

1 UNITED STATES OF AMERICA
2 FEDERAL TRADE COMMISSION
3 OFFICE OF ADMINISTRATIVE LAW JUDGES

4 In the Matter of)
5 Benco Dental Supply Co.,)
6 a corporation,)
7 HENRY SCHEIN, INC.,) Docket No. 9379
8 a corporation, and)
9 PATTERSON COMPANIES, INC.,)
10 a corporation,)
11 Respondents.)
12 -----)

13 February 14, 2019

14 9:46 a.m.

15 TRIAL VOLUME 19

16 PUBLIC RECORD

17
18 BEFORE THE HONORABLE D. MICHAEL CHAPPELL

19 Chief Administrative Law Judge

20 Federal Trade Commission

21 600 Pennsylvania Avenue, N.W.

22 Washington, D.C.
23
24

25 Reported by: Josett F. Whalen, Court Reporter

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 2 I N D E X
 3 IN THE MATTER OF BENCO DENTAL SUPPLY CO., et al.
 4 TRIAL VOLUME 19
 5 PUBLIC RECORD
 6 FEBRUARY 14, 2019

7

8 WITNESS: DIRECT CROSS REDIRECT RECROSS VOIR
 9 CARLTON 5349 5402

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12 EXHIBITS FOR ID IN EVID STRICKEN/REJECTED

13 CX

14 (none)

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16 RX

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19 JX

20 (none)

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1 P R O C E E D I N G S

2 - - - - -

3 JUDGE CHAPPELL: Okay. We're back on the
4 record.

5 Anything before we call our next witness?

6 MR. KASS: No, Your Honor.

7 MR. DILLICKRATH: No, Your Honor.

8 JUDGE CHAPPELL: All right. Go ahead.

9 MR. KASS: Good morning, Your Honor.

10 Henry Schein calls Dr. Dennis Carlton.

11 - - - - -

12 Whereupon --

13 DENNIS WILLIAM CARLTON

14 a witness, called for examination, having been first
15 duly sworn, was examined and testified as follows:

16 DIRECT EXAMINATION

17 BY MR. KASS:

18 Q. Good morning, Dr. Carlton.

19 A. Good morning.

20 Q. Could you please state your name for the
21 record.

22 A. Dennis William Carlton.

23 Q. Let's pull up RXD 5 on the screen.

24 This is the agreement the FTC alleges, an
25 agreement by Benco, Schein and Patterson not to do

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1 business -- not to provide discounts to, or otherwise
2 contract with, buying groups of independent dentists.

3 Did you analyze the evidence to determine
4 whether it is consistent or inconsistent with Schein
5 participating in any such agreement?

6 A. I did.

7 Q. Before we get to your -- oh, and what did you
8 conclude?

9 A. I concluded that an economic analysis of the
10 evidence shows that Schein did not participate in the
11 conduct that the FTC is claiming.

12 Q. Before we get to the reasons for that
13 conclusion, I'd like to ask you about what qualifies
14 you to offer an opinion about the evidence.

15 Can you please give us an overview of your
16 academic background.

17 A. Sure.

18 I graduated Harvard with honors and with a
19 major in applied math and economics. I then went to
20 MIT, where I got my Ph.D. in economics. While I was at
21 MIT, I also got a master's degree in operations
22 research, which is a branch of applied math that is
23 applied to business.

24 After I did my dissertation, I taught for a
25 year at MIT in the economics department, a course in

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1 econometrics, economic statistics. And then I moved
2 to the University of Chicago, where I've been ever
3 since.

4 At the University of Chicago, I was first in
5 the economics department, and then I became a tenured
6 member of the law school for several years, and then I
7 moved to the business school, where I've been ever
8 since.

9 At Chicago, I teach a variety of courses,
10 microeconomics, industrial organization, which
11 probably everybody knows here is the field of
12 economics that studies how firms compete with each
13 other and it's the field most closely aligned with --
14 related to antitrust.

15 And I've taught strategic behavior. I've
16 taught a variety of courses. My courses are often
17 cross-listed in the law school, economics department
18 and business school.

19 I currently am teaching a Ph.D. course in
20 industrial organization. In the spring, I'll be
21 teaching my usual course, which is antitrust --
22 industrial organization with special applications to
23 antitrust. That course is primarily a Ph.D. course
24 for economics graduate students, but I allow advanced
25 law students in antitrust to also take that course.

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1 Q. And do you regularly publish in the field of
2 economics?

3 A. Yes.

4 I've published two books, one of which is a
5 leading textbook in industrial organization. I've also
6 published over a hundred articles.

7 And I have been frequently asked to give
8 keynote addresses on antitrust around the world.

9 I -- most of my research is based on topics in
10 microeconomics, industrial organization, with
11 applications to antitrust.

12 Q. Have any of your published works focused on
13 cartels or conspiracies?

14 A. Yes. I have several papers that discuss
15 cartels. Probably more importantly, I have a chapter
16 in my textbook on cartels.

17 I also have a chapter in my textbook on
18 antitrust and the economic applications, the economic
19 analysis of antitrust issues.

20 Q. And have you won any awards for your work?

21 A. I have. I've won several. I'll just list a
22 few.

23 I was -- probably the most important award is I
24 was named the 2014 Distinguished Fellow of the
25 Industrial Organization Society for making

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1 distinguished contributions to industrial
2 organization.

3 I've also won an award -- one of my books won
4 award. Several of my papers have won various awards
5 for being a best paper, often with antitrust
6 applications.

7 And I was named the best antitrust economist
8 recently.

9 Q. And have you ever served for the United States
10 government in any antitrust cases as an economist?

11 A. I've served in a variety of roles for the
12 government. I -- probably most importantly I was the
13 deputy assistant attorney general in the
14 Antitrust Division from the end of 2006 to the
15 beginning of 2008, basically a chief economist.

16 I had about 50 Ph.D. economists under my
17 direction, and we investigated lots of topics,
18 including the enforcement of the antitrust laws, as
19 well as the appropriate focus and -- of the antitrust
20 laws, both in the United States and throughout the
21 world.

22 JUDGE CHAPPELL: Who did you report to while at
23 DOJ?

24 THE WITNESS: It would have been Tom Barnett,
25 who was then the assistant attorney general in charge

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1 of antitrust.

2 And during that period, I also worked with the
3 FTC -- Michael Salinger was the chief economist at the
4 FTC at the time, and if my memory serves me right,
5 Bill Kovacic was the chairman -- and interacted a lot
6 with the FTC both --

7 JUDGE CHAPPELL: When you say you worked with
8 someone at the FTC, what did that entail?

9 THE WITNESS: So I'll just give you two
10 examples.

11 One of the first things that happened when I
12 showed up at the Department of Justice is Congress
13 asked -- I think either Congress or the president
14 asked for an investigation of the energy market and to
15 make sure there were no antitrust issues going on
16 causing the price of gasoline to be high. And
17 together with the FTC -- Michael Salinger was the
18 person who I interacted with most -- we produced an
19 economic report, that ultimately I think went to either
20 Congress or the president, on antitrust issues in
21 gasoline.

22 Also, during this period, in the -- in trips
23 abroad -- I have a Boston accent so sometimes I'll drop
24 an R -- anyway, in trips abroad, two of the foreign
25 antitrust agencies, we would coordinate on

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1 presentations and discussions about proper antitrust
2 policy.

3 At the FTC, in addition to Bill Kovacic and the
4 other commissioners who would come along --
5 Debbie Majoras actually was the one, now that I
6 remember, that I went to Japan with. She was the
7 chairwoman -- we would not just go on separate
8 delegations that had as a purpose the U.S. meeting with
9 a foreign government, but there are international
10 conferences, such as the OECD and the
11 International Competition Network, where we were --
12 again, I would coordinate with the FTC.

13 JUDGE CHAPPELL: Did you sit on a joint
14 committee or panel between FTC and DOJ to decide which
15 entity would pursue a case against a common company or
16 target that both entities were targeting?

17 THE WITNESS: Not while I was at the DOJ, but
18 I was twice appointed by the ABA task force -- when a
19 president gets elected, before the president
20 supposedly takes office, the ABA appoints a bipartisan
21 committee to make recommendations. And I suspect, if
22 I recall correctly, that might well have been one of
23 our recommendations, to sort that out.

24 But there was another commission I was on.
25 There was a congressional committee to investigate the

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1 antitrust laws. It was 12 people, bipartisan. I was
2 the only economist appointed. And I'm virtually
3 certain -- and we issued a report on how we thought
4 the U.S. was doing in administering the antitrust laws
5 and made recommendations. And I'm virtually
6 certain -- I'd have to go back and check -- that one
7 of our recommendations was that that be sorted out
8 because sometimes there are I guess arguments
9 between -- as to or disputes as to who's in charge of
10 a particular area, and that can delay the
11 administrative process of consummating a merger.

12 JUDGE CHAPPELL: Go ahead.

13 BY MR. KASS:

14 Q. And was that the antitrust modernization
15 committee that you were referring to?

16 A. Yes. The Antitrust Modernization Commission
17 was another service that I provided to the government.
18 I was just describing that, so I won't describe it
19 again.

20 But there have been others, other cases.

21 I was appointed by the American Economic
22 Association to advise the Bureau of the Census on the
23 use of economic statistics and econometrics.

24 And I've also served on several occasions as a
25 consultant to the Federal Trade Commission and to the

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1 Department of Justice.

2 Q. Have you done any consulting or testifying work
3 as an expert witness?

4 A. Yes, I have.

5 Since the firm was found in the late 1970s,
6 I've been associated, with a brief interlude when I was
7 in the government, with a consulting firm called
8 Lexecon. It's now called Compass Lexecon. And in that
9 role I have served as an economic expert in numerous,
10 numerous cases.

11 Q. Did any of those cases involve conspiracies or
12 cartel matters?

13 A. Some of them did. I don't recall the exact
14 number, but certainly more than ten.

15 And they ranged across a variety of
16 industries. Just the ones I remember would be liquid
17 crystal displays -- those are the screens on your
18 computer, for example -- CRT monitors.

19 I've been involved in conspiracy cases
20 involving the airline industry, the rail industry,
21 involving computer reservation systems that travel
22 agencies use, cases involving credit cards, cases
23 involving conspiracy among universities.

24 Those would be some.

25 Q. And were these all for either all defendants or

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1 all plaintiffs or a mixture of the two?

2 A. It would be a mixture, primarily defendants,
3 but on -- several of the cases involve plaintiffs.

4 Q. So in some cases you represent -- you'd testify
5 for the defense and sometimes you'd testify for the
6 plaintiffs; is that right?

7 A. That's fair.

8 Q. Okay. Professor Carlton, I'd like to turn now
9 to this case and your work on this case.

10 What were you asked to do?

11 A. I was asked to perform an economic analysis of
12 the FTC's claims and also to evaluate
13 Professor Marshall's report.

14 Q. And what did you do to carry out your
15 assignment?

16 A. I did a variety of things to familiarize
17 myself with the industry.

18 I had access to Schein's sales data, so I used
19 that in my analysis.

20 I relied on interviews, had interviews with
21 several people at Schein.

22 I looked at parts of the record in this case,
23 including the expert reports of, for example,
24 Professor Marshall.

25 I looked at some of the deposition testimony.

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1 And I've been trying to follow some of the
2 trial transcripts from this trial.

3 Q. And based on this work, did you reach any
4 conclusion about whether Schein participated in the
5 conspiracy that complaint counsel alleges?

6 A. Yes. As I said at the outset, my overall
7 conclusion is my economic analysis of the evidence is
8 inconsistent with Schein participating in the
9 conspiracy the FTC has alleged.

10 Q. And why did you reach those conclusions -- that
11 conclusion?

12 A. There are a variety of reasons, and I'm happy
13 to go through them. I would say there are four main
14 reasons that I've organized my testimony today to
15 describe.

16 Q. Okay. Well, let's list those reasons. Let's
17 do it one at a time, and then we'll go through each one
18 in more detail.

19 What was the first reason for your opinion
20 that Schein did not participate in the alleged
21 conspiracy?

22 A. My first reason I'll call no parallel conduct.
23 That is, my analysis of the evidence shows that the
24 FTC is wrong to claim that Schein and the other
25 defendants acted in a parallel fashion not to deal

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1 with buying groups and that the evidence shows that
2 Schein dealt with buying groups before the conspiracy
3 that's alleged, during the conspiracy that's alleged
4 and after the conspiracy that's alleged, so the
5 evidence shows that they're just wrong if they say
6 Schein was not dealing and discounting to buying --
7 specifically to buying groups.

8 And I'll try and be careful, but when I say
9 "buying groups" in that sentence it means the FTC
10 buying groups, the buying groups that the FTC is
11 alleging they should have been dealing with.

12 JUDGE CHAPPELL: When you say "Schein and the
13 other defendants," are you saying there was no parallel
14 conduct between any of the defendants or are you only
15 opining regarding Schein?

16 THE WITNESS: I'm only opining with respect to
17 Schein. I'm aware of some of the evidence on the
18 others, I'd say Benco and Patterson, but my opinions
19 are limited to Schein. That's who I examined.

20 So what I'm saying is Schein dealt with these
21 buying groups before, during and after.

22 BY MR. KASS:

23 Q. Okay. So I just want to list your opinions
24 here, so the first one is, at least as to Schein, no
25 parallel conduct; is that right?

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1 A. Yes. You can use that as a shorthand for what
2 I just said.

3 Q. Okay. And what's the second of your four
4 reasons?

5 A. You know, a shorthand we could use is no
6 structural breaks. By that I mean Professor Marshall
7 has claimed that there's a structural break in the
8 conduct of Schein that he can use as a marker for the
9 beginning of the conspiracy and the ending of a
10 conspiracy. And to the extent he's claiming that, the
11 evidence does not support that.

12 Q. Okay. So the second reason is no structural
13 breaks?

14 A. Yes.

15 Q. Okay. The third reason?

16 A. The third reason is that to the extent that
17 Professor Marshall is saying that the industry
18 characteristics allow him to conclude that there was a
19 conspiracy, that's wrong.

20 By that I mean -- and when I say "industry
21 characteristics," that it's highly concentrated.

22 So to the extent he's saying that because it's
23 highly concentrated you can infer conspiracy, that's
24 just wrong.

25 Q. So the third reason is there's no inference of

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1 a conspiracy from industry characteristics?

2 A. Yes. I would say no inference of conspiracy
3 from industry characteristics alone.

4 Q. Okay.

5 Okay. And what's your fourth reason?

6 A. My fourth reason is that to the extent that
7 Professor Marshall is saying that Schein did not act
8 in its own self-interest by refusing to deal with
9 buying groups, he's wrong. His analysis is wrong.
10 He is wrong both from the theory he's using as
11 well as the empirical studies he does. Both the
12 theory he's using is wrong and the empirical studies
13 he provides -- he provides two -- well, five but
14 depending on two, one for Smile Source and one for
15 Kois -- they just don't support his point.

16 Q. So the fourth reason is no acts against
17 self-interest.

18 A. Yes. Summarize it by that.

19 JUDGE CHAPPELL: Under that third reason,
20 you're saying that Marshall says you can infer
21 conspiracy just based on the concentration and that's
22 all that would be required?

23 THE WITNESS: You know, obviously, he can speak
24 for himself.

25 JUDGE CHAPPELL: Well, I'm asking your --

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1 excuse me. Hold it.

2 I'm asking your take on this particular item I
3 just heard you tell me.

4 THE WITNESS: Yes. My take is he can't just
5 look and see that an industry is, for example,
6 concentrated and say, Aha, the behavior is explained by
7 a conspiracy.

8 There are plenty of industries that are
9 concentrated. Some behave competitively, some don't,
10 but even the ones that don't, that doesn't mean there's
11 a conspiracy.

12 You know, a good example I was going to use
13 later in my testimony -- I'll use it now -- take the
14 cigarette industry before 1980. That industry had
15 very parallel behavior. Everybody would move their
16 prices in locked step, and the cigarette industries
17 were making a lot of money. And that doesn't mean
18 there was a conspiracy. It means there was parallel
19 conduct and there was an oligopoly.

20 It doesn't rule out that there could have been
21 a conspiracy, but you can't just say, Gee, I can look
22 at an industry that's really concentrated, and
23 you know, there's other characteristics, hard to enter,
24 et cetera. That's typical of a lot of oligopolies, so
25 you can't just say it's the industry characteristics

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1 alone allow you to determine that there's a conspiracy
2 going on.

3 JUDGE CHAPPELL: Whether or not any inference
4 would be proper, are you aware of what the law is in
5 that area?

6 THE WITNESS: I have a --

7 JUDGE CHAPPELL: Let me rephrase that.

8 Whether or not any inference is proper, are you
9 making any legal opinion on that?

10 THE WITNESS: No. I'm not a lawyer. Although
11 I've taught antitrust in the law school, co-taught it
12 with a law professor, I'm not going to -- I don't give
13 any legal conclusions. Everything I say is going to be
14 based on economics.

15 BY MR. KASS:

16 Q. Okay. Let's go through some of these, your
17 conclusions, one by one.

18 The first one, no parallel conduct, can you
19 explain what you mean by "no parallel conduct"?

20 A. Yes. As I just said, my understanding is the
21 FTC is alleging that Schein, along with the others,
22 didn't deal with certain buying groups. And that's not
23 consistent with my evaluation of the evidence, their
24 sales data.

25 Q. Well, complaint counsel looks at that and says,

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1 Well, to the extent Schein did business with buying
2 groups, that's just cheating.

3 How do you respond to that?

4 A. Well, to the extent they say that, you can
5 only call it cheating if you assume there's a
6 conspiracy not to deal with buying groups.

7 Now, however you describe the data -- you'll
8 see what it says as I'll show you what it says in a
9 second -- however you describe it, there's no question
10 Schein is selling to these FTC buying groups.

11 And you know, if they want to describe it that
12 it's cheating, well, you know, that's assuming a
13 conspiracy, but another way of describing it and that's
14 indisputable, as far as I understand it, it's evidence
15 of nonparallel behavior with a conspiracy that they're
16 alleging.

17 Q. And what did you do to determine whether there
18 was or wasn't parallel conduct in this case?

19 A. Well, as I indicated, I first got Schein's
20 sales records from -- and it's 2009 to 2017 -- and I
21 looked at their sales and their sales to various
22 groups, buying groups. And what it shows is they're
23 making sales before the conspiracy, alleged conspiracy,
24 during the alleged conspiracy and after the alleged
25 conspiracy.

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1 Q. Did you report your results in your report that
2 you submitted in this case?

3 A. Yes, I did.

4 Q. Okay. Let's pull up RX 2832. And let's go
5 to -- it's page 17 of the report, it's paragraph 28 of
6 your report, and it's in your binder and it's on the
7 screen.

8 A. All right. I have it in front of me.

9 Q. What are you conveying in paragraph 28 of your
10 report?

11 A. At the time I wrote my report, Schein had
12 identified I think it was 44 buying groups that they
13 dealt with. Now, I know there's a dispute between the
14 FTC and Schein as to whether the buying groups Schein
15 has identified satisfy the FTC definition.

16 So what I do in paragraph 28 is I say, I don't
17 want to take sides in that dispute, the judge will
18 figure that out. But of the 44 buying groups that
19 Schein identified, how many are on the FTC's list that
20 the FTC says is a buying group that they're interested
21 in, and those are listed -- there are seven of them.
22 I'll call them the first group.

23 And then there's a second group, and that is
24 buying groups that Schein identifies should fit the FTC
25 definition, how many of those are there, and there are

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1 seven.

2 And then what I did was, of the remaining, I
3 had my staff, we went on the Internet and asked do any
4 of these buying groups identify themselves as
5 consisting of independent dentists, which is the
6 criteria -- one of the criteria the FTC is using. And
7 of those, there were four more.

8 So those are three groups. And then for the
9 others Schein was unable to help us identify it further
10 at that time, and therefore, I just call that the other
11 group.

12 So this is just dividing that, those 44, into
13 basically four groups.

14 Q. And you reported your results from the sales
15 data by these categories; is that right?

16 A. Yes.

17 And the next page of my report, table 1, what I
18 do is --

19 Q. So let me stop you right there and just pull
20 up -- for the court let me just pull that up onto the
21 screen, so it's RX 2832-22.

22 This is the table you were talking about?

23 A. Yes.

24 Q. Okay. So can you describe it.

25 A. Yes.

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1 In this table, what I do is I calculate from
2 the Schein sales data the sales for the various types
3 of buying groups or sums of buying groups.

4 So, for example, the first line in the table
5 is reporting the sum of those first two groups, the
6 ones that the FTC say fit their definition and the one
7 that Schein says fits the FTC definition.

8 And then the second line is group three.

9 The third line, the one that's highlighted, is
10 the sum of those first two lines.

11 The next line, the fourth line, Other Buying
12 Groups are the ones that at the time I couldn't
13 identify one way or another whether they fit the FTC
14 definition.

15 And then the last line is the sum of all of
16 them.

17 Q. And what did you conclude from this chart?

18 A. Well, you know, just to focus attention, let's
19 look at the highlighted line. It actually doesn't
20 matter which line you look at, but let's just look at
21 it.

22 So it says that in 2009 the sales -- Schein's
23 sales to independent -- to what I'll call the FTC
24 buying groups or they could fit the FTC buying group
25 definition is 20.7 million. In 2010, it's

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1 21.9 million. Now, this is the period preconspiracy,
2 no allegation of conspiracy. And then I asked, well,
3 what happens after that.

4 So 2011-2012 is when I understand the FTC is
5 claiming a conspiracy occurs or begins. And you can
6 see that Schein continues to make sales in those years.
7 Indeed, the sales are slightly higher. But certainly
8 they're not zero, slightly higher than they were in
9 2009-2010.

10 And then you can also see as you let your eyes
11 go across the page that Schein continues to make sales,
12 2013, 2014, 2015, you know, all time periods when the
13 FTC is alleging that there's a conspiracy not to deal
14 with these buying groups.

15 And then towards the end of the period, 2015,
16 '16 and '17, Schein continues to make sales.

17 So the point of the chart is that Schein
18 continues or makes sales before the alleged conspiracy,
19 during the alleged conspiracy and after the alleged
20 conspiracy.

21 Q. Now, you also have this line below the
22 highlighted one that says "Other Buying Groups," and if
23 I understand that right, those are buying groups that
24 you couldn't fit within the other three categories of
25 the FTC at the time said what was a buying group,

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1 Schein testimony at the time referenced it as a FTC
2 buying group, and your website search didn't identify
3 it as a buying group; is that right?

4 A. That's correct.

5 Q. Okay. And this was all done during the
6 discovery phase, during when your report was due; is
7 that right?

8 A. Yes.

9 Q. And there's been testimony in this courtroom
10 about various buying groups; is that right?

11 A. That's my understanding.

12 Q. Okay. And now, sitting here today, what will
13 you say about the other buying group categories?

14 MR. DILLICKRATH: Your Honor, I'm going to
15 object. This is calling for testimony outside the
16 scope of Dr. Carlton's report.

17 MR. KASS: Your Honor, all I'm doing at this
18 point is asking whether, sitting here today, that
19 his -- he would make any revisions to his report in
20 light of the testimony that has come out in this
21 courtroom. He could not have provided that testimony
22 or put it into his report at the time his report was
23 due because the testimony had not yet been presented.

24 JUDGE CHAPPELL: Any testimony that was
25 presented that was not in the report of the testifying

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1 expert is not going to be considered in this case, so
2 unless the answer to this question is no, the objection
3 is sustained.

4 MR. KASS: Okay. Then I will move on.

5 BY MR. KASS:

6 Q. In your report, you talked about the estimate
7 of -- that you presented in this table as being
8 conservative.

9 Could you explain what you meant by that.

10 A. Yes.

11 So to the extent that the data I had available
12 to me at the time I wrote my report excluded sales of
13 people who would be in FTC buying groups but just I
14 wasn't able to identify them, obviously, it's
15 conservative in that sense.

16 The sales data aren't always perfect, so there
17 are instances in which I -- even if I tried hard, I
18 can't always identify sales to a buying group, so to
19 the extent that my sales data are underestimating
20 those sales because they're not reported, to the
21 extent that obviously there are other buying groups
22 that haven't been identified in, say, my top three
23 lines, then the line we highlighted would be low -- or
24 would be high -- is too low; that is, I'm
25 understating.

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1 Q. Now, the FTC says -- and you have a category
2 here -- the FTC says there are some that they agreed
3 are FTC buying groups.

4 If we focused on those, do your opinions
5 change?

6 A. No, they don't.

7 Q. Why not?

8 A. If you looked at -- and the FTC showed me such
9 a chart during my deposition. If you looked at the
10 numbers, they make exactly the same point. Obviously,
11 the numbers are different, but they make exactly the
12 same point. Schein is discounting before the alleged
13 conspiracy period, during the alleged conspiracy period
14 and after the alleged conspiracy period, so it doesn't
15 change my answer at all.

16 Q. Okay. Let's move on to your second
17 conclusion.

18 What was that?

19 A. My section -- second conclusion was no
20 structural break. And by that I mean, to the extent
21 Professor Marshall is saying that Schein's behavior
22 changed at the beginning of the conspiracy to cease
23 dealing with a buying group or to the extent he's
24 saying something happened at the end to indicate an
25 ending of the conspiracy, my analysis of the data shows

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1 that's just wrong.

2 Q. And where do you report that opinion?

3 Was it the same table or was it --

4 A. Yes. You can see from the table we just had
5 up that -- let's focus on the yellow line again, but
6 like I say, it really doesn't -- you can focus on any
7 line, but let's just focus on the yellow line for
8 concreteness.

9 You can see that in 2009 and 2010 it's 20.7 and
10 21.9 million, so then the question is, the conspiracy
11 begins, supposedly, in 2011 and 2012, is there any
12 break in what Schein is doing. You know, you look at
13 the data and you don't see any break in the sense of it
14 going to zero, which would be consistent with the FTC's
15 claim. In fact, it remains high, and in fact it's even
16 higher than it was in the nonconspiratorial period, so
17 there's no evidence in the data that there's a
18 structural break around that time period in terms of
19 the conduct of Schein.

20 And if you look towards the end of the
21 conspiracy period, again, although, you know, it goes
22 up and down, it certainly indicates that it is false
23 to claim that, say, in 2013, 2014 or the beginning of
24 2015 it's zero and then it goes way up in 2015 and
25 2016. That's not true. 2015 and 2016 is when the

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1 conspiracy ended. If you look at that highlighted
2 line, you don't see anything like what would be
3 suggested if there really were a conspiracy where the
4 numbers in 2013 and 2014 and sometime in 2015 were near
5 zero.

6 Q. Now, the FTC points out that in 2017 sales
7 increased.

8 What does that say about whether there was a
9 structural break at the end of the alleged conspiracy
10 period in 2015?

11 A. Well, I don't think it goes to that point at
12 all.

13 First of all, as I understand it, the FTC is
14 claiming the conspiracy ends in 2015, the early part of
15 2015, so, you know, they could say there's a lag, but I
16 don't know why there should be.

17 But more importantly, the reason the numbers
18 are going up in 2017 are really due to two buying
19 groups that Schein is doing business with. The first
20 one is Klear Impakt.

21 Now, Klear Impakt was a relatively new buying
22 group that was developing at the very end of 2014, and
23 in fact Schein was in contact with Klear Impakt in
24 2014 -- that's my understanding -- and negotiated to
25 deal with Klear Impakt in 2015 and started dealing

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1 with them in 2015, so to say that Schein is not
2 negotiating with a buying group that didn't exist, I
3 mean, as soon as it comes into existence, it starts --
4 or pretty close to its formation, it's dealing with
5 them, and this is during the conspiracy period, 2014.

6 So you can't claim that its dealing with
7 Klear Impakt that led to an increase in 2017 is
8 somehow a break in their policy of dealing with buying
9 groups.

10 Moreover, the second main reason why the
11 numbers go up in 2017 is because of Smile Source.
12 I'll talk a little bit more about Smile Source later.
13 But my understanding is that Schein -- I'll obviously
14 leave it to the judge to decide this, but my
15 understanding of the facts are that Schein was willing
16 to continue to deal with Smile Source in 2012 at the
17 discounted --

18 JUDGE CHAPPELL: Hold it. When someone stands
19 up, you need to hold your answer.

20 THE WITNESS: Yes, Your Honor.

21 MR. DILLICKRATH: Your Honor, I'm going to
22 have to object. Dr. Carlton is simply reviewing facts,
23 his understanding, as he put it, of the facts. He's
24 not giving economic testimony here, and I'm going to
25 object and ask that the last question and answer not be

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1 considered.

2 MR. KASS: Your Honor, he's giving his reasons
3 as to why the sales data does not reflect a structural
4 break, and he's testifying as to his review and the
5 reasons why the sales data says what it says, and
6 that's -- and that's -- an economic expert can testify
7 as to that.

8 JUDGE CHAPPELL: All right. The objector is
9 clear, is correct, that this is not a fact witness.
10 In fact, when it comes to experts, if they are
11 incorrect in the facts that they rely on, that can be a
12 fatal problem, so just make it clear with this witness
13 that he's not sitting here trying to tell us what the
14 facts are, but this is the facts as he relied upon
15 them.

16 MR. DILLICKRATH: Fair enough.

17 MR. KASS: Thank you, Your Honor.

18 JUDGE CHAPPELL: So you need to rephrase that
19 one, and that response in the record will not be
20 considered.

21 MR. KASS: Okay.

22 BY MR. KASS:

23 Q. Dr. Carlton, can you explain why you believe
24 that the sales data in 2017 does not reflect a
25 structural break based on the facts not as you're

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1 finding them but as you understand them from the
2 record.

3 A. Yes. And just to be clear, I understand
4 what's at issue, and whenever I say "my understanding
5 of the facts," I understand that if my understanding is
6 wrong, my conclusion could be wrong. I understand
7 that.

8 As I said, if you look at the chart, it's clear
9 that the numbers, the sales to the buying groups,
10 aren't zero in, say, the alleged conspiracy period.
11 In particular, they're not zero in 2013, 2014 and
12 2015.

13 The conspiracy ends in 2015, so if there's a
14 structural break, you would expect, okay, now everybody
15 is dealing with buying groups. You don't see any
16 increase -- large increase in 2015. You don't see any
17 large increase in 2016.

18 You do see an increase in 2017, and that, as I
19 was explaining earlier, is primarily due to Schein's
20 sales to two buying groups. One is Klear Impakt. One
21 is Smile Source.

22 So you have to ask, is that a structural
23 break. And based on my understanding of the facts --
24 and I understand -- I defer to Your Honor to determine
25 whether that's correct or not -- the Klear Impakt

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1 increase -- sorry -- the increase associated with
2 Klear Impakt is coming from Klear Impakt, which, as I
3 understand it, is a new buying group, new in the sense
4 that it was being formed in 2014.

5 Soon after it was formed, Schein was in contact
6 with Klear Impakt to do business with it and did
7 business in, you know, about 2015, negotiated to do
8 business and was doing business in 2015.

9 The fact that Klear Impakt then is buying a
10 lot in 2017 can't possibly be an indication of a break
11 after the conspiracy ends because during the alleged
12 conspiracy it's dealing with Klear Impakt, it's
13 negotiating with it, based on my understanding of the
14 facts.

15 With regard to Smile Source, again, there's a
16 large increase in 2018, 2017, because of the sale of
17 Schein -- Schein's sales to Smile Source. It would
18 not -- based on, again, my understanding of the
19 facts -- and again, I defer to the judge to determine
20 if that's correct or not -- Schein was willing to deal
21 with Smile Source, had been dealing with Smile Source.
22 It was willing to continue to deal with Smile Source,
23 for example, in 2012 when it was giving it discounts.
24 It was willing to continue those discounts. It made a
25 discount offer to them in 2014.

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1 And therefore, it doesn't fit -- its dealings
2 with Smile Source don't fit the FTC claim that it was
3 unwilling to deal with Smile Source. And therefore,
4 Professor Marshall can't say, Oh, you're dealing with
5 Smile Source and they're selling a lot, that's a break
6 in your behavior of willingness to deal with
7 Smile Source.

8 Q. Okay. Dr. Marshall also, sticking with
9 Smile Source, also says that there's a structural break
10 in 2012 with respect to Smile Source.

11 Did you look at that issue?

12 A. Yes, I did.

13 Q. And what did you find?

14 A. Well, again, one of the things that
15 Professor Marshall claims, one of the reasons why he
16 claims Smile Source and Schein ceased doing business
17 is he relies on some testimony involving the fact --
18 the claim that discounts started disappearing, started
19 being reduced. And I investigated that.

20 By "discounts being reduced" I mean
21 Smile Source was dealing with Schein and was getting
22 discounts. The claim -- what Professor Marshall cites
23 is some evidence from a claim of someone that the
24 reason Smile Source left Schein is because Schein
25 started reducing those discounts.

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1 Q. Okay. So --

2 A. So I looked at that. I looked at the discounts
3 in 2011 and 2012 to see if they were going down. And I
4 found they weren't.

5 Q. Okay.

6 A. And there's a table in my report.

7 Q. Okay. Let's pull up the table. It's table 3,
8 page 55 of your report, RX 2832.

9 Is this the table you're referring to?

10 A. Yes.

11 Q. And what does it show?

12 A. So I used the Schein sales data to calculate
13 the discount that Schein was giving Smile Source, and
14 I started in 2010 and I calculated for each quarter,
15 and that's what's revealed in the last column of
16 table 3.

17 And you can see that, by and large, the
18 discount in the 2010 period is somewhere between 22 and
19 23 percent and 24 percent.

20 And you can see that the discounts in
21 2011 quarter one, quarter two, quarter three, quarter
22 four and in 2012 quarter one the same, roughly the
23 same. They vary between 22 and 23 and 24 percent.

24 So from my point of view, there's certainly no
25 evidence that the discounts have fallen to zero.

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1 Moreover, there's no evidence they're falling at all,
2 so it refutes the claim that the reason for the
3 termination of Smile Source of Schein was because they
4 were changing the discounts.

5 I'd also just want to point out, there's no
6 question Schein was offering discounts, so as I
7 understand what Professor Marshall was saying is,
8 well, now I'm not disputing they were offering
9 discounts, I'm just saying it should have been more of
10 a discount.

11 Well, that's a different theory than I
12 understand the FTC is putting forth. The FTC is saying
13 you're not offering any discounts. Now we're arguing
14 whether the discounts dropped from 23 to 24 percent.
15 Well, it doesn't, but I'm just pointing out that it's a
16 funny change in the theory because now the theory
17 apparently is no longer that Smile Source was offering
18 a zero discount, it's that the discount isn't enough.

19 Q. Does Dr. Marshall agree that your calculations
20 here are correct?

21 A. Yes.

22 Q. Okay. And again, what does this say about
23 whether Schein induced Smile Source to terminate the
24 contract with Schein in January of 2012?

25 A. Well, it refutes the claim that Schein lowered

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1 the discounts in order to induce a change in its
2 dealings with Smile Source.

3 Q. Okay. Let's go to the third conclusion that
4 you presented. And we already talked a little bit
5 about that in response to the judge's questions, so I
6 won't ask you much about it, but can you briefly
7 explain why the industry characteristics that
8 Dr. Marshall identifies do not themselves support an
9 inference of a conspiracy or Schein's participation in
10 a conspiracy.

11 A. Sure. I'll be brief, try not to repeat too
12 much.

13 Basically, Professor Marshall identifies five
14 industry characteristics. I'll just for shorthand
15 talk about high concentration. And he says those are
16 industry characteristics that make an industry -- I
17 think he uses the words "susceptible to a conspiracy."

18 And you know, I agree that those
19 characteristics, if there's a conspiracy, can raise the
20 success -- the likely success of a conspiracy. That's
21 not the point. The point he's making or seems to be
22 suggesting is that these industry characteristics are
23 useful for inferring whether or not there's a
24 conspiracy.

25 Now, as I said, just taking -- focusing on

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1 concentration as a shorthand, there are a lot of
2 industries in which there's high concentration. There
3 are a lot of industries in which it's hard to enter.
4 And some of those industries behave pretty
5 competitively; some don't. I gave you that example of
6 the cigarette industry. That doesn't mean it's a
7 conspiracy.

8 So you can't infer that there's a conspiracy
9 just from industry characteristics. There may be and
10 there may not be. It depends.

11 Q. Have you heard of the term "oligopolistic
12 interdependence"?

13 A. Yes.

14 Q. What does that mean?

15 A. That is a term used to recognize the fact that
16 if you're in a concentrated industry, firm -- one firm
17 is going to understand that its actions will affect
18 what the other firm does. And if an industry is
19 showing oligopolistic interdependence, that is another
20 way of describing why there's parallel behavior in
21 which prices are moving together and may be far above
22 the competitive level. It explains why an oligopoly
23 can behave in a noncompetitive way having nothing to do
24 with conspiracy.

25 Q. And does Dr. Marshall distinguish between

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1 oligopolistic interdependence and conspiracy?

2 A. Well, he may claim he does, but I couldn't see
3 in his testimony how he could possibly distinguish
4 between the two based on what he did, and therefore, if
5 you solely look at industry characteristics to
6 determine whether there's -- you can infer conspiracy,
7 you can't.

8 Q. Well, Dr. Marshall also looked at acts against
9 self-interest, and you have a conclusion on that.

10 What's your conclusion about acts against
11 self-interest?

12 A. Professor Marshall claims that Schein acted
13 against its self-interest because it didn't discount to
14 the FTC buying groups. And he bases his analysis --
15 there's a theory part and an empirical part. And both
16 of them are wrong.

17 Q. First of all, just stepping back, what is an
18 act against self-interest? How do you define --

19 A. I would define an act against self-interest in
20 a conspiracy as follows. If you were going to do
21 something in the absence of a conspiracy, but you don't
22 do it because you're in a conspiracy, that's -- could
23 be construed as an act against self-interest because we
24 think when you're not conspiring you act in your
25 interest.

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1 So just to be specific in this case, I
2 understand that what's being claimed is Schein would
3 have found it more profitable to discount to buying
4 groups, but because -- than not to discount to buying
5 groups, but because of a conspiracy, it didn't discount
6 to buying groups.

7 Q. In an oligopolistic market, one with high
8 concentration, are there difficulties in determining
9 whether a particular act is contrary to one's
10 unilateral self-interest?

11 A. Yes.

12 So just to go back to my cigarette example,
13 you -- if the prices are high, two firms are charging
14 two very high prices, you might say, Gee, it's in the
15 interest of one of the firms to undercut that high
16 price to steal business from the other one. But if
17 you think about it for a while, the first firm might
18 say, Hmm, if I do that, maybe the second firm is going
19 to cut its price and maybe a price war will occur, and
20 then we'll both be worse off.

21 So by taking -- recognizing that there's
22 oligopolistic interdependence, you can explain why
23 prices remain high even though someone might say, well,
24 all else equal, that is, if your rival doesn't cut its
25 price, this would be really profitable to do.

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1 So it makes it very difficult to distinguish
2 oligopolistic interdependence that keeps prices high
3 from a conspiracy that keeps prices high.

4 Q. And did Dr. Marshall do anything to determine
5 whether his supposed acts against self-interest were
6 the result of oligopolistic interdependence?

7 A. I didn't find his analysis convincing.

8 Q. Okay. Well, let's talk about his analysis.
9 Did you reach any conclusions about
10 Dr. Marshall's self-interest analysis and what he
11 refers to as profitability analysis?

12 A. Yes, I did.

13 Q. Okay. And what were your conclusions?

14 A. Well, like I said earlier, his conclusions
15 really have a theoretical part based on really two
16 prongs. One is a theory and one is an empirical part.

17 The theory part says, based on theory, Schein
18 should have found it profitable to discount to the FTC
19 buying groups. That's wrong the way he did it.

20 And then the second is he does an empirical
21 study of Smile Source and Kois and he says, based on
22 those two empirical studies, he's proven that it would
23 have been Schein -- in Schein's interest to -- I think
24 what he's saying is to deal with buying groups. And
25 I'll -- as I'll explain in a few moments, his empirical

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1 study is just wrong.

2 Q. Okay. Well, let's take those one at a time,
3 and focusing first on the theoretical claim that
4 Schein acted irrationally if it failed to do business
5 with every buying group, what did you conclude?

6 A. I concluded that his theory is just -- is
7 wrong. He -- there are a lot of reasons why a firm
8 might not want to deal with a particular customer or a
9 particular buying group.

10 Q. What are some of those reasons?

11 A. And it will depend on a whole host of factors,
12 but there's a very simple way of thinking about it.
13 You want to ask the question, if you make a discount
14 offer to a buying group, are you likely to make more
15 money than if you don't make such an offer, so your
16 profits -- your expected profits if you make the offer
17 versus your expected profits if you don't make the
18 offer.

19 And then you can start thinking about, well,
20 what are the factors that are going to matter from an
21 economic point of view.

22 So you think, well, if I give a discount
23 clearly on the people who I would have otherwise made a
24 sale to, I'm going to be earning less. The price is
25 lower.

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1 A second, I might induce people who our my
2 customers who aren't in the buying group to join the
3 buying group because they can perhaps get a lower
4 price.

5 A third, it might be that other customers who
6 aren't in the buying group will hear about it and
7 complain to the salesman, and the salesman will feel
8 compelled to offer a price discount to that person.

9 All of those are reducing revenue from what I
10 would otherwise get. Sometimes that's a form of what I
11 think in this case has been called cannibalization.
12 The simple point is, that's causing your revenues to go
13 down.

14 Now, offsetting that is, if your price -- if
15 you discount, you might get more business, so you're
16 going to sell more.

17 So if you sell a lot more, that can make it
18 profitable to do, but if you don't sell all that much
19 more, that can make it unprofitable, when you take
20 account of the fact that prices are declining on some
21 of these sales.

22 So both of those, those types of factors, are
23 going to matter. But there are additional ones.

24 So, for example, you might want to say does
25 this align, selling to buying groups, align with my

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1 objectives in the firm, my strategic objectives, so
2 what do I mean by that?

3 Schein is a full-service organization. They
4 rely on what they call FSCs, field service
5 consultants -- or sales consultants, in order to deal
6 with dentists. They want those FSCs to see the
7 dentists frequently to build up a long-term
8 relationship with the dentist so that the dentist
9 relies on them. Well, in order to do that, they have
10 to pay these guys, give them an incentive, these FSCs,
11 to work.

12 Well, you know, a buying group where some,
13 you know, national price cutting is occurring, that's
14 going to reduce how much money or commissions these
15 FSCs make, so you have an internal conflict. I'm not
16 saying that prevents you from dealing with buying
17 groups, but it's just something that you might want to
18 take into account.

19 And then, of course, there could be costs of
20 dealing with a buying group. Sometimes a buying group
21 may charge Schein a fee for dealing with a buying
22 group.

23 And finally, you have to think, well, how will
24 my actions affect what my rivals do, and I have to take
25 that into account.

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1 So all of those factors will matter in trying
2 to decide are profits going to be higher, likely to be
3 higher if I offer a discount compared to what profits
4 would be if I don't offer a discount.

5 Q. And did Dr. Marshall account for these
6 factors?

7 A. No. Not in my view.

8 Q. Okay. Now, you said that Schein needs to
9 consider all of these factors in deciding whether or
10 not to do business with a buying group.

11 Is there a framework that you use to determine
12 whether or a company like Schein should use to
13 determine whether or not an act is -- whether or not it
14 should do business with a buying group?

15 A. Yes. And it's really just the same as what I
16 said earlier. It's your expected profitability if you
17 make the offer, and you want to compare that to your
18 expected profitability if you don't make the offer, and
19 you can write that as an equation if you like.

20 Q. Okay. Well, let's pull up page 48 of your
21 report -- it's RX 2832 -- paragraph 75.

22 A. Yes.

23 Q. Is this the equation you were referring to?

24 A. Yes. That's just basically writing out what I
25 just said, the expected profitability if you make the

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1 offer, comparing it to the expected profitability if
2 you don't make the offer.

3 Q. And how do the factors you just talked about
4 play into this equation?

5 A. The factors that I described would be the
6 factors that would influence the expected profitability
7 of the firm.

8 Q. So, for example, one factor might change the
9 revenue or the margin if you make the offer or might
10 impact the revenues or the margins if you don't make
11 the offer.

12 MR. DILLICKRATH: Objection, Your Honor.
13 That's clearly leading. He's just feeding the answer
14 to the witness.

15 MR. KASS: Your Honor, I'm just trying to make
16 it clear for the court as to what he actually just
17 said, so I think it's just to move the testimony
18 along.

19 MR. DILLICKRATH: Your Honor, when you start
20 with "for example," that's clearly giving an example
21 for him to agree with. It is leading.

22 JUDGE CHAPPELL: It is leading, but is this
23 information that you believe is not already in the
24 report?

25 MR. DILLICKRATH: I think the substance of it

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1 is. I'm not sure it's in the report exactly as
2 Mr. Kass articulated it.

3 JUDGE CHAPPELL: He stands on the objection.
4 Sustained.

5 MR. KASS: Okay.

6 JUDGE CHAPPELL: I appreciate you trying to
7 move along.

8 MR. KASS: I'll ask it a different way then.

9 BY MR. KASS:

10 Q. Dr. Carlton, how would the factors that you
11 mentioned impact the various elements of your equation
12 here?

13 A. Each of the factors I mentioned would
14 influence what I have in -- expressed in the equation,
15 so just maybe -- I mean, it's obvious, but if you lower
16 your price, it's going to lower your margin. Okay. If
17 you have a volume effect, it's going to affect how much
18 you sell, so, obviously, those are going to affect
19 these, these terms.

20 Q. Does Dr. Marshall agree with you that this is
21 the right equation to determine whether Schein acted
22 contrary to its self-interest?

23 A. I believe he does. Yes.

24 Q. Did he attempt to do this, to apply this
25 equation?

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1 A. No, he did not.

2 Q. Did you do this calculation?

3 A. I didn't do a calculation of what's in that
4 paragraph, no, I didn't.

5 Q. Okay. Well, Dr. Marshall says you can't apply
6 this equation, it's impossible.

7 How do you respond to that?

8 A. Well, I agree the factors I mentioned
9 complicate it. But businesses make judgments every
10 day, have to make decisions based on complicated
11 factors like I just described. Every firm that wants
12 to make a decision to increase its profitability has to
13 be making decisions like this day in and day out, and
14 to say that a businessman doesn't make decisions that
15 are intended to increase his expected profitability
16 would be I think just wrong. And my discussions with
17 Schein executives confirm that that's what they're
18 trying to do.

19 So I just disagree with him, that if he's
20 trying to say what I've put forward as that formula,
21 that it's irrelevant, he's just wrong. That's exactly
22 what the businessmen are trying to implement in their
23 own business judgment.

24 Q. Well, Dr. Marshall did have some form of an
25 analysis, his profitability analysis.

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1 What's your understanding of that analysis, and
2 how does that fit into your equation?

3 A. Well, his profitability analysis is not
4 implementing this equation. As he says, the equation
5 I've listed, namely, what do you think your profits
6 are if you make the offer compared to what they would
7 be if you didn't make the offer, is what he referred to
8 as -- I think he used the word "counterfactual." I
9 would agree with that, the use of the term. He doesn't
10 do that.

11 Instead, he looks at -- he looks at a variety
12 of things that -- we can go through some of them. But
13 he looks at Schein's profitability not if Schein wins
14 versus losing an offer, but actually he doesn't take
15 into account, for example, what would happen in the
16 Kois bid if Schein had won.

17 What do I mean he doesn't take into account
18 when he's calculating profits? I mean he doesn't pay
19 attention to the fact that Schein would have had to
20 lower its price. He doesn't take account of that
21 cost. That's the whole point of dealing with a buying
22 group. You've got to give them a discount to get them.
23 And he doesn't take account of that.

24 So he's not implementing the right -- the right
25 calculation. He does a calculation, but it's not the

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1 right one.

2 Q. So other than failing to account for the fact
3 that Schein would have to lower its price in order
4 to -- if it were to win the buying group business, were
5 there other things that Dr. Marshall failed to account
6 for as part of his profitability analysis?

7 A. Yes. Let's just again take a specific
8 example. I find it helpful to talk about a specific
9 example.

10 He's looking -- he's trying to say that Schein
11 should have -- would have made money if it won the Kois
12 bid, and he does some calculations, but nowhere, as I
13 just said, did he take account of the fact that Schein
14 would have had to lower its price.

15 He also ignores the fact -- and this is a very
16 important fact for buying groups -- that if Schein had
17 won the business of the Kois buying group, that would
18 influence who is in the Kois buying group. You're
19 going to get a different group of people in the Kois
20 buying group, likely to, if Schein wins than if
21 Burkhardt wins. He doesn't pay any attention to that.

22 Q. And so what does that mean in terms of
23 Dr. Marshall's ability, as part of his analysis, to
24 account for the likely cannibalization that would occur
25 if Schein were to win -- bid for and win a buying group

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1 business?

2 A. My own view is his calculations are inadequate
3 to give an indication as to what Schein's profits would
4 have been had Schein won the Kois business.

5 Q. Okay. Well, didn't Dr. Marshall show that
6 winning a buying group business or winning the buying
7 group contract was profitable for Burkhart? Why does
8 that not show that it would be profitable for Schein?

9 A. Well, Burkhart and Schein are very different
10 companies, so if it's profitable for Burkhart doesn't
11 mean it would be profitable for Schein. They have
12 different -- they're different businesses.

13 Schein is nationwide, has a large share
14 throughout the nation. It varies from state to state.
15 But Burkhart is mainly a regional supplier, so there's
16 no reason to think -- and they're different companies,
17 so there's no reason to think that what's true for
18 Burkhart is necessarily true for Schein.

19 Q. Well, didn't Dr. Marshall also do his analysis
20 for Washington State Burkhart, Washington State for
21 Kois members? Doesn't that prove that doing business
22 with buying groups is always profitable for Schein?

23 A. Well, I honestly can't tell what conclusion
24 he's trying to draw from the Washington experience of
25 Burkhart with the Kois group. I had several

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1 reactions.

2 To the extent that he's saying that the
3 Burkhart experience shows that it's sometimes
4 profitable to deal with a buying group, I agree with
5 that. I mean, I would -- I don't know with certainty,
6 but I assume Schein would agree with that. Schein
7 deals with buying groups, so if that's what he's
8 saying, I agree.

9 But if what he's saying is instead that this
10 proves that it's profitable for Schein to deal with
11 every buying group, if that's what he's saying, I
12 would disagree. That's going to depend on the ability
13 of a buying group to move people, and you can't assume
14 every buying group is going to be just like the Kois
15 group, so then I would disagree.

16 If instead of trying to say something about
17 every buying group instead what he's saying is no, the
18 Burkhart empirical example in Washington State that he
19 goes through is useful for establishing that it would
20 have been profitable for Schein to deal with the Kois
21 group everywhere, then I guess I have two responses to
22 that why it's wrong.

23 First -- and again, let me make clear -- based
24 on my understanding of the facts, which I understand,
25 you know, may or may not be true -- the judge will

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1 decide -- my understanding is that Sullivan has
2 testified that he didn't have adequate time or
3 information to make a bid. Well, if that's true, then,
4 you know, there's an easy explanation why Schein is not
5 dealing with Kois.

6 But putting that aside, let's ask does his
7 numbers from Washington State, "his" meaning
8 Professor Marshall's numbers from Washington State, are
9 showing that Schein would have found it profitable to
10 deal with the Kois group, I would say no for the
11 reason I just explained.

12 He's not doing a counterfactual. He's not
13 recognizing that Schein has very different market
14 shares throughout the country than does Burkhart. What
15 happens in Washington State to Burkhart may not be
16 indicative of what would happen even to Burkhart in
17 other parts of the country, but it's not obvious it
18 would be indicative of what would happen to Schein in
19 other parts of the country if Schein wins the Kois
20 business.

21 So for all of those reasons, I think his
22 Washington analysis fails to establish whatever he
23 might be claiming it is establishing.

24 Q. And so, Dr. Carlton, based on your analysis in
25 this case, what is your overall opinion about whether

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1 the evidence supports an inference that Schein
2 participated in the conspiracy that complaint counsel
3 alleges?

4 A. Well, I'll just repeat my overall conclusion.
5 My analysis, economic analysis of the evidence, is
6 inconsistent with Schein participating in the
7 conspiracy that the FTC claims it is participating
8 in.

9 MR. KASS: Thank you, Dr. Carlton. I have no
10 further questions at this time.

11 I pass the witness.

12 JUDGE CHAPPELL: Any more questions from this
13 side?

14 MR. OSTOYICH: Not from Patterson, Your Honor.

15 MR. RACOWSKI: No questions from Benco.

16 JUDGE CHAPPELL: Before you do that -- is there
17 going to be cross?

18 MR. DILLICKRATH: Yes, Your Honor.

19 JUDGE CHAPPELL: All right. Hold that for a
20 second.

21 I want to talk about posttrial briefing since
22 we have three respondents.

23 When the posttrial briefings come in, they
24 have to be analyzed, read, reviewed, all those things.
25 One thing that gets complicated when we have more than

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1 one respondent, posttrial proposed findings of fact
2 and the reply proposed findings of fact. I'm trying
3 to find a way to better manage and handle the
4 situation. It's like a flowchart on a murder board in
5 a definitive homicide squad with lines going
6 everywhere. And I'm open to suggestion, but I wanted
7 to throw out an idea that I had.

8 And I'm not the only one. The prosecuting
9 attorney also has to deal with replying to all these
10 different replies and assertions.

11 So I'm thinking maybe one section of proposed
12 findings of fact that would be joint if all three of
13 you can agree -- it would have to be all or none -- and
14 so it would be the initial proposed findings of fact
15 and the reply proposed findings of fact, and that would
16 be a joint offer by all three. And then to the extent
17 you can agree, you have some commonality -- there
18 should be something there. Maybe there's not -- but
19 then you would each do your separate proposed findings
20 and reply findings for each respondent.

21 I'm throwing it out to consider. If you want
22 to talk about it, if you want to let me know tomorrow,
23 that's fine. If you need more time, e-mail my office,
24 say, by Wednesday next week.

25 I understand this would take more time. I will

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1 allow more time for posttrial briefing for you to work
2 this out.

3 Would you have any objection to that?

4 MR. DILLICKRATH: No, Your Honor.

5 MR. KASS: Thank you, Your Honor. We'll
6 discuss it, and we will get back to you very
7 promptly.

8 JUDGE CHAPPELL: All right. Any objection
9 right away, initial feelings?

10 MR. OSTOYICH: No objection here. I think it's
11 a good idea. The question is how mechanically to do
12 it.

13 JUDGE CHAPPELL: Yes. That's why I'm leaving
14 it open. If you have a better idea or anything you
15 want me to consider that you want to propose, let me
16 know.

17 MR. KASS: Thank you, Your Honor.

18 JUDGE CHAPPELL: All right.

19 Go ahead with cross.

20 MR. DILLICKRATH: May I approach the witness
21 with a binder, Your Honor -- binders?

22 JUDGE CHAPPELL: Yes.

23 MR. DILLICKRATH: May I proceed, Your Honor?

24 JUDGE CHAPPELL: Go ahead.

25 - - - - -

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1 CROSS-EXAMINATION

2 BY MR. DILLICKRATH:

3 Q. Good morning, Dr. Carlton.

4 A. Good morning.

5 Q. We spoke briefly before court started today,
6 but again, for the record, my name is Tom Dillickrath
7 here on behalf of complaint counsel. Nice to see you
8 again.

9 A. Nice to see you again.

10 Q. Now, Dr. Carlton, if we have any questions
11 about the report that you submitted in the case, you're
12 the person we should come to; correct?

13 A. Yes.

14 Q. You drafted the report.

15 A. Yes. With the assistance of my staff, yes.

16 Q. And you've reviewed the report cover to cover;
17 correct?

18 A. Yes.

19 Q. Did you submit any errata in connection with
20 the report?

21 A. I'd have to check.

22 Q. You're not aware of any.

23 A. I don't recall.

24 Q. Okay. I'll give you a second to get situated,
25 Dr. Carlton.

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1 A. There's a lot here. Okay. Sorry.

2 Q. Some long reports.

3 And Dr. Carlton, I want to start by asking you
4 just a few questions about Appendix A to your report,
5 which is -- starts on RX 2832-070. And we put it up on
6 the screen to help.

7 And while you're getting there, this is
8 labeled Curriculum Vitae with Four Years of Testimony;
9 correct?

10 A. Yes.

11 Q. And this, at the time that you submitted this,
12 was your current CV; right?

13 A. I believe so.

14 Q. Okay. And it's intended to capture, if you go
15 to page 814 of the exhibit, which is RX 2832-083, your
16 testimonial experience over the preceding four years;
17 correct?

18 A. That was certainly the intent. Yes.

19 Q. And you were aware that the court's order,
20 scheduling order in this case, requires four years of
21 testimonial experience.

22 A. I believe I had an understanding that that's
23 why we were providing the four years.

24 Q. Okay. And I just want to ask you about a
25 couple of the cases where you testified previously that

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1 are on this list.

2 A. Okay.

3 Q. And just for the record, you've testified on
4 behalf of Schein in other matters; correct?

5 A. Yes.

6 Q. And that was in the SourceOne litigation?

7 A. Yes.

8 Q. And that one is on your CV, just to make sure
9 I'm right, on page A-15.

10 Hana, can you highlight that.

11 And that's the SourceOne litigation where you
12 represented Schein; correct?

13 It's up on the screen. It may be easier to
14 see.

15 A. Yes.

16 Q. Okay. Now, I want to ask you about another
17 case that you testified in, and it's called
18 In re Solodyn.

19 Are you familiar with that case?

20 A. I'm just trying to find it.

21 Q. Hana, can you highlight the In re Solodyn case
22 for Dr. Carlton. Thank you.

23 A. Yes.

24 Q. And did you testify on behalf of defendants in
25 that case?

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1 A. That's my recollection.

2 Q. And do you recall that the plaintiffs filed a
3 Daubert motion to exclude part of your testimony in
4 that case?

5 A. I don't know if I recall that. I don't think I
6 do, no. It might have happened, but -- it might have
7 happened. I don't have a recollection.

8 JUDGE CHAPPELL: Hold it. You need to quit
9 talking over each other. Wait for him to finish the
10 question.

11 Go ahead.

12 MR. DILLICKRATH: Thank you, Your Honor.

13 BY MR. DILLICKRATH:

14 Q. Hana, if you would pull up CXD 051.

15 And this, Dr. Carlton, is the district court
16 decision in the In re Solodyn case.

17 And Hana, if you would go to page 006 of this
18 and highlight the last paragraph in the right-hand
19 column.

20 It says, "Plaintiffs' motion to exclude
21 portions of Howson's and Carlton's opinions is thus
22 allowed in part, as to Carlton's reliance upon Howson's
23 technical probability estimates."

24 Do you see that?

25 A. Yes. That does refresh my recollection.

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1 If I recall, I relied on a -- another expert,
2 Howson, and there was a dispute. And I believe --
3 about her -- that person's testimony. And the part of
4 her testimony that was not allowed -- again, this is
5 just my -- best of my recollection -- they said I then
6 couldn't rely on that testimony.

7 Q. Okay. So your testimony was excluded, in part,
8 based on the fact that your conclusion was in reliance
9 on the work done by another expert; fair?

10 A. I don't think that's a correct
11 characterization. I think a fairer characterization
12 is, of the many opinions I gave in that case, opinions
13 that relied on Howson's testimony, that to the extent
14 that's excluded, that my opinion wouldn't be given any
15 weight.

16 Q. And do you recall testifying in a case called
17 Kleen Products v. Packaging Corporation of America?

18 Let's go ahead and pull up Appendix A again.
19 And Hana, just to save a little time for Dr. Carlton,
20 perhaps you can highlight the Kleen Products line.
21 Thank you.

22 A. Okay.

23 Q. Do you now recall testifying in that case?

24 A. I have a general recollection, sounds right.

25 Q. And do you recall if there was a Daubert motion

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1 filed against you in that case?

2 A. I don't have a specific recollection, no.

3 Q. Hana, if you would pull up CXD 0052.

4 And this is the U.S. District Court for the
5 Northern District of Illinois decision in the
6 Kleen Products case.

7 And if you would go to CXD 0024, please, the
8 24th page of this, and highlight the last paragraph
9 under the heading Dennis Carlton.

10 And you see there, Dr. Carlton, that a Daubert
11 motion was granted, unopposed, precluding you from
12 testifying in this matter; correct?

13 A. I don't have a recollection that I was
14 precluded from testifying. I thought that the judge
15 was just saying there was a -- do you have that in the
16 notebook here that I can look at?

17 Q. We can hand you up a copy, Dr. Carlton.

18 May I approach the witness, Your Honor?

19 JUDGE CHAPPELL: Yes.

20 (Document review.)

21 BY MR. DILLICKRATH:

22 Q. And just to help you focus, Dr. Carlton, the
23 very last line of the paragraph under your name says,
24 "Accordingly, the Court bars the proffered testimony
25 that Plaintiffs' impact analysis needs to account for

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1 the possibility that class members' overcharge may have
2 been reduced by lower prices paid in other
3 transactions."

4 (Document review.)

5 A. The only reason I'm -- you're suggesting my
6 testimony was excluded in this case. My
7 recollection -- and I'd have to go back and check -- is
8 that my testimony wasn't excluded in this case and that
9 it was only a small part of my opinion that the
10 attorneys felt wasn't important, and therefore, they
11 didn't oppose the motion.

12 So if you're here suggesting they threw out my
13 testimony, that's not my recollection at all. It's
14 quite the reverse, that the part of the testimony they
15 were objecting to my attorneys didn't think was
16 important enough to raise an objection, but I'm trying
17 to find here where they discuss me. But anyway, that's
18 my recollection.

19 Q. And did you testify at the trial in that case,
20 sir?

21 A. I don't know if there was a trial in this
22 case. I'd have to check. I don't recall the exact
23 specifics of the case. I --

24 Q. It might be --

25 A. -- the case is ongoing. I don't believe there

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1 was testimony.

2 Does it say on my vitae that there was trial
3 testimony?

4 Q. I can move on, Dr. Carlton.

5 A. I don't believe there was.

6 Q. Okay.

7 A. I believe the case settled. But I'd have
8 to --

9 Q. Let me move on.

10 A. -- I'd have to check.

11 But I just want to be clear. It is not my
12 recollection that your characterization that my
13 opinions were stricken in their entirety is correct.
14 My recollection is, at most, there was a small piece of
15 my testimony that my attorneys had thought was
16 sufficiently unimportant that they didn't oppose the
17 motion. By "my attorneys" I mean the attorneys for the
18 defendants.

19 Q. Is that your recollection, sir, or are you
20 testifying that that's a fact?

21 A. I would have to check. I'm not familiar with
22 exactly what happened in this Daubert motion, but that
23 is my recollection.

24 Q. All right.

25 A. But again, I'd have to check.

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1 Q. Before I forget, sir, in the cases that are
2 listed in your Appendix A that you've testified in
3 over the last four years, of the cases that you
4 testified in federal court, were there any that are on
5 this list in which you testified for the plaintiffs?

6 A. I'd have to check. But I'm currently involved
7 in a case in the federal courts for plaintiffs,
8 involving the computer reservation systems used by
9 travel agencies, and in that case I'm representing --
10 I'm submitting on behalf of the plaintiffs.

11 I'm also in a class action on behalf of the
12 plaintiffs against the credit card companies.

13 Q. Okay. Sir, my question is somewhat different,
14 so let me ask it again.

15 Of the cases that you have listed on your
16 Appendix A where you gave testimony over the previous
17 four years in federal court, in any of those cases that
18 are listed in your appendix did you testify on behalf
19 of plaintiffs?

20 A. I have to check.

21 (Document review.)

22 JUDGE CHAPPELL: Do you mean a plaintiff or the
23 government?

24 MR. DILLICKRATH: Correct, Your Honor.

25 JUDGE CHAPPELL: Make sure he understands.

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1 BY MR. DILLICKRATH:

2 Q. So, Dr. Carlton, when I say "plaintiffs," it
3 would be whether you were representing a private
4 plaintiff or the U.S. government in the list that's in
5 your appendix.

6 You understand that; right?

7 A. Yes. I'm just going through.

8 (Document review.)

9 Just based on a quick review, I don't believe
10 so.

11 Q. Okay.

12 A. But like I say, I'm currently involved in the
13 cases I mentioned, which are on behalf of class
14 plaintiffs.

15 MR. DILLICKRATH: Your Honor, I'm going to move
16 to strike the last part of the answer. I asked a very
17 specific question. Dr. Carlton would prefer to answer
18 a different one I believe.

19 JUDGE CHAPPELL: I'm going to allow that.
20 Overruled.

21 MR. DILLICKRATH: Thank you, Your Honor.

22 BY MR. DILLICKRATH:

23 Q. Just one more case I want to ask you about,
24 Dr. Carlton, and then we'll move forward.

25 You mentioned I believe in your direct

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1 testimony a case involving the rail industry. Did I
2 have that right?

3 A. As a conspiracy case.

4 Q. Would that be In re Rail Freight Fuel Surcharge
5 Antitrust Litigation?

6 A. That would be one of them. There was another
7 one. I don't think it's -- it was many years ago -- in
8 which I -- my recollection is I was representing
9 plaintiffs against -- I believe it had to do with the
10 people who made -- there's a technical name for it and
11 I can't remember, but it's the stuff you put around
12 railroad tracks when you go over a railroad track
13 crossing. And that was another, if I recall correctly,
14 conspiracy case, and that was on behalf of plaintiffs.
15 But the other case I was thinking of is the rail
16 freight case that you mentioned.

17 Q. And you represent defendants in that case;
18 correct?

19 A. In that case, yes.

20 Q. And that's a price fixing case?

21 A. You could characterize it that way.

22 Q. And you testified at a class cert hearing in
23 that case; correct?

24 A. I believe that's correct.

25 Q. And that was in September 2016?

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1 A. I don't remember the exact date.

2 Q. Okay. And do you recall being deposed in that
3 case as well?

4 A. I may recall there was a deposition. I don't
5 recall the specifics of the deposition.

6 Actually, I would have to check if there was a
7 deposition. I assume there was a deposition.

8 Q. Let me -- bear with me one moment.

9 I want to ask Hana to pull up CDX -- or CXD --
10 excuse me -- 0037 and just start on the first page,
11 Hana.

12 I just want to do this to orient us,
13 Dr. Carlton. This is the docket printout from the
14 In re Rail Freight Fuel Surcharge Antitrust Litigation
15 that we've been discussing.

16 And if we could turn, Hana -- it's a long
17 document. We're just going to go to page 073.

18 A. Yes. You know, while there was a slight
19 break, I did have the chance to read the concluding
20 paragraph of that case with the Daubert motion. And it
21 does say that it's not allowing me to testify to
22 something because neither side requested or assisted
23 it, but it also says what I can testify to, and my
24 recollection that I gave you therefore is correct, that
25 they're just saying I couldn't testify to this

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1 particular point, not my entire testimony.

2 Q. So, Dr. Carlton, your attorneys will have a
3 chance to ask you additional questions, but I would
4 ask that you answer the question that's before you,
5 and they can always ask you more questions if they
6 feel there's a need for you to clarify anything.

7 Okay?

8 A. Yeah.

9 Q. So as we look at page 073, I'm going to ask
10 Hana to highlight the sixth entry down, just to orient
11 us.

12 A. What is this again?

13 Q. This is the docket sheet for In re Rail Fuel.

14 A. Okay.

15 Q. And it says: Minute entries for proceedings
16 before Judge Paul L. Friedman, class certification
17 hearing held September 30, 2016, witness testimony,
18 Dr. Dennis Carlton.

19 A. Okay.

20 Q. So does that help you recall that you testified
21 in this case in 2016?

22 A. I have no reason to dispute that.

23 Q. Okay. You can take this down, Hana.

24 And before I get into the substance of this
25 case, can you just show me where on Appendix A you've

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1 listed this case?

2 A. Which case?

3 Q. The in re fuel antitrust litigation -- in re --
4 let me start that again. It's a tongue-twister.

5 The In re Rail Freight Fuel Surcharge Antitrust
6 Litigation.

7 A. It should have been listed. Are you saying
8 it's not listed?

9 Q. Well, I had some trouble finding it, sir, so
10 I'm asking, and perhaps it's listed under some other
11 identity that I'm not aware of.

12 (Document review.)

13 A. I don't see it. It should have been listed.
14 Hmm.

15 Unless I'm missing something, I don't see it,
16 and I agree with you it should have been listed.

17 Q. Okay.

18 A. It certainly would have been my intention to
19 list it, and now I'm worried that that somehow was
20 inadvertently left off of all my CVs, but I will check
21 that, so thank you. That was one of the cases I had
22 referred to earlier that I had been involved in.

23 Q. Okay. And Dr. Carlton, you've disclosed this
24 case in other litigations that you've been involved in;
25 correct?

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1 A. I've disclosed this case?

2 Q. Yes, sir.

3 A. Do you mean I -- I would have listed this case
4 on my CV. Is that what you mean?

5 Q. Right.

6 A. Yeah. I would assume so.

7 Q. Now, let me ask you a little bit about your
8 testimony in this case that was not in your Appendix A
9 of your testimony over the past four years.

10 Was there a Daubert motion filed against you in
11 this price fixing case?

12 A. In this case?

13 Q. Yes. In In re Rail Freight antitrust
14 litigation?

15 A. Oh, in the rail freight case?

16 Q. Yes.

17 A. I'd have to check. I don't know. I don't
18 recall specifically. I mean, I know Daubert motions
19 are often part of the routine.

20 Q. Okay. So you don't know if a Daubert motion
21 was granted in the -- in part in the rail freight
22 case?

23 A. I don't have a specific recollection.

24 Q. Okay. Let us pull up CXD 0036.

25 And Your Honor, just to save a little time, may

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1 I approach the witness with a copy of this --

2 JUDGE CHAPPELL: Go ahead.

3 MR. DILLICKRATH: -- in case he wants it?

4 BY MR. DILLICKRATH:

5 Q. So, Dr. Carlton, it's a long decision. I'm not
6 going to ask you to talk about the entire thing, but I
7 just want to ask you about a couple of -- a couple of
8 particular points.

9 If -- Hana, if you would go to CXD 0036-044 and
10 highlight the first paragraph on the right-hand side of
11 the page.

12 Highlight the first sentence perhaps.

13 It says there, "The Court concludes that
14 Dr. Carlton's RCAF false positives exercises would
15 confuse rather than aid the fact-finder because it is
16 unlikely that railroads would have used the RCAF-U
17 index - standing alone - to set prices in the but-for
18 world."

19 Do you see that, sir?

20 Can we blow that up at all for Dr. Carlton.

21 A. Oh, I see. I see it now.

22 Q. Okay. And does that help you recall that the
23 court --

24 A. Yes.

25 Q. -- excluded part of your testimony on Daubert

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1 grounds?

2 A. Yes, this helps me recall that. Again, it was
3 only a small part, but yes, I recall this. I don't
4 agree with it, but I recall it.

5 Q. And ultimately, if you look at the last
6 sentence, the court said "the Court excludes
7 Dr. Carlton's RCAF false positive exercises as
8 unhelpful to the fact-finder under Daubert and
9 Rule 702"; correct?

10 A. Yes. That's what happened, but I -- and I
11 wound up giving, you know, extensive testimony about
12 other facts but did not talk about this particular RCAF
13 false positive.

14 Q. All right. And the court also excluded a
15 second portion of your testimony. Do you recall that?

16 A. I don't but appreciate it if you could remind
17 me.

18 Q. Of course.

19 Let's go to CXD 0036-0064. And Hana, if you
20 would highlight the -- and perhaps blow up the second
21 paragraph on the right-hand side of the page.

22 It says, "The Court finds Dr. Carlton's fuel
23 shares criticism of the constant fuel coefficient
24 unpersuasive for two reasons: the assumption on which
25 Dr. Carlton's work is based -- that fuel price shares

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1 should equal fuel price elasticity – is inappropriate,
2 and the results from Dr. Carlton's fuel shares analysis
3 generate incorrect signs – that is, signs that are
4 inconsistent with economic theory – thereby undermining
5 the reliability of his results."

6 Do you recall that now, Dr. Carlton?

7 A. Yes. I -- I recall -- I wouldn't have
8 recalled it if you didn't show me this. I don't agree
9 with it for the reasons explained in the next sentence,
10 but the judge is saying economic theory doesn't apply
11 to the railroad industry.

12 Q. Okay. Let's move on.

13 Now, your hourly rate, Dr. Carlton, is
14 \$1,600 an hour? Do I have that right?

15 A. Yes.

16 Q. And that's what you're charging Schein in this
17 case?

18 A. Well, that's what Lexecon is charging. Yes.

19 Q. Now, you don't have any educational background
20 in dentistry; right?

21 A. I do not.

22 Q. Never worked in the dental industry?

23 A. My only experience is in the chair.

24 Q. My sympathies for that.

25 And you know who Dr. Lawrence Wu is; correct?

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1 A. I do.

2 Q. And you know that he submitted a report on
3 behalf of Patterson in this case; right?

4 A. I have a general understanding of that. Yes.

5 Q. And you didn't offer any opinion in your report
6 about Dr. Wu's report; correct?

7 A. I did not, no.

8 Q. And you know who Dr. John Johnson, IV is;
9 correct?

10 A. I don't think I know him personally, but I know
11 he submitted a report.

12 Q. And that report was on behalf of Benco?

13 A. That's my understanding.

14 Q. And in your report, no opinion on Dr. Johnson's
15 work; right?

16 A. That's correct.

17 Q. And you didn't receive any inputs from Dr. Wu
18 on your work, did you?

19 A. No.

20 Q. You didn't receive any inputs from Dr. Johnson
21 on your work; correct?

22 A. Not that I know of, no.

23 Q. Do you know of an economist named
24 George Stigler?

25 A. Yes.

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1 Q. Famous economist?

2 A. Yes.

3 Q. University of Chicago?

4 A. Yes.

5 Q. Nobel Prize winner?

6 A. Yes.

7 Q. You cite him in your report; correct?

8 A. I believe so.

9 Q. He has a famous article called What Does an
10 Economist Know, and that's the article you cite in your
11 report; right?

12 A. I'd have to check. I believe so. I believe
13 I'm citing that report criticizing Professor Marshall's
14 interpretation of e-mails.

15 Q. And are you aware that in that article
16 Dr. Stigler wrote that an economist -- and I quote --
17 "has no special skill in reading documents and relating
18 them to actual behavior"?

19 A. I do. I believe I make that point in my
20 report.

21 Q. And you agree with that; right?

22 A. Yes.

23 He doesn't have any special skills in reading a
24 document and trying to infer what it means. He can
25 take -- he can state his assumption as to what he says

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1 he thinks it means, but he shouldn't be interpreting
2 the document himself if it requires interpretation.

3 Q. Now, you yourself, you mentioned -- and I've
4 read a lot of them -- you've written hundreds of
5 articles; correct?

6 A. I wouldn't say hundreds, but it's in the
7 hundred -- over a hundred.

8 Q. I won't claim to have read all of them, but I
9 have read one called How should Economic Evidence be
10 Presented and Evaluated?

11 Do you remember that one?

12 A. I remember I wrote a paper on that topic. I
13 don't remember in detail its contents.

14 Q. Well, let's pull up CXD 0043.

15 I just want to ask you one or two questions
16 about this.

17 A. Okay.

18 Q. This looks familiar to you as the article I was
19 describing?

20 A. I can't -- do you have a physical copy of it?

21 Q. Oh, sure.

22 May I approach the witness, Your Honor?

23 JUDGE CHAPPELL: Yes.

24 THE WITNESS: Thank you.

25 JUDGE CHAPPELL: Do respondents have a copy?

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1 MR. DILLICKRATH: They do, Your Honor.

2 JUDGE CHAPPELL: All right.

3 THE WITNESS: Yes.

4 BY MR. DILLICKRATH:

5 Q. And Hana, if you could pull up 009, please.

6 And I just want to ask you a question about the
7 section about halfway down the page under Price fixing.

8 A. What page is that?

9 Q. 009.

10 A. Yes.

11 Q. And in the first sentence, you say, "As I have
12 already mentioned, George Stigler once pointed out that
13 economists can interpret documents no better, and
14 likely worse, than lawyers."

15 And then you go on to say, "Asking an
16 economist to read a document and discern its hidden
17 meaning is just not a skill that economists are trained
18 to do."

19 You still agree with that; right?

20 A. I do. I believe I make exactly that point in
21 my report in this case in criticizing
22 Professor Marshall.

23 Q. And you yourself, Dr. Carlton, you don't have
24 any special training or expertise in reading documents;
25 right?

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1 A. I wouldn't claim to, not necessarily.

2 Q. I'm sorry?

3 A. I wouldn't claim to.

4 Q. Would you agree that if the court were to find
5 that in this case there was a per se violation of the
6 antitrust laws, there would be no role for an
7 economist?

8 A. Well, I'm not a lawyer. I have some
9 understanding of the law. But if, you know, the judge
10 were to determine that this is a per se violation of
11 the antitrust laws, my understanding is that doesn't
12 require an economist.

13 Q. Now, is it fair to say that you did not look at
14 every single document in this case?

15 A. That's certainly fair.

16 Q. And you didn't read all the depositions in this
17 case; correct?

18 A. That's certainly true. Yes.

19 Q. And as part of your submission to the FTC, your
20 expert report, you listed the materials you relied upon
21 in the report; right?

22 A. Yes.

23 Q. And that's at Appendix B of your report, and
24 that is page -- let me make sure I get it right --
25 RX 2832 and it starts on page 086. I want to ask you a

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1 few questions about that.

2 A. Okay.

3 Q. And we counted up the depositions, not the
4 investigational hearings but the -- where the word
5 "deposition" appears, the depositions you relied on
6 here. And you're welcome to double-check me, but we
7 came up with 16 depositions that you relied on.

8 Does that sound about right?

9 A. That is cited in the report.

10 Q. That are in your Appendix B materials relied
11 upon.

12 A. Yes.

13 So anything that I footnoted in the report I
14 listed in that appendix, and you know, if you say there
15 are 16, then I'll believe you.

16 Q. And you know there were many more depositions
17 than 16 taken; correct?

18 A. Again, I don't have any reason to disagree.

19 Q. I'll represent to you there were 46 depositions
20 taken in this case. Okay?

21 A. Okay.

22 Q. So by relying on 16 out of 46, if I do the math
23 correctly, that's a little more than a third; is that
24 about right?

25 A. Sounds correct.

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1 Q. Okay. So you didn't rely on about two-thirds
2 of the depositions that were taken in this case;
3 correct?

4 A. Well, whatever I'm not listing -- I stated in
5 my report what I relied on, so whenever I make a
6 statement that I feel like I need to have some
7 substantiation, I would put a footnote. And this is --
8 would be what I would be relying on, so if I listed 16,
9 there are, as you said, 46, that would mean there are
10 one-third of them that I'm listing about.

11 Q. Now, as you agreed with -- as I think you agree
12 with me, an economist is no better at digging out facts
13 than a lawyer; right?

14 A. An economist is no better interpreting a
15 document than a lawyer, if that's what you mean.
16 That's what we were talking about earlier.

17 Q. And in fact, it's not the role of an economist
18 in preparing his expert report, his or her expert
19 report, to interpret documents; right?

20 A. I would agree with that. You can say what your
21 interpretation is, but that's subject to an
22 understanding that you're not the fact-finder, "you"
23 meaning the economist isn't the fact-finder. He can
24 only state what his understanding of the facts are.

25 Q. Now, in your deposition -- well, strike that.

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1 When you use the words "I understand" in your
2 report, you're relying on what someone else told you;
3 is that correct?

4 A. I really -- I'd have to look at my report.
5 I'm happy to do that if you have an instance. I can
6 tell you what I'm understanding.

7 Q. Would it refresh your recollection to take a
8 look at your deposition where I asked you what you
9 meant by when you used the words "I understand"?

10 A. It might, but I was just suggesting, I have my
11 report in front of me, if there's any questions, I'd be
12 happy to answer. I generally use the word "I
13 understand" to mean that I'm relying on someone, but
14 that would be indicated in a footnote, so if you point
15 me to a particular sentence, I can see if it's
16 footnoted.

17 Q. I think you've answered my question.
18 Thank you.

19 You conducted interviews with Schein personnel
20 during the course of preparing your report; right?

21 A. I did, yes.

22 Q. And you didn't retain any notes of these
23 conversations that you had with Schein personnel;
24 right?

25 A. That's correct.

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1 Q. You might have taken notes, but you didn't
2 retain them; is that fair?

3 A. I didn't retain my notes --

4 Q. Okay.

5 A. -- to the extent I took any.

6 Q. And you're just relying -- when you prepared
7 your report and as you testify today, you're relying on
8 your memory of those conversations; correct?

9 A. My memory as well as my staff and attorneys
10 were on the phone on those also.

11 Q. Okay.

12 A. On those phone calls.

13 Q. I just wanted to ask you about one more case.

14 Do you recall being hired as an economic expert
15 in a case called Jamsports Entertainment v. Paradama
16 Productions?

17 A. I remember working on a case Jamsports. I
18 think that was a while ago.

19 Q. That involved motorcycles; is that right?

20 A. I believe that's correct.

21 Q. More exciting than dentistry; right?

22 A. Pardon me?

23 Q. Never mind, Doctor. I withdraw the question.

24 You were hired by the defense in that case?

25 A. That's my recollection. Yes.

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1 Q. And that was an antitrust case?

2 A. I'd really have to review my recollection. I
3 think that case was several years ago, but my general
4 recollection is involving antitrust issues.

5 Q. And do you recall whether there was a motion to
6 exclude parts of your testimony in that case?

7 A. I don't have a specific recollection of that.
8 There may have been.

9 Q. Okay. Hana, if we can pull up CXD 0044.
10 Your Honor, may I approach Dr. Carlton?

11 JUDGE CHAPPELL: Yes.

12 BY MR. DILLICKRATH:

13 Q. And just looking at the caption, Dr. Carlton,
14 this Jamsports v. Paradama case, that appears to be
15 the case that we've been discussing for the past minute
16 or two; correct?

17 A. I believe so.

18 Q. Okay. Let me call your attention,
19 Dr. Carlton, to page 008, and we'll put it up on the
20 screen as well.

21 And Hana, if you'd highlight or blow up the
22 first full paragraph there on the right-hand column.
23 Thank you.

24 A. 008 did you say?

25 Q. Yes.

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1 A. Okay.

2 Q. And we're looking at the first full paragraph
3 in the right-hand column.

4 And I'm just going to start from the second
5 sentence.

6 "Having now re-reviewed Carlton's report in
7 light of our rulings regarding Baade, the Court notes
8 that that report, like Baade's, incorporates findings
9 that consist of little more than the interpretation of
10 written or verbal statements by others."

11 Do you see that?

12 A. Yes.

13 Q. And it goes on to say, "Such 'findings,' like
14 those of Baade discussed above, are not an appropriate
15 subject for expert testimony."

16 And then it goes on to say, "Carlton, like
17 Baade, will be barred from rendering opinions that
18 amount to simply interpreting the evidence and drawing
19 inferences regarding the motivation of Clear Channel or
20 others."

21 Do you see that?

22 A. I do see that. And I agree with it entirely
23 and that I try to make clear in my testimony that what
24 I'm assuming to be true as a fact, and if there's a
25 dispute about it, people -- the fact-finder can make

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1 that determination, so I agree with that sentiment.

2 It is not my intention ever to do that. I'll
3 have to look at the -- I don't remember the specifics
4 of this case, but I try and be very clear when I
5 testify as to what I am assuming the facts on. And if
6 it results from a memo and interpretation, I agree
7 entirely with this statement that is made here.

8 Q. You testified on direct a little bit about
9 your assignment, and I wrote it down.

10 You said you were asked to perform economic
11 analysis of the FTC's claims and evaluate
12 Dr. Marshall's report; is that right?

13 A. Sounds right.

14 Q. Okay. I just want to clarify the assignment
15 that was in your actual report, which is a little bit
16 different, I think.

17 If you would go to RX 2832-006.

18 And B says "Assignment." And let me just read
19 into the record the first paragraph:

20 "I have been asked by counsel for Henry Schein,
21 Inc. ('Schein') to review the merits of the claim by
22 the Federal Trade Commission that Schein, along with
23 Patterson and Benco, conspired to refuse to deal with
24 or offer discounts to buying groups representing
25 certain types of dentists."

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1 Do you see that?

2 A. Yes.

3 Q. Do you think it's the role of an economist to
4 review the merits of a claim?

5 A. I thought that's exactly consistent with what I
6 just answered to your earlier question. If you think
7 what I said earlier is fine, I'm happy to -- that's how
8 I interpret paragraph 5.

9 I'm not and don't claim in the report to do
10 any legal analysis of legal merits. I'm just -- I'm
11 an economist. I'm doing an economic analysis, so I
12 don't mean anything different in paragraph 5 from what
13 I just said. I thought paragraph 5 is what I had
14 said.

15 Q. We talked a little bit earlier about your
16 buying groups analysis that I think is captured in
17 table 1. You discussed that with Mr. Kass. You recall
18 that; right?

19 A. Table 1 I discussed, yes.

20 Q. Okay. And when you use the term "buying group"
21 in your report, you're using a definition of
22 "buying groups" that is broader than the definition
23 that the FTC alleged in the complaint; correct?

24 A. Well, just so there's no confusion, the word
25 "buying group" is used in a variety of different ways

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1 by lots of people, so I try and be very clear when I'm
2 talking about the FTC buying groups and when I'm
3 talking about other buying groups. But I do discuss
4 various definitions of "buying groups" in one of my
5 footnotes, and I also make the point that in the
6 industry there's no precise definitions of "buying
7 groups" that everybody agrees with.

8 Q. Well, let's go to your footnote, and it's on
9 page RX 2832-008.

10 And Hana, if you'd pull that up and highlight
11 footnote 6.

12 And you say, "I interpret the FTC's definition
13 of 'Buying Groups' to include only buying groups of
14 independent dentists and small group practices, as
15 defined in the footnote above, in which the buying
16 group does not have any ownership stake in any of its
17 members. For the purpose of my report, I refer to the
18 FTC's definition of buying group as 'buying groups of
19 independent dentists,' while using the general term
20 'buying groups' to represent any entity, other than a
21 DSO, that seeks to negotiate prices on behalf of its
22 members."

23 You see that; right?

24 A. Yes.

25 Q. So when you use the term "buying groups,"

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1 you're using that in a broader sense than
2 independent -- well, strike that.

3 The term "buying groups" includes more than
4 buying groups of independent dentists; right?

5 A. The term "buying groups" is used in a lot of
6 different ways.

7 Q. I'm asking you how you use it in your report,
8 Dr. Carlton.

9 A. I was trying to answer your question.

10 The word "buying group" is used in a lot of
11 different ways. I'm trying to make clear in that
12 footnote how I'm using it in the report. I'm happy, if
13 you think there's an ambiguity anywhere in the report,
14 to clarify.

15 In my testimony I tried to be very clear,
16 because I was worried about this ambiguity that you're
17 pointing out, as to when I was referring -- exactly
18 what I was referring to. That's why I went through
19 paragraph 28.

20 Q. So just to be clear, when you used the term
21 "buying groups," that encompasses more than the term
22 "buying groups of independent dentists"; correct?

23 MR. KASS: Your Honor, asked and answered.
24 Objection.

25 MR. DILLICKRATH: Your Honor, I've asked it

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1 several times. I've yet to hear him respond yes or no.

2 JUDGE CHAPPELL: Overruled.

3 THE WITNESS: I use "buying group" -- if I just
4 generally in the report used the word "buying group" as
5 I think I tried to explain in this footnote what I'm
6 referring to. In my testimony this morning I tried to
7 be crystal clear -- if I'm not, I'm happy to clarify --
8 exactly what I meant.

9 So I talked about four categories in
10 paragraph 28, the first category what the FTC said is a
11 buying group, according to their definition. The
12 second group was what Schein said was a buying group
13 according to the FTC's definition. The third group was
14 what I determined would be a buying group according to
15 the FTC's definition. And the fourth group was
16 everything else.

17 So I'd be happy to clarify if you think
18 there's any ambiguity in my testimony as to what I'm
19 referring to. If you show me a sentence or some -- or
20 ask me a question about my testimony, I'd be happy to
21 explain.

22 MR. DILLICKRATH: So, Your Honor, I'm going to
23 move that the last response not be considered and that
24 Dr. Carlton be instructed to answer the questions that
25 are being asked. He has not provided a yes or no to

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1 the simple question of whether a buying group as he
2 defines it in his report includes more than buying
3 groups of independent dentists.

4 MR. KASS: Your Honor, I believe he's answered
5 the question now multiple times to the best of his
6 ability. It doesn't call for a clear yes or no because
7 the word "buying group" appears so many different times
8 in so many different contexts both in his report and in
9 his testimony.

10 JUDGE CHAPPELL: His answer to the question --

11 THE WITNESS: In my report --

12 JUDGE CHAPPELL: -- is in the record, and the
13 answer stands.

14 MR. DILLICKRATH: Thank you, Your Honor. I'll
15 move on.

16 BY MR. DILLICKRATH:

17 Q. Now, in section IV of your report -- and we can
18 just use the index for purposes of this question to
19 make things a little bit simpler, which is
20 page RX 2832-002 -- you have a section that says
21 "Schein Negotiates with and Offers Discounts to Buying
22 Groups."

23 Do you see that?

24 A. Yes.

25 Q. And when you're using it in that heading,

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1 you're intending it for "buying groups" to refer to the
2 broader definition of "buying groups" that includes but
3 is not limited to buying groups of independent
4 dentists; correct?

5 A. No. The report speaks for itself. What you
6 said is correct, and that section includes
7 paragraph 28, where I explain exactly what I'm doing in
8 the table, which is what I did in my testimony this
9 morning.

10 Q. You don't conclude anywhere in your report, by
11 the way, that Dr. Marshall's definition of a buying
12 group is unreasonable, do you?

13 A. I'm sorry. Just say that once more.

14 Q. You don't conclude anywhere in your report that
15 Dr. Marshall's definition of a buying group is
16 unreasonable; correct?

17 A. I -- I don't say that in -- in the report. I
18 did say at my deposition that the FTC's definition is
19 very peculiar and inconsistent, but -- and I'm happy to
20 explain that, but I'm not contesting that you have a
21 definition -- the FTC has a definition of a buying
22 group. For reasons I explained at my deposition, I
23 don't think it's a sensible definition, but I'm just
24 taking that as given.

25 Q. But that's not part of your report; right?

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1 A. I -- correct.

2 Q. Now, I want to ask you some questions about
3 Appendix D of your report. Okay? And that starts on
4 page D-1, which is RX 2832-118.

5 A. Okay.

6 Q. And Hana, you can pull that up, if you would.
7 This section is titled Buying Groups that
8 Schein Has Dealt With.

9 Do you see that?

10 A. Yes.

11 Q. And that's buying groups including but not
12 limited to buying groups of independent dentists, as
13 you discussed with Mr. Kass this morning; right?

14 A. Exactly.

15 Q. Okay. And you didn't personally investigate
16 whether any of these entities are actually buying
17 groups; correct?

18 A. Yes. As I testified this morning, I'm taking
19 the characterizations of the FTC. I'm saying if you
20 defined your buying groups, I'll take those as given.
21 Schein tells me what they say are the FTC buying groups
22 that satisfy the definition. I look on the Internet
23 what the dentists say, whether they're independent.
24 And I'm not investigating that. I'll leave that to the
25 fact-finder to determine who's right and who's wrong

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1 about definitions.

2 Q. So let me start by asking you some questions
3 about section B, which starts on page D-5, RX 2832-122.

4 A. Yes.

5 Q. And this is the group B, which is buying groups
6 that Schein has identified as comprised of independent
7 dentists; correct?

8 A. Yes.

9 Q. And how did you come to acquire this list?

10 A. This is the second group that I described.
11 Schein has testified -- I was provided testimony or
12 interrogatories indicating that they are composed --
13 that these groups are composed of independent
14 dentists.

15 Q. So that's the only criteria that you used in
16 selecting these; correct?

17 A. That's the criteria I used, yes.

18 Q. Okay. I want to ask you about some of the
19 specific examples that you provided. Let's start with
20 Ciraden, which is on page D-6, RX 2382-123.

21 And you say, "Ciraden was a buying group
22 comprised of independent dentists. Ciraden had a
23 relationship with Schein from 2005 to 2010."

24 Do you see that?

25 A. Yes.

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1 Q. And you're aware that the allegations in this
2 case are that the conspiracy period started in 2011;
3 correct?

4 A. I am aware of that, yes.

5 Q. Okay. In fact, you go on to say that
6 Ciraden's management disbanded in approximately 2011;
7 right?

8 A. Yes.

9 Q. Let me turn to another one, and that is on
10 page D-7, RX 2832-124.

11 And what I'm going to try to do here, on the
12 screen, as you may or may not be able to see this,
13 Doctor, is a redacted version of the report, and I'm
14 going to ask the questions carefully so I don't
15 require you to reveal any confidential information and
16 will ask that you not reveal any specifics. And if you
17 feel you can't answer the question, let me know. Is
18 that fair?

19 A. I will.

20 The last sentence you read, you didn't read the
21 full sentence.

22 MR. DILLICKRATH: Your Honor, if his counsel
23 wants to question him further about things, he's
24 welcome to. I've moved on to another question.

25 JUDGE CHAPPELL: When you ask, "Is that fair?"

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1 he has a right to respond accordingly. That's
2 overruled.

3 MR. DILLICKRATH: Okay.

4 JUDGE CHAPPELL: You need to rephrase your
5 question if you're going to object.

6 BY MR. DILLICKRATH:

7 Q. Let me go back to the question I asked then.

8 My question was: In fact, you go on to say
9 that Ciraden's management disbanded in approximately
10 2011; right?

11 A. That's correct. But the rest of the sentence
12 said but Schein -- "and Schein kept the member offices
13 on the same discount plan." That means that the
14 discount the group had negotiated continued to benefit
15 the members who had been in the Ciraden group.

16 Q. But there was no more buying group; correct?

17 A. There's no more buying group, but there was a
18 benefit from the buying group that continued.

19 Q. Now let's go back to the question I just asked
20 you about the Mastermind Group, and I didn't actually
21 get to my question. I was just ensuring that we didn't
22 step on any confidential information, so I'm going to
23 ask my question carefully to try and avoid that. Fair
24 enough?

25 A. Okay. Just tell me what page again, please.

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1 Q. Sure. It's D-7, RX 2832-124.

2 A. Yes. Okay.

3 Q. And if we look at the Mastermind Group, would
4 it be correct to say that the relationship between
5 Mastermind Group and Schein started after the alleged
6 conspiracy period ended?

7 A. Yes. Based on this -- what's in the text, it
8 said it's --

9 Q. Don't give the date. I just -- I don't mean to
10 interrupt you.

11 A. Okay, okay.

12 Yes, you're asking me -- I think I understand
13 what you're asking me, and I think the answer is yes,
14 it's not during the conspiracy period.

15 Q. Okay. Let me ask you a few questions about
16 Dental Smart.

17 JUDGE CHAPPELL: Before you do that, we're
18 going to take a break. When we come back, I'm going to
19 ask for a time estimate.

20 We'll reconvene at 12:15.

21 (Recess)

22 JUDGE CHAPPELL: Okay. We're back on the
23 record.

24 Time estimate.

25 MR. DILLICKRATH: I think around 30 minutes,

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1 Your Honor, perhaps less.

2 JUDGE CHAPPELL: Is another witness available
3 today?

4 MR. KASS: No, Your Honor.

5 JUDGE CHAPPELL: What's your time estimates on
6 the two witnesses tomorrow?

7 MR. McDONALD: From the respondents, the first
8 witness I think we'll have 30 to 45 minutes, and the
9 second witness, Joe Cavaretta, my guess is an hour to
10 an hour and a half.

11 JUDGE CHAPPELL: So we'll finish easily
12 tomorrow with those two?

13 MR. McDONALD: Easily.

14 MR. DILLICKRATH: That's correct, Your Honor.
15 We would anticipate being able to complete our crosses
16 as well.

17 JUDGE CHAPPELL: All right. Let's do it.
18 Go ahead.

19 So when we're done with this witness, we're
20 done for today.

21 MR. KASS: Yes, Your Honor.

22 JUDGE CHAPPELL: Just so I'm clear with what I
23 was talking about earlier, the briefing, I'm not
24 talking about a joint brief, I'm talking about proposed
25 findings of fact, which is a separate animal.

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1 MR. KASS: Understood, Your Honor.

2 MR. DILLICKRATH: Thank you, Your Honor.

3 MS. KAHN: Thank you, Your Honor.

4 BY MR. DILLICKRATH:

5 Q. All right, Dr. Carlton. Welcome back.

6 A. Thank you.

7 Q. Right before the break, I was about to ask you
8 a few questions about Dental Smart. And that's at
9 D-6 of your appendix, RX 2832-123.

10 And can you pull that up, Hana. Thank you.

11 And I want to read you the first sentence. And
12 it says, "Schein contends that Dental Smart possibly
13 falls within the FTC's definition of a buying group";
14 right?

15 A. Yes.

16 Q. Okay. So the -- all you're saying here is that
17 there is a possibility, according to Schein, that
18 Dental Smart is a buying group; right?

19 A. That is what I'm saying here. You know, my
20 understanding is there's new information, but...

21 Q. I'm -- okay. In your report, you're just
22 saying there's a possibility. That's as far as you
23 went in your report; correct?

24 A. Yes. I'm highlighting that because that's my
25 understanding of what Schein is saying at that time.

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1 Q. Okay. Dr. Carlton, if an entity is a DSO, it
2 does not fit within your definition of a buying group;
3 is that right?

4 A. If it's a -- I excluded DSOs in that
5 paragraph 28 that we went through where I was
6 comprising the various groups for which I calculated
7 sales in table 1, so I -- that was my intention to
8 exclude DSOs. My understanding is they're not part of
9 this case.

10 Q. I want to turn to your section C of your
11 appendix, and that is labeled as Buying Groups that
12 Describe Their Members as Independent Dentists.

13 Now, you didn't interview anyone at any of
14 those entities that are described in group C prior to
15 completing your report; correct?

16 A. I didn't interview dentists. That's correct.
17 I didn't interview dentists in group C.

18 Q. And what you relied on in group C was your
19 staff's Internet searches that provided information on
20 these four dentists listed in group C; right?

21 A. Yes.

22 Q. Okay. And for purposes of your report, you
23 didn't consider whether the information your staff
24 googled was accurate or inaccurate; right?

25 A. That's correct. As I said in my direct

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1 testimony, I'm taking the categorizations as given.
2 I'm not opining on whether they're correct or not, just
3 like if there was a question like there was for that
4 one where I said it may be a buying group, the reason I
5 say that is it was an MSO, and I don't know whether an
6 MSO belongs in the FTC definition or not. But I'm
7 trying to make clear that I'm relying on other people's
8 characterizations.

9 Q. Are you familiar with an entity called
10 Comfort Dental?

11 A. Well, it's listed in my report.

12 Q. And it's in your -- it's in your group C that
13 your staff did the googling on; right?

14 A. Yes.

15 Q. Okay. And are you aware that Schein has
16 referred to Comfort Dental as an elite DSO?

17 A. I -- that may -- I might have seen documents
18 that say that. I don't specifically recall.

19 Q. And you would agree that if indeed
20 Comfort Dental were a DSO, it would not be properly be
21 included within your group C of Appendix D; right?

22 A. If it were a DSO. I don't know exactly what
23 the word "elite DSO" means, but I believe the reason
24 that this is included is because Schein identified
25 this as one of the 44 groups that are buying groups.

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1 It was not my understanding they were a DSO
2 whereby DSO -- that's a dental service organization --
3 centrally owned and managed. My understanding was, as
4 I say in here, is that they are franchises and that
5 they describe their dentists as independent.

6 Q. And that's -- I'm sorry. Go ahead.

7 A. And I was going to point out my understanding
8 also, by the way, of Smile Source is that they also
9 refer to their dentists as franchised and that
10 Smile Source is identified as an FTC buying group,
11 so...

12 Q. So, Dr. Carlton, I will again ask that you
13 answer the questions that I ask you. I did not ask you
14 anything about Smile Source, but we were talking about
15 Comfort Dental.

16 A. Yes.

17 Q. And let me ask you to assume along with me that
18 the evidence at this hearing will establish that
19 Comfort Dental is a DSO, just assume that.

20 A. Okay.

21 Q. If Comfort Dental was a DSO, then they should
22 not be included in one of the buying groups that you
23 include in Appendix D; right?

24 A. I agree. If the fact-finder determines that
25 Comfort Dental is not within the definition that the

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1 FTC has given for an FTC buying group, then it should
2 not be included.

3 Q. Okay. And when you say your understanding,
4 when you reflected your understanding in the last
5 question, that's your understanding of the facts.
6 That's not an economic analysis; right?

7 A. I'm not sure where I used the word "my
8 understanding," but what I was trying to say is, if --
9 if Your Honor determines that Comfort Dental doesn't
10 fit the FTC definition of a buying group, then I
11 wouldn't have included it.

12 Q. I want to ask you a few questions about the
13 next entity listed in your Appendix C. That's
14 Corydon Palmer.

15 Do you know who Dr. Baytosh is?

16 A. I might have once, but I don't have a
17 recollection right now.

18 Q. If I told you that Dr. Baytosh was an officer
19 of Corydon Palmer, would that refresh your
20 recollection?

21 A. I don't think so. No.

22 Q. Okay. Well, let me represent to you that
23 Dr. Baytosh, who testified here, is an officer -- or
24 was an officer -- excuse me -- at Corydon Palmer.

25 Now, if we look at your materials relied

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1 upon -- you'll recall we talked about that a little
2 bit earlier, and it is your Appendix B. And on
3 page B-3 you provide a list of the depositions that you
4 relied upon in preparing this report. That's
5 RX 2832-088.

6 Dr. Baytosh's name doesn't appear there, does
7 it?

8 A. I don't -- let me just look. I don't believe
9 so.

10 Q. You didn't rely on Dr. Baytosh's testimony in
11 your conclusion that Corydon Palmer should be in your
12 group C; correct?

13 A. I would not have, no. Like I say, I explained
14 already in my direct testimony what I relied on to put
15 someone in group C.

16 Q. And if we look at your Appendix C, and if you
17 go to RX 2832-099, this is labeled Materials Seen,
18 S-E-E-N.

19 A. What page is that in the report?

20 Q. RX 2832-099.

21 It's up on the screen if that's easier for
22 you.

23 A. Yes. Okay.

24 Q. And that's your materials seen; right?

25 A. Okay.

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1 Q. And I'm correct that that represents materials
2 that you did not necessarily rely upon but had looked
3 at in connection with preparing your expert report;
4 right?

5 A. I believe that's accurate.

6 Q. Okay. And if we look at RX 2832-101 and
7 RX 2832-102, you never even read Dr. Baytosh's
8 deposition, according to your materials seen list;
9 correct?

10 A. I don't recall doing so.

11 (Pause in the proceedings.)

12 Q. Correct?

13 I'm sorry. You didn't -- I didn't hear an
14 answer. I'm sorry.

15 A. I'm sorry. I thought I said I don't recall
16 doing so.

17 Q. Okay. Thank you.

18 Now, at RX 2832-126, you talk about an entity
19 called Teeth Tomorrow.

20 And again I want to be careful on this one
21 because there is some confidential material in the
22 report, so I'm going to ask the question carefully and
23 would ask that you not reveal any particular dates
24 when you give your answer so we can protect
25 confidentiality.

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1 A. Okay.

2 Q. Would you agree that the relationship between
3 Teeth Tomorrow and Schein began after the conspiracy
4 period alleged by the FTC?

5 A. Let me just read the paragraph.

6 (Document review.)

7 Yes, I would agree, I would agree with that.
8 That means to the extent they're in the sales data they
9 get zeros if they're not being dealt with.

10 Q. And I wanted to ask you a question about
11 Klear Impakt.

12 You recall discussing Klear Impakt with
13 Mr. Kass earlier today; right?

14 A. Yes.

15 Q. And it would be accurate to say that Schein's
16 agreement with Klear Impakt was not entered into until
17 August 2015; correct?

18 A. I can tell that from what I've written. Am I
19 allowed to say dates on this one?

20 Q. I believe this is confidential, so I'll ask
21 that you not give the dates.

22 Let me call your attention to a portion that's
23 redacted -- it won't be on the public screen -- and
24 it's page RX 2832-120.

25 A. Yes.

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1 Q. And if you look at the third sentence --

2 A. Yes.

3 Q. -- it describes when the agreement became
4 effective, so let me ask that question.

5 A. Yes. That's what I was going to answer, but --

6 Q. Okay. So it's fair to say that the agreement
7 with Klear Impakt became effective not earlier than
8 August 2015; right?

9 A. Yes. That's -- based on what I had written
10 here, that would be accurate.

11 Q. And you also include in your group A an entity
12 called Smile Source; right?

13 A. Yeah. Just to be clear, group A was what I
14 think I referred to as group 1 before, you know, the
15 first group, the group that the FTC had identified.

16 Q. And -- well, just for clarity, to make sure the
17 record is clear, on page RX 2832-118, this is group A.
18 Buying Groups the FTC Has Identified as Comprised of
19 Independent Dentists is the heading. Okay?

20 A. Yes.

21 Q. So we're talking about the same thing.

22 A. All I'm saying is that in my testimony earlier
23 this morning I referred to that as the first group in
24 that paragraph 28.

25 Q. Now, you did not do any economic analysis of

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1 the offer that Schein made to Smile Source in 2014;
2 correct?

3 A. I didn't do any analysis other than, you know,
4 than noting it, noting it. I do discuss this in my
5 report. I do say a bit more than I said about in my
6 testimony, but other than what I say in my report, I
7 haven't done any additional analysis.

8 Q. And the analysis in your report is fact-based;
9 correct?

10 A. The analysis in my report is reporting what I
11 understand to be the facts.

12 Q. And on page RX 2832-121 you talk about an
13 entity called Steadfast Medical.

14 A. Yes.

15 Q. And you say that Steadfast had agreements with
16 Schein from 2011 to 2014; correct?

17 A. Yes.

18 Q. And that's based on your understanding of the
19 facts.

20 A. Well, it's based -- I listed as footnote 46 the
21 supplemental responses of Schein as well as a
22 Henry Schein exhibit. Yes.

23 Q. So let me pull up CX 2667, which is a document
24 on the exhibit list in this proceeding.

25 And just blow that up a little bit, Hana.

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1 Thank you.

2 And this is an e-mail from John Boresi to a
3 gentleman named Randy Foley, dated January 31, 2011.

4 Do you know who Mr. Foley is?

5 A. I believe he worked at Henry Schein, but I'd
6 have to check.

7 Q. Okay. If I told you he was the general manager
8 of Special Markets for the year 2010 -- I'll make that
9 representation to you just for purposes of this
10 e-mail.

11 A. Sounds right.

12 Q. Okay. And this e-mail says, "Here is the
13 report that lists 2010 sales by location that I used to
14 build 2010 baseline requirements for One Schein."

15 Do you see that?

16 A. Yes.

17 Q. So there's a very long spreadsheet that's
18 attached to this, this particular e-mail, and what we
19 did was create a demonstrative to highlight a few lines
20 from that, and that is CDX 0054. The spreadsheet would
21 be far too long to print out.

22 Would you like a hard copy of that,
23 Dr. Carlton?

24 A. That would be great if you have one.

25 MR. DILLICKRATH: I'm happy to give you one.

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1 May I approach, Your Honor?

2 JUDGE CHAPPELL: Go ahead.

3 THE WITNESS: Great. Thank you.

4 MR. DILLICKRATH: You're welcome.

5 BY MR. DILLICKRATH:

6 Q. And Dr. Carlton, if you look at this document
7 that was produced to Mr. Foley, calling for the
8 2010 sales figures, you'll see that there are a number
9 of lines associated with Steadfast Medical and there
10 are sales included for Steadfast Medical for 2010,
11 resulting in a 2010 total.

12 Do you see that?

13 A. Yes. The last column, yes.

14 Q. And assume with me that this document is
15 accurate. Okay? Can you make that assumption?

16 A. Okay.

17 Q. None of these sales are reflected in your
18 table 1, are they?

19 A. I would have to check.

20 Q. Well, you say that sales began in 2011. This
21 indicates sales for 2010.

22 If this is accurate, then the relationship
23 actually began in 2010; correct?

24 A. If this is accurate, the relationship would
25 have begun in 2010, yes.

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1 Q. You can put that aside.

2 Take that down, Hana. Thank you.

3 And in coming to the conclusions in table 1,
4 which you discussed with Mr. Kass at some length
5 earlier, you're assuming that your facts are the
6 correct ones that you relied on; correct?

7 A. Yes.

8 Q. And you're aware there are some factual
9 disputes between the parties that are going to be up to
10 the judge to resolve; right?

11 A. Yes. I referred to a number of those in my
12 testimony already.

13 Q. And you would agree that some of those factual
14 disputes may impact the results in your table 1;
15 correct?

16 A. Well, anything is possible, but, again, based
17 on what I've done for table 1 and what we went through
18 at my deposition, it doesn't look like any of my
19 conclusions would change even if you adopt different
20 definitions. But, obviously, if there's a dramatic
21 difference between the numbers over time that I
22 produce and what someone else produces that shows a
23 different pattern or that in fact Schein was not
24 selling to buying groups during the alleged conspiracy
25 period, that would affect what I could say. I agree

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1 with you.

2 Q. And in fact, if any of the conclusions about
3 the entities in your group B or group C are wrong, the
4 numbers will change; correct?

5 A. The numbers -- the exact numbers would change.
6 The real question is it going to change the
7 implication of the table. And you know, we went
8 through what the FTC did in my deposition and I showed
9 you it didn't.

10 So I think the important point is, as I'm sure
11 everybody in this court is aware, data is never
12 perfect. You do the best you can. And you want to
13 make sure, if you do it in different ways, it's not
14 going to have a big, big effect.

15 So if you're asking me, if I did it in a
16 different way, would it have a big effect, I'd have to
17 do it, but I haven't seen anyone put forward any
18 evidence that it would undermine my conclusions.
19 That's the main point you should take away from what I
20 was testifying this morning.

21 Q. But you don't know. You haven't done the work
22 of seeing if you took this one away or that one away
23 or the other one away. You haven't done that
24 analysis.

25 A. That's false. I did that in my deposition.

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1 That's exactly the exercise you took me through, and I
2 pointed out, as I pointed out in my testimony, it
3 doesn't matter.

4 Now, if someone were to show me that, oh, it
5 really does matter if you do it this way, of course
6 I'd respond. But to suggest that table 1 is -- would
7 be an improper basis to make a conclusion when that's
8 the best evidence I think is available, I think it
9 would be a mistake, but as you say, and I agree, if
10 someone could reorganize and regroup things -- and
11 again, I'll leave that to the fact-finder -- and it
12 changes materially the implications you get with
13 table 1, I agree with you, you would have to take that
14 into account.

15 Q. Now, looking at paragraph 76 of your report,
16 RX 2832-051 --

17 A. 76.

18 Q. And you talked about this with Mr. Kass a
19 little bit earlier about the calculation, and you refer
20 to it in your report paragraph 76, you say, "This
21 calculation is complex and the values for its input
22 would be based on the following expectations and
23 estimations."

24 You see that; right?

25 A. Yes.

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1 Q. And the complex calculation that you describe
2 requires inputs based on Schein's understanding of
3 Kois Buyers Group members and its expectations of which
4 dentists would become Kois Buyers Group members in the
5 future; right?

6 A. Yes.

7 Q. And Schein's expectation of the purchasing
8 patterns at Schein among current and future members
9 both with and without offering a discount to
10 Kois Buyers Group; right?

11 A. Yes.

12 Q. And Schein's expectations of the discount it
13 would have to offer Kois Buyers Group and the effect
14 of discounting on its prices to other customers;
15 correct?

16 A. Yes.

17 Q. And these are the constituent parts of the
18 Carlton equation that Mr. Kass showed you earlier.

19 Hana, can you highlight the equation, please.

20 And that's this equation here; right?

21 A. Well, I'm complimented you call it the Carlton
22 equation, but it's the equation that is just saying the
23 expected profits if you make an offer compared to
24 expected profits if you don't, but we can call it
25 whatever you'd like.

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1 Just for clarification, the factors in 76, it
2 should probably say the values for -- would be -- the
3 factors that would influence it would include, dot,
4 dot, dot. That would probably be better grammar.

5 Q. So you'd like to offer a revision to your
6 report.

7 A. It's a detail, but I think it would be slightly
8 better.

9 Q. So how would you like us to rewrite that?

10 A. The complication [sic] is complex and the
11 values for its inputs would include the following.

12 Q. There might have even be more than that.

13 A. You know, it could. It would depend on the
14 business judgment of the people who are undertaking
15 this decision.

16 Q. So it might even be more complex than the three
17 factors that you --

18 A. Generally, business decisions are complex, and
19 I can at least include what I've described. And based
20 on my understanding of speaking to Schein executives,
21 they consider what they feel are all the relevant
22 influences and try and assess collectively their effect
23 on expected profitability.

24 Q. But no one at Schein ever told you that they
25 considered the three complex factors that you describe

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1 here and in -- well, let me strike that.

2 You didn't ask specific questions that would
3 explain how Schein would understand the values that are
4 described in your complex equation; right?

5 A. Well, I'm not sure I would agree with that
6 statement. I had extensive conversations with Schein
7 executives as to what they weigh when they're making a
8 decision whether to go forward with a buying group.
9 And basically, my summary of what they're telling me is
10 they consider the expected profitability if they go
11 forward versus not, and there are many factors that
12 influence that decision. And the ones I've written
13 down are important ones that would influence that
14 decision.

15 Q. Do you recall I asked you that exact question
16 at your deposition and you answered differently?

17 A. I don't recall.

18 Q. Okay. Go ahead and take a look at your -- let
19 me give you the right page number.

20 If you'll take a look at your deposition at
21 page 281 line 30 through page 282 line 3 and see if
22 that refreshes your recollection.

23 We can't pull it up on the screen I'm afraid.
24 It's in your big binder as RX 2966.

25 A. Okay. And what page should I look at?

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1 Q. So it's 281 line 30 through 282 line 3.

2 (Document review.)

3 Oh, I'm sorry. I may have given you the wrong
4 number

5 A. No. It's correct, 281 to 283.

6 Q. I meant line 20. I think I said "line 30." My
7 apologies.

8 A. Well, but if you read it, it seems -- it says
9 exactly what I just said, "they would have to figure
10 out in their minds whether this will have an effect on
11 competition." And you say, "Did you ask them?"
12 specifically, and I said, "I spoke generally about
13 these factors with them." That's just what I said.

14 Q. Well --

15 A. And then you go and ask did you go down,
16 you know, factor by factor. And I said, I didn't go
17 over each element and ask them how they formed their
18 expectation of each element. It's the combination that
19 give rise to the ultimate profitability that they
20 come -- that they have to come to a conclusion. And it
21 is those factors that I'm articulating in the report.

22 And then you say, you know, how did you come up
23 with that formula, and I say, I'm not sure I understand
24 your question. What are you asking?

25 And then, you know, you say, Did someone at

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1 Schein tell you we need to understand Kois Buyers Group
2 members and its expectations of which dentists would
3 become Kois buyers?

4 And I go on and I say, it's my formulation
5 based on my interviews with them as well as my
6 discussions with them as the application of economics.

7 So I think that's exactly what I just told
8 you.

9 Q. So I think the question was only if it
10 refreshed your recollection, but I suppose the answer
11 to that one would be yes and --

12 A. Yes. It reflects my recollection and what I
13 said is consistent with --

14 Q. So it's your understanding based on these
15 interviews that you had where you didn't keep your
16 notes -- this is your understanding based on the
17 interviews you had with a couple of Schein executives;
18 correct?

19 A. Well, several. Yes.

20 Q. Okay.

21 A. That they take actions in evaluating buying
22 groups based on what they think their expected
23 profitability is going to be and that they choose the
24 most profitable course of action.

25 Q. And you never asked anyone, "Do you apply this

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1 equation that I've put forth in paragraph 75?" Did you
2 ever show that to anyone at Schein and say, "Do you use
3 this equation?"

4 A. I never showed an equation to anyone at
5 Schein, but I've explained the equation is expected
6 profitability by making the offer compared to not. And
7 that's exactly what we've been discussing, so I'm
8 really not sure I'm following your question.

9 Q. When you spoke with the Schein executives, did
10 you read them your three complex factors in
11 paragraph 76 and ask them if they took those precise
12 factors as articulated in paragraph 76 into account?

13 A. I don't recall reading them anything. I had a
14 general discussion with them about how they chose
15 which buying groups to deal with and which not to deal
16 with and what considerations went into it.

17 And as I said in my deposition and just said in
18 answer to a prior question, they try and pursue the
19 most profitable course, which would include taking into
20 account all these factors that I'm discussing.

21 Q. And what sources do you cite for
22 paragraphs 75 and 76 in your report?

23 A. Let me --

24 Q. Can we pull up, Hana, just to make it easier --

25 A. 75?

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1 Q. -- RX 2832-051.

2 My question is, what sources are footnoted in
3 paragraphs 75 and 76?

4 A. 75 is -- I'm not sure I -- 75 is expected
5 profitability with an offer versus not an offer, so the
6 first sentence said Schein, you know, is basically
7 trying to maximize its expected profits, so that's all
8 that says in equation form. I'm not really sure I
9 understand.

10 Are you asking me do I think Schein is
11 operating to maximize their expected profits? If
12 that's the question, the answer is I would say yes.
13 That's how I assume not just Schein operates based on
14 my interviews but how most businesses operate.

15 MR. DILLICKRATH: Your Honor, I move to strike
16 the last response, which isn't even vaguely responsive
17 to the question I asked, which is: What sources are
18 footnoted in paragraphs 75 and 76?

19 JUDGE CHAPPELL: He didn't answer that
20 question. That answer will not be considered.

21 THE WITNESS: My turn?

22 BY MR. DILLICKRATH:

23 Q. So let me ask my question again. And it's a
24 very simple one.

25 What sources are footnoted in paragraphs 75 and

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1 76?

2 A. There are no footnotes in paragraphs 75 and 76.

3 Q. Thank you.

4 Now, in your report, you did not do any
5 quantitative analysis of the but-for world; correct?

6 A. Other than what's in my report, I don't do a
7 but-for analysis, yes.

8 Q. And would it be right to say you did not do a
9 quantitative analysis of the but-for world because
10 your conclusions are based on an understanding of the
11 facts?

12 A. No. I don't think that's quite right.

13 My conclusions are based on my understanding
14 of the facts. That, I agree with. I go through in
15 the report why -- I mean, I don't do a but-for
16 analysis of Kois or Smile Source, but I point out that
17 the but-for analysis -- the analysis that
18 Professor Marshall does is inadequate to support his
19 conclusion.

20 Q. But you did not do your own; correct?

21 A. I did not, that's correct.

22 Q. Now, a lot of your report does indeed rely on
23 your understanding of the facts as we've talked about
24 today; correct?

25 A. Absolutely.

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1 Q. Okay. And in fact, if we look at -- and we
2 can do this on the index to make life easier -- look
3 at section VI.B.1 of your report, and we can just look
4 at the title on page RX 2832-002. That's labeled
5 Professor Marshall's Analysis Is Contradicted by
6 Facts.

7 A. Where are you?

8 Q. I'm on RX 2832-002, VI.B.1. The title is
9 Professor Marshall's Analysis Is Contradicted by
10 Facts.

11 A. That's what I would -- that's what it says.

12 Q. And if we look at the heading for section VII
13 of your report, that's labeled Professor Marshall's
14 Claim that Schein Changed Its Behavior with Respect to
15 Dealing with Buying Groups Is Contradicted by the
16 Evidence; right?

17 A. I believe you're reading that correctly. Yes.

18 Q. Okay. And the evidence is the facts; right?
19 That's what you're trying to say in this
20 heading.

21 A. Well, I mean, I think the report speaks for
22 itself, but if you go to the individual sections, it
23 says exactly what facts I'm relying on.

24 So, for example, I'm relying on the underlying
25 sales data when I'm contesting about the discount being

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1 lowered to Smile Source by Schein and I'm saying that's
2 wrong and it doesn't accord with the underlying
3 evidence.

4 Now, you're right, if the evidence is
5 different, I would have to change what I say. I mean,
6 I might have if you're telling me the data is wrong.

7 Q. And if we look at -- well, strike that.

8 You would agree that it's the job of the
9 economic consultant to reach an expert opinion in
10 light of all the evidence, both the good and bad;
11 correct?

12 A. Yes. All relevant evidence should be taken
13 into account. I agree with that.

14 Q. And would you agree that it destroys an
15 expert's credibility to present only the supportive
16 evidence?

17 A. Yes. I think if an expert hasn't looked at
18 the report he considers the relevant facts, it's
19 certainly appropriate to bring up what you say in this
20 case the FTC thinks are the relevant facts and say
21 that's different from what you are assuming, so if you
22 told me my sales data were wrong, I'd say okay, I think
23 that's right, I'm relying on that sales data, yes.

24 No one has said that, by the way. In fact,
25 Marshall endorsed what I did on the discounts to

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1 Smile Source.

2 Q. And the facts aren't just limited to the sales
3 data that you consider in your report, are they?

4 A. I agree. I was just giving that as an example,
5 and I'm agreeing with you. If someone said there's a
6 fact that is different from what you're assuming, would
7 that change things, you're perfectly correct to raise
8 that, and I would have to evaluate if that would change
9 my views. I agree with that.

10 Q. Do you know who Dr. Goldsmith is?

11 A. I believe he was associated with Smile Source.

12 Q. And in the materials relied upon, which are
13 Exhibit B -- or Appendix B -- excuse me -- to your
14 report starting at RX 2382-087, did you rely upon
15 Dr. Goldsmith's deposition?

16 A. What pages am I supposed to be looking at?

17 Q. RX 2832-087 and the following page, 088.

18 A. Yes.

19 Q. Did you rely on Dr. Goldsmith's deposition?

20 A. I don't recall relying on his deposition, but
21 you did ask me this at my deposition, and what I stated
22 was I relied upon Marshall's statements about
23 Smile Source. And if you go back to the paragraphs
24 I'm referring to that Marshall is citing, he's relying
25 on Goldsmith's deposition, so I don't cite Goldsmith's

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1 deposition. I do cite the paragraphs that Marshall --
2 that I'm responding to from Marshall where Marshall is
3 relying on Goldsmith.

4 Q. Let's look at RX 2832-101 and 102, which is
5 your materials seen.

6 And Dr. Carlton, did you even bother to read
7 Dr. Goldsmith's report -- or deposition? Excuse me.

8 A. I hadn't at the time of my report, but I've
9 since read some parts of it.

10 Q. But at the time you filed this report you had
11 not taken the time to read it; correct?

12 A. I had not read it for the reasons I explained,
13 but it doesn't change anything.

14 Q. In your report you're not offering any analysis
15 on the relevant product market; correct?

16 A. Correct.

17 Q. You're not offering any analysis of the
18 relevant geographic market; correct?

19 A. Correct.

20 MR. DILLICKRATH: Your Honor, may I have one
21 moment?

22 JUDGE CHAPPELL: Go ahead.

23 (Pause in the proceedings.)

24 MR. DILLICKRATH: Nothing further, Your Honor.
25 Thank you.

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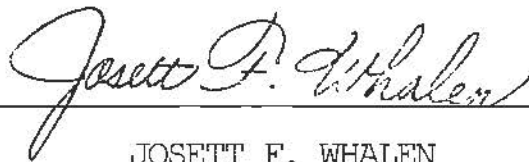
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1 JUDGE CHAPPELL: Redirect?
2 MR. KASS: Nothing further, Your Honor.
3 JUDGE CHAPPELL: Thank you, sir. You may stand
4 down.
5 Give me a second.
6 (Pause in the proceedings.)
7 Anything further today?
8 MR. KASS: No, Your Honor.
9 MR. DILLICKRATH: No, Your Honor.
10 JUDGE CHAPPELL: We'll reconvene at 9:45 in the
11 morning.
12 We're in recess.
13 (Whereupon, the foregoing hearing was adjourned
14 at 1:02 p.m.)
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CERTIFICATE OF REPORTER

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3
4 I, JOSETT F. WHALEN, do hereby certify that the
5 foregoing proceedings were taken by me in stenotype and
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7 that I am neither counsel for, related to, nor employed
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16 JOSETT F. WHALEN

17 Court Reporter
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