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

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

BENCO DENTAL SUPPLY CO.'S PRE-TRIAL BRIEF

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INTRODUCTION

Complaint Counsel's case against Respondents fails for multiple, independent reasons. In a case where Complaint Counsel is required to establish that Respondents entered into an agreement that harmed competition, the evidence fails to support (1) a reasonable inference that

Finally, Complaint Counsel's assertion of an "invitation to collude" claim against Benco under Section 5 of the FTC Act is legally and factually deficient. First, the evidence does not support the existence of any conspiracy that Benco supposedly invited Burkhart to join. Second, caselaw does not support extension of liability under Section 5 to the ambiguous statements relied upon by Complaint Counsel on this claim.

BACKGROUND

Benco is a privately-owned, full-service distributor focusing exclusively on the distribution of dental supplies and related services. The third-generation family-owned company was founded in Pennsylvania in 1930, and for the majority of its existence, Benco operated as a regional distributor, with its principal customer base in Northeastern Pennsylvania and later into New York, Ohio, and Virginia. In the mid-1990's, the third generation of management began to develop and implement a plan to grow Benco into a nationwide distributor by gradually expanding Benco's presence, region-by-region, across the country. Benco grew by vigorously competing with entrenched distributors, Patterson and Schein as well as local regional distributors. It acquired existing smaller local distributors, hired employees of existing distributors, and grew through ground-up expansion. As Benco expanded, it built a reputation among its competitors for a strong brand, aggressive pricing, and "high touch" customer service. Benco also added showroom, warehouse and distribution facilities in order efficiently fulfill customer orders. Now, Benco operates five distribution centers as well as 50 regional showrooms. Benco has roughly 1300 employees, including approximately 750 regional sales, service, and support personnel. As of 2016, Benco supplied roughly 39,000 different dental practices across all 50 states. Benco's market share has been estimated to be between 7 and 11 percent of the sales of dental products that are sold by distributors. Benco is thus much smaller than the other Respondents in this action: Patterson (with a market share estimated to be between

29 and 33 percent), and Schein (with a market estimated to be between 34 and 43 percent of sales of dental products sold through distributors).

Complaint Counsel alleges that in 2013, Benco was the "ring leader" and conspired with co-Respondents to refus

Respondents jointly refused to work with "groups comprised of dental practitioners who sought to leverage collective purchasing power to obtain lower prices" (Complaint Counsel's Pre-Trial Brief, at 1) – is unsupported. The evidence will show that Benco *was* willing to work with groups who sought to leverage their purchasing power to obtain lower prices to the extent such groups were able to effectively consolidate demand and lower Benco's own cost of service. The evidence will show that prior to and continuing into the alleged conspiracy period, Benco was willing to work with groups that met the following criteria: (1) all offices are wholly owned by a single entity; (2) a single entity owns all the hard assets of all offices and a dentist or multiple dentists own the practices; (3) a single entity has majority ownership in all the offices, but may have multiple minority partners; (4) a management company with no ownership in any office, but can compel purchasing from vendors it chooses, provides purchasing services for the group, and is the entity that is invoiced for the group, and is the entity that pays the bills for the group;

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reasons. There is no evidence, nor has there been any suggestion, that the Policy was adopted to thwart competition. Thus, the lack of buying group relationships is

conversation explicitly manifesting the existence of the agreement in question." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 324 n.23 (3d Cir. 2010). There is no such direct evidence of the agreement alleged by Complaint Counsel.

(1986). *See also Anderson News*, 899 F.3d at 104-05 ("A jury's choice between [] two equally likely explanations for defendants' conduct, one legal and one illegal, would 'amount to mere speculation.'") (citing *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 258 (2d Cir. 1987).) The Court so ruled in *Matsushita* because "mistaken inferences" in antitrust cases may "chill the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 588. Thus, a finding of conspiracy requires "evidence that tends to exclude the possibility" that the defendant was "acting independently." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984); *id.* at 768 (explaining that a plaintiff must present "evidence that tends to exclude the possibility of independent action" by the defendants – that is, "evidence that reasonably tends to prove that the [defendants] had a conscious commitment to a common scheme designed to achieve an unlawful objective.").

Benco expects the evidence at trial to show independent conduct by Benco that is not actionable under the antitrust laws.

A. The Limited Communications Concerning Buying Groups Do Not Support An Inference Of Conspiracy.

Complaint Counsel's theory is based on (1) a small number of ambiguous communications among the respondents, following which Complaint Counsel claims that (2) Respondents' coordinated their behavior to engage in parallel conduct (refusing to do business with buying groups) contrary to the firms' individual economic interests. Although Complaint Counsel purportedly identifies numerous communications among the Respondents, Benco expects that the evidence at trial will show that the total number of communications is far lower than Complaint Counsel claims; that there are, in fact, only a handful of communications that concern buying groups, and none of those communications explicitly or implicitly reference the existence of an agreement not to do business with or provide discounts to buying groups.

Benco expects that the evidence at trial will show limited communications between Benco and its competitors concerning buying groups that do not evidence any agreement. These

respondent pursued different strategies when facing the question of whether to deal with buying groups. The evidence will show that:

- Benco, following its longstanding policy, did not deal with buying groups before, during or after the alleged conspiracy;
- Schein dealt with selected buying groups before, during and after the alleged alleged conspiracy; and
- Patterson which previously did not deal with buying groups or other large groups, started considering doing so and engaged independent consultants to assist it in mapping out a strategy for dealing with group purchasing.

Benco expects that the evidence will show independent consideration and decision-making that is inconsistent with, and defeats any inference of a conspiracy among Respondents.

C. The Evidence Will Show That There Was No Conduct Contrary To Responents' Individual Economic Interests.

Benco further expects that the evidence will show that, even if there had been parallel conduct, the Respondents acted in accordance with their individual self-interest, which also defeats an inference of conspiracy. *See, e.g., Orson Inc. v. Miramax Film Corp*., 79 F.3d 1358, 1369-70 (3d Cir. 1996) (finding no conspiracy because conduct was in defendants' independent self-interest); *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1456 n.30 (11th Cir. 1991) (it is "well settled in this circuit 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 rei (s)-1 tti in arence of conspiracDC60.33 0 Td 8600)aoimv on dofpprdiunt DC60io

volume of sales to members of the group or reduce costs of servicing group members. Benco itself unilaterally adopted and has maintained its policy of not doing business with buying groups for compelling, procompetitive business reasons. Buying groups that do not have common ownership do not lower Benco's cost to serve the independent dentists members and cannot provide compliance or increased purchasing volume. Therefore, when such a group approaches Benco seeking lower prices for its purported members, Benco has no compelling business reason to provide lower prices without increased volume or a corresponding reduction of Benco's costs to serve the individual dentists. Moreover, these types of "groups" interject a third party into the supply chain, diminishing Benco's valuable direct relationship with its customers.

The evidence will show that as a general rule, buying groups could neither grant exclusivity, nor guarantee volume, nor reduce costs – and therefore Benco had no incentive to do business with them. It was thus to be expected that Benco would choose not to do business with many – or any – buying groups and would seek out as much information about a group's ownership structure before bidding for a group's business.

II. Complaint Counsel's Evidence Fails To Establish Harm To Competition.

Even if Complaint Counsel were able to prove that the Respondents had formed an agreement not to do business with buying groups, Complaint Counsel lacks evidence that the alleged agreement restricted competition. Indeed, the Commission's complaint fails even to allege that the asserted agreement actually caused demonstrable harm to competition in the manner established pursuant to the traditional rule of reason. Instead, the complaint alleges only that asserted agreement is a *per se* violation (First Violation Alleged), is an "inherently suspect" violation (Second Violation Alleged), or is unlawful pursuant to a "truncated rule of reason

unlawful *per se*

so great as to render unjustified further examination of the challenged conduct.

20 n. 33, or can confidently conclude that it always or almost always causes anticompetitive harm.

The alleged agreement is not price fixing because it determined nothing with respect to *customers* who actually purchased products. To be clear, buying groups are not customers. Benco expects that Complaint Counsel will fail to establish that buying groups perform the functions of customers. To the contrary, Benco expects the evidence to be clear that buying groups do not buy anything. Buying groups do not select products for purchase; they do not place orders; they do not take delivery; they do not stock inventory; they do not pay invoices due. They do nothing other than negotiate terms and take their cut. They are middle men.

And Complaint Counsel has not alleged that Respondents entered into any agreement

an agreement will harm competition without conducting an evaluation of prices actually paid by end-customers.

Nor is the alleged agreement a *per se* unlawful boycott. As the Supreme Court has previously instructed the Federal Trade Commission, *per se* treatment applies to only a particular type of boycott—

and markets" and "the great likelihood of anticompetitive effects can easily be ascertained." *Id*.

let alone experience so clear as to permit a "confident conclusion," that a purported agreement not to "provide discounts to" or "compete for the business of" third-party negotiators, but not affecting ongoing, vigorous competition for the business of end-customers, causes actual anticompetitive harm to those end-customers. In short, Benco expects that Complaint Counsel's evidence will fail to provide a sufficient basis to establish that the purported agreements are "inherently suspect" or to justify truncating a rule of reason analysis.

Indeed, Benco expects that the evidence will not only raise questions about the "principal tendency" of the purported agreement, but will actually demonstrate the absence of anticompetitive harm. The evidence will show that Benco consistently refused to deal with buying groups, but competed vigorously for the business of dentists – including members of buying groups – before, during, and after the period of the alleged agreement. The evidence will establish that Benco's practice would not have differed absent the communications in question. Benco's practice is fully explained by the buying groups' flawed business model, which failed to provide additional services to dentists, to effectively consolidate demand to drive volume, or to lower costs, and therefore was not valued by either manufacturers or the national full-service distributors. Benco expects that the evidence also will show that neither Patterson nor Schein changed its position with respect to buying groups during the relevant time period. And most importantly, Benco expects that the evidence will show that dentists were able to get the benefits of competitive pricing and discounts – whether they chose to purchase pursuant to the arrangements of buying groups or directly from full-service distributors. Benco expects Complaint Counsel's allegations to founder on its failure to carry its burden of establishing harm to competition.

III. The Evidence Fails To Establish That Benco Violated Section 5 Of The FTC Act.

The Commission's Complaint also alleges that Benco violated Section 5 of the FTC Act by extending an invitation to Burkhart Dental to join the purported agreement discussed above. This allegation fails both as a matter of law and, as Benco expects the evidence at trial to demonstrate, of fact.

A. The Caselaw Fails To Support The Commission's Alleged Violation Of "Invitation To Collude".

Considerable controversy has surrounded the question of what conduct, if any, is permissible under Sherman or Clayton Acts but nevertheless prohibited under the amorphous standard of Section 5 of the FTC Act. Although the Supreme Court has confirmed that the reach of Section 5 is potentially broader than the antitrust statutes, appellate courts have overturned attempts by the Commission to apply it without proper limits. In *Boise Cascade Corp. v. Federal Trade Commission*, the Commission challenged industry-wide use of delivered pricing that, the Commission argued, facilitated collusive pricing in the industry. The Commission did not allege an actual agreement among competitors with respect to pricing, and therefore did not allege that the practice violated the Sherman Act. Nevertheless, the Commission found that the practice violated Section 5 of the FTC Act. Boise Cascade appealed, and the Ninth Circuit overturned the Commission's decision. The court held, "in the absence of evidence of overt agreement . . ., the Commission must demonstrate that the challenged pricing system has actually had the effect of fixing or stabilizing prices." *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 577 (9th Cir. 1980).

Ever since *Boise Cascade*, proof of actual harm to competition has formed a central principle of the Commission's enforcement of Section 5. Indeed, in 2015, the Commission recently adopted a specific enforcement statement based on the principle that "an act or practice

Communications, Inc., 2006 FTC LEXIS 25 (2006) (Valassis proposed to competitor News America pricing of $6.00 per thousand for full page newspaper advertisements and $3.90 per thousand for half-page newspaper advertisements). Such invitations are clear; an enforcement error is unlikely, and there is little risk of business confusion.

The present case, by contrast, fails to meet the standard established by the Second Circuit in *Ethyl*. Benco expects that the evidence will show, at most, discussions and information seeking by Benco that does not involve any mention of a conspiracy or any invitation to participate in any conspiracy. Regardless of what the Commission has done in certain consent agreements, this evidence simply will not meet the legal standard for application of Section 5 of the FTC Act.

CONCLUSION

For the foregoing reasons, the evidence at trial will show that 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: October 9, 2018

Respectfully submitted,

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