

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



**ORIGINAL**

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In the Matter of )  
)  
)  
**BENCO DENTAL SUPPLY CO.,** )  
**a corporation,** )  
)  
**HENRY SCHEIN, INC.,** )  
**a corporation, and** )  
)  
)  
**PATTERSON COMPANIES, INC.** )  
**a corporation.** )

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**DOCKET NO. 9379**

**RESPONDENTS' REPLY TO COMPLAINT COUNSEL'S POST-TRIAL PROPOSED  
CONCLUSIONS OF LAW**

Dated: June 6, 2019

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**I. THE FEDERAL TRADE COMMISSION HAS JURISDICTION**

1. The Federal Trade Commission (“FTC or “Commission”) has jurisdiction over the subject matter of this proceeding, pursuant to Section 5 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45.

***Response:***<sup>1</sup>

No response.

2. The Commission has jurisdiction over Respondent Benco Dental Supply Co. (“Benco”).

***Response:***

No response.

3. Respondent Benco is, and at all relevant times has been, a corporation as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

***Response:***

No response.

4. The Commission has jurisdiction over Respondent Henry Schein, Inc. (“Schein”).

***Response:***

No response.

5. Respondent Schein is, and at all relevant times has been, a corporation as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

***Response:***

No response.

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<sup>1</sup> Unless otherwise noted, all emphasis added and internal citations and quotation marks omitted. Schein’s Responses use the following citing conventions: Complaint Counsel’s Post-Trial Brief (“CC Br.”) and Proposed Findings of Fact (“CCFF”); Schein’s Post-Trial Brief (“S. Br.”), Proposed Findings of Fact (“SF”), and Reply Brief (“S. Reply”); Patterson’s Proposed Findings of Fact (“PF”) and Reply Brief (“P. Reply”); Respondents’ Joint Findings of Fact (“JF”) and Conclusions of Law (“RCL”); Schein’s Portion of Respondents’ Reply Findings of Fact (“SRF”); Complaint Counsel’s Exhibits (“CX”) and Demonstratives (“CXD”); Respondents’ Exhibits (“RX”) and Demonstratives (“RXD”).

6. The Commission has jurisdiction over Respondent Patterson Companies, Inc. (“Patterson”).

***Response:***

No response.

7. Respondent Patterson is, and at all relevant times has been, a corporation as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

***Response:***

No response.

8. Respondents Benco, Schein, and Patterson’s challenged restraint relates to an agreement not to discount to dental buying groups, which is in or affects commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

***Response:***

The “challenged restraint” is alleged only; Complaint Counsel has failed to prove the existence of any restraint. Otherwise, Respondents have no specific response.

9. Respondent Benco’s solicitation of Burkhart not to discount to dental buying groups is in or affects commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

***Response:***

“Benco’s solicitation of Burkhart” is alleged only; Complaint Counsel has failed to prove the existence of any actual solicitation. Otherwise, Respondents have no specific response.

10. Section 5 of the FTC Act prohibits “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.”<sup>2</sup>

***Response:***

No response.

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<sup>2</sup> 15 U.S.C. § 45(a)(1).

11. Unfair methods of competition under Section 5 of the FTC Act include any conduct that would violate Section 1 of the Sherman Act.<sup>3</sup>

***Response:***

No response.

**II. RESPONDENTS AGREED NOT TO DISCOUNT TO BUYING GROUPS**

12. Section 1 of the Sherman Act prohibits “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.”<sup>4</sup>

***Response:***

No response, other than to note that the Sherman Act only prohibits “unreasonable” restraints of trade.

13. A “unity of purpose or a common design and understanding”<sup>5</sup> satisfies the agreement element of Section 1.

***Response:***

While “unity of purpose or a common design and understanding” may be necessary to find an anticompetitive agreement, *American Tobacco* did not hold that such unity or commonality alone is sufficient to “satisf[y]” the agreement element of Section 1.

Particularly in an oligopoly, a “unity of purpose or a common design and understanding” can simply be a natural and lawful outcome of a concentrated market. *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). As the Third Circuit explained:

Oligopolies pose a special problem under § 1 because rational, independent actions taken by oligopolists can be nearly indistinguishable from [concerted action]. This problem is the result of “interdependence,” which occurs because “any rational decision [in an oligopoly] must take into account the anticipated reaction of other firms.” ... Even though such interdependence or “conscious parallelism” harms consumers just as a monopoly does, it is beyond the reach of [the] antitrust laws....

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<sup>3</sup> *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948).

<sup>4</sup> 15 U.S.C. § 1.

<sup>5</sup> *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).

*Valspar Corp. v. E.I. Du Pont De Nemours & Co.*, 873 F.3d 185, 191 (3d Cir. 2017).

In such a market, “the finder of fact must weigh all the evidence in the actual business context to decide whether a traditional agreement emphasizing commitment is more probable than not.” *McWane, Inc. & Star Pipe Prods., Ltd.*, 155 F.T.C. 903, at \*226 (2013), *aff’d in part, rev’d in part*, 2014 WL 556261 (F.T.C. 2014). Complaint Counsel must “rule out the hypothesis that the defendants were engaged in self-interested but lawful oligopolistic behavior.” *Kleen Prods. LLC v. Georgia-Pac. LLC*, 910 F.3d 927, 934 (7th Cir. 2018).

14. The Supreme Court has also described an agreement as a “conscious commitment to a common scheme designed to achieve an unlawful objective.”<sup>6</sup>

***Response:***

No response, other than to note that “oligopolies pose a special problem under § 1,” and “even though ... interdependence or ‘conscious parallelism’ harms consumers just as a monopoly does, it is beyond the reach of [the] antitrust laws.” *Valspar Corp.*, 873 F.3d at 191.

15. Further, an inter-firm exchange of competitive information followed by tacit coordination is sufficient to find a violation of Section 1 of the Sherman Act.<sup>7</sup>

***Response:***

The proposed conclusion of law misconstrues the holding of *Esco*. It is not just an inter-firm exchange of any competitive information followed by tacit coordination that

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<sup>6</sup> *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980)).

<sup>7</sup> *Accord Esco Corp. v. United States*, 340 F.2d 1000, 1008 (9th Cir. 1965) (Agreement is satisfied “if a course of conduct . . . once suggested or outlined by a competitor in the presence of other competitors, is followed by all . . . and continuously for all practical purposes, even though there are slight variations. . . . An exchange of words is not required. Thus not only action, but even a lack of action, may be enough from which to infer a combination or conspiracy.”); *In re Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d 968, 978 (N.D. Ohio 2015) (“No formal agreement is necessary to constitute an unlawful conspiracy. . . . The essential combination or conspiracy in violation of the Sherman Act may be found in

established a conspiracy in *Esco*. It was a transfer of a particular piece of information followed by a particular kind of conduct: (1) “*a course of conduct* ... suggested or outlined by a competitor in the presence of other competitors” that is then (2) “*followed by all.*” *Esco Corp. v. United States*, 340 F.2d 1000, 1008 (9th Cir. 1965).

Thus, *Esco* simply stands for the fact that – as with traditional contract law – an agreement can be reached when one makes an offer followed by acceptance through conduct, if the offer is clearly articulated and the conduct indicates an intent to accept the offer. *See* Restatement (Second) of Contracts § 53 (“An offer can be accepted by the rendering of a performance only if the offer invites such an acceptance.”). As a matter of proof, demonstrating offer followed by acceptance through conduct, therefore, requires: proof that (i) collusion was invited, and (ii) parallel conduct that would not have occurred but for the invitation. *See* Restatement (Second) of Contracts § 53, cmt. b (“Ordinarily the making of an offer does not limit the offeree's freedom of action or inaction; he may act or forbear without reference to the offer.”); *see also, e.g., In re Beef Indus. Antitrust Litig.*, 907 F.2d 510, 514 (5th Cir. 1990) (A plaintiff must “first demonstrate that the defendants’ actions were parallel.”); *Anderson News, L.L.C. v. Am. Media, Inc.*, 899 F.3d 87, 106-12 (2d Cir. 2018) (“Without ‘parallel acts’ ... evidence supporting the presence of certain plus factors ... can provide little support for a finding of unlawful conspiracy.”).

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a course of dealings or other circumstances as well as in any exchange of words.”) (quoting *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809-810 (1946)); *see United States v. Foley*, 598 F.2d 1323, 1332-34 (4th Cir. 1979) (finding an agreement where defendants adopted similar business policy following receipt of competitive information from a rival).

16. A “tacit” agreement is just as much an antitrust violation as an “express” agreement.<sup>8</sup>

***Response:***

The term “tacit” collusion is vague. Conduct that qualifies as oligopolistic interdependence is not unlawful, even if competitors each recognize that the others are behaving in an interdependent manner. Conduct that qualifies as offer and acceptance by performance may qualify as an “agreement,” and thus, may be a violation of antitrust laws. As the Supreme Court noted in *Twombly*, the types of parallel conduct that might suffice to state a claim under a “tacit” agreement theory involve “conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (quoting Blechman, *Conscious Parallelism, Signaling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws*, 24 N.Y.L. S. L. Rev. 881, 899 (1979)).

17. Indeed, “[i]t is not necessary to find an express agreement . . . but it is sufficient that a concert of action be contemplated and that defendants conform to the arrangement.”<sup>9</sup>

***Response:***

As noted in response to Complaint Counsel’s Proposed Conclusion of Law ¶15, this stands for the requirement that plaintiffs prove: (i) an invitation to collude, and (ii) intentional acceptance through performance.

18. Complaint Counsel need only establish Respondents’ agreement by a preponderance of the evidence.<sup>10</sup> In other words, a plaintiff need only present evidence that is sufficient to allow the fact-finder “to infer that the conspiratorial explanation is more likely than not.”<sup>11</sup>

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<sup>8</sup> See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (distinguishing independent conduct from an agreement—either tacit or express).

<sup>9</sup> *Esco*, 340 F.2d at 1008.

<sup>10</sup> *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656, 663 (7th Cir. 2002); *In re Adventist Health Sys./West*, 117 F.T.C. 224, 297 (1994) (“Each element of the case must be established by a preponderance of the evidence.”).

<sup>11</sup> *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012) (quoting Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (hereinafter “Areeda & Hovenkamp”) 1403(b)).



**Response:**

The quoted excerpt from Areeda & Hovenkamp is discussing the *Matsushita* “tends to exclude” standard, which “limits the range of permissible inferences” that may be drawn from ambiguous evidence. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574-75, 588, 594 (1986). A permissible inference of agreement requires evidence of both parallel conduct and plus factors, which taken together “tend[] to exclude the possibility of” unilateral conduct. *Id.* at 597 (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764, 768); *Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 51-52; *Mkt. Force, Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1170-71, 1173-74 (7th Cir. 1990).

19. A conspiracy may be established through either direct or circumstantial evidence, or a combination of the two. Because it is unlikely that conspirators will formally sign a written agreement, proof of conspiracies rarely consists of direct evidence of an explicit agreement.<sup>12</sup> “Rather, conspiracies nearly always must be proven through inferences that may fairly be drawn from the behavior of the alleged conspirators.”<sup>13</sup>

**Response:**

Complaint Counsel’s speculation that Section 1 violations “nearly always” require circumstantial evidence is unfounded. Many written agreements are challenged under Section 1 of the Sherman Act. In some cases, the agreement may very well be memorialized in some other writing or recorded, or there may be eye witness testimony (including from a whistleblower or other participant) attesting to the agreement. There is nothing to be gained from speculating about the relative frequency or merits of the types of proof required to prove an agreement. Rather, there is a clear framework for evaluating whether there is direct evidence of a conspiracy, and if not, whether the circumstantial

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<sup>12</sup> *Esco*, 340 F.2d at 1006-07; *In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d 671, 681 (S.D.N.Y. 2012).

<sup>13</sup> *Elec. Books Antitrust Litig.*, 859 F. Supp. 2d at 681.

evidence satisfies Complaint Counsel’s obligation to prove a conspiracy by a preponderance of the evidence. In that regard, it is important to note that antitrust law “limits the range of permissible inferences” that may be drawn from ambiguous evidence. *Matsushita*, 475 U.S. at 588, 594. A permissible inference of agreement requires evidence of both parallel conduct and plus factors, which taken together “tend[] to exclude the possibility of” unilateral conduct. *Matsushita*, 475 U.S. at 588, 597.

20. Circumstantial evidence is no less persuasive than direct evidence.<sup>14</sup>

***Response:***

While this can be the case, it is not always the case. Circumstantial evidence comes in many varieties and forms, some more persuasive than others. For instance, in the classic example of circumstantial evidence, a wet sidewalk *might* permit an inference that it rained, but it may be nowhere near as persuasive as direct evidence that it rained (*e.g.*, a videotape showing it raining on the sidewalk), as there could be any number of other explanations for and potential inferences from a wet sidewalk.

**A. The Totality of the Evidence Establishes Respondents’ Agreement**

21. To determine whether an antitrust conspiracy exists, courts must consider the “totality of the evidence.”<sup>15</sup> “The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.”<sup>16</sup>

***Response:***

While the proposed conclusion is generally true, the fact that evidence must be judged as a whole does not absolve Complaint Counsel of its obligation to show each

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<sup>14</sup> *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013), *aff’d* 791 F.3d 290 (2d Cir. 2015).

<sup>15</sup> *Id.*

<sup>16</sup> *Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) *superseded by statute on other grounds*, Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C. § 6a (quoting *Am. Tobacco Co. v. United States*, 147 F.2d 93, 106 (6th Cir. 1944)).

Respondent participated in the alleged conspiracy and that to do so, evidence must be assessed defendant-by-defendant. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 463 (1978) (“[L]iability [can] only be predicated on the knowing involvement of each defendant, considered individually, in the conspiracy charged...”); *Anderson News, L.L.C. v. Am. Media, Inc.*, 899 F.3d 87, 106-11 (2d Cir. 2018) (assessing the evidence defendant-by-defendant); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1265 (E.D. Pa. 1981) (plaintiff must show evidence “not only of the existence of a conspiracy to restrain trade, but also of the membership of that defendant in the conspiracy”).

22. Proof of an agreement can include evidence that competitors exchanged assurances of a common course of action,<sup>17</sup> followed conduct “suggested or outlined by a competitor,”<sup>18</sup> communicated about perceived deviations from prior assurances or reassured each other that they would abide by prior assurances,<sup>19</sup> or made statements about the collective action of competitors,<sup>20</sup> among other evidence that make the inference of agreement more likely than not.

***Response:***

The proposed conclusion is an inaccurate statement of the law because of the use of the disjunctive “or” in listing types of evidence. The proposed conclusion of law sets out examples of what courts have deemed “plus factors,” but no single plus factor is by itself “proof of an agreement.” To support “an inference of agreement,” courts follow a three-step process:

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<sup>17</sup> *Gainesville Util. Dep’t v. Fla. Power & Light Co.*, 573 F.2d 292, 300-01 (5th Cir. 1978).

<sup>18</sup> *United States v. Champion Int’l Corp.*, 557 F.2d 1270, 1273 (9th Cir. 1977); *Esco*, 340 F.2d at 1007-08; *Foley*, 598 F.2d at 1331-32.

<sup>19</sup> *See United States v. Beaver*, 515 F.3d 730, 738 (7th Cir. 2008) (Defendant’s “assertion that ‘no person voiced their assent to the supposed conspiracy’ rings hollow. Such assent was voiced when the coconspirators either confronted others about cheating on the cartel, or reassured others . . . that they were abiding by the agreement.”).

<sup>20</sup> *See Standard Oil Co. of Cal. v. Moore*, 251 F.2d 188, 208 (9th Cir. 1957) (defendant’s statement alluding to the conduct of competitors supported the jury’s conclusion of conspiracy); *B&R Supermkt. v. Visa, Inc.*, No. C 16-01150 WHA, 2016 WL 5725010, at \*6 (N.D. Cal. Sep. 30, 2016) (finding one credit card company executive’s statement about the conduct of all competitors was “direct evidence of a conspiracy,” for she “could not speak so confidently on behalf of *all* networks save and except for her knowledge of collusion”).

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

*Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1301 (11th Cir. 2003).

Each step is required, thus the proper conjunction is “and.” A plaintiff must prove parallel behavior *and* plus factors sufficient to create an inference of conspiracy that is not rebutted by defendants’ evidence. *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999) (“Once the plaintiffs have presented evidence of the defendants’ consciously parallel [conduct] *and* supplemented this evidence with plus factors, a rebuttable presumption of conspiracy arises.”).

23. In *Gainesville Utilities Department v. Florida Power & Light Co.*, the totality of direct communications between high-level executives of rival utility companies led the court to find an agreement to divide the market, reasoning: “Indeed, if solid economic reasons existed for refusing service to [each other’s territory], there was no reason for communicating with a competitor about the refusal, and certainly not for expressing such decisions in terms of hopeful, if not expected, reciprocity.”<sup>21</sup>

***Response:***

*Gainesville*, a pre-*Matsushita* case, does not stand for either the proposition that evidence of direct communications alone is sufficient to support a finding of agreement, or the proposition that legitimate unilateral reasons for the challenged conduct is not relevant, both of which Complaint Counsel asserts in their brief, citing *Gainesville*. (CC Br. 5, 94).

The holding in *Gainesville* was driven by the evidence of an “exchange of letters” of which the content was known. *Gainesville Utils. Dep’t v. Fla. Power & Light Co.*, 573 F.2d 292, 295-99, 301 (5th Cir. 1978). Thus, it was not the “totality of direct

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<sup>21</sup> 573 F.2d at 299, 301.

communications” behind the *Gainesville* holding, but the totality of the direct evidence of the communications’ *content*.

As to independent and unilateral justifications for challenged conduct, while it may be true that evidence of unilateral self-interest does not negate a *direct* evidence case like that in *Gainesville*, such evidence does negate a circumstantial case of the type Complaint Counsel attempts to make against Respondents. That is because even where a plaintiff can make out a circumstantial case, it merely creates a rebuttal presumption of conspiracy. Accordingly, Respondents may rebut the presumption with evidence that they acted independently. *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 n.30 (11th Cir. 1991) (to “ensure[] that unilateral or procompetitive conduct is not punished or deterred[.]” “‘plus factors’ only create a rebuttable presumption of a conspiracy which the defendant may defeat with his own evidence”); *In re Baby Food Antitrust Litig.*, 166 F.3d at 122. As such, “evidence of lawful business reasons for parallel conduct will dispel any inference of a conspiracy.” *Wilcox Dev. Co. v. First Interstate Bank of Or., N.A.*, 605 F. Supp. 592, 594 (D. Or. 1985).

24. In *United States v. Champion International Corp.*, defendant lumber buyers claimed that their individual interests in particular U.S. forestry sales was plain to all, nonetheless a tacit no-bid agreement was found where “the defendants did not leave the exchange of this information to chance” and met to advise each other about their plans to bid on future forestry sales, and indeed refrained from bidding on one another’s’ preferred sales.<sup>22</sup> “Whether or not anyone ever agreed at those meetings to bid or to refrain from bidding in any way, there was no doubt that the defendants ‘had an understanding’ about bidding.”<sup>23</sup>

***Response:***

*Champion* demonstrates the necessary components of proving a circumstantial case: parallel conduct (bidding patterns) and plus factors (meetings discussing which bids

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<sup>22</sup> 557 F.2d at 1273.

<sup>23</sup> *Id.*

each defendant was interested in) unrebutted by defendants' evidence. *Williamson Oil Co.*, 346 F.3d at 1301. *Champion* is inapposite as to Respondents, as Complaint Counsel has failed to prove parallel conduct or any plus factor as to Respondents.

25. The totality of the record evidence makes it more likely than not that Respondents had a common understanding that they would not discount to buying groups.

***Response:***

Incorrect, and as described in Respondents' post-trial briefs and proposed findings of fact, this proposed conclusion is unsupported by the evidence regarding Respondents. Complaint Counsel's attempt to lump Respondents together in this proposed conclusion is improper and skirts their burden to prove participation in the alleged conspiracy as to each Respondent. *In re Zinc Antitrust Litig.*, 155 F. Supp. 3d 337, 384 (S.D.N.Y. 2016) (noting that plaintiffs should be "admonished" for "resorting to ... group pleading.>").

**B. Plus Factors Confirm Respondents' Agreement**

26. Plus factors are required when a plaintiff relies solely on parallel conduct to prove an agreement.<sup>24</sup> In such a case, plus-factor evidence serves as a proxy for direct evidence of agreement.<sup>25</sup>

***Response:***

This proposed conclusion is an incomplete, and thus incorrect, statement of the law. Plus factors are required when a plaintiff seeks to prove a conspiracy through circumstantial evidence. Because antitrust law restricts the permissible inferences that can be made from ambiguous evidence, there is only one way to prove a circumstantial case: through evidence of parallel conduct *and* plus factors that is unrebutted by defendants' evidence. *Matsushita*, 475 U.S. at 588, 594; *Williamson Oil Co.*, 346 F.3d at 1301; *see*

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<sup>24</sup> *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 323 (3d Cir. 2010).

<sup>25</sup> *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004).

also *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 324 n.23 (3d Cir. 2010) (“Courts devised the requirement of ‘plus factors’ in the context of offers of proof of an agreement that rest on parallel conduct, i.e., circumstantial evidence.”). Thus, the more accurate statement is that parallel conduct and plus factors are required when a plaintiff relies on circumstantial evidence to prove an agreement.

27. Where, as here, evidence of agreement goes beyond parallel conduct, plus-factor evidence is not necessary.<sup>26</sup> Nonetheless, plus-factor evidence may further corroborate evidence establishing an agreement violating Section 1.

***Response:***

The proposed conclusion is vague as to what Complaint Counsel means by evidence that “goes beyond parallel conduct.” Since Complaint Counsel has not established parallel conduct, they have not “gone beyond” parallel conduct but rather have conceded the absence of a required element of a circumstantial case. In any event, the proposed conclusion is not the law, nor is it the holding of *In re Insurance Brokerage* or *Apple*.

Evidence of parallel conduct is *required* in a circumstantial case – Complaint Counsel does not get to go “beyond” it. *In re Beef Indus. Antitrust Litig.*, 907 F.2d 510, 514 (5th Cir. 1990) (a plaintiff must “first demonstrate that the defendants’ actions were parallel”); *Anderson News, L.L.C. v. Am. Media, Inc.*, 899 F.3d, 87, 106-12 (2d Cir. 2018) (“Without ‘parallel acts’ ... evidence supporting the presence of certain plus factors ... can provide little support for a finding of unlawful conspiracy.”). *In re Insurance Brokerage* made this clear in noting that “evidence of parallel conduct by alleged co-conspirators is *not sufficient* to show an agreement” because “parallel conduct is just as much in line with

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<sup>26</sup> *Ins. Brokerage Antitrust Litig.*, 618 F.3d at 323; *Apple*, 952 F. Supp. 2d at 690.

a wide swath of rational and competitive business strategy,” thus requiring “plus factors” that “tend to rule out the possibility” of independent conduct “in order to enforce the Sherman Act....” 618 F.3d 300, 321 (3d Cir. 2010).

Plus factor evidence is thus necessary to prove a circumstantial case. As the court in *Apple* put it, “unambiguous evidence of agreement to fix prices ... is all the proof a plaintiff needs,” but absent such evidence, plus factors are required. *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689-90 (S.D.N.Y. 2013). Thus, the only thing that “obviates the need for such a showing” is “direct evidence of a conspiracy, such as a document or conversation explicitly manifesting the existence of the agreement in question – evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted.” *In re Ins. Brokerage*, 618 F.3d at 324 n.23.

### 1. Actions Against Self-Interest

28. Actions against unilateral economic self-interest is plus-factor evidence that supports a finding of conspiracy.<sup>27</sup>

#### ***Response:***

In conjunction with evidence of parallel conduct, evidence of actions against unilateral economic self-interest *might* constitute a plus-factor that supports a ***rebuttable*** presumption of conspiracy. *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 n.30 (11th Cir. 1991); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999).

However, when assessing plus factor evidence in the context of a concentrated market, actions against self-interest are less important because they largely “restate interdependence.” *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360-61 (3d Cir. 2004);

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<sup>27</sup> *Apple*, 952 F. Supp. 2d at 690.



*Valspar Corp.*, 873 F.3d at 196 (“[I]n oligopolistic markets, the first two factors [motive and actions against self-interest] largely restate the phenomenon of interdependence....”).

29. “Evidence that the defendant acted contrary to its interests means evidence of conduct that would be irrational assuming that the defendant operated in a competitive market.”<sup>28</sup>

***Response:***

No response, other than the term “competitive market” is vague. To the extent a “competitive market” means a market free from collusive conduct, including highly concentrated markets in which all firms engage in oligopolistic interdependent, then the proposed conclusion of law has some validity. If the term “competitive market” is defined as an economist would define it, for example, markets in which all firms are atomistic and charge marginal cost, the proposed finding is incorrect.

30. For example, sharing competitively sensitive information with rivals is a plus factor contributing to the finding of an agreement.<sup>29</sup>

***Response:***

In conjunction with evidence of parallel conduct, evidence of sharing competitively sensitive information *might* constitute a plus-factor that supports a ***rebuttable*** presumption of conspiracy. *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 n.30 (11th Cir. 1991); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999).

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<sup>28</sup> *Flat Glass Antitrust Litig.*, 385 F.3d at 360-61.

<sup>29</sup> *See Ross v. Bank of Am.*, No. 05-7116, 2012 U.S. Dist. LEXIS 19760, at \*17-18, 26 (S.D.N.Y. Feb. 8, 2012) (noting credit card defendants “arguably acted against their unilateral interests by . . . providing competitors with certain sensitive business information” about their plans to change contract arbitration clauses and finding such actions constituting a plus factor supportive of agreement); *see also In re Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d 968, 991 (N.D. Ohio 2015) (“A jury could reasonably conclude that Defendants shared such information with each other because there existed a common understanding of how the information would be used—not to compete, but to collude. And a jury can draw that inference without ‘threaten[ing] to chill procompetitive behavior.’”) (internal citation omitted).

It should be noted that Complaint Counsel's case, *Ross*, does not support the proposed conclusion that sharing "sensitive information ... contribut[ed] to the finding of an agreement." Rather, the court simply found that even though plaintiff's "reading of [the] statement seems improbable," it nonetheless created a "factual dispute ... inappropriate for resolution on summary judgment." *Ross v. Bank of Am.*, 2012 U.S. Dist. LEXIS 19760, at \*18, 26 (S.D.N.Y. 2012). *In re Polyurethane Foam Antitrust Litigation* was also a summary judgment decision, giving plaintiff "the benefit of every reasonable inference." 152 F. Supp. 3d 968, 975 (N.D. Ohio 2015).

No such benefit is applicable after trial. After trial, if "the evidence points equally to two or more inferences, an objective fact finder would not decide the inference in favor of the party with the burden of proof," here, Complaint Counsel. *In re McWane, Inc. & Star Pipe Prods., Ltd.*, 155 F.T.C. 903, at \*268 (2013). Here, as explained in Respondents' post-trial briefing, the evidence weighs decidedly in Respondents' favor.

31. In *Fleischman v. Albany Medical Center*, competitor exchanges of information that could have been used to outcompete rivals absent a conspiracy was "persuasive evidence" of conspiracy because such exchanges were against self-interest.<sup>30</sup>

***Response:***

Complaint Counsel misreads *Fleischman*. There, the court noted that the exchange of detailed information would not be likely "absent an agreement" because it would be "contrary to their economic self interest." *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 162 (N.D.N.Y. 2010). The court noted that the acts against self-interest – not the mere exchange of any competitive information – was "persuasive evidence." *Id.* As such, in order for the exchange of information to be "persuasive evidence" of an agreement, the

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<sup>30</sup> 728 F. Supp. 2d 130, 162 (N.D.N.Y. 2010).

plaintiff must establish that the information exchanged would not have occurred absent an agreement and that it was contrary to *both* parties' economic self-interest to have exchanged that information.

Moreover, *Fleischman* was a summary judgment decision, giving plaintiff "all reasonable inferences." *Id.* at 145. No such benefit is applicable after trial. After trial, if "the evidence points equally to two or more inferences, an objective fact finder would not decide the inference in favor of the party with the burden of proof," here, Complaint Counsel. *In re McWane, Inc. & Star Pipe Prods., Ltd.*, 155 F.T.C. 903, at \*268 (2013). Here, as explained in Respondents' post-trial briefing, the evidence weighs decidedly in Respondents' favor.

32. Respondents sharing competitively sensitive information was against their economic self-interest and indicative of an agreement.

***Response:***

Complaint Counsel's attempt to lump Respondents together in this proposed conclusion is improper and skirts their burden to prove participation in the alleged conspiracy as to each Respondent. *In re Zinc Antitrust Litig.*, 155 F. Supp. 3d 337, 384 (S.D.N.Y. 2016) (noting that plaintiffs should be "admonished" for "resorting to ... group pleading."). Moreover, this proposed conclusion of law is not a legal issue, but a factual

finding. Respondents, therefore, respectfully refer the Court to their respective responses to Complaint Counsel’s proposed factual findings relating to this issue.

33. Depriving oneself of a profitable sales opportunity is another action against self-interest that points towards conspiracy.<sup>31</sup>

***Response:***

In conjunction with evidence of parallel conduct, evidence of depriving oneself of a profitable sales opportunity *might* constitute a plus-factor that supports a ***rebuttable*** presumption of conspiracy. *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 n.30 (11th Cir. 1991); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999).

Inferring an agreement from putatively parallel refusals to deal, however, is problematic. Because firms have a unilateral incentive to resist engaging new modes of commerce that may threaten their existing business, evidence of such resistance does not create an inference of a conspiracy. As the Supreme Court explained, because “resisting competition is ***routine market conduct*** ... there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 566 (2007). *Twombly* rejected the argument that the incumbents acted contrary to their self-interest by not interconnecting with the new entrants or expanding their territories. As the Court noted, “although the complaint says generally that the [incumbent firms] passed up ‘especially attractive business opportunit[ies]’ by declining to [expand outside their historic territories], it does not allege that [such]

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<sup>31</sup> *Toys “R” Us v. FTC*, 221 F.3d 928, 935 (7th Cir. 2000) (finding an agreement after it was “suspicious for a manufacturer to deprive itself of a profitable sales outlet”); *In re Pool Prods. Distrib. Mkt. Antitrust Litig.*, 988 F. Supp. 2d 696, 713 (E.D. La. 2013) (acts that “risk a loss of market share to the other manufacturers” are acts against economic self-interest supporting claim of conspiracy); *see also Standard Oil*, 251 F.2d at 206-07 (evidence of appellants’ sales representatives who wanted to negotiate with, sell to, or “have the opportunity” of working with a customer that appellants later turned down supported finding of agreement rather than independent business decision).

competition ... was potentially any more lucrative than other opportunities being pursued by the [defendants] during the same period.” *Twombly*, 550 U.S. at 568-69. “[F]irms do not expand without limit and none of them enters every market that an outside observer might regard as profitable, or even a small portion of such markets.” *Twombly*, 550 U.S. at 568-69.

As such, courts are particularly reluctant to second-guess a company’s business judgment whether to pursue new opportunities, especially a company’s *inaction*. See *In re Baby Food Antitrust Litig.*, 166 F.3d at 127 (holding that the court was “unwilling to question [defendant’s] business judgment” where “the evidence reflect[ed] [defendant’s] strategic planning as to whether and when to pursue particular business opportunities.”).

Complaint Counsel again cites to cases that rely on pretrial standards inapplicable here. *In re Pool Products* was on a motion to dismiss and found that it was equally plausible to infer from plaintiffs’ allegations motive to conspire and independent action. But “the choice between two plausible alternative inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion.” 988 F. Supp. 2d 696, 713 (E.D. La. 2013). The result is the opposite after trial. If “the evidence points equally to two or more inferences, an objective fact finder would not decide the inference in favor of the party with the burden of proof,” here, Complaint Counsel. *In re McWane, Inc. & Star Pipe Prods., Ltd.*, 155 F.T.C. 903, at \*268 (2013). Here, as explained in Respondents’ post-trial briefing, the evidence weighs decidedly in Respondents’ favor.

34. Toy manufacturers’ decisions to forego sales to warehouse club stores, a growing and profitable sales channel, was conduct against self-interest that was indicative of an agreement in *Toys “R” Us v. FTC*, especially where each manufacturer feared its competitors would steal market share by selling to warehouse stores.<sup>32</sup>

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<sup>32</sup> 221 F.3d 928, 931-32, 935-36 (7th Cir. 2000).

***Response:***

In conjunction with evidence of parallel conduct, evidence of forgoing a “growing and profitable sales channel” *might* constitute a plus-factor that supports a *rebuttable* presumption of conspiracy. *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 n.30 (11th Cir. 1991); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999).

But Complaint Counsel misreads *Toys “R” Us* for three reasons.

First, *Toys “R” Us* was a direct evidence case. The key piece of evidence was not that “each manufacturer feared its competitors would steal market share by selling to warehouse stores.” The key piece of evidence was the *direct evidence* that Toys “R” Us “communicated the message ‘I’ll stop if they stop’ from manufacturer to competing manufacturer.” *Toys “R” Us v. FTC*, 221 F.3d 928, 932, 936 (7th Cir. 2000). Thus, *Toys “R” Us* was a direct evidence case. Complaint Counsel has no such evidence as to Respondents, and does not claim to bring a direct evidence case against Respondents.

*Second*, to the extent *Toys “R” Us* commented on the quantum of proof required to establish a circumstantial case, it noted that in past cases there had been “substantial unanimity of action taken” and “a radical shift from the industry’s prior business practices” that went “beyond the range of probability that such unanimity of action was explainable only by chance.” 221 F.3d at 935. Here, Complaint Counsel has not proven any unanimity of behavior or shift in conduct.

*Third*, *Toys “R” Us* is inapposite, since it applied a deferential standard, simply looking at whether an inference of a conspiracy was “permissible.” 221 F.3d at 935. Here, Complaint Counsel bears the burden, not of showing a permissible inference, but of showing an agreement by a preponderance of the evidence.

35. Respondents' actions against their economic self-interest by failing to pursue buying groups suggests an agreement was more likely than not.

***Response:***

Complaint Counsel's attempt to lump Respondents together in this proposed conclusion is improper and skirts their burden to prove participation in the alleged conspiracy as to each Respondent. *In re Zinc Antitrust Litig.*, 155 F. Supp. 3d 337, 384 (S.D.N.Y. 2016) (noting that plaintiffs should be "admonished" for "resorting to ... group pleading."). As noted in Respondents' post-trial briefs and proposed findings of fact, Complaint Counsel has failed to prove that Respondents acted against their respective individual economic self-interest with respect to any buying group.

And as noted above, declining a potentially profitable opportunity does not in itself make "an agreement ... more likely than not." As the Supreme Court noted in *Twombly*, such actions are often "***routine market conduct.***" *Twombly*, 550 U.S. at 566. "[F]irms do not expand without limit and none of them enters every market that an outside observer might regard as profitable, or even a small portion of such markets." *Twombly*, 550 U.S. at 568.

Furthermore, an action against economic self-interest is not indicative of an agreement at all in the absence of parallel conduct. *See Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 n.30 (11th Cir. 1991); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999).

**2. Change in Conduct**

36. Changes in conduct constitute plus-factor evidence of a conspiracy.<sup>33</sup>

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<sup>33</sup> *Twombly*, 550 U.S. at 556 n.4; *In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1092-95 (N.D. Cal. 2007) (when allegations of parallel conduct are the basis of a Section 1 claim, must allege facts to suggest preceding agreement, such as unprecedented change in behavior).

**Response:**

The law is not so broad as this proposed conclusion suggests. Firms change conduct all the time without constituting plus-factor evidence.

In determining whether parallel conduct may support an inference of conspiracy, a change in conduct may be a plus factor only if it is “radical,” “abrupt,” or “unprecedented.” *Valspar Corp.*, 873 F.3d at 196, 215; *In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1092-95 (N.D. Cal. 2007); *see also Twombly*, 550 U.S. at 557 n.4 (to support an inference of a conspiracy, changes in conduct must be of the type that “would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties[,]” such as “complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors ... for no other discernable reason.”).

37. In *Toys “R” Us*, the toy manufacturers’ shift from dealing with warehouse clubs to boycotting warehouse clubs was indicative of an agreement and inconsistent with independent action.<sup>34</sup>

**Response:**

Unlike in *Toys “R” Us*, there was no shift from dealing with buying groups to not dealing with them. Benco at all times followed a strict no-buying-group policy; Patterson mostly said no to buying groups but evaluated them as they came; and Schein consistently did business with buying groups where it made sense.

38. The many examples of Respondents’ changes in conduct with respect to their general buying group policies as well as whether to discount to individual buying groups make the inference of agreement more likely than not.

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<sup>34</sup> 221 F.3d at 936.



**Response:**

Complaint Counsel’s attempt to lump Respondents together in this proposed conclusion is improper and skirts their burden to prove participation in the alleged conspiracy as to each Respondent. *In re Zinc Antitrust Litig.*, 155 F. Supp. 3d 337, 384 (S.D.N.Y. 2016) (noting that plaintiffs should be “admonished” for “resorting to ... group pleading.”). As noted in Respondents’ post-trial briefs and proposed findings of fact, Complaint Counsel has failed to prove any “radical,” “abrupt,” or “unprecedented” change in conduct that could constitute a plus factor supporting an inference of a conspiracy. *Valspar Corp.*, 873 F.3d at 196, 215.

Furthermore, even if there were any such radical, abrupt, and unprecedented changes, they are meaningless in the absence of parallel conduct. *See Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 n.30 (11th Cir. 1991); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999).

### 3. **Other Plus Factors: Motive, Opportunity, and Market Concentration**

39. Courts recognize motive to conspire as a plus factor in finding an agreement based on parallel conduct.<sup>35</sup>

**Response:**

In conjunction with evidence of parallel conduct, evidence of motive to conspire *might* constitute a plus-factor that supports a *rebuttable* presumption of conspiracy.

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<sup>35</sup> *Flat Glass*, 385 F.3d at 360-61; *see Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 222 (1939) (finding a “strong motive for concerted action” where the film distributors sought higher ticket prices for first-and second-run theaters, but needed agreement by all distributors to increase profits, else they were in active competition with one another); *Toys “R” Us*, 221 F.3d at 931-32, 935-36 (toy manufacturers’ common motive to boycott a discount sales channel was instructive in finding an agreement, especially where absent the agreement, individual manufacturers would not have boycotted for fear that their competitors would have stolen market share by selling to warehouse stores).

*Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 n.30 (11th Cir. 1991); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999).

In general, however, evidence of a motive to conspire is probative of very little. Motive to conspire is a “background” plus factor that cannot establish a conspiracy on its own. *Blomkest Fertilizer, Inc. v. Potash Corp. of Sask.*, 203 F.3d 1023, 1043 (8th Cir. 2000). Particularly in an oligopoly, where “motivation is ... synonymous with interdependence,” it “adds nothing.” *White v. R.M. Packer Co.*, 635 F.3d 571, 582 (1st Cir. 2011) (quoting 6 Areeda & Hovenkamp ¶ 1434(c)(1) at 269)); *see also In re Baby Food Antitrust Litig.*, 166 F.3d at 122 (“[C]onspiratorial motivation is ambiguous because it can describe mere interdependent behavior....”); *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1194-95 (9th Cir. 2015) (“‘[C]ommon motive to conspire’ simply restates that a market is interdependent (*i.e.*, that the profitability of a firm’s decisions regarding pricing depends on competitors’ reactions).”).

40. In *Apple*, defendants’ common motivation of challenging the “swiftly growing e-book market” that would “severely undermine their more profitable physical book business” and “protect[ing] their then-existing business model” was compelling plus-factor evidence of conspiracy.<sup>36</sup>

***Response:***

Incorrect. *Apple* involved two sets of defendants with different motivations: Publisher Defendants and Apple. Apple effectively conceded there was a conspiracy among the Publisher Defendants. Thus, their motive to challenge the e-book market was irrelevant. 952 F. Supp. 2d at 691-92.

This reading of *Apple* is supported by *Twombly*, in which the Supreme Court found the incentive to resist upstarts and maintain the status quo of a profitable business did not

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<sup>36</sup> 952 F. Supp. 2d at 691.

support an inference of conspiracy. *Twombly*, 550 U.S. at 566-68 (rejecting claim where the complaint failed to allege that the “resistance to the upstarts was anything more than the natural, unilateral reaction of each [incumbent competitor] intent on keeping its regional dominance”); *see also In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 349 (where defendants were reaping significant profits from their current business practices, it was natural for them to have “no desire to upset the apple cart”); *In re Interest Rate Swaps Antitrust Litig.*, 261 F. Supp. 3d 430, 464 (S.D.N.Y. 2017) (defendants had “good reason” to discourage “development of a new trading paradigm that threatened, some day, to cannibalize their trading profits.”).

41. Respondents’ motive to conspire to combat the growing threat posed by buying groups is plus-factor evidence pointing towards conspiracy.

***Response:***

Complaint Counsel’s attempt to lump Respondents together in this proposed conclusion is improper and skirts their burden to prove participation in the alleged conspiracy as to each Respondent. *In re Zinc Antitrust Litig.*, 155 F. Supp. 3d 337, 384 (S.D.N.Y. 2016) (noting that plaintiffs should be “admonished” for “resorting to ... group pleading.”). As noted in Respondents’ post-trial briefs and proposed findings of fact, Complaint Counsel has failed to prove any economically rational motive to conspire or any motive that is not equally consistent with oligopolistic interdependence.

The proposed conclusion ignores the fact that in an oligopoly, where “motivation is ... synonymous with interdependence,” it “adds nothing.” *White v. R.M. Packer Co.*, 635 F.3d 571, 582 (1st Cir. 2011).

42. Similarly, evidence of opportunities to conspire is supportive of an inference of agreement.<sup>37</sup>

**Response:**

The law is settled and clear: opportunity evidence is *not* “supportive of an inference of agreement.” *E.g., In re Baby Food Antitrust Litig.*, 166 F.3d at 133 (“[E]vidence of opportunity” is not entitled to “much weight” and “evidence of social contacts and telephone calls ... [is] insufficient to exclude the possibility that the defendants acted independently.”); *Petruzzi’s IGA Supermks., Inc. v. Darling-Del. Co.*, 998 F.2d 1224, 1235, 1242 n.15 (3d Cir. 1993) (Social calls and telephone contacts are “[p]roof of opportunity to conspire [which], without more, will not sustain an inference that a conspiracy has taken place.”); *Venzie Corp. v. U.S. Mineral Prods. Co.*, 521 F.2d 1309, 1312 (3d Cir. Pa. 1975) (dismissing case because evidence that defendants had made “numerous telephone calls” to each other only proved an opportunity for an agreement).

Complaint Counsel cite a 65-year-old case to argue otherwise: *C-O-Two Fire Equipment*. But courts have since rejected *C-O-Two* as authority to consider opportunity evidence. *See Weit v. Cont’l Ill. Nat’l Bank & Tr. Co.*, 467 F. Supp. 197, 214 (N.D. Ill. 1978) (“Plaintiffs mistake the significance of the meetings in the view of the court in *C-O-Two*; the finding of conspiracy was held to be warranted in light of the other factors: identical bids, unnecessary product standardization, illegal licensing contracts, dealer policing, and identical price increases at times of surplus, coupled with the fact that the defendants offered no evidence in rebuttal.”). Nor does *Petroleum Products* support

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<sup>37</sup> *C-O-Two Fire Equip. Co. v. United States*, 197 F.2d 489, 493 (9th Cir. 1952); *see also In re Coordinated Pretrial Proceedings in Petrol. Prods. Antitrust Litig.*, 906 F.2d 432, 453 (9th Cir. 1990) (“[P]ermitt[ing] an inference of conspiracy from direct competitor contacts will not have significant anticompetitive effects.”).

Complaint Counsel’s view of opportunity evidence. The communications evidence there was not mere opportunity evidence, but was actual “exchange of price information.” *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 452 (9th Cir. 1990).

43. In *C-O-Two Fire Equipment Co. v. United States*, fire extinguisher manufacturers argued that their in-person meetings had no probative value as to whether an agreement was reached where plaintiffs lacked direct evidence of what transpired at the meetings.<sup>38</sup> The court disagreed, finding that opportunity to collude evidence was a plus factor deserving of consideration as part of the totality of the evidence.<sup>39</sup>

***Response:***

Complaint Counsel improperly reads *C-O-Two*, a pre-*Matsushita* case.

In *C-O-Two*, there were many facts that could not be explained based on the unilateral behavior of the defendants, and that collectively, such conduct supported an inference of an agreement. For example, in that case, the defendants had entered into a *written agreement* that contained the challenged minimum price maintenance provision, and the only question was whether it continued in force. The court simply held that the conduct suggested that it remained in force. Far from approving a *finding* that there was a conspiracy based on opportunity evidence, the court held that such facts were just “another one in a series” of factors that the lower court considered. 197 F.2d at 493. In that regard, the court found suspicious the fact that the defendants “submitted identical bids” on multiple occasions. *Id.* at 494.

To the extent *C-O Two* holds that mere opportunity evidence – unaccompanied by suspicious conduct that could not have occurred absent agreement – supports an inference of an agreement, Courts have since rejected any such interpretation. *See Weit v. Cont’l Ill.*

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<sup>38</sup> *C-O-Two Fire Equip.*, 197 F.2d at 493.

<sup>39</sup> *Id.*

*Nat'l Bank & Tr. Co.*, 467 F. Supp. 197, 214 (N.D. Ill. 1978) (“Plaintiffs mistake the significance of the meetings in the view of the court in *C-O-Two*; the finding of conspiracy was held to be warranted in light of the other factors: identical bids, unnecessary product standardization, illegal licensing contracts, dealer policing, and identical price increases at times of surplus, coupled with the fact that the defendants offered no evidence in rebuttal.”).

As noted, the law on opportunity evidence is settled: “evidence of opportunity [is] ... insufficient to exclude the possibility that the defendants acted independently.” *In re Baby Food Antitrust Litig.*, 166 F.3d at 133; *see also, e.g., Petruzzi's IGA Supermkts., Inc. v. Darling-Del. Co.*, 998 F.2d 1224, 1235, 1242 n.15 (3d Cir. 1993) (“Proof of opportunity to conspire, without more, will not sustain an inference that a conspiracy has taken place.”).

44. Respondents repeated face-to-face meetings, joint attendance at industry events, unsaved notes and letters, and one-on-one telephone calls provide plus-factor evidence relevant to a finding of agreement.

***Response:***

Incorrect. Such opportunity evidence falls far short of plus-factor evidence relevant to an agreement. *See, e.g., In re Baby Food Antitrust Litig.*, 166 F.3d at 133 (“evidence of social contacts and telephone calls ... [is] insufficient to exclude the possibility that the defendants acted independently”); *In re Chocolate Confectionary*, 801 F.3d 383, 406 (3d Cir. 2015) (“social contacts between competitors without more are not unlawful”); *Holiday Wholesale Grocery Co. v. Philip Morris Inc.*, 231 F. Supp. 2d 1253, 1308 (N.D. Ga. 2002) (“opportunities to conspire” was not a plus factor in a case where there were social contacts between tobacco company executives “such as golf, dinner, lunches, trade association conferences, and teleconferences”), *aff'd sub nom. Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287 (11th Cir. 2003); *Hinds Cty., Miss. v. Wachovia Bank N.A.*, 708 F.

Supp. 2d 348, 362 (S.D.N.Y. 2010) (“mere presence at industry associations and meetings” insufficient to establish agreement); *LaFlamme v. Société Air Fr.*, 702 F. Supp. 2d 136, 148 (E.D.N.Y. 2010) (“[M]embership and participation in a trade association alone does not give rise to a plausible inference of illegal agreement.”).

45. “Economists [and courts] recognize that when a market is concentrated it is easier to coordinate collusive behavior.”<sup>40</sup>

***Response:***

Because competition in an oligopolistic market can be equally consistent with natural, lawful behavior as with unlawful conspiracy, conspiracy cannot be inferred from evidence of market structure or interdependence. *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 50, 53 (7th Cir. 1992) (“[T]he mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws.... A firm in a concentrated industry typically has reason to decide (individually) to copy an industry leader.”); *In re Chocolate Confectionary*, 999 F. Supp. 2d. at 790 (“The mere fact that a market may exhibit oligarchic tendencies and characteristics is, without more, insufficient to establish antitrust liability.”); *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1023 n.6 (N.D. Cal. 2007) (dismissing case where the alleged facts showed nothing more than “a small number of firms [that] can affect the total market output and the market price, [making] firms’ ... decisions [] interdependent.”); *Burtch v. Milberg Factors*, 662 F.3d 212, 227 (3d Cir. 2011) (the “fact that market behavior is interdependent and characterized by conscious parallelism” is “legally insufficient”).

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<sup>40</sup> See, e.g., *Gainesville Utils. Dep’t*, 573 F.2d at 303.

For this reason, as Complaint Counsel’s case notes, “courts have been reluctant to find a conspiracy in such a concentrated market,” so the evidence must be “carefully scrutinize[d].” *Gainesville*, 573 F.2d at 303. There, the evidence of a “continuous exchange of letters” explicitly indicating reciprocity with respect to a territorial allocation of the market was enough to overcome that reluctance. *Id.* at 301. Here, there is no such evidence.

46. Respondents’ high collective market share makes the full-service dental distribution industry conducive to collusion.

***Response:***

Complaint Counsel cites no support for this proposed conclusion. As noted in response to the previous proposed conclusion, the law is precisely contrary.

**C. Respondents’ Denials are Unavailing**

47. Self-serving witness denials do not preclude a conspiracy finding in an antitrust case.<sup>41</sup>

***Response:***

Complaint Counsel claims the Court can just ignore sworn denials, but the cases they cite say no such thing. Each involved evidence of conspiracy that Complaint Counsel has failed to adduce here. *Gainesville*, for instance, does not say sworn denials are to be ignored. It just says that, in that case, the plaintiff was able to overcome the sworn denials with evidence of parallel activity *and* a “continuous exchange of letters,” the content of

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<sup>41</sup> See, e.g., *id.* at 301 n.14 (overturning denial of judgment notwithstanding the verdict relying on witness denials); *Champion Int’l*, 557 F.2d at 1273 (upholding trial court finding of an agreement to eliminate competitive bidding for timber where defendants asserted that meetings were innocent, but court found otherwise); *Vitagraph, Inc. v. Perelman*, 95 F.2d 142, 146 (3d Cir. 1936) (upholding a finding of conspiracy even though defendants’ witnesses denied any conspiracy); *United States v. Capitol Service, Inc.*, 568 F. Supp. 134, 144-45 (E.D. Wis. 1983), *aff’d*, 756 F.2d 502 (7th Cir. 1985) (finding agreement despite defendants’ testimony that no agreement existed); *United States v. Beachner Const. Co.*, 555 F. Supp. 1273, 1278-79 (D. Kan. 1983), *aff’d*, 729 F.2d 1278 (10th Cir. 1984) (“[A]though witnesses denied any overall agreement or understanding or participation in a single conspiracy, there can be no doubt that bid rigging was a way of life in the industry in Kansas.”).



which indicated reciprocity. 573 F.2d 292, 301 (5th Cir. 1978). None of the remaining cases Complaint Counsel cites even discusses the impact of sworn denials.

The law is clear on sworn denials – they are direct evidence contrary to the alleged conspiracy and are entitled to significant weight. *E.g., In re McWane*, 155 F.T.C. at \*267 (finding that defendants’ sworn testimony denying the illegal conduct is “direct evidence contrary to the asserted agreement ... and is entitled to weight” and that such testimony cannot be “dismissed as ‘self-serving’” absent a finding that the witness lied under oath or is otherwise not credible); *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1302 (11th Cir. 2003) (finding plaintiffs’ evidence insufficient to overcome the defendants’ sworn denials and that it would have been improper to permit the jury “to engage in speculation” in the face of defendants’ denials).

The fact that denials might be “self-serving” is neither here nor there. Complaint Counsel “cannot make its case just by asking the fact finder to disbelieve the defendant’s witnesses.” *In re McWane, Inc.*, 155 F.T.C. at \*267, 363; *see also Venzie Corp.*, 521 F.2d at 1313 (“mere disbelief [does] not rise to the level of positive proof of agreement to sustain plaintiffs’ burden of proving conspiracy”); *Valspar Corp. v. E.I. Du Pont De Nemours & Co.*, 873 F.3d 185, 195 n.6 (3d Cir. 2017) (noting that, even if the court were to reject denials as pretextual, “pretextual reasons [for the alleged conduct] are insufficient to create a genuine issue of fact without other evidence pointing to [an unlawful] agreement”); *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 214 (1931) (“[T]he court ... is not at liberty to disregard the testimony of a witness on the ground that he is an employee of the defendant, in the absence of conflicting proof or of circumstances justifying countervailing

inferences or suggesting doubt as to the truth of his statement, unless the evidence be of such a nature as fairly to be open to challenge as suspicious or inherently improbable.”).

48. “It is to be expected that [Respondents’] witnesses would deny that there was an agreement, but [such] testimony does not offset . . . compelling documentary evidence of a planned common course of action or understanding.”<sup>42</sup>

***Response:***

As noted in response to the prior proposed conclusion, sworn denials are entitled to significant weight. Thus, to overcome such denials, “significant probative evidence” is required. *Weit v. Cont’l Ill. Nat’l Bank & Tr. Co. of Chi.*, 641 F.2d 457, 464-65 (7th Cir. 1981); *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 130 (D.D.C. 2006) (“Facing the sworn denial of the existence of conspiracy, it is up to plaintiff to produce significant probative evidence ... that conspiracy existed....”).

In *Advertising Specialty National Association v. FTC*, the plaintiff overcame that burden with evidence “for more than mere parallelism in business behavior:” (i) pricing practices “were almost uniformly followed;” (ii) documented “group resolutions;” (iii) express responses of “complete accord;” and (iv) “uncontradicted evidence [of] polic[ing].” 238 F.2d 108, 114-17 (1956). Here, Complaint Counsel cannot even show parallel behavior, let alone the caliber of plus factor evidence adduced in *Advertising Specialty National Association*.

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<sup>42</sup> *Advert. Specialty Nat’l Ass’n v. FTC*, 238 F.2d 108, 117 (1st Cir. 1956).

49. Oral testimony that is in conflict with contemporaneous documentary evidence deserves little weight.<sup>43</sup>

***Response:***

The rules of evidence do not create a blanket hierarchy of persuasiveness. The amount of weight the trier of fact gives to each piece of evidence, and how it resolves conflicts among such evidence, depends on the nature of the evidence. A random, flippant, off-hand remark in an email, for example, does not undermine considered testimony under oath.

As the Commission noted in *Rambus*, “*Gypsum* was actually considerably more limited.” *In the Matter of Rambus, Inc.*, 2006 WL 2330117, at \*15 n.123 (F.T.C. 2006) (specifically rejecting the broad proposition “where trial testimony is in conflict with contemporaneous documents, the trial testimony is entitled to little weight.”). The Commission determined that “absent a specific reason to question the credibility or reliability of a specific witness or a specific statement, [it had] no basis to discredit any of the testimony in the record.” *In the Matter of Rambus, Inc.*, 2006 W.L. 2330117, at \*15 n. 123 (F.T.C. 2006).

50. Requiring admission of agreement would be tantamount to requiring direct evidence of conspiracy—a standard that finds no support in the law.<sup>44</sup>

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<sup>43</sup> *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395-96 (1948) (“On cross-examination most of the witnesses denied that they had acted in concert . . . Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact.”); *Gainesville Utils. Dep’t*, 573 F.2d at 301 n.14 (Where defendants’ executives testimony denying an agreement “is in conflict with contemporaneous documents we can give it little weight.”).

<sup>44</sup> *See, e.g., Apple*, 952 F. Supp. 2d at 689 (“A plaintiff may rely on either direct or circumstantial evidence to establish that a defendant entered into an agreement in violation of the antitrust laws.”).

***Response:***

It is true that a plaintiff may rely on either direct or circumstantial evidence, as noted in the footnote. But this does not mean that sworn denials of a conspiracy must be automatically ignored because plaintiffs have the option of relying on circumstantial evidence. To the contrary, as this Court has held, such testimony is entitled to weight. *In re McWane*, 155 F.T.C. at \*267-68 (“sworn testimony from [Respondents] that they ... did not discuss and agree to [not compete] ... is direct evidence contrary to the asserted agreement ... and is entitled to weight.”).

51. Respondents’ executives’ denials do not offset the documentary evidence supporting an inference of agreement.

***Response:***

Complaint Counsel’s attempt to lump Respondents together in this proposed conclusion is improper and skirts their burden to prove participation in the alleged conspiracy as to each Respondent. *In re Zinc Antitrust Litig.*, 155 F. Supp. 3d 337, 384 (S.D.N.Y. 2016) (noting that plaintiffs should be “admonished” for “resorting to ... group pleading.”). The documentary evidence is very different as to each Respondent. (*E.g.*, S. Reply 38-39). As noted in Respondents’ post-trial briefs, the proposed conclusion is not supported by the documentary evidence or the law.

**D. Claims of Independent Business Justification Are No Defense to an Unlawful Conspiracy**

52. Whether conspiracy conduct is consistent with independent business justifications does not preclude a finding of collusion.<sup>45</sup>

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<sup>45</sup> *Standard Oil*, 251 F.2d at 211 (“[I]f there is sufficient evidence to support a finding that a merchant entered into such an agreement, combination, or conspiracy, the fact that his individual refusal to deal may be explainable as a reasonable business decision is not excusatory of liability.”).

**Response:**

*Standard Oil* simply notes that once an agreement is proven, independent justifications may not be an affirmative “defense” to an illegal conspiracy. That is, if there were *direct evidence of a conspiracy*, the fact that the conspirators were acting in their unilateral self-interest would not negate liability.

But in a circumstantial case, such evidence undermines any inference of a conspiracy. *E.g., In re Baby Food Antitrust Litig.*, 166 F.3d at 132 (evidence of “independent pricing determined by market conditions at the time, profit margins, and the effect of price increases or decreases on sales volume and distribution ... *negates* the plaintiffs’ inference of conscious parallelism.”).

53. “It is of no consequence, for purposes of determining whether there has been a combination or conspiracy under § 1 of the Sherman Act, that each party acted in its own lawful interest.”<sup>46</sup>

**Response:**

The proposed conclusion is only true where a conspiracy has been proved with direct evidence, as in *General Motors*. *General Motors* “does not preclude the possibility that a defendant may rely upon circumstantial evidence of its own self-interest or actions taken inconsistent with the scope of the alleged conspiracy as a means to argue that it never engaged in an agreement in the first place.” *In re Processed Egg Prods. Antitrust Litig.*, 2016 WL 3912843, at \*4 (E.D. Pa. 2016). To hold otherwise would allow Complaint Counsel to present a circumstantial case with evidence of acts against self-interest but preclude defendants from presenting the same type of evidence. The law is not so one-sided. *Id.* (“If circumstantial evidence is available to one litigant ... there is no justification

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<sup>46</sup> *United States v. Gen. Motors Corp.*, 384 U.S. 127, 142 (1966).

for rejecting the symmetry of permitting the other side use of circumstantial evidence as well.”).

54. In *United States v. North Dakota Hospital Ass’n*, an agreement among hospitals not to grant discounts to Indian Health Services and “to adhere to [the hospitals’] independently developed, preexisting policies against granting [such] discounts” was nonetheless an unreasonable restraint where “the effect of defendants’ agreement was to foreclose any potential competition.”<sup>47</sup>

***Response:***

Like *General Motors* in the prior proposed conclusion, *North Dakota Hospital* involved “direct evidence of an express agreement.” *U.S. v. North Dakota Hosp. Ass’n*, 640 F. Supp. 1028, 1036. Independently developed policies may not be an affirmative defense to direct evidence of an agreement, but they would negate an inference of agreement in a circumstantial case of the type Complaint Counsel attempts to bring. *E.g.*, *In re Baby Food Antitrust Litig.*, 166 F.3d at 132 (evidence of “independent pricing determined by market conditions at the time, profit margins, and the effect of price increases or decreases on sales volume and distribution ... *negates* the plaintiffs’ inference of conscious parallelism.”).

55. In *Apple*, “the fact that Apple’s conduct was in its own economic interest in no way undermines the inference that it entered an agreement to raise ebook prices.”<sup>48</sup>

***Response:***

As with *General Motors* and *North Dakota Hospital* in the prior two proposed conclusions, *Apple* was a direct evidence case. There, it was undisputed that publishers were “acting in concert” through Apple, but Apple argued it was an “unwitting[.]” participant and acted consistent with its “independent business interests.” *United States v.*

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<sup>47</sup> 640 F. Supp. 1028, 1036-37 (D.N.D. 1986).

<sup>48</sup> See *United States v. Apple, Inc.*, 791 F.3d 290, 318 (2d Cir. 2015).

*Apple, Inc.*, 791 F.3d 290, 316, 318 (2d Cir. 2015). As such, the direct evidence proved an agreement in *Apple* to which independent self-interest was not a defense.

Here, in contrast to the evidence in *Apple*, Complaint Counsel has not shown through direct evidence (or otherwise) that Respondents entered into an agreement. Thus, evidence of “independent pricing determined by market conditions at the time, profit margins, and the effect of price increases or decreases on sales volume and distribution ... *negates* the plaintiffs’ inference of conscious parallelism.” *In re Baby Food Antitrust Litig.*, 166 F.3d at 132.

56. Respondents’ claims that refusing to discount to buying groups was in their economic interests, (while contradicted by the documentary evidence and expert testimony) do not prevent a finding of a horizontal agreement.

***Response:***

Complaint Counsel’s attempt to lump Respondents together in this proposed conclusion is improper and skirts their burden to prove participation in the alleged conspiracy as to each Respondent. *In re Zinc Antitrust Litig.*, 155 F. Supp. 3d 337, 384 (S.D.N.Y. 2016) (noting that plaintiffs should be “admonished” for “resorting to ... group pleading.”).

As noted in Respondents’ post-trial briefing, the documentary evidence and expert testimony (including Complaint Counsel’s expert) show that Respondents each acted in their own economic self-interest with respect to buying groups. Such evidence “*negates* the plaintiffs’ inference of conscious parallelism.” *In re Baby Food Antitrust Litig.*, 166 F.3d at 132.

**E. Imperfect Compliance Does Not Negate the Existence of an Agreement**

57. Perfect compliance with an anticompetitive agreement is not necessary to prove an agreement in violation of Section 1.<sup>49</sup>

***Response:***

In the absence of direct evidence of a conspiracy, plaintiffs must prove parallel conduct along with plus factors that tend to exclude the possibility of unilateral or oligopolistic interdependent behavior. Evidence that defendants acted differently prevents a finding of parallel conduct. While this does not preclude a direct evidence case, it does preclude a circumstantial evidence case based on parallel conduct and plus factors.

Likewise, where plaintiffs have direct evidence of conspiracy, proof of compliance with the agreement is not required. But that principle does not apply absent such direct evidence. Put simply, conduct contrary to the conspiracy cannot simply be dismissed as “cheating,” for doing so improperly assumes the existence of the conspiracy. *In re McWane, Inc.*, 155 F.T.C. at \*260 (“the cases” holding that an agreement can be inferred from “complaints about cheating” involved “independent proof of the underlying agreement allegedly ‘breached’”); *see also id.* at 241 (“to accept Complaint Counsel’s inference that any increase in Project Pricing during this period was the result of a collapsed conspiracy, rather than a common reaction to the competitive environment, would require presuming the existence of the conspiracy in the first instance, which is improper”); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1023, 1033 (8th Cir. 2000) (“[A] litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly.”).

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<sup>49</sup> *Beaver*, 515 F.3d at 739 (“[E]vidence of cheating certainly does not, by itself, prevent the government from proving a conspiracy.”).



58. Section 1 condemns the *agreement*, as that is the trigger for danger to the marketplace.<sup>50</sup>

***Response:***

Section 1 condemns only *unreasonable* agreements. *Standard Oil Co. v. United States*, 221 U.S. 1, 60-68 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106, 178-181 (1911); *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289 (1985) (“Whether [an agreement] violates § 1 of the Sherman Act depends on whether it is adjudged an *unreasonable* restraint.”). *United States v. Beaver*, which involved a conviction for a criminal price-fixing conspiracy, is inapplicable to the present matter, involving an alleged agreement regarding middle-men where robust competition to end customers remained unaffected. Here, as explained in Respondents’ post-trial briefing, Complaint Counsel has failed to present prior judicial or empirical economic evidence to establish that the alleged agreement unreasonably restricts competition.

59. Once an anticompetitive agreement is established, whether actors performed the agreement perfectly or successfully is immaterial to the question of liability.<sup>51</sup>

***Response:***

While the proposed conclusion is true enough in itself, it should be noted that conduct contrary to the conspiracy cannot simply be dismissed as “cheating,” for doing so improperly assumes the existence of the conspiracy. Non-parallel conduct cannot be disregarded or explained away as evidence of “cheating” absent extrinsic evidence independently establishing the existence of a conspiracy. *In re McWane, Inc.*, 155 F.T.C.

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<sup>50</sup> *Id.*

<sup>51</sup> *Foley*, 598 F.2d at 1333 (“Since the agreement itself, not its performance, is the crime of the conspiracy, the partial non-performance of [defendant]. . . does not preclude a finding that it joined the conspiracy.”); *Plymouth Dealers’ Ass’n of N. Cal. v. United States*, 279 F.2d 128, 132 (9th Cir. 1960) (“[O]nce the agreement to fix a price is made . . . it is ‘immaterial whether the agreements were ever actually carried out, whether the purpose of the conspiracy was accomplished in whole or in part, or whether an effort was made to carry the object of the conspiracy into effect.’”) (quoting *United States v. Trenton Potteries Co.*, 273 U.S. 392, 402 (1927)).

at \*260 (“the cases” holding that an agreement can be inferred from “complaints about cheating” involved “independent proof of the underlying agreement allegedly ‘breached’”); *see also id.* at 241 (“to accept Complaint Counsel’s inference that any increase in Project Pricing during this period was the result of a collapsed conspiracy, rather than a common reaction to the competitive environment, would require presuming the existence of the conspiracy in the first instance, which is improper”); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1023, 1033 (8th Cir. 2000) (“[A] litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly.”).

60. Just as a breach of contract does not negate the existence of a contract, nor does imperfect compliance negate the existence of an anticompetitive agreement.<sup>52</sup>

***Response:***

The proposed conclusion improperly first assumes the existence of the conspiracy and then interprets the evidence in that light. To continue the contract analogy, in order for there to be a breach of contract, one must first prove the existence of a valid contract. An alleged breach does not mean there was a contract in the first place.

Non-parallel conduct thus cannot be disregarded or explained away as evidence of “cheating” absent extrinsic evidence independently establishing the existence of a conspiracy. *In re McWane, Inc.*, 155 F.T.C. at \*260 (“the cases” holding that an agreement can be inferred from “complaints about cheating” involved “independent proof of the underlying agreement allegedly ‘breached’”); *see also id.* at 241 (“to accept Complaint Counsel’s inference that any increase in Project Pricing during this period was the result of a collapsed conspiracy, rather than a common reaction to the competitive environment,

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<sup>52</sup> *Beaver*, 515 F.3d at 739.

would require presuming the existence of the conspiracy in the first instance, which is improper”); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1023, 1033 (8th Cir. 2000) (“[A] litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly.”).

61. In *In re Brand Name Prescription Drugs Antitrust Litigation*, as here, the defendants’ assertions of working with buying groups to disprove a conspiracy targeting buying groups did not “erase the factual question of whether the defendants joined the conspiracy.”<sup>53</sup>

***Response:***

Incorrect. Complaint Counsel’s reliance on *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 615 (7th Cir. 1997), and *United States v. Foley*, 598 F.2d 1323 (4th Cir. 1979) is misplaced. Both cases involved direct evidence of a conspiracy and did not rely on inferences from conduct. In *Brand Name Prescription Drugs*, plaintiffs introduced “smoking gun” evidence of an agreement; unlike Schein’s consistent work with buying groups and Patterson’s occasional work with buying groups, the defendants in that case did not start working with buying groups until after suit was filed, and the case was on summary judgment, “constru[ing] the evidence as favorably to the plaintiffs as the record permits.” 123 F.3d at 614. After trial, in contrast, if “the evidence points equally to two or more inferences, an objective fact finder would not decide the inference in favor of the party with the burden of proof,” here, Complaint Counsel. *In re McWane, Inc. &*

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<sup>53</sup> 123 F.3d 599, 615 (7th Cir. 1997); *see also Foley*, 598 F.2d at 1332-34 (describing various defendants as not having perfectly complied with the agreement, noting one did not comply thirty percent of the time, and stating, “the partial non-performance of [defendant] does not preclude a finding that it joined the conspiracy”).

*Star Pipe Prods., Ltd.*, 155 F.T.C. 903, at \*268 (2013). Here, as explained in Respondents' post-trial briefing, the evidence weighs decidedly in Respondents' favor.

Likewise in *Foley*, a pre-*Matsushita* case, the government relied solely on evidence of cartel communications to prove a conspiracy.

Here, in contrast, Complaint Counsel has disclaimed any direct evidence case against Respondents and seeks to build a circumstantial case based on inferences from Respondents' conduct. In such a case, Schein's longstanding and consistent business with buying groups negates any inference of participation in the alleged conspiracy. Likewise, Patterson's occasional work with what it considered buying groups, and its consistent evaluation of buying groups throughout the alleged conspiracy, negates such an inference. Behavior contrary to "the existence of a conspiracy" – such as Respondents dealing with allegedly boycotted firms – precludes a finding of parallel conduct and undermines any circumstantial inference of a conspiracy. *See, e.g., Anderson News, L.L.C.*, 899 F.3d at 105 (finding no evidence of parallel conduct where "[m]any defendants ... undertook independent efforts to negotiate with" the allegedly boycotted plaintiff); *see also In re McWane, Inc.*, 155 F.T.C. at \*259 (rejecting conspiracy claim, in part, because the documentary evidence stated that one alleged conspirator was "using 'project pricing to get every order,' which is inconsistent with the existence of an agreement ... to curtail Project Pricing.").

Thus, a circumstantial case asserting an alleged boycott cannot stand where a defendant did precisely what the plaintiff claimed the defendant had promised not to do. *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1368 (3d Cir. 1996) (alleged refusal to grant first-run licenses to plaintiff failed where "the evidence is to the contrary; [plaintiff]

received a first-run license from Miramax”); *see also In re Baby Food Antitrust Litig.*, 166 F.3d at 127 n.9 (dismissing claim that Heinz’s decision not to enter the Chicago market was the result of an unlawful “truce,” given Heinz’s “formal, written proposal to [a]... large Chicago supermarket chain [which] rejected the proposal”).

### III. RESPONDENTS’ AGREEMENT IS UNLAWFUL *PER SE*

62. It is long-settled law that agreements among horizontal competitors to fix prices are illegal *per se*.<sup>54</sup>

***Response:***

This is not a case about fixing prices; it is about an alleged boycott of buying groups. The cases cited by Complaint Counsel are thus inapplicable to the present matter, involving an alleged agreement regarding middle-men where robust competition to customers remained unaffected. Here, Complaint Counsel has failed to present prior judicial precedent to establish that the alleged agreement, even if proven, would be illegal *per se*.

63. Even where “not . . . aimed at complete elimination of price competition,” horizontal price-fixing poses a “threat to the central nervous system of the economy’ by creating a dangerously attractive opportunity for competitors to enhance their power at the expense of others,” and is illegal *per se*.<sup>55</sup>

***Response:***

The *Apple* decision is inapplicable to the present matter, involving an alleged agreement regarding middle-men where robust competition to customers remained

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<sup>54</sup> *Nat’l Soc’y of Prof. Eng’rs v. United States*, 435 U.S. 679, 692 (1978) (quoting *United States v. Container Corp.*, 393 U.S. 333, 337 (1969) (“[A]n agreement that ‘interferes with the setting of price by free market forces’ is illegal on its face.”); accord *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 646-47 (1980) (price-fixing agreements are “plainly anticompetitive” and presumed illegal without further examination); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (“[P]rice-fixing agreements are unlawful *per se* under the Sherman Act and [ ] no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.”).

<sup>55</sup> *Apple*, 791 F.3d at 326 (quoting *Socony-Vacuum Oil*, 310 U.S. at 224 n.59).

unaffected. Here, Complaint Counsel has failed to present prior judicial precedent to establish that the alleged agreement, even if proven, would be illegal *per se*. See *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986) (In group boycott cases “the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor—a situation obviously not present here.”).

64. “[P]rice-fixing includes more than the mere establishment of uniform prices.”<sup>56</sup>

**Response:**

*Socony-Vacuum Oil* is inapplicable to the present matter, involving an alleged agreement regarding middle-men where robust competition to customers remained unaffected. Here, the alleged agreement is distinct from the price-fixing agreements with which courts have extensive experience and which they confidently can conclude “always or almost always tend to restrict competition.” *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979).

65. “[A]n agreement to eliminate discounts” is one such type of agreement that “falls squarely within the traditional *per se* rule against price fixing.”<sup>57</sup>

**Response:**

This case is not about an agreement to “eliminate discounts.” Rather, it is about an alleged agreement to boycott buying groups. The cases cited by Complaint Counsel are thus inapplicable to the present matter, involving an alleged agreement regarding middle-

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<sup>56</sup> *Socony-Vacuum Oil*, 310 U.S. at 222.

<sup>57</sup> *Catalano*, 446 U.S. at 648; *accord TFWS, Inc. v. Schaefer*, 242 F.3d 198, 210 (4th Cir. 2001) (“[V]olume discount ban is [] a *per se* violation of the Sherman Act.”); *United States v. Stop & Shop Cos.*, Crim. No. B 84-51, 1984 U.S. Dist. LEXIS 22103, at \*1 (D. Conn. Nov. 8, 1984) (“[A]s a matter of substantive law, a conspiracy to discontinue double coupons is a form of price-fixing and therefore a *per se* violation of the Sherman Act.”); *Areeda & Hovenkamp 2022c* (*per se* rule governs “agreements eliminating or restricting discounts or rebates”); see also *Gen. Motors*, 384 U.S. at 145 (“Elimination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the Act.”).

men where robust competition to customers remained unaffected. Here, as explained in the alleged agreement is distinct from the agreements to eliminate discounts with which courts have extensive experience and which they confidently can conclude “always or almost always tend to restrict competition.” *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979).

66. In *Catalano, Inc. v. Target Sales, Inc.*, an agreement among horizontal competitors to eliminate interest free credit was condemned, as both the credit terms and the discount were an “inseparable part of the price.”<sup>58</sup>

**Response:**

The conduct here – an agreement not to do business with buying groups – is not an “inseparable part of price.” In sharp contrast to the facts of the present matter, the *Catalano* decision did not involve an alleged agreement with respect to intermediaries or middlemen where robust competition to customers continued unaffected. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 644-45 (1980). *Catalano* involved an agreement among wholesalers with respect to an element of prices paid by retailers – the customers of the wholesalers.

67. An agreement among rivals to boycott a particular customer is also plainly anticompetitive. “[A]ny agreement by a group of competitors to boycott a particular buyer or group of buyers is illegal *per se*”<sup>59</sup> “[T]he Sherman Act makes it an offense for respondents to agree among themselves to stop selling to particular customers.”<sup>60</sup>

**Response:**

Certain types of group boycotts are *per se* illegal. In this case, however, buying groups are not customers. The cases cited by Complaint Counsel are thus inapplicable to

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<sup>58</sup> 446 U.S. at 648.

<sup>59</sup> *Fed. Maritime Comm’n v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 250 (1968); accord *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 543 (1978).

<sup>60</sup> *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951), overruled on other grounds by *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 763-64 (1984).

the present matter. Respondents are not alleged to have agreed to boycott any customers. An alleged agreement regarding intermediaries or middle-men, where robust competition to customers remained unaffected, is distinct from the boycotts of customers with which courts have extensive experience and which they confidently can conclude “always or almost always tend to restrict competition.” *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979).

68. In *FTC v. Superior Court Trial Lawyers Ass’n*, the lawyers’ “concerted refusal to serve an important customer” (indigent criminal defendants) to compel higher attorney fees was held to be the essence of a *per se* price-fixing scheme.<sup>61</sup>

***Response:***

The boycotted entity in *Superior Court Trial Lawyers Association* was the state, which paid the fees for such indigent representation. Here, the customers are the dentists, and there is no allegation of any boycott of any dentist. *FTC v. Superior Court Trial Lawyers Ass’n* is thus inapplicable to the present matter. Respondents are not alleged to have engaged in a concerted refusal to serve any customer. An alleged agreement regarding intermediaries or middle-men, where robust competition to customers remained unaffected, is distinct from the boycotts of customers with which courts have extensive experience and which they confidently can conclude “always or almost always tend to restrict competition.” *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979).

69. Respondents’ agreement not to discount to buying groups constituted a *per se* offense under Sherman Act Section 1, 15 U.S.C. §1, and FTC Act Section 5, 15 U.S.C. § 45(a).

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<sup>61</sup> 493 U.S. 411, 415-17, 422-23 (1990); *accord* Areeda & Hovenkamp, 1901e (“[T]he concerted refusal to deal directed at the customer itself is simply a price-fixing device.”).



**Response:**

The proposed conclusion improperly assumes the existence of the alleged conspiracy, and Respondents' participation in it, both of which Complaint Counsel has failed to prove. Furthermore, Complaint Counsel has failed to cite to judicial precedent to establish that an alleged agreement regarding intermediaries or middle-men, where robust competition to customers remained unaffected, is a *per se* under either Section 1 of the Sherman Act, 15 U.S.C. § 1, or Section 5 of the FTC Act, 15 U.S.C. § 45(a). *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986) (In group boycott cases “the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor—a situation obviously not present here.”).

#### IV. RESPONDENTS' AGREEMENT IS UNLAWFUL UNDER THE TRUNCATED RULE OF REASON

70. “When restraints are not *per se* unlawful, and their net impact on competition not obvious, the conventional rule-of-reason approach requires courts to engage in a thorough analysis of the relevant market and the effects of the restraint in that market.”<sup>62</sup>

**Response:**

No response.

71. “[E]ven when practices are not condemned by a *per se* rule, a full[-]blown rule-of-reason analysis is not always required.”<sup>63</sup> A truncated rule of reason (or inherently suspect) analysis is appropriate when an “observer with even a rudimentary understanding of economics could conclude that the arrangement in question would have an anticompetitive effect.”<sup>64</sup> Thus, this

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<sup>62</sup> *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 825 (citation omitted).

<sup>63</sup> *N. Tx. Specialty Physicians v. FTC*, 528 F.3d 346, 360 (5th Cir. 2008) (citing *Texaco, Inc. v. Dagher*, 547 U.S. 1, 7 n.3 (2006) (“To be sure, we have applied the quick look doctrine to business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability.”)); *accord Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770-71 (1999).

<sup>64</sup> *Cal. Dental*, 526 U.S. at 770 (1999).

analysis applies “[i]f, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition.”<sup>65</sup>

**Response:**

No response, other than to note that truncated rule-of-reason modes of analysis are disfavored and inappropriate for this case. *See Cal. Dental Ass’n. v. FTC*, 526 U.S. 756 (1999) (Commission erred by applying “abbreviated” or “quick look” rule of reason).

72. Under this standard, the agreement is presumed anticompetitive, and Respondents can avoid liability only by advancing a cognizable, plausible procompetitive justification for the agreement.<sup>66</sup>

**Response:**

The proposed conclusion improperly assumes the existence of the alleged agreement, and Respondents’ participation in it, both of which Complaint Counsel has failed to prove.

Even if a “truncated rule of reason” applied to this case, it does not automatically result in a presumption of harm to competition. Rather, as noted in *Polygram Holding*, the Court must “see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principle tendency of a restriction will follow from a quick (or at least quicker) look, in place of a sedulous one.” 416 F.3d 29, 35 (D.C. Cir. 2005) (the court “must determine whether it is obvious from the nature of the challenged conduct that it will likely harm consumers”). Only if Complaint Counsel sustains their burden of showing such obviousness does the analysis move to the second

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<sup>65</sup> *Polygram Holding, Inc. v. FTC* (“*Polygram Holding II*”), 416 F.3d 29, 36 (D.C. Cir. 2005); *accord In re Polygram Holding, Inc.* (“*Polygram Holding I*”), 136 F.T.C. 310, 344 (July 24, 2003), *aff’d*, *Polygram Holding II*, 416 F.3d 29 (D.C. Cir. 2005) (“A plaintiff may avoid full rule of reason analysis . . . if it demonstrates that the conduct at issue is inherently suspect owing to its likely tendency to suppress competition.”); *see also NCAA v. Bd. of Regents of Univ. of Okla.* 468 U.S. 85, 109 n.39 (1984) (“[T]he rule of reason can sometimes be applied in the twinkling of an eye.”) (internal quotation omitted).

<sup>66</sup> *Polygram Holding II*, 416 F.3d at 35-36; *PolyGram Holding I*, 136 F.T.C. at 345.

step and allow defendants to present “some plausible (and legally cognizable) competitive justification.” *Id.* at 35-36.

Furthermore, contrary to Complaint Counsel’s assertion, a justification may take one of two forms: either (1) evidence that a practice that is “competitively suspect as a general matter may not be expected to have adverse consequences in the context of the particular market in question,” or (2) reasons why the practice is likely to have beneficial effects for consumers. *Id.* at 36 (the defendant “must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm.”). Respondents have presented substantial evidence that dentists have not suffered anticompetitive harm, while Complaint Counsel has presented none.

No matter what framework is used, “[a]t bottom, the Sherman Act requires the court to ascertain whether the challenged restraint hinders competition.” *Id.* at 36.

**A. Respondents’ Agreement is Inherently Suspect**

73. Certain categories of restraints almost always tend to raise price or reduce output, and hence are treated as “inherently suspect,” or presumptively anticompetitive.<sup>67</sup>

***Response:***

No response.

74. Respondents’ agreement not to discount to buying groups is presumptively anticompetitive because it (1) restrained competitive bidding and (2) prohibited discounting to a

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<sup>67</sup> *In re Realcomp II Ltd.*, Docket No. 9320, 2007 WL 6936319, at \*21 (FTC Dec. 10, 2007); *Polygram Holding I*, 136 F.T.C. at 344-45.

customer segment. As such, the agreement deprived independent dentists of the opportunity to aggregate their purchasing volume to increase their bargaining power vis-a-vis the Respondents.

***Response:***

The proposed conclusion improperly assumes the existence of the alleged agreement, and Respondents' participation in it, both of which Complaint Counsel has failed to prove.

Complaint Counsel has failed to present any empirical economic evidence that an alleged agreement regarding intermediaries or middle-men, but not affecting ongoing robust competition for the business of customers, almost always tends to raise price or reduce output. *Cf. In re Polygram Holding, Inc.*, 136 F.T.C. 310, 354-58, 355 n. 52 (citing and discussing 17 published empirical econometric studies establishing a correlation between advertising restraints and higher prices in support of conclusion that a restraint on advertising is inherently suspect); *In re 1-800 Contacts, Inc.*, Dkt. 9372 (Nov. 14, 2018) at 19-20 (citing expert testimony referring to 21 published empirical econometric studies in support of conclusion that a restraint on advertising is inherently suspect).

No matter what framework is used, “[a]t bottom, the Sherman Act requires the court to ascertain whether the challenged restraint hinders competition.” *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005). As noted in Respondents' responses to Complaint Counsel's proposed findings of fact, Complaint Counsel has failed to prove any restraint in competitive bidding, any discount that dentists would have received in the but-for world that they did not receive in the actual world, or any other harm to competition. (*E.g.*, SRF 1412-45).

75. Agreements suppressing bidding are presumptively unlawful.<sup>68</sup> “[N]o elaborate industry analysis is required to demonstrate the anticompetitive character of . . . an agreement [that] operates as an absolute ban on competitive bidding. [Such a ban] ‘impedes the ordinary give and take of the market place.’”<sup>69</sup>

***Response:***

Complaint Counsel has failed to present any empirical economic evidence that an alleged agreement regarding intermediaries or middle-men, but not affecting ongoing robust competition for the business of customers, suppresses bidding or operates as an absolute ban on competitive bidding. *Cf. In re Polygram Holding, Inc.*, 136 F.T.C. 310, 354-58, 355 n.52 (citing and discussing 17 published empirical econometric studies establishing a correlation between advertising restraints and higher prices in support of conclusion that a restraint on advertising is inherently suspect); *In re 1-800 Contacts, Inc.*, Dkt. 9372 (Nov. 14, 2018) at 19-20 (citing expert testimony referring to 21 published empirical econometric studies in support of conclusion that a restraint on advertising is inherently suspect).

76. Similarly, agreements to refuse discounts are “inherently suspect because such restraints by their nature tend to raise prices and to reduce output.”<sup>70</sup>

***Response:***

Complaint Counsel has failed to present any empirical economic evidence that an alleged agreement regarding intermediaries or middle-men, but not affecting ongoing

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<sup>68</sup> *Nat'l Soc'y of Prof Eng'rs*, 435 U.S. at 692; *see also FTC v. Actavis, Inc.*, 570 U.S. 136, 157 (2013) (eliminating the “risk of competition” is a relevant antitrust harm).

<sup>69</sup> *Nat'l Soc'y of Prof Eng'rs*, 435 U.S. at 692-95.

<sup>70</sup> *Polygram Holding I*, 136 F.T.C. at 353, 382-83 (“The anticompetitive nature of the agreement not to discount is obvious. [T]his is simply a form of price fixing, and is presumptively anticompetitive . . . likely to result in higher prices to consumers, restriction of output, and reduced allocative efficiency. . . . Respondents’ restraints on price discounting and advertising are inherently suspect, because experience and economic learning consistently show that restraints of this sort dampen competition and harm consumers.”); *see also N.C. State Bd. of Dental Exam'ers*, 717 F.3d 359, 374 (4th Cir. 2013) (“It is not difficult to understand that forcing low-cost teeth-whitening providers from the market has a tendency to increase a consumer’s price for that service.”); *In re Mass. Bd. of Registration in Optometry*, Docket No.

robust competition for the business of customers, by their nature tend to raise prices or reduce output. *Cf. In re Polygram Holding, Inc.*, 136 F.T.C. 310, 354-58, 355 n.52 (citing and discussing 17 published empirical econometric studies establishing a correlation between advertising restraints and higher prices in support of conclusion that a restraint on advertising is inherently suspect); *In re 1-800 Contacts, Inc.*, Dkt. 9372 (Nov. 14, 2018) at 19-20 (citing expert testimony referring to 21 published empirical econometric studies in support of conclusion that a restraint on advertising is inherently suspect).

77. Respondents' agreement not to discount to buying groups is presumptively anticompetitive, especially as buying groups are a customer segment whose intrinsic purpose is to aggregate purchasing power to achieve discounted prices for their members.

***Response:***

The proposed conclusion improperly assumes the existence of the alleged agreement, and Respondents' participation in it, both of which Complaint Counsel has failed to prove. Moreover, as noted in Schein's responses to Complaint Counsel's proposed findings of fact, buying groups are not a "customer segment" and do not actually aggregate purchasing power despite their claims to the contrary. (*E.g.*, SRF 67; JF 60). Indeed, they do not buy anything. (PF 483). Complaint Counsel has failed to present any empirical economic evidence that an alleged agreement not to discount to buying groups, which act as intermediaries or middle-men, but not affecting robust competition for the business of customers, is presumptively anticompetitive. *Cf. In re Polygram Holding, Inc.*, 136 F.T.C. 310, 354-58, 355 n.52 (citing and discussing 17 published empirical econometric studies establishing a correlation between advertising restraints and higher prices in support of conclusion that a restraint on advertising is inherently suspect); *In re*

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9195, 1988 FTC LEXIS 159, at \*126 (June 13, 1988) (an agreement not to advertise discounts was "especially pernicious" as it eliminated a form of price competition).

*I-800 Contacts, Inc.*, Dkt. 9372 (Nov. 14, 2018) at 19-20 (citing expert testimony referring to 21 published empirical econometric studies in support of conclusion that a restraint on advertising is inherently suspect).

78. The inquiry into Complaint Counsel’s burden ends with evidence of Respondents’ agreement not to discount to buying groups—a presumptively anticompetitive agreement.

***Response:***

The proposed conclusion improperly assumes the existence of the alleged agreement, and Respondents’ participation in it, both of which Complaint Counsel has failed to prove. Furthermore, the proposed conclusion would be an incorrect statement of the law even if Complaint Counsel had proved the existence of an agreement for the reasons set forth below.

Complaint Counsel has failed to present any empirical economic evidence that an alleged agreement not to discount to buying groups, which act as intermediaries or middlemen, but not affecting robust competition for the business of customers, is presumptively anticompetitive. *Cf. In re Polygram Holding, Inc.*, 136 F.T.C. 310, 354-58, 355 n. 52 (citing and discussing 17 published empirical econometric studies establishing a correlation between advertising restraints and higher prices in support of conclusion that a restraint on advertising is inherently suspect); *In re I-800 Contacts, Inc.*, Dkt. 9372 (Nov. 14, 2018) at 19-20 (citing expert testimony referring to 21 published empirical econometric studies in support of conclusion that a restraint on advertising is inherently suspect).

Furthermore, even if Complaint Counsel had made such a showing, Respondents could respond by presenting either (1) evidence that a practice that is “competitively suspect as a general matter may not be expected to have adverse consequences in the context of the particular market in question,” or (2) reasons why the practice is likely to

have beneficial effects for consumers. *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005) (the defendant “must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm.”). Respondents have presented substantial evidence that dentists have not suffered anticompetitive harm.

No matter what analytical framework is used, “[a]t bottom, the Sherman Act requires the court to ascertain whether the challenged restraint hinders competition.” *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005). As noted in Respondents’ responses to Complaint Counsel’s proposed findings of fact, Complaint Counsel has failed to prove any restraint in competitive bidding, any discount that dentists would have received in the but-for world that they did not receive in the actual world, or any other harm to competition. (*E.g.*, SRF 1412-45).

79. Once anticompetitive harm is presumed, the burden of production shifts to the defendant to provide a substantial procompetitive justification.<sup>71</sup>

***Response:***

Even if a “truncated rule of reason” applied to this case, it does not automatically result in a presumption of harm to competition. Rather, as noted in *Polygram Holding*, the Court must “see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principle tendency of a restriction will follow from a quick (or at least quicker) look, in place of a sedulous one.” 416 F.3d at 35 (the court “must determine whether it is obvious from the nature of the challenged conduct that

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<sup>71</sup> *Polygram Holding I*, 136 F.T.C. at 345, 349-50 (“If the challenged restrictions are of a sort that generally pose significant competitive hazards and thus can be called inherently suspect, then the defendant can avoid summary condemnation only by advancing a legitimate justification for those practices. . . . [T]he defendant must come forward with a substantial reason why there are offsetting procompetitive benefits.”).



it will likely harm consumers”). Only if Complaint Counsel sustains their burden of showing such obviousness does the analysis move to the second step and allow defendants to present “some plausible (and legally cognizable) competitive justification.” *Id.* at 35-36.

Even if Complaint Counsel had presented evidence to support a presumption of anticompetitive harm (which it has not), contrary to Complaint Counsel’s assertion, a defendant may respond by presenting either (1) evidence that a practice that is “competitively suspect as a general matter may not be expected to have adverse consequences in the context of the particular market in question,” or (2) reasons why the practice is likely to have beneficial effects for consumers. *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005) (the defendant “must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm.”). Respondents have presented substantial evidence that dentists have not suffered anticompetitive harm.

No matter what framework is used, “[a]t bottom, the Sherman Act requires the court to ascertain whether the challenged restraint hinders competition.” *Id.* at 36. As noted in Respondents’ responses to Complaint Counsel’s proposed findings of fact, Complaint Counsel has failed to prove any restraint in competitive bidding, any discount that dentists would have received in the but-for world that they did not receive in the actual world, or any other harm to competition. (SRF 1412-45).

**B. Respondents Have Offered No Plausible, Cognizable Justification for their Agreement**

80. To avoid liability, Respondents must provide cognizable justifications, which must explain how the presumptively anticompetitive restraint at issue may permit defendants to increase output or improve quality, service, or innovation.<sup>72</sup>

***Response:***

Even if a “truncated rule of reason” applied to this case, it does not automatically result in a presumption of harm to competition. Rather, as noted in *Polygram Holding*, the Court must “see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principle tendency of a restriction will follow from a quick (or at least quicker) look, in place of a sedulous one.” 416 F.3d at 35 (the court “must determine whether it is obvious from the nature of the challenged conduct that it will likely harm consumers”). Only if Complaint Counsel sustains their burden of showing such obviousness does the analysis move to the second step and allow defendants to present “some plausible (and legally cognizable) competitive justification.” *Id.* at 35-36; *see also In re Polygram Holding, Inc.*, 136 F.T.C. 310, 345 (2003) (under truncated rule of reason, plaintiff must “demonstrate[] that the conduct at issue is inherently suspect owing to its likely tendency to suppress competition”).

Complaint Counsel lists procompetitive justifications of improving output, quality, service, or innovation as if they are an exclusive list of justification. They are only illustrative. Justifications can be any “plausible reasons why practices ... may not be expected to have adverse consequences in the context of the particular market in question; or they may consist of reasons why the practices are likely to have beneficial effects for

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<sup>72</sup> *Id.* at 345-47.

consumers.” *Polygram Holding*, 136 F.T.C. at 345 (noting defendant’s initial burden is to “only articulate a legitimate justification”).

81. “The proponent of the restraint bears a heavy burden of establishing an affirmative [benefit] that competitively justifies the demonstrated competitive harm.”<sup>73</sup>

***Response:***

Incorrect. As noted in *Polygram Holding*, defendant’s initial burden is to “only articulate a legitimate justification.” 136 F.T.C. at 345. Once such justifications are articulated, then plaintiff “must make a more detailed showing that the restraints at issue are indeed likely, in the particular context, to harm competition.” *Id.* at 348. Then, if that burden is met, “defendant’s burden to respond ... depend[s] ... upon the quality and amount of evidence that the plaintiff has produced.” *Id.* at 350. At all times, the “plaintiff has the burden of persuasion overall.” *Id.* at 349.

82. Respondents offered no procompetitive justification for their agreement.

***Response:***

The proposed conclusion improperly assumes the existence of the alleged agreement, and Respondents’ participation in it, both of which Complaint Counsel has failed to prove. Indeed, Schein’s business with buying groups and its consistent, deliberate, rational, and unilateral approach to buying groups is uncontradicted evidence of the procompetitive nature of Schein’s conduct. Likewise, Patterson’s occasional business with buying groups and its consistent, independent assessment of them in the context of its overall business strategy was at all times procompetitive. And Benco’s unilateral no-

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<sup>73</sup> *In the Matter of 1-800 Contacts*, Docket No. 9372, Initial Decision, slip op. at 201 (F.T.C. Oct. 27, 2017), available at [https://www.ftc.gov/system/files/documents/cases/docket\\_9372\\_1-800\\_contacts\\_inc.\\_initial\\_decision\\_final\\_redacted\\_public\\_version.pdf](https://www.ftc.gov/system/files/documents/cases/docket_9372_1-800_contacts_inc._initial_decision_final_redacted_public_version.pdf).

middleman policy was pro-competitive, as it allowed Benco to focus its energies elsewhere and compete vigorously on a direct basis for dentists' business.

Furthermore, even if Complaint Counsel had presented evidence to support a presumption of anticompetitive harm (which it has not), Respondents may respond by presenting either (1) evidence that a practice that is "competitively suspect as a general matter may not be expected to have adverse consequences in the context of the particular market in question," or (2) reasons why the practice is likely to have beneficial effects for consumers. *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005) (the defendant "must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm."). Respondents have presented substantial evidence that dentists have not suffered anticompetitive harm.

83. As an anticompetitive agreement without offsetting benefits, Respondents' agreement not to discount to buying groups constitutes an unfair method of competition in violation of FTC Act Section 5, 15 U.S.C. §45(a), and Section 1 of the Sherman Act, 15 U.S.C. § 1.

***Response:***

The proposed conclusion improperly assumes the existence of the alleged agreement, and Respondents' participation in it, both of which Complaint Counsel has failed to prove. The proposed conclusion also improperly assumes the existence of anticompetitive harm despite the absence to empirical economic evidence to support any presumption and substantial record evidence demonstrating the absence of competitive harm to dentists.

**C. Respondents' Agreement Caused Anticompetitive Harm**

84. Where Respondents' agreement is inherently suspect and Respondents lack any cognizable, procompetitive justification for their agreement, no further showing of harm is necessary.

***Response:***

The proposed conclusion improperly assumes the existence of the alleged agreement, and Respondents' participation in it, both of which Complaint Counsel has failed to prove. The proposed conclusion also improperly assumes that the alleged agreement is inherently suspect despite the absence to empirical economic evidence to support any such presumption. The proposed conclusion also ignores Respondents' cognizable justifications in the form of evidence of both the procompetitive nature of their conduct and the absence of competitive harm to dentists.

85. Nonetheless, Complaint Counsel has shown direct evidence, through its expert and other documentary proof, that Respondents' agreement harmed competition.

***Response:***

False. There is neither direct evidence nor reliable expert opinion of harm to competition. Complaint Counsel has failed to prove any restraint in Respondents' bidding, any discount that dentists would have received in the but-for world that they did not receive in the actual world, or any other harm to competition. (SRF 1412-45).

86. Where there is a showing of harm to competition, Complaint Counsel need not show the parties "had market power and that their conduct tended to reduce competition,"<sup>74</sup> which is simply an alternative method of showing harm.

***Response:***

No response, other than to note Complaint Counsel has not shown how Respondents' conduct – their business with buying groups – has harmed competition.

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<sup>74</sup> *Realcomp II*, 2007 WL 6936319, at \*19.

Complaint Counsel has failed to prove any restraint in Respondents' bidding, any discount that dentists would have received in the but-for world that they did not receive in the actual world, or any other harm to competition. (SRF 1412-45).

87. Nonetheless, Complaint Counsel has shown that Respondents have market power in the relevant markets.

***Response:***

This proposed conclusion of law is not a legal issue, but a factual finding. Respondents, therefore, respectfully refer the Court to their respective post-trial briefs and responses to Complaint Counsel's proposed factual findings relating to this issue. As described therein, Complaint Counsel improperly defined the relevant product market, failed to apply the proper geographic market definition, and did not properly assess market power in properly-defined relevant markets.

88. Market power is the collective "ability [of firms] to significantly affect prices and other outcomes in [an antitrust] market."<sup>75</sup>

***Response:***

As explained in Schein's Responses to Complaint Counsel's Proposed Findings of Fact, Complaint Counsel relies exclusively on Dr. Marshall's opinions for their market power assertion, but Dr. Marshall improperly mixed and matched two different sets of data, excluded relevant competition from online and mail-order distributors, and failed to analyze market power in any relevant market, which he defined as being local or regional. (SRF 1593-1600). Dr. Marshall's *own* analysis demonstrates that the existence of just *one* regional distributor renders any attempt to individually or collectively raise prices unprofitable. (SRF 1593-1600).

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<sup>75</sup> *California v. Safeway, Inc.*, 651 F.3d 1118, 1154 (9th Cir. 2011).

89. An antitrust market consists of a relevant product market and a relevant geographic market.<sup>76</sup>

**Response:**

No response.

90. The key factors in identifying the bounds of a relevant product market are “(1) the reasonable interchangeability of use” by consumers and “(2) the cross-elasticity of demand between the product itself and substitutes for it.”<sup>77</sup>

**Response:**

After noting the “two [traditional] factors,” the *Arch Coal* decision continued, “[r]elevant markets will generally include producers who, given product similarity, have the ability to take significant business from each other.” *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 119 (D.D.C. 2004).

91. The relevant geographic market is the “area of effective competition . . . in which the seller operates, and to which the purchaser can practicably turn for supplies.”<sup>78</sup>

**Response:**

The full quotation from *Tampa Electric* is:

[T]he area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies. In short, the threatened foreclosure of competition must be in relation to the market affected.

365 U.S. 320, 327 (1961).

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<sup>76</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).

<sup>77</sup> *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 119 (D.D.C. 2004) (quoting *Brown Shoe*, 370 U.S. at 325); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 157 (D.D.C. 2000); *FTC v. Staples*, 970 F. Supp. 1066, 1074 (D.D.C. 1997).

<sup>78</sup> *Tampa Elec. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961).

92. The relevant product market in which to analyze competitive effects from Respondents' agreement is full-service distribution of dental products and services to independent dentists.

***Response:***

False. As noted in Respondents' Responses to Complaint Counsel's Proposed Findings of Fact, Complaint Counsel has failed to sustain their burden to limit the product market to full-service distribution. (SRF 1522-66). To the extent the court reaches the question of market definition (which is unnecessary in this case because there is no evidence any Respondent entered the alleged agreement), the relevant product market consists of dental distribution services by full-service distributors, online or mail-order distributors, direct-to-dentist manufacturers, and other means by which dentists obtain access to any supplies, equipment, or other services.

93. The relevant geographic market in which to analyze competitive effects from Respondents' agreement is local markets within the United States.

***Response:***

No response, except to note that Complaint Counsel's expert, Dr. Marshall, failed to analyze any alleged competitive effects in any defined local market.

94. Respondents have market power in the provision of full-service distribution of dental products and services to independent dentists in local markets within the United States.

***Response:***

False. As explained in Schein's Responses to Complaint Counsel's Proposed Findings of Fact, Complaint Counsel relies exclusively on Dr. Marshall's opinions for their market power assertion, but Dr. Marshall improperly mixed and matched two different sets of data, excluded relevant competition from online and mail-order distributors, and failed to analyze market power in any relevant market, which he defined as being local or regional. (SRF 1593-1600). Dr. Marshall's *own* analysis demonstrates that the existence



of just *one* regional distributor renders any attempt to individually or collectively raise prices unprofitable. (SRF 1593-1600).

## V. BENCO'S INVITATION TO BURKHART TO JOIN THE AGREEMENT VIOLATES SECTION 5

95. An invitation to collude can justify a remedy under Section 5 of the FTC Act, even if the invitation does not result in an unlawful agreement under Section 1 of the Sherman Act.<sup>79</sup>

### *Response:*

*First*, there is no justifiable remedy as to the recipient of an alleged invitation to collude in the absence of evidence that the “offer” was “accepted.”

*Second*, a rejected invitation has not “actually had [an] effect” on competition, and therefore does not satisfy the Ninth Circuit’s standard for a violation of Section 5 of the FTC Act in the absence of an overt agreement. *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 577 (9th Cir. 1980); *see also* Fed. Trade Comm’n, Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (Aug. 13, 2015) (to be challenged by the Commission under Section 5, an act or practice “must cause, or be likely to cause, harm to competition or the competitive process.”).

Because a rejected invitation does not have an actual effect on competition and creates no prospect of future harm, there is no basis for the Commission to issue an order. *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) (injunctive relief permitted only if there is a “cognizable danger of recurrent violation”); *Borg-Warner Corp. v. F.T.C.*, 746 F.2d 108, 110 (2d Cir. 1984) (no basis for Commission order regarding already terminated conduct); *TRW, Inc. v. F.T.C.*, 647 F.2d 942, 954 (9th Cir. 1981) (no basis for

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<sup>79</sup> *Areeda & Hovenkamp* ¶ 1419d; *see also Liu v. Amerco*, 677 F.3d 489, 494 (1st Cir. 2012) (“[A]n unsuccessful attempt to fix prices . . . [is] pernicious conduct with a clear potential for harm and no redeeming value whatever.”); *Areeda & Hovenkamp* ¶ 1419d (“Solicitation to a conspiracy is dangerous to competition even if it cannot be shown that an ‘offer’ has been ‘accepted.’”).

Commission order when the company was not infringing at the time of the Commission's order absent proof of a "cognizable danger of recurrent violation").

96. An invitation to collude is unlawful where a respondent explicitly or implicitly proposes to a competitor terms of coordination that, if accepted by the competitor, would constitute a violation of the Sherman Act.<sup>80</sup>

***Response:***

A rejected invitation has not "actually had [an] effect" on competition, and therefore does not satisfy the Ninth Circuit's standard for a violation of Section 5 of the FTC Act in the absence of an overt agreement. *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 577 (9th Cir. 1980); *see also* Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015) (to be challenged by the Commission under Section 5, an act or practice "must cause, or be likely to cause, harm to competition or the competitive process.").

An implicit invitation fails to meet the standard set by the Second Circuit because it fails to discriminate properly between normally acceptable business behavior and conduct that is unreasonable or unacceptable, and thus opens the door to arbitrary or capricious administration of Section 5 of the FTC Act. *E.I. du Pont de Nemours & Co., v. FTC*, 729 F.2d 128, 137 (2d Cir. 1984).

97. "The invitation may appear ambiguous, such as when a competitor merely complains to its rival about the latter's 'low price.' Yet, the 'objective' meaning of such a statement to the

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<sup>80</sup> *See In re U-Haul Int'l Inc.*, FTC File No. 081 0157, published at 75 Fed. Reg. 35033, 35034-35 (June 21, 2010); *In re Valassis Commc'ns, Inc.*, Docket No. C-4160, 2006 FTC LEXIS 25, at \*5 (Compl. Apr. 19, 2006) (alleging invitation to collude where respondent stated on earnings call that it would "quote all [competitor's] first right of refusal customers at the floor price."); *In re Precision Moulding Co.*, Docket No. C-3682, 1996 FTC LEXIS 386, at \*3 (Compl. Sept. 3, 1996) (alleging invitation to collude where respondent told competitor that its prices were "ridiculously low" and the competitor need not "give the product away."); *In re YKK (USA) Inc.*, Docket No. C-3445, 1993 FTC LEXIS 161, at \*2-3 (Compl. July 1, 1993) (alleging invitation to collude where respondent sought to urge competitor to desist from offering free installation equipment).

reasonable observer seems clear: the only business rationale for complaining is to induce a higher price.”<sup>81</sup>

***Response:***

An ambiguous invitation fails to satisfy the standard set by the Second Circuit because it fails to discriminate properly between normally acceptable business behavior and conduct that is unreasonable or unacceptable, and thus opens the door to arbitrary or capricious administration of Section 5 of the FTC Act. *E.I. du Pont de Nemours & Co., v. FTC*, 729 F.2d 128, 137 (2d Cir. 1984).

98. Respondent Benco’s complaints about buying groups to Burkhart and its encouraging Burkhart to refuse to discount to buying groups constituted an invitation to collude, in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

***Response:***

As explained in Benco’s post-trial briefing, the statements of Benco representatives did not constitute an invitation to collude.

A rejected invitation has not “actually had [an] effect” on competition, and therefore does not satisfy the Ninth Circuit’s standard for a violation of Section 5 of the FTC Act in the absence of an overt agreement. *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 577 (9th Cir. 1980); *see also* Fed. Trade Comm’n, Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (Aug. 13, 2015) (to be challenged by the Commission under Section 5, an act or practice “must cause, or be likely to cause, harm to competition or the competitive process.”).

An implicit or ambiguous invitation fails to meet the standard set by the Second Circuit because it fails to discriminate properly between normally acceptable business behavior and conduct that is unreasonable or unacceptable, and thus opens the door to

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<sup>81</sup> Areeda & Hovenkamp ¶ 1419a.

arbitrary or capricious administration of Section 5 of the FTC Act. *E.I. du Pont de Nemours & Co., v. FTC*, 729 F.2d 128, 137 (2d Cir. 1984).

## VI. THE PROPOSED ORDER IS WARRANTED

99. Respondents Benco, Schein, and Patterson’s agreement constituted unfair methods of competition in or affecting commerce in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. Such agreements and acts may recur in the absence of the Proposed Order in this proceeding.

***Response:***

False. For the reasons stated in Respondents’ post-trial briefs and proposed findings of fact and conclusions of law, there was no agreement. As to recurrence, according to Complaint Counsel’s own allegations, the alleged conspiracy ended more than *four years ago* in April 2015 (Kahn, Tr. 19), and is now, “for all intents and purposes, ... impossible to maintain.” (Kahn, Tr. 54; JF 81).

100. Respondent Benco’s solicitation of Burkhart constituted unfair methods of competition in or affecting commerce in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. Such acts may recur in the absence of the Proposed Order in this proceeding.

***Response:***

As explained in Benco’s post-trial briefing, the statements of Benco representatives did not constitute an invitation to collude.

A rejected invitation has not “actually had [an] effect” on competition, and therefore does not satisfy the Ninth Circuit’s standard for a violation of Section 5 of the FTC Act in the absence of an overt agreement. *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 577 (9th Cir. 1980); *see also* Fed. Trade Comm’n, Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (Aug. 13, 2015) (to be challenged by the Commission under Section 5, an act or practice “must cause, or be likely to cause, harm to competition or the competitive process.”).

An implicit or ambiguous invitation fails to meet the standard set by the Second Circuit because it fails to discriminate properly between normally acceptable business behavior and conduct that is unreasonable or unacceptable, and thus opens the door to arbitrary or capricious administration of Section 5 of the FTC Act. *E.I. du Pont de Nemours & Co., v. FTC*, 729 F.2d 128, 137 (2d Cir. 1984).

As explained in Respondents' post-trial briefing, Complaint Counsel have failed to present any evidence that the acts alleged in the complaint are likely to recur.

101. Entry of the Proposed Order is necessary and appropriate to remedy and prevent the violations of law found to exist.<sup>82</sup>

***Response:***

False, for the reasons stated in Respondents' Post-Trial Reply Brief. (*E.g.*, S. Reply 70-73; P. Reply, Part VI).

102. A remedy is appropriate even where a respondent no longer engages in the illegal conduct if there is a sufficient danger of recurrence; a temporary pause in illegal conduct does not preclude the issuance of an order.<sup>83</sup>

***Response:***

It is Complaint Counsel's burden to show the requisite "cognizable danger of recurrent violation [that is] something more than the mere possibility...." *Borg-Warner Corp. v. FTC*, 746 F.2d 108, 110 (2d Cir. 1984) (Complaint Counsel bears the "burden of showing that an injunction [is] warranted.").

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<sup>82</sup> *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428-30 (1957).

<sup>83</sup> *Polygram Holding I*, 136 F.T.C. at 379.

103. The Court has “wide discretion” in its choice of remedy where there is “a reasonable relation to the unlawful practices found to exist.”<sup>84</sup>

***Response:***

The Court’s discretion is within reason. Any remedy must be reasonably related to the violations found to have been proven at trial. *See ITT Cont’l Baking Co. v. F.T.C.*, 532 F.2d 207, 221 (2d Cir. 1976) (deleting Commission’s remedies that “do not appear to be reasonably calculated to prevent future violations of the sort found to have been committed”).

104. The Court is not limited to prohibiting the illegal practices in the precise form in which it finds they existed in the past. The Court “must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.”<sup>85</sup>

***Response:***

The proposed conclusion leaves out the next sentence from *Polygram Holding*, which reiterates an important limitation. “The remedy selected, however, must be reasonably related to the violation found to exist.” *In re Polygram Holding, Inc.*, 136 F.T.C. at 379-80.

105. The evidence supports the Court entering an order consistent with the Proposed Order, which enjoins Respondents from engaging in the challenged by the Complaint.

***Response:***

Incorrect, for the reasons provided in Respondents’ post-trial briefs, proposed findings of fact and conclusions of law, and responses to Complaint Counsel’s proposed findings of fact. In short, the evidence demonstrates that Schein did not enter any alleged conspiracy to boycott buying groups but instead, since well before the alleged conspiracy, acted consistently, rationally, and unilaterally in evaluating buying group opportunities on

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<sup>84</sup> *Jacob Siegal Co. v. FTC*, 327 U.S. 608, 611-13 (1946).

<sup>85</sup> *Polygram Holding I*, 136 F.T.C. at 379.

a case-by-case basis, doing business with many but declining those that did not present a real opportunity for Schein. Likewise, the evidence demonstrates that Patterson did not enter such a conspiracy but instead always evaluated buying groups on their individual merits, working with them on the rare occasion where it made sense for Patterson. Finally, the evidence demonstrates that Benco did not enter such a conspiracy but instead always applied its unilateral no-middleman policy, which allowed Benco to compete vigorously on a direct basis for dentists' business.

Dated: June 6, 2019  
Respectfully submitted,

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

June 6, 2019

By: /s/ Owen T. Masters

Notice of Electronic Service

**I hereby certify that on June 06, 2019, I filed an electronic copy of the foregoing Respondents' Reply To Complaint Counsel's Post-Trial Proposed Conclusions Of Law, with:**

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