore Mr. Chuck Cohen's testimony that the specific attributes of the Elite Dental Alliance arrangement made it more likely that members of Elite Dental Alliance would comply with the program and Benco would actually realize incremental revenue from the arrangement. (Marshall, Tr. 3403).

1325. In Benco's view, the specific attributes of Elite Dental Alliance made it more like an integrated entity than a buying club. (Cohen, Tr. 818-22).

1326. From an economic perspective, the specific attributes of the Elite Dental Alliance arrangement avoided many of the problems that the typical buying group model had for Benco. (J. Johnson, Tr. 4862).

1327. Dr. Marshall was unaware of, forgot, or chose to ignore Mr. Chuck Cohen's testimony that the specific attributes of Elite Dental Alliance made it more like an integrated entity than a buying club. (Marshall, Tr. 3403-3404).

1328. Dr. Marshall claimed that he relied on Benco's view that Elite Dental Alliance was a buying club, but he paid no attention to Mr. Cohen's testimony that he viewed Elite Dental Alliance more like an integrated entity than a buying club. (Marshall, Tr. 3404).

1329. Dr. Marshall was unable to identify a single buying group that offered terms similar to those of Elite Dental Alliance. (Marshall, Tr. 3404).

1330. Dr. Marshall has no basis to opine that Benco's dealings with respect to Elite Dental Alliance represented a "structural break" if he didn't know the salient features that mattered for purposes of doing the assessment. (J. Johnson, Tr. 4863).

1331. Dr. Marshall failed to consider the full factual story and failed to understand how Elite Dental Alliance was different from other buying groups. (J. Johnson, Tr. 4858-4859).

1332. Benco's partnership with Cain Watters to form Elite Dental Alliance was consistent with Benco's value proposition. (J. Johnson, Tr. 4862).

1333. Benco's partnership with Cain Watters to form Elite Dental Alliance did not represent a change in Benco's economic behavior. (J. Johnson, Tr. 4860).

1334. Dr. Marshall's assertion that Benco's partnership with Cain Watters to form Elite Dental Alliance constituted a "structural break" with respect to Benco's dealings with buying groups in general "just has it wrong." (J. Johnson, Tr. 4863-4864).

3. **Smile Source's Acceptance of Schein's Offer in 2017 Did Not Constitute A Structural Break**

1335. [redacted]

1336. [redacted]

1337. In February 2014, Schein submitted a bid for the business of Smile Source. (Maurer, Tr. 4942-43; CX4105).

1338. Economic analysis indicates that Schein's offer was more comparable to Burkhart's offer than Dr. Marshall suggests. (RX2832 at 59, ¶ 88).

1339. Smile Source turned down Schein's offer because it was equivalent to Burkhart's discounts at the time and Smile Source felt a sense of loyalty to Burkhart. (Maurer, Tr. 4942-43).

1340. [redacted] Maurer, Tr. 4946-49).

1341. [redacted]

1342. In 2016, Schein submitted a bid for the business of Smile Source. (Maurer, Tr. 4986).

1343. In 2017, Smile Source accepted Schein's bid because its membership had grown to the point where Smile Source wanted a nationwide distributor. (Maurer, Tr. 4954-55).

1344. Schein's behavior towards Smile Source was consistent from 2011 to 2017, and did not constitute structural breaks as alleged by Dr. Marshall. (RX2832 at 59-60, ¶¶ 88-90).

XVI. DR. MARSHAL'S ASSERTION THAT RESPONDENTS' CONDUCT CAUSED HARM TO COMPETITION IS FUNDAMENTALLY FLAWED AND CONTRADICTED BY THE EVIDENCE

A. DR. MARSHALL FAILED TO FIND ANTICOMPETITIVE HARM IN ANY RELEVANT MARKET

1345. Dr. Marshall never identified harm to competition in any specific relevant product and geographic markets. (Marshall, Tr. 3406-3408).

1346. Dr. Marshall never looked at Chicago to define the relevant market and analyze what the harm to competition was in the relevant market encompassing Chicago. (Marshall, Tr. 3371-3372; Marshall, Tr. 3406-3407).

1347. Dr. Marshall never looked at Boston or Massachusetts or Southern New England or all of New England to define the relevant market, identify the competitors, customers and competitive conditions in that market, and then analyze the extent of anticompetitive harm in that relevant market. (Marshall, Tr. 3372; Marshall, Tr. 3407).

1348. Dr. Marshall never determined the relevant market for the region that encompasses Houston and then analyzed the extent of harm to competition in that relevant market. (Marshall, Tr. 3371; Marshall, Tr. 3407-3408).

1349. Dr. Marshall never determined the relevant market for other regions of the United States and then analyzed the extent of harm to competition in those relevant markets. (Marshall, Tr. 3370; Marshall, Tr. 3372-3373; Marshall, Tr. 3407-3408 ("If you're asking me did I do this analysis for Houston, no, I didn't do it for Houston, and we can keep enumerating cities.")).

1350. [redacted]

1351. [redacted]

1352. [redacted]

B. THE RECORD EVIDENCE CONTRADICTS DR. MARSHALL'S ASSERTION THAT RESPONDENTS' CONDUCT CAUSED ANTICOMPETITIVE HARM

1353. In section VI of his report, Dr. Marshall discussed competitive impact. (Marshall, Tr. 3411).

1354. In Section VI of his report, Dr. Marshall did not perform any analysis of the extent to which Benco, Schein and Patterson competed for the business of individual dentists who were members of buying groups. (Marshall, Tr. 3411-3412).

1355. In Section V of his report, Dr. Marshall noted that there seemed to be substantial competition for the business of individual dentists. (Marshall, Tr. 3412).

1356. From the analysis that Dr. Marshall did perform, he had no reason to believe that Benco did not compete aggressively for the business of individual dentists. (Marshall, Tr. 3412).

1357. [redacted]

1358. [redacted]

1359. [redacted]

1360. [redacted]

1361. A distributor that enters into an agreement with a buying group does not necessarily provide the lowest margins to the members of that buying group.

1362. A distributor that enters into an agreement with a buying group does not necessarily provide the lowest prices to the members of that buying group.

1363. [redacted]

1364. [redacted]

1365. [redacted]

1366. [redacted]

1367. [redacted]

1368. [redacted]

1369. [redacted]

1370. [redacted]

1371. [redacted]

1372. [redacted]

1373. [redacted]

1374. [redacted]

1375. [redacted]

1376. [redacted]

1377. [redacted]

1378. [redacted]

Dated: April 11, 2019

By: */s/ Kenneth L. Racowski*

Howard D. Scher (howard.scher@bipc.com)
Kenneth L. Racowski (kenneth.racowski@bipc.com)
Thomas P. Manning (thomas.manning@bipc.com)
Buchanan Ingersoll & Rooney PC
50 S. 16th St., Suite 3200
Philadelphia, PA 19102
Phone: 215-665-8700
Fax: 215-665-8760

Geoffrey D. Oliver (gdoliver@jonesday.com)
Jones Day
51 Louisiana Ave., NW
Washington, D.C. 20001
Phone: 202-879-3939

CERTIFICATE OF SERVICE

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

Lin Kahn (Attorney)
lkahn@ftc.gov
Ronnie Solomon (Attorney)
rsolomon@ftc.gov
Matthew D. Gold (Attorney)
mgoid@ftc.gov
John Wiegand (Attorney)
jwiegand@ftc.gov
Erika Wodinsky (Attorney)
ewodinsky@ftc.gov
Boris Yankilovich (Attorney)
byankilovich@ftc.gov
Jeanine K. Balbach (Attorney)
ibalbach@ftc.gov
Thomas H. Brock (Attorney)
tbrock@fte.gov
Jasmine Rosner (Attorney)
jrosner@ftc.gov
Federal Trade Commission
901 Market St., Ste. 570
San Francisco, CA 94103
Phone Number: 415-848-5115

COMPLAINT COUNSEL

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

Joseph A. Ostoyich
William C. Lavery
Baker Botts L.L.P.
1299 Pennsylvania Avenue NW
Washington, DC 20004
Tele: (202) 639-7905

E-mail: joseph.ostoyich@bakerbotts.com
E-mail: william.lavery@bakerbotts.com

Counsel for Patterson Companies, Inc.

Timothy J. Muris, Esq.
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
T: 202-736-8000
F: 202 736-8711
tmuris@sidlev.com

Colin Kass, Esq.
ckass@proskauer.com
Proskauer Rose LLP
1001 Pennsylvania Ave., NW
Ste. 600 South
Washington, D.C. 20004-2533
T: 202-416-6800
F: 202-416-6899

John P. McDonald, Esq.
jpmcdonald@lockelord.com
Lauren Fincher, Esq.
lfinchergockelord.com
Locke Lord LLP
2200 Ross Avenue, Ste. 2800
Dallas, TX 75201
T: 214-740-8000
F: 214-740-8800

Counsel for Respondent Henry Schein, Inc.

Dated: April 11, 2019 By: ___*/s/ Kenneth L. Racowski*___

Notice of Electronic Service

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

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

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

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

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

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

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

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

Erika Wodinsky
Attorney
Federal Trade Commission
Complaint

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

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

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

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

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

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

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

John McDonald
Locke Lord LLP
jpmcdonald@lockelord.com
Respondent

Lauren Fincher
Locke Lord LLP
lfincher@lockelord.com
Respondent

Colin Kass
Proskauer Rose LLP
ckass@proskauer.com
Respondent

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

Timothy Muris
Sidley Austin LLP
tmuris@sidley.com
Respondent

Geoffrey D. Oliver
Jones Day

gdoliver@jonesday.com
Respondent

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sarah Lancaster
Locke Lord LLP
slancaster@lockelord.com
Respondent

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

Stephen Chuk
Proskauer Rose LLP
schuk@proskauer.com
Respondent

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

Jessica Moy
Federal Trade Commission
jmoy@ftc.gov
Complaint

Thomas Dilickrath
Federal Trade Commission
tdilickrath@ftc.gov
Complaint

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

David Munkittrick
Proskauer Rose LLP
dmunkittrick@proskauer.com
Respondent

David Heck
Proskauer Rose LLP
dheck@proskauer.com
Respondent

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

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

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

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

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

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

Kenneth Racowski
Attorney