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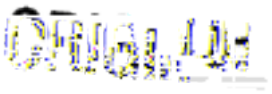

TABLE OF CONTENTS

Other Authorities

INTRODUCTION

The evidence presented at trial confirms the position that Benco has consistently taken throughout this litigation – that Benco did not participate in any agreement with Schein and/or Patterson to refrain from doing business with buying groups. Benco's story is straightforward.

"structural breaks" are nothing more than his personal interpretation of selected factual evidence; his assertions regarding Respondents' unilateral self-interest were based on fundamentally flawed analysis and proved untenable at trial; and he performed no proper market-based analysis from which any proper conclusions can be drawn regarding presence or absence of harm to competition. Dr. Marshall's opinions should be disregarded.

BACKGROUND

The specific facts relevant to the resolution of the claims against Benco are generally set out in the argument as applicable, below. This section is limited to setting out the genesis and rationale of Benco's no-middleman policy.

Since the mid-1990's, Benco has had a policy that it does not recognize or work with middlemen that come between it and its customers. FF 166, 167 & 450. The policy was based upon Benco Managing Director Chuck Cohen's personal experience as a territory representative and his vision of the kind of customer-focused, high-touch company that he wanted Benco to be. FF 169. Because the policy is customer-focused, it is important for Benco to determine who precisely the "customer" is that Benco is serving. Benco uses the policy to determine what Benco considers a "customer" and which entities Benco will sell to as a single customer. FF 170. Even before groups of independent dentists started to approach Benco, other companies, such as dental insurance companies and dental laboratories, would try to get Benco to offer discounts on supplies to dental practices that accepted their insurance or used their laboratory services. Benco would decline, because it did not want to put anyone between Benco and its customers. FF 168.

In formalizing the policy, Benco developed five rules set forth in Benco's "Group Practice Engagement Rules" to determine when a group will be recognized as a single customer:

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

(b) Where a single ent

ARGUMENT

F.3d 300, 324 n.23 (3d Cir. 2016). See also Joint COL 16-17.[3] Following the trial, there is still no such direct evidence of the agreement alleged by Complaint Counsel.

First, every fact witness has denied any knowledge of the alleged conspiracy. Prior to trial, Complaint Counsel identified 40 individuals as having knowledge of the alleged conspiracy. Joint FF 82. Every individual identified by Complaint Counsel who testified at trial or in a deposition in this case denied any knowledge of the alleged conspiracy. Joint FF 83-118. Sworn denials of the existence of an agreement by those alleged to have personal knowledge of the agreement is direct evidence that there was no agreement. In re McWane, Inc. & Star Pipe Prods., Ltd., 155 F.T.C. 903, at *267 (2013), aff'd in part, rev'd in part, FTC No. 9351, 2014 WL 556261 (Jan. 30, 2014), aff'd sub nom. McWane, Inc. v. FTC, 783 F.3d 814 (11th Cir. 2015) (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

B. The Circumstantial Evidence Cannot Sustain a Finding of Any Agreement.

The circumstantial evidence that Complaint Counsel has put into the record is insufficient to establish the alleged conspiracy. Circumstantial evidence, unlike direct evidence, requires further inferences to establish the proposition being asserted. Circumstantial evidence that may support an inference of conspiracy includes "a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications." *Mayor & City Council of Baltimore*, 709 F.3d at 136. Circumstantial evidence is "usually ... of two types – economic evidence suggesting that the defendants were not in fact competing, and noneconomic evidence suggesting that they were not competing because they had agreed not to." *In re McWane, Inc.*, 155 F.T.C., at *223 (quoting *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002)).

In antitrust cases, particularly those involving oligopolistic industries, the Supreme Court has limited "the range of permissible inferences from ambiguous evidence," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), because "mistaken inferences in [antitrust] cases ... are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Id.* at 594. For that reason, the "circumstantial evidence of a conspiracy, when considered as a whole, must tend to rule out the possibility of independent action." *In re McWane, Inc.*, FTC No. 9351, 2012 WL 5375161, at *6 (Aug. 9, 2012) (citing *Matsushita Elec. Indus. Co.*, 475 U.S. at 764). Ambiguous o /TT1 1 Tf .12 Tw T* [(d (le)6 ( )]63 (aneum (t)-2 (i)-2 (

which occurs because 'any rational decision [in an oligopoly] must take into account the anticipated reaction of other firms." Valspar Corp. v. E.I. Du Pont De Nemours & Co., 873 F.3d 185, 192 (3d Cir. 2017) (quoting In re Flat Glass Antitrust Litig., 385 F.3d 350, 359 (3d Cir. 2004)). See also Joint COL 38. Because "competitors in concentrated markets watch each other like hawks[,]" internal discussions about what other competitors might be doing does not give rise to an inference of agreement. In re Text Messaging Antitrust Litig., 782 F.3d 867, 875 (7th Cir. 2015).

Accordingly, to determine whether the circumstantial evidence suffices to prove an agreement, courts follow a three-step process. "First, the court must determine whether the plaintiff has established a pattern of parallel behavior. S, 359 (r2 (a)4 (t)-f.)4 (1359 (r2 (a

Complaint Counsel claims that Respondents acted in parallel in refusing to do business with buying groups during the alleged conspiracy period. Although, as explained below, the evidence shows that Benco did not act in parallel to Patterson or Schein, parallel conduct alone cannot support an inference of conspiracy unless it consists of "complex and historically unprecedented changes … made at the very same time by multiple competitors, and made for no other discernible reason." Mayor & City Council of Baltimore, 709 F.3d at 137 (internal quotation marks omitted); see also Tc 0 Tw 14.]TJ /TT1 1 Tf [(709 Ft)-2 (a)4 (l)-2 (i)Ali0rD,s (l)-n

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seriously evaluated the possibility of bidding or negotiating for the business of multiple buying groups during the relevant time period, even if it ultimately decided not to go forward. See Schein FF Section II.C. Complaint Counsel objects, claiming that not all of these entities meet its particular definition of buying groups. But even Complaint Counsel concedes that many do. Complaint Counsel tries to explain away individual instances, arguing for example that perhaps some of this business was continuation of business begun before the relevant time period, and perhaps certain other instances were examples of Schein cheating. But Complaint Counsel can't explain away Schein's record of continuous business with buying groups, multiple evaluations of potential new business with buying groups, and bids and negotiations for new business with buying groups throughout the relevant time period. This record is supported by the unanimous testimony of Schein witnesses, and confirmed by third party witnesses, that Schein seriously pursued buying group business during the relevant time period. See generally Schein FF Section II.B. Schein's record of dealing with buying groups stands in stark contrast to that of Benco and that of Patterson.

This marked absence of parallel conduct establishes the absence of any conspiracy. Indeed, even the decision-making process – a clear, pre-existing policy on the part of Benco, decentralized evaluation by Patterson, and centralized engagement by Schein – are inconsistent with the concept of a conspiracy.

In an effort to rebut this stark factual record, Complaint Counsel relied on Dr. Marshall to opine that Schein stopped dealing with buying groups between 2011 and 2015, and that therefore its conduct might be considered parallel to that of Benco and Patterson during these years. But this opinion is nothing more than Dr. Marshall's interpretation of factual evidence which is beyond his competence as a supposed economics expert. What entities were, or were perceived

to be, buying groups, and what actions Benco, Schein and Patterson took with respect to such groups, are purely factual questions as to which Dr. Marshall has nothing to contribute. The factual nature of the issue is evident in the errors underlying his views.

Dr. Carlton properly recognized that the definition of buying groups is for the factfinder to decide. Therefore, he examined data regarding Schein's business dealings with various categories of entity (to account for various possible findings by the factfinder) and confirmed that, for any realistic definition of buying group, Schein's business pursuant to agreements with buying groups increased between 2011 and 2015. FF 831-37.

[redacted]

Further evidence of nonparallel conduct is found in the bids that Schein placed between 2011 and 2015 in unsuccessful attempts to win buying group contracts. FF [redacted]; Dr. Marshall had to concede that Schein submitted a bid for the business of Smile Source in 2014, in

[redacted]. Schein's bid to Smile Source in 2014 and [redacted] were not parallel to the conduct of Benco and Patterson at that time.

Dr. Marshall's efforts to dismiss this clear evidence of non-parallel conduct are circular and internally inconsistent: he assumes parallel conduct as evidence of conspiracy, and assumes conspiracy to explain away evidence of non-parallel conduct. FF 878. And even using the numbers conceded by the FTC, the sales data demonstrate that Schein was discounting to buying groups before the alleged conspiracy period, during the alleged conspiracy period, and after the alleged conspiracy period.[7] Dr. Marshall simply has no basis in the record for the spin he tries to put on the facts; the evidence clearly demonstrates that Respondents' conduct with respect to buying groups was not parallel.

2. Complaint Counsel Could Not Establish the Start of the Alleged Agreement.

Complaint Counsel has alleged a general conspiracy among respondents "that none of them would do business with buying groups or discount to buying groups." (Opening Tr. 17). Complaint Counsel advanced various theories, but no actual evidence, as to how, when, by whom, or with respect to exactly what entities, the alleged conspiracy was formed. Indeed, Complaint Counsel was inconsistent in claiming when the alleged conspiracy began. In the Complaint, Complaint Counsel alleged that the conspiracy began as one between Benco and Schein "no later than July 2012." (Complaint ¶ 32). But there is no record of communications between Benco and Schein regarding buying groups at any time before, on, or around July 2012,

[7] [redacted]

Bencorecruited four or five Schein employees (the "Rotert Group"), from the Fresno, California area. Benco's hiring of the "Rotert Group" from Schein resulted in several discussions over the following months, and resulted in Benco and Schein renegotiating the terms of a "Competitive Hiring Agreement" they had previously entered into. FF 577-81.

Complaint Counsel posits that a January 13, 2012 telephone call between Chuck Cohen of Benco and Tim Sullivan of Schein, concerned a buying group named Unified Smiles, and is evidence of Benco "enforcing" the alleged conspiracy (that supposedly started at some earlier time). But the evidence cannot support Complaint Counsel's assertion. Mr. Cohen and Mr. Sullivan testified that, based upon their review of surrounding documents (including employment records and records of other communications around that time), the January 13, 2012, call concerned employment issues and did not concern Unified Smiles. FF 586-94. The communications records show that Mr. Cohen called his attorney who handled employment matters just before and after Mr. Cohen's call with Mr. Sullivan. FF 590-91. And based upon his review of text messages around the time of the call, Mr. Sullivan believes they discussed Kent Hayes (a Fresno recruit) and employment related issues. FF 593. Mr. Sullivan testified that he was certain that Unified Smiles was not discussed on the call. FF 592.

Complaint Counsel has offered no evidence to overcome the testimony and documentary evidence showing that the call was about employment issues and did not concern Unified Smiles or buying groups. Complaint Counsel's assertion that the January 13, 2012 call concerned buying groups is sheer speculation. See, e.g., In re McWane, Inc., 155 F.T.C. at *253 (where witnesses "denied having any recollection of the telephone calls and/or denied any recollection of what was discussed[,]" it "would be pure speculation … to simply assume" that unlawful agreements were reached); see also Joint COL 76-77.

an end of the alleged conspiracy, ignores the numerous substantive differences between EDA and other buying groups that had approached Benco, which differences made EDA uniquely attractive to Benco.

4. Dr. Marshall s Assertion of Structural Breaks is Based on Willful Ignorance of the Record and Should Be Disregarded.

Complaint Counsel seek support from Dr. Marshall, who claims to have identified "structural breaks" that show that Benco, Schein and Patterson changed their behavior, which he interprets as evidence of conspiracy. Dr. Marshall's assertions are simply wrong. They reflect nothing more than Dr. Marshall's view of selected facts (of which he has no independent knowledge and no particular ability to interpret) to try to bolster his flawed analyses. Even a cursory examination of the evidence reveals that Dr. Marshall is wrong. Respondents' conduct was consistent over time.

In his identification of supposed "structural breaks," Dr. Marshall applied no recognized method of economic analysis[8] – he simply offered his interpretation of factual evidence. FF 1243-50. The absence of any principled economic analysis is demonstrated by the simple fact that, if his "methodology" were applied consistently, it would define Benco's agreement with Atlantic Dental in 2013 as a "structural break" that would disprove the existence of any conspiracy.[9] FF 1251-60. Dr. Marshall didn't like this outcome, of course, so he interpreted those events differently.

[8] As Dr. Johnson pointed out, Dr. Marshall tried to dress up his interpretation of factual evidence in

Once Dr. Marshall's exercise is revealed to be simple interpretation of factual evidence, its weaknesses are clear. Dr. Marshall did not know the factual record. Rather than assessing all of the relevant evidence, he cherry-picked isolated facts and based his pronouncements on them. So long as one Respondent believed that an entity was a buying group and the entity was not named Atlantic Dental, Dr. Marshall seized on a decision to bid or not to bid for its business as determinative without regard for any other surrounding evidence.

Dr. Marshall asserted that Schein's decision not to bid for the business of Unified Smiles in 2011 constituted a "structural break." He ignored not only all of the surrounding circumstances and the reasons why Schein decided not to bid for that business, FF 1263-65, but also the fact that on the very next d[redacted] FF 1266. Similarly, he asserted that Schein constructively terminated its relationship with Smile Source in early 2012, and this also constituted a "structural break." FF 1278. Dr. Marshall willfully ignored testimony, documentary evidence and data establishing that, far from being any break at all, Schein sought to continue its relationship with Smile Source. FF 1280-84. Carlton undertook a proper economic analysis – based on interpretation of the contemporaneous sales data – and concluded that there was no "structural break." Schein's conduct was consistent during the time period in question. FF 1282-83.

Dr. Marshall also opined that Schein's bid for an agreement with Smile Source in 2016-2017 constituted a "structural break." Again, Dr. Marshall ignored all of the testimonial and documentary evidence establishing that Schein submitted a competitive bid for Smile Source's business in 2014 and remained in touch during 2015 and 2016 in order to try to win the bid at the next opportunity. FF 1337-43. Schein's bid in 2016 simply was not a change in conduct. FF 1344.

Dr. Marshall also claimed that Benco's agreement to partner with Cain Watters to form Elite Dental Alliance in 2016 constituted a "structural break." Dr. Marshall ignored all of the unique f

First, a conspiracy cannot be inferred from industry characteristics. FF 787-907. Even if there had been parallel behavior among Respondents with respect to buying groups (which there was not), that would be explained by oligopolistic interdependence, which has nothing to do with conspiracy. FF 789. Dr. Marshall failed to distinguish between oligopolistic interdependence and conspiracy. FF 790.

Second, even if Dr. Marshall's exercise could, in theory, be meaningful, his actual analysis tells us nothing. The same set of characteristics that he cites as conducive to collusion are would, in fact, undermine the ability of a cartel to form at all. FF 791. Furthermore, Dr. Marshall failed to perform his analysis in properly defined relevant markets: he failed to assume shares properly or to consider important competitive constraints in the dental distribution industry. FF 792-799. He also incorrectly assumed manufacturers lack bargaining power vis-à-vis distributors, and thus would be unable to discipline any collusion; in fact, the evidence of record refutes Dr. Marshall's assumption. FF 800-806. Dr. Marshall also incorrectly claimed that the industry is characterized by high barriers to entry. This assertion is contradicted by Benco's successful entry into a series of territories, including entry into the west coast and into the Pacific Northwest during the time period in question.[10] FF 809-913. As a result, Dr. Marshall simply cannot tell us whether or not the market structure actually would be conducive to collusion.

Furthermore, Dr. Marshall ignored multiple characteristics of the dental distribution industry that would make the alleged conspiracy less likely to succilleie>

Care. FF 420. The only communications that Chuck Cohen has ever even had with anyone at Patterson about buying groups is limited to two brief e-mail exchanges with Paul Guggenheim,

it and would have surprised Mr. Cohen, he was therefore "skeptical" of the truth of this information. FF 431-33.

On February 8, 2013, Mr. Cohen forwarded the email chain to Paul Guggenheim of Patterson. FF 421. Mr. Cohen wanted to let Mr. Guggenheim know about industry noise concerning one of Patterson's branches that Guggenheim might not have heard about and might want to know. Mr. Cohen thought that if the shoe had been on the other foot, he hoped that Mr. Guggenheim would have let him know of information about Benco that Mr. Cohen might not have known. FF 443-44.

ultimately did business with Schein through the Utah Dental Cooperative in 2013 and 2014. FF 456.

The February 8, 2013 email from Mr. Cohen is not probative evidence of the alleged conspiracy. Monitoring competitors' activities is common and to be expected in competitive markets. See, e.g., In re Text Messaging Antitrust Litig., 782 F.3d 867, 879 (7th Cir. 2015) ("We can, .. . without suspecting illegal collusion, expect competing firms to keep close track of each other's pricing and other market behavior and often to find it in their self-interest to imitate that behavior rather than try to undermine it . . . ."); Baby Food, 166 F.3d at 126 (explaining that "[g]athering competitors' price information can be consistent with independent competitive behavior.") Similarly, competing firms may exchange information that is of common interest, and such information exchanges do not violate the antitrust laws where the parties then make independent business decision on the basis of that information. Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036, 1048 (2d Cir. 1976) ("[I]t is not a violation of [Sherman Act §] 1 to exchange such information, provided that any action taken in reliance upon it is the result of each firm's independent judgment, and not of agreement."); see also Interborough News Co. v. Curtis Publ'g Co., 225 F.2d 289, 293 (2d Cir. 1955) (explaining that customers' "past preference for maintaining an exclusive relationship with a single wholesaler provides a legitimate reason for defendants' lobbying efforts to persuade each other … to consider dealing with an alternative wholesaler"). Ross v. Citigroup, Inc., 630 Fed. Appx. 79, 82 (2d Cir. 2015) (affirming grant of summary judgment in favor of defendants where, despite a high level of inter-firm communications, "the district court found that the 'final decision to adopt class-action-barring clauses was something the Issuing Banks hashed out individually and internally.'").

bid. Thanks." FF 513. The first part of Mr. Cohen's text message—whether ADC is or is not a buying group—is not competitively sensitive information; it simply reflects market research that Benco had performed. FF 514. Mr. Cohen's statement that Benco is going to bid for ADC's business did reveal Benco's plans. However, it does not evidence existing agreement between the two companies not to do business with buying groups. The text does not reference any preexisting agreement and does not discuss any information about Schein's plans, policies, or practices.

The evidence of these communications does not support an inference of any agreement between Mr. Sullivan and Mr. Cohen regarding buying groups. Mr. Cohen never inquired about, and Mr. Sullivan did not reveal, any information about Schein's policies, practices, or plans relating to ADC or buying groups generally. At most, they show Benco trying to gain basic factual information regarding a potential client before submitting a bid, one for whom Benco ultimately bid for and won the business.

There is no evidence of any communication between Benco and Patterson concerning ADC before Benco bid for, and won the business.

After Benco won the business of ADC, on June 6, 2013, Paul Guggenheim of Patterson sent an email to Mr. Cohen concerning ADC. Mr. Guggenheim wrote his e-mail on top of the February 8, 2013 e-mail from Cohen. FF 533 (CX0062). Guggenheim's e-mail asked, "Reflecting back on our conversation earlier this year, could you shed some light on your business agreement with Atlantic Dental Care? I understand they are a group of 55 dentists in and around Chesapeake Va. Being led by a practice management consultant that your team has signed a supply agreement with. I'm wondering if your position on buying groups is still as you articulated back in February? Let me know your thoughts….Sometimes these things grow legs

without our awareness." FF 534. Guggenheim testified that he had sent that e-mail because he had been approached by the Patterson local branch manager, Devon Nease, at the end of May 2013 concerning Benco winning the ADC bid. FF 535. Guggenheim wanted to see what he "could learn in terms of field intelligence about what we might be missing here" and to gain

that evidence of conscious parallelism does not permit an inference of conspiracy unless the plaintiff establishes that . . . each defendant engaging in the parallel action acted contrary to its economic self-interest."); Merck-Medco Managed Care v. Rite Aid Corp., 201 F.3d 436 (4th Cir. 1999) (unpublished) (showing of legitimate business reasons for conduct rebutted inference of conspiracy based on motive and opportunity to conspire).

Evidence that a Respondent acted independently includes (i) the sworn testimony of its employees attesting to that fact; (ii) evidence that that it made business decisions based on legitimate factors, such as the likely effect of a course of action on its prices, or its profits, or sales

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doing business with buying groups for compelling, procompetitive business reasons. FF 166-89; see also, supra. Benco's policy was consistent with its unilateral economic self-interest. FF 189, 414, 532, 879-886, 903-915. The evidence demonstrates that Patterson and Schein likewise acted in each of their own unilateral economic self-interests. See generally Patterson FF Section VIII; Schein FF at Section V.

Complaint Counsel relies on Dr. Marshall's opinion that Benco (and Schein and Patterson) must have acted pursuant to a conspiracy because each acted contrary to its own individual economic self-interest. But Dr. Marshall's analysis is deeply flawed and provides no reliable basis for his opinion. Indeed, when properly analyzed, Dr. Marshall's data actually show that Benco, Schein and Patterson did act in their own individual economic self-interest.

[redacted] Despite that major concession, he failed to consider that Benco has little incentive to deal with buying groups if they cannot guarantee volume. FF 913-15. Marshall overlooked the fact that buying groups do nothing to reduce Benco's costs to serve. Without product or volume commitments, Benco could not negotiate lower prices from manufacturers. FF 91[redacted]

[redacted] Dr. Marshall simply dismissed Benco's

carefully planned business strategy of expanding systematically into the regions of the United States where it was not yet present, and the fact that Benco succeeded in doing so, profitably and on schedule, despite not following the business path that Dr. Marshall thinks it should have followed. FF 53, 59, 1186-1242. *See, e.g.*, *In re Citric Acid Litig.*, 191 F.3d at 1101 ("Courts have recognized that firms must have a broad discretion to make decisions based on their judgments of what is best for them and that business judgments should not be second-guessed even where the evidence concerning the rationality of the challenged activities might be subject to reasonable dispute.").

Dr. Marshall's initial opinion was internally inconsistent, contrary to the factual record, and nonsensical, and he was forced to abandon it at trial. Initially, Dr. Marshall pronounced, broadly, without reservations, that [redacted]

its unilateral economic self-interest for years before the alleged conspiracy (FF 942),[13] and Schein acted contrary to its unilateral economic self-interest on multiple occasions before 2011. FF 952. Similarly, Dr. Marshall's theory implied that Respondents acted contrary to their own unilateral economic self-interest by declining to bid for the business of buying groups on multiple occasions after 2015. FF 944.

Dr. Marshall admitted that his analysis showed the exact same action by Respondents during and outside the alleged conspiracy period (FF 944),[14] but offered no explanation for why Benco, Patterson or Schein would act contrary to their independent economic self-interest before 2011 or after 2015. Conversely, if Benco, Patterson and Schein acted consistently with their unilateral economic self-interest in the years before 2011 and the years after 2015, Dr. Marshall had no explanation for why the identical conduct – declining to do business with various buying groups – was in each company's unilateral economic self-interest in the years before 2011, contrary to their unilateral economic self-interest from 2011 to 2015, and then in their unilateral economic self-interest again after 2015. FF 929-55.

Furthermore, Dr. Marshall admitte2</MCID 2 >>Bo (s)-1 (t)-2f7(f)33 (he)4 (i)4 (r)3 (s)1 (tila4

that he didn't know whether it was in a Respondent's unilateral economic interest to decline to do business with his listed buying groups. FF 987, 989, 998.

Ultimately, Dr. Marshall confirmed that he had conducted an analysis with respect to two buying groups only – Kois and Smile Source – and that he was not offering an opinion as to whether Benco acted contrary to its own unilateral economic self-interest by declining to bid for the business of any of the other 36 buying groups listed in his report. FF 9990. Thus, Dr. Marshall admitted that his opinion is really that Respondents acted contrary to their unilateral economic self-interest by declining to bid for the business of two buying groups only: Kois and Smile Source (or, in the case of Schein, failing to win the bid for the business of Smile Source). FF 9989-99. But this analysis of Dr. Marshall was so flawed as to be meaningless. FF 1000-02.

Dr. Marshall's profitability studies followed no accepted economic methodology. FF 624, 1023. He did not cite to a single academic, peer-reviewed study endorsing the type of analysis he performed. FF 1022-25. As Dr. Carlton explained, Dr. Marshall's theoretical construct was flawed because it conflates conspiratorial behavior with non-conspiratorial oligopolistic behavior. FF 1001. These flaws in Dr. Marshall's analysis render it lacking in any theoretically valid foundation for reaching any conclusions about whether a distributor's behavior can be explained by a conspiracy. FF 1001.

Dr. Marshall failed to consider any disadvantages of dealing with buying groups other

- of customers outside the buying group demanding similar discounts;
- of reducing the commissions that a distributor's sales consultants earn;
- that buying groups would charge a distributor administrative fees; and
- that selling to buying groups might not align with the strategic objectives of the distributor.

In addition, in reaching his conclusions, Dr. Marshall relied on a series of other unsupported assumptions, including that:

- had Benco, Patterson or Schein won bids for the business of Kois or Smile Source, no more, and no fewer, dentists would have become buying group members (FF 1128-29);

FF 11491167. Drs. Carlton and Johnson agree that Dr. Marshall's failure to perform the proper calculation was fatal to his analysis because he did not perform a counterfactual analysis, Dr. Marshall "has no basis to draw the conclusions he has." FF 1167.

Most critically, Dr. Marshall failed to perform a counterfactual analysis that considered Benco's alternatives to dealing with buying groups. FF 1158. Apart from being vaguely aware of Benco's entry into Southern California, Dr. Marshall did not analyze Benco's strategy objectives between 2011 and 2015. FF 1180. Thus, Dr. Marshall did not undertake any analysis of how much profit Benco could have earned by deploying its resources elsewhere compared to what it would have earned serving Kois or Smile Source. FF 1182. Nor did Dr. Marshall conduct any study to determine what impact it would have had on Benco's strategy of nationwide expansion if Benco had diverted its resources to support buying groups. FF [redacted]

In contrast to Dr. Marshall, Dr. Johnson did consider Benco's strategic plan and its alternatives. He found that Benco successfully achieved its long-term goal of expanding profitably into the remaining parts of the country—the west coast and the Pacific Northwest—by focusing on its own business plan rather than pursuing Dr. Marshall's favored strategy. FF 1186-93.

More specifically, to determine whether Benco acted in its own unilateral economic self interest, Dr. Johnson examined the most relevant information—Benco's own sales. For each of Dr. Marshall's five studies, Dr. Johnson examined the data regarding Benco's sales, rather than sales of Burkhart, Atlanta Dental, or Schein. In each case, he found that, by pursuing its own business strategy, Benco was able to increase its sales and number of customers in the largest

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."). Complaint Counsel bears the burden of establishing that the alleged agreement in fact caused harm to competition.

Complaint Counsel argues it can avoid its traditional burden of proving that the alleged conduct actually caused anticompetitive harm in one or more antitrust markets by asserting instead that Your Honor should presume that the alleged agreement has caused harm to competition. (See Complaint Counsel's Pre-Trial Brief at 53 et seq.; Tr. 62-64. Complaint Counsel characterizes the alleged agreement as unlawful per se or, in the alternative, as presumptively unlawful ("inherently suspect" or subject to a "truncated" analysis, both of which would shift the burden of persuasion to Respondents). (Complaint Counsel's Pre-Trial Brief at 53-58; Tr. 62-64.) But the actual evidence presented by Complaint Counsel at trial failed to provide the requisite basis for treating the alleged agreement as either unlawful per se or as subject to any presumption of harm to competition (whether labeled "inherently suspect" or considered in a "truncated" analysis).

Thus far, Complaint Counsel has not cited to legal precedent applying the per se rule to the type of agreement alleged in this case. And Complaint Counsel failed to provide any empirically-based evidence to establish that an agreement of the type alleged always or almost always causes harm to competition, such that it should be considered inherently suspect or subject to a truncated rule of reason. Absent a solid legal or economic basis for applying a presumption of harm to competition, Your Honor should refrain from extending the law in this manner.

A. The Alleged Agreement Is Not Per Se Unlawful.

Complaint Counsel argues that Your Honor should dispense with the typical requirement of proving actual harm to competition because, it asserts, the alleged agreement is per se unlawful. (See Complaint Counsel's Pre-Trial Brief at 53 et seq.; Tr. 62-64.) But Complaint Counsel failed to prove that the alleged agreement is of a type that courts typically consider to be unlawful per se

The Supreme Court has emphasized that the "prevailing" standard of evaluation of a restraint on competition is the rule of reason, which involves an examination of the "demonstrable economic effect" to a defined anti6 (n)yvnsidha79Ex (i)-6diie arct16-5 (,)-14 (Td [(ha7 r2 (c)ac theihest (i)-2on competit ofiti4 (va)4 (i)-e idld 2.3 T1D [(unl)-2 (a)4 (w)2 (f)3.(i)-2-6.1ful 0-6 (n

can be conclusively presumed to be unreasonable). As the Court has described, the per se rule is appropriate only if "surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 103-104 (1984). Per se rules are appropriate "only for 'conduct that is manifestly anticompetitive.'" Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. at 723.

Importantly, application of the per se rule is an empirical exercise based on substantial real-world marketplace experience. Because the per se rule requires courts to make "broad generalizations" about particular commercial practices, GTE Sylvania, 433 U.S. at 50 n.16, per se liability applies only if courts have "considerable experience with the type of challenged restraint," and based on that experience, can confidently conclude that a particular practice would "always or almost always tend to restrict competition and decrease output." Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20, 20 n.33 (1979) ("BMI"). The Court has emphasized that application of the per se rule must be justified on the basis of a record of marketplace effects, not abstract labels. In the words of the Court, any "departure from the rule of reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." GTE Sylvania Inc., 433 U.S. at 58-59 (emphasis added).

Application of the per se rule is not

Indeed, the flaws in this approach are evident in Complaint Counsel's struggle to describe the agreement it has alleged. Complaint Counsel asserts that the alleged agreement is equivalent

even discussed prices, price levels, or discount levels, or that they discussed or agreed to anything involving the dentists to whom the prices are actually charged, it is impossible to cohlclcose (e)4c6 (hl)-6 (h)m-6 clhgrw (t)-6 14 e-5 (e)4hg(e)6 4 (e t 4 (cl)-4 (cl))6 (hl)m (e)4 i (e)

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unlawful boycott to which the Supreme Court held the Federal Trade Commission in Indiana Federation of Dentists

Here again, Complaint Counsel's evidence falls far short of this standard. Complaint Counsel failed to identify any general marketplace experience across multiple industries, let alone "empirical evidence" or marketplace experience "so clear" as to permit a "confident conclusion," that an agreement not to bid for the business of buying groups while leaving unaffected robust competition for the individual members of buying groups always or almost always causes harm to competition. Id. Complaint Counsel offered no record of prior academic or empirical marketplace study of the effects of the type of agreement at issue. Complaint Counsel's expert, Dr. Marshall, offered no opinion as to whether the alleged agreement should be regarded as inherently suspect. FF 836. Nor has Complaint Counsel presented any evidence of the effects of such agreements in other industries, market situations, or time periods. In its Pre-Trial Brief, Complaint Counsel relied on two graphs taken from their expert's report (Complaint Counsel's Pre-Trial Brief at 54), covering a grand total of 351 out of some 200,000 dentists in the United States, (FF 1026), and derived from methodology replete with (FF errors 1023-25), as the total basis on which it expects Your Honor to find that the alleged agreement is of a type that "always or almost always" causes harm to competition. This falls woefully short of evidence from which Your Honor can make a "confident conclusion" as to the effect of the alleged agreement such that an analysis of the actual effects is unnecessary.

In short, Complaint Counsel's evidence failed to provide a sufficient basis to establish that the purported agreements are "inherently suspect" or to justify truncating a rule of reason analysis.

2. The Record Fails to Support the Allegation of Harm to Competition

The Commission voted upon and issued a complaint in this matter that does not allege a violation based on a traditional rule of reason analysis in its complaint. Complaint Counsel

cannot now try to overcome the absence of evidence to support a truncated analysis by arguing that it has presented a watered-down version of a rule of reason case. Any such argument is inconsistent with the Commission's complaint.

Furthermore, the evidence of anticompetitive harm presented by Complaint Counsel is inherently unreliable. Complaint Counsel rely on the testimony of Dr. Marshall to argue that the alleged agreement caused harm to competition. But Dr. Marshal's assertion that Respondents' alleged conduct caused harm to competition is fundamentally flawed and contradicted by the evidence.

Dr. Marshall admitted that he failed to find anticompetitive harm in any relevant geographic markets. FF 1345-53. This alone renders his conclusions unreliable. As Dr. Johnson explained, an economist cannot define competitive impact without a relevant product or geographic market in which to look. FF 1351. Because Dr. Marshall failed to determine competitive impact in properly defined relevant markets, it is impossible to him to assert that he accurately evaluated competitive conditions. FF 1345-53.

Dr. Marshall's failure to conduct a proper analysis is of particular concern because the record evidence contradicts his assertion that Respondents' conduct caused anticompetitive harm. FF 1353-78. The fundamental issue is whether dentists paid more for dental products. As Dr. Johnson explained, Dr. Marshall's theory of anticompetitive effects would require evidence of elevated margins and prices. FF 1376. Yet Dr. Marshall didn't study this. Dr. Marshall did not perform any analysis of the extent to which Benco, Schein and Patterson competed for the business of individual dentists, including dentists who were members of buying groups. FF 1354. Dr. Marshall conceded that there seemed to be substantial competition for the business of individual dentists. FF 1355. Dr. Marshall further conceded that, from the analysis that he did

Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (August 13, 2015).

Commission challenges to "invitations to collude" have never been tested in the courts.

FF 649. Reese denied being ever being told that there was any agreement between Benco and any other company not to do business with buying groups or dentist groups, and was not invited to join such an agreement. FF 650. And Burkhart did not change or modify any policy, including any policy to do business with buying groups, as a result of any communication with Benco. FF 651.

2. Application of Section 5 to This Vague Communication Would Violate Standards for Freestanding Enforcement of the FTC Act.

The Commission must provide clear guidance to distinguish between lawful and unlawful conduct when applying Section 5 independently of the Sherman and Clayton Acts. The Second Circuit provided the clearest statement of this requirement in its *Ethyl* decision. In that case, the Commission found that competitors' independent use of delivered pricing, advance notice of price changes, and "most favored nation" pricing terms violated Section 5 of the FTC Act despite the absence of an explicit agreement or monopoly power. The Second Circuit overturned the Commission's decision. The Court insisted that the Commission's application of Section 5 independently of the Sherman and Clayton Acts must be subject to "appropriate standards" to ensure that respondents' rights are protected. As the court stated, "[a]s the Commission moves away from attacking conduct that is either a violation of the antitrust laws [or] collusive, coercive, predatory, restrictive or deceitful, and seeks to break new ground by enjoining otherwise legitimate practices, the closer must be our scrutiny upon judicial review." *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 137 (2d Cir. 1984). The court explained,

> When a business practice is challenged by the Commission, even though, as here, it does not violate the antitrust laws and is not collusive, coercive, predatory or exclusionary in character, standards for determining whether it is "unfair" within the meaning of § 5 must be formulated to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable. Otherwise the door would be open to arbitrary or capricious administration of § 5 . . ..

CONCLUSION

For the foregoing reasons, Complaint Counsel has failed to establish that Benco has violated Section 5 of the FTC Act, and Complaint Counsel's request for an order granting the relief sought in the Notice of Contemplated Relief should be denied.

Dated: April 11, 2019

Respectfully submitted,

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Notice of Electronic Service

I hereby certify that on April 18, 2019, I filed an electronic copy of the foregoing Benco's Post Trial Brief, Benco's Proposed Findings of Fact, with:

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