

No. 19-963

In the Supreme Court of the United States

HENRY SCHEIN, INC., PETITIONER

v.

ARCHER AND WHITE SALES, INC.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

**JOINT APPENDIX
(REDACTED FOR PUBLIC FILING)**

KANNON K. SHANMUGAM
*Paul, Weiss, Rifkind,
Wharton & Garrison LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com*

*Counsel of Record
for Petitioner*

LEWIS T. LECLAIR
*McKool Smith, P.C.
300 Crescent Court,
Suite 1500
Dallas, TX 75201
(214) 978-4984
lleclair@mckoolsmith.com*

*Counsel of Record
for Respondent*

PETITION FOR A WRIT OF CERTIORARI FILED: JANUARY 31, 2020
CERTIORARI GRANTED: JUNE 15, 2020

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II

The following opinions, decisions, judgments, and orders have been omitted in printing the joint appendix because they appear as appendices to the petition for certiorari as follows:

Appendix A: Court of appeals opinion,
Aug. 14, 2019

Appendix B: District court memorandum opinion
and order, Dec. 7, 2016

Appendix C: Magistrate judge memorandum order,
May 28, 2013

Appendix D: Court of appeals order,
Dec. 6, 2019

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-41674

ARCHER AND WHITE SALES, INCORPORATED,
Plaintiff-Appellee,

v.

HENRY SCHEIN, INCORPORATED, ET AL.,
Defendants-Appellants

DOCKET ENTRIES

DATE	PROCEEDINGS
12/14/2016	PRIVATE CIVIL FEDERAL CASE docketed. NOA filed by Appellants Danaher Corporation, Dental Equipment L.L.C., Dental Imaging Technologies, Corporation, Instrumentarium Dental Incorporation and KaVo Dental Technologies, L.L.C. [16-41674] (LCA)
	* * * * *
02/10/2017	ELECTRONIC RECORD ON APPEAL FILED. Exhibits on File in District Court? No. Electronic ROA deadline satisfied. [16-41674] (MRB)

* * * * *

03/17/2017 APPELLANT'S BRIEF FILED
of Copies Provided: 0 A/Pet's
Brief deadline satisfied. Paper
Copies of Brief due on 03/27/2017
for Appellants Danaher Corpora-
tion, Dental Equipment, L.L.C.,
Dental Imaging Technologies,
Corporation, Henry Schein, In-
corporated, Instrumentarium
Dental, Incorporation and KaVo
Dental Technologies, L.L.C. [16-
41674] REVIEWED AND/OR
EDITED - The original text prior
to review appeared as follows:
APPELLANT'S BRIEF FILED
by Danaher Corporation, Dental
Equipment, L.L.C., Dental Imag-
ing Technologies, Corporation,
Instrumentarium Dental, Incor-
poration and KaVo Dental Tech-
nologies, L.L.C. *and by Henry
Schein, Inc.* Date of service:
03/17/2017 via email - Attorney
for Appellants: Chuk, Fontecilla,
Kruse, Ondeck, Pitt, Schuster,
Timms; Attorney for Appellees:
Brumbaugh, Pope [16-41674]
(Jonathan Bradley Pitt)

03/17/2017 RECORD EXCERPTS FILED.
of Copies Provided: 0 Paper
Copies of Record Excerpts due on
03/27/2017 for Appellants Dana-

her Corporation, Dental Equipment, L.L.C., Dental Imaging Technologies, Corporation, Henry Schein, Incorporated, Instrumentarium Dental, Incorporation and KaVo Dental Technologies, L.L.C. [16-41674] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: RECORD EXCERPTS FILED by Appellants Danaher Corporation, Dental Equipment, L.L.C., Dental Imaging Technologies, Corporation, Instrumentarium Dental, Incorporation and KaVo Dental Technologies, L.L.C. *and by Henry Schein, Inc.* Date of service: 03/17/2017 via email - Attorney for Appellants: Chuk, Fontecilla, Kruse, Ondeck, Pitt, Schuster, Timms; Attorney for Appellees: Brumbaugh, Pope [16-41674] (Jonathan Bradley Pitt)

* * * * *

04/11/2017 APPELLEE'S BRIEF FILED
 # of Copies Provided: 0 E/Res's
 Brief deadline satisfied. Paper
 Copies of Brief due on 04/17/2017
 for Appellee Archer and White
 Sales, Incorporated. [16-41674]
 REVIEWED AND/OR EDITED
 - The original text prior to review

appeared as follows: APPELLEE'S BRIEF FILED by Archer and White Sales, Incorporated. Date of service: 04/11/2017 via email - Attorney for Appellants: Chuk, Fontecilla, Govett, Kruse, Montgomery, Ondeck, Pitt, Schuster, Timms; Attorney for Appellees: Brumbaugh, Pope [16-41674] (Kay Lynn Brumbaugh)

* * * * *

04/21/2017 APPELLANT'S REPLY
 BRIEF FILED # of Copies Provided: 0
 Reply Brief deadline satisfied. Paper Copies of Brief due on 05/01/2017 for Appellants Danaher Corporation, Dental Equipment, L.L.C., Dental Imaging Technologies, Corporation, Henry Schein, Incorporated, Instrumentarium Dental, Incorporation and KaVo Dental Technologies, L.L.C. [16-41674]
 REVIEWED AND/OR EDITED
 - The original text prior to review appeared as follows: APPELLANT'S REPLY BRIEF FILED by Danaher Corporation, Dental Equipment, L.L.C., Dental Imaging Technologies, Corporation, Instrumentarium Dental, Incorporation and KaVo Dental

Technologies, L.L.C. and *Henry Schein, Inc.* Date of service: 04/21/2017 via email - Attorney for Appellants: Chuk, Fontecilla, Govett, Kruse, Montgomery, Ondeck, Pitt, Schuster, Timms; Attorney for Appellees: Brumbaugh, Pope [16-41674] (Liam James Montgomery)

* * * * *

06/07/2017 ORAL ARGUMENT HEARD before Judges Higginbotham, Graves, Higginson. Arguing Person Information Updated for: Lewis T. LeClair arguing for Appellee Incorporated Archer and White Sales; Arguing Person Information Updated for: Jonathan Bradley Pitt arguing for Appellant Danaher Corporation, Appellant L.L.C. Dental Equipment, Appellant Corporation Dental Imaging Technologies, Appellant Incorporation Instrumentarium Dental AND Appellant Kavo Dental Technologies, L.L.C., Appellant Henry Schein, Incorporated [16-41674] (KMP)

* * * * *

12/21/2017 PUBLISHED OPINION FILED. [16-41674 Affirmed] Judge: PEH, Judge: JEG, Judge: SAH. Mandate issue date is

01/12/2018 [16-41674] (This opinion includes URL material that is archived by the Fifth Circuit Court of Appeals Library, and made available at <http://www.lb5.uscourts.gov/ArchivedURLS/>.) (JMA)

12/21/2017 JUDGMENT ENTERED AND FILED. [16-41674] (JMA)

* * * * *

01/12/2018 MANDATE ISSUED. Mandate issue date satisfied. [16-41674] (CAG)

* * * * *

02/12/2019 SUPREME COURT JUDGMENT filed on 02/11/2019 remanding case to the 5th Circuit [16-41674]--[Edited 02/12/2019 by CAS] (CAS)

02/12/2019 OPPOSED MOTION filed by Appellants Danaher Corporation, Dental Equipment, L.L.C., Dental Imaging Technologies, Corporation, Instrumentarium Dental, Incorporation and KaVo Dental Technologies, L.L.C. to file supplemental briefs [8982794-2]Supplemental Briefs Included? No. Date of service: 02/12/2019 via email - Attorney for Appellants: Chuk, Fontecilla, Govett, Kruse, Montgomery, Ondeck, Pitt, Schuster, Timms; Attorney for

Appellee: LeClair [16-41674]
(Liam James Montgomery)

02/13/2019 COURT DIRECTIVE ISSUED
requesting supplemental briefing
addressing the Supreme Court's
remand. [8983701-2] A/Pet Sup-
plemental Brief due on 02/25/2019
for Appellants Danaher Corpora-
tion, Dental Equipment, L.L.C.,
Dental Imaging Technologies,
Corporation, Henry Schein, In-
corporated, Instrumentarium
Dental, Incorporation and KaVo
Dental Technologies, L.L.C.
E/Res Supplemental Brief due on
02/25/2019 for Appellee Archer
and White Sales, Incorporated.
[16-41674] (CAS)

* * * * *

02/25/2019 APPELLANT'S SUPPLE-
MENTAL BRIEF FILED by
Henry Schein, Incorporated. # of
Copies Provided: A/Pet's Supple-
mental Brief deadline satisfied.
Paper Copies of Brief due on
03/04/2019 for Appellants Dana-
her Corporation, Dental Equip-
ment, L.L.C., Dental Imaging
Technologies, Corporation, Hen-
ry Schein, Incorporated, Instru-
mentarium Dental, Incorporation
and KaVo Dental Technologies,
L.L.C. [16-41674]

REVIEWED AND/OR EDITED
 - The original text prior to review appeared as follows: APPELLANT'S SUPPLEMENTAL BRIEF FILED by Danaher Corporation, Dental Equipment, L.L.C., Dental Imaging Technologies, Corporation, Instrumentarium Dental, Incorporation and KaVo Dental Technologies, L.L.C. Date of service: 02/25/2019 via email - Attorney for Appellants: Chuk, Fontecilla, Govett, Kruse, Montgomery, Ondeck, Pitt, Schuster, Timms; Attorney for Appellee: LeClair [16-41674] (Jonathan Bradley Pitt)

02/25/2019 SUFFICIENT APPELLEE'S SUPPLEMENTAL BRIEF FILED # of Copies Provided: 0 Sufficient Brief deadline satisfied. Paper Copies of Brief due on 03/04/2019 for Appellee Archer and White Sales, Incorporated. [16-41674]

REVIEWED AND/OR EDITED
 - The original text prior to review appeared as follows: APPELLEE'S SUPPLEMENTAL BRIEF FILED Brief NOT Sufficient as it requires Attorney name and address on cover. Instructions to Attorney: PLEASE READ THE ATTACHED NOTICE FOR INSTRUCTIONS

ON HOW TO REMEDY THE DEFAULT. # of Copies Provided: 0 E/Res's Supplemental Brief deadline satisfied. Sufficient Brief due on 03/06/2019 for Appellee Archer and White Sales, Incorporated. [16-41674] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: APPELLEE'S SUPPLEMENTAL BRIEF FILED by Archer and White Sales, Incorporated Date of service: 02/25/2019 via email - Attorney for Appellants: Chuk, Fontecilla, Govett, Kruse, Montgomery, Ondeck, Pitt, Schuster, Timms; Attorney for Appellee: LeClair [16-41674] (Lewis T. LeClair)

* * * * *

04/29/2019 SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Appellants Danaher Corporation, Dental Equipment, L.L.C., Dental Imaging Technologies, Corporation, Instrumentarium Dental, Incorporation and KaVo Dental Technologies, L.L.C. Date of Service: 04/29/2019 via email - Attorney for Appellants: Chuk, Fontecilla, Govett, Kruse, McCloud, Montgomery, Ondeck, Pitt,

Schuster, Timms, Van Kirk; Attorney for Appellee: LeClair [16-41674] (Charles McCloud)

* * * * *

04/29/2019 SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Appellee Archer and White Sales, Incorporated Date of Service: 04/29/2019 via email - Attorney for Appellants: Chuk, Fontecilla, Govett, Kruse, McCloud, Montgomery, Ondeck, Pitt, Schuster, Timms, Van Kirk; Attorney for Appellee: LeClair [16-41674] (Lewis T. LeClair)

05/01/2019 ORAL ARGUMENT HEARD before Judges Higginbotham, Graves, Higginson. Arguing Person Information Updated for: Lewis T. LeClair arguing for Appellee Incorporated Archer and White Sales; Arguing Person Information Updated for: Charles McCloud arguing for Appellant Henry Schein, Appellant Danaher Corporation, Appellant L.L.C. Dental Equipment, Appellant Corporation Dental Imaging Technologies, Appellant Incorporation Instrumentarium Dental AND Appellant Kavco Dental Technologies, L.L.C. [16-41674] (KMP)

08/14/2019 PUBLISHED OPINION FILED.
[16-41674 Affirmed] Judge:
PEH, Judge: JEG, Judge: SAH.
Mandate issue date is 09/05/2019
[16-41674]

(This opinion includes URL mate-
rial that is archived by the Fifth
Circuit Court of Appeals Library,
and made available at [http://www.
lb5.uscourts.gov/ArchivedURLS/](http://www.lb5.uscourts.gov/ArchivedURLS/))
(NFD)

08/14/2019 JUDGMENT ENTERED AND
FILED. Costs Taxed Against:
Each party to bear its own costs
on appeal. [16-41674] (NFD)

* * * * *

08/28/2019 PETITION filed by Appellant
Henry Schein, Incorporated for
rehearing en banc [9132438-2]
Number of Copies:0. Mandate is-
sue date canceled. Paper Copies
of Rehearing due on 09/03/2019
for Appellants Danaher Corpora-
tion, Dental Equipment, L.L.C.,
Dental Imaging Technologies,
Corporation, Henry Schein, In-
corporated, Instrumentarium Den-
tal, Incorporation and KaVo Den-
tal Technologies, L.L.C. Date of
Service: 08/28/2019 [16-41674]

REVIEWED AND/OR EDITED
- The original text prior to review
appeared as follows: PETITION

filed by Appellants Danaher Corporation, Dental Equipment, L.L.C., Dental Imaging Technologies, Corporation, Instrumentarium Dental, Incorporation and KaVo Dental Technologies, L.L.C. for rehearing en banc [9132438-2]. Date of Service: 08/28/2019 via email - Attorney for Appellants: Chuk, Govett, Kruse, McCloud, Montgomery, Ondeck, Pitt, Schuster, Timms, Van Kirk; Attorney for Appellee: LeClair [16-41674] (Charles McCloud)

* * * * *

09/16/2019 COURT DIRECTIVE ISSUED requesting a response to the Petition for rehearing en banc filed by Appellants Danaher Corporation, Instrumentarium Dental, Incorporation, Dental Equipment, L.L.C., KaVo Dental Technologies, L.L.C., Dental Imaging Technologies, Corporation and Henry Schein, Incorporated in 16-41674 [9132438-2] Response/Opposition due on 09/26/2019. [16-41674] (CAS)

09/26/2019 RESPONSE/OPPOSITION [91-54048-1] to the Petition for rehearing en banc filed by Appellants Danaher Corporation, In-

strumentarium Dental, Incorporation, Dental Equipment, L.L.C., KaVo Dental Technologies, L.L.C., Dental Imaging Technologies, Corporation and Henry Schein, Incorporated in 16-41674 [91324-38-2] Date of Service: 09/26/2019. [16-41674]

REVIEWED AND/OR EDITED
- The original text prior to review appeared as follows:

RESPONSE/OPPOSITION filed by Archer and White Sales, Incorporated [9154048-1] to the Petition filed by Appellants Danaher Corporation, Dental Equipment, L.L.C., Dental Imaging Technologies, Corporation, Instrumentarium Dental, Incorporation, KaVo Dental Technologies, L.L.C. and Henry Schein, Incorporated [9132438-2] Date of Service: 09/26/2019 via email - Attorney for Appellants: Chuk, Govett, Harris, Kruse, McCloud, Montgomery, Ondeck, Pitt, Schuster, Timms, Van Kirk; Attorney for Appellee: LeClair. [16-41674] (Lewis T. LeClair)

* * * * *

12/04/2019 LETTER filed by Appellant Henry Schein, Incorporated Notify Court of case status. Date of

Service: 12/04/2019 via email - Attorney for Appellants: Chuk, Govett, Harris, Kruse, McCloud, Montgomery, Ondeck, Pitt, Schuster, Timms, Van Kirk; Attorney for Appellee: LeClair [16-41674] (Paul Featherstone Schuster)

12/06/2019 COURT ORDER denying Petition for rehearing en banc filed by Appellants Danaher Corporation, Instrumentarium Dental, Incorporation, Dental Equipment, L.L.C., KaVo Dental Technologies, L.L.C., Dental Imaging Technologies, Corporation and Henry Schein, Incorporated [9132438-2] Without Poll. Mandate issue date is 12/16/2019; [9204855-1] [16-41674] (CAS)

12/16/2019 MANDATE ISSUED. Mandate issue date satisfied. [16-41674] (CAS)

01/06/2020 OPPOSED MOTION filed by Appellant Henry Schein, Incorporated to recall this Court's mandate, to stay district court proceedings [9223681-3] Ruling is requested by: 01/10/2020. Date of service: 01/06/2020 via email - Attorney for Appellants: Chuk, Govett, Harris, Kruse, McCloud, Montgomery, Ondeck, Pitt, Schuster, Timms, Van Kirk; Attorney

for Appellee: LeClair [16-41674]
(Paul Featherstone Schuster)

01/07/2020

COURT ORDER that appellant, Henry Schein, Incorporated's opposed motion to recall this Court's mandate for the limited purpose of staying the district court proceedings pending the Supreme Court's decision on Henry Schein's forthcoming petition for writ of certiorari is DENIED [9223681-2]; [9223681-3]. [16-41674] (MCS)

* * * * *

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
(MARSHALL)

No. 2:12-cv-00572-JRG

ARCHER AND WHITE SALES, INC.,
Plaintiff,

v.

HENRY SCHEIN, INC., ET AL.,
Defendants

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
08/31/2012	1	COMPLAINT against All Defendants (Filing fee \$ 350 receipt number 0540-3760981.), filed by Archer and White Sales, Inc. (Attachments: # 1 Civil Cover Sheet) (Beane, Jerry) (Entered: 08/31/2012) * * * * *
09/26/2012	10	MOTION to Compel Arbitration and Stay All Proceedings by Danaher Corporation, Dental Equipment LLC, Dental Imaging Technologies, Corporation, Instrumentarium Dental Inc., KaVo

Dental Technologies, LLC. (Attachments: # 1 Exhibit Declaration of James Weingarten, # 2 Exhibit Ex. A to Declaration, # 3 Exhibit Ex. B to Declaration, # 4 Text of Proposed Order Proposed Order) (Kruse, Layne) (Attachment 4 (Proposed Order) replaced on 9/27/2012) (sm,). Modified on 9/27/2012 (sm,). (Entered: 09/26/2012)

* * * * *

10/01/2012 14 MOTION to Compel *Plaintiff to Arbitrate and to Stay Proceedings* by Henry Schein, Inc. (Attachments: # 1 Text of Proposed Order) (Schuster, Paul) (Entered: 10/01/2012)

* * * * *

10/12/2012 21 RESPONSE in Opposition re 10 MOTION to Compel *Arbitration and Stay All Proceedings [Plaintiff Archer and White Sales, Inc.'s Response in Opposition to Manufacturer Defendants' Motion to Compel Arbitration and Stay All Proceedings]* filed by Archer and White Sales, Inc. (Attachments: # 1 Affidavit Declaration of Kay Lynn Brumbaugh, # 2 Exhibit 1 to Declaration, #3 Exhibit 2 to Declaration) (Beane, Jerry) (Entered: 10/12/2012)

- 10/16/2012 22 RESPONSE in Opposition re 14 MOTION to Compel *Plaintiff to Arbitrate and to Stay Proceedings [Plaintiff Archer and White Sales, Inc.'s Response in Opposition to Defendant Henry Schein, Inc.'s Motion to Compel Plaintiff to Arbitrate and to Stay All Proceedings]* filed by Archer and White Sales, Inc. (Beane, Jerry) (Entered: 10/16/2012)
- * * * * *
- 10/22/2012 24 REPLY to Response to Motion re 10 MOTION to Compel *Arbitration and Stay All Proceedings filed by Danaher Corporation, Dental Equipment LLC, Dental Imaging Technologies, Corporation, Instrumentarium Dental Inc., KaVo Dental Technologies, LLC.* (Attachments: # 1 Exhibit C, # 2 Exhibit D, #3 Exhibit E, # 4 Exhibit F, # 5 Exhibit G) (Kruse, Layne) (Entered: 10/22/2012)
- * * * * *
- 10/26/2012 31 REPLY to Response to Motion re 14 MOTION to Compel *Plaintiff to Arbitrate and to Stay Proceedings filed by Henry Schein, Inc.* (Schuster, Paul) (Entered: 10/26/2012)

* * * * *

10/29/2012 33 SUR-REPLY to Reply to Response to Motion re 10 MOTION to Compel *Arbitration and Stay All Proceedings [Plaintiff Archer and White Sales, Inc.'s Sur-Reply in Opposition to Manufacturer Defendants' Motion to Compel Arbitration and Stay All Proceedings]* filed by Archer and White Sales, Inc. (Beane, Jerry) (Entered: 10/29/2012)

* * * * *

11/05/2012 37 SUR-REPLY to Reply to Response to Motion re 14 MOTION to Compel *Plaintiff to Arbitrate and to Stay Proceedings [Plaintiff Archer and White Sales, Inc.'s Sur-Reply in Opposition to Defendant Henry Schein, Inc.'s Motion to Compel Arbitration and to Stay All Proceedings]* filed by Archer and White Sales, Inc. (Beane, Jerry) (Entered: 11/05/2012)

* * * * *

02/28/2013 41 Minute Entry for proceedings held before Magistrate Judge Roy S. Payne: Motion Hearing held on 2/28/2013 re Motions to Compel Arbitration 10 and 14. (Court Reporter Sunbelt Reporting.) (jml) (Entered: 02/28/2013)

* * * * *

- 05/28/2013 44 ORDER, granting 10 MOTION to Compel *Arbitration and Stay All Proceedings* filed by Dental Equipment LLC, KaVo Dental Technologies, LLC, Instrumentarium Dental Inc., Dental Imaging Technologies, Corporation, Danaher Corporation, granting 14 MOTION to Compel *Plaintiff to Arbitrate and to Stay Proceedings* filed by Henry Schein, Inc. This action is stayed pending arbitration of the claims asserted herein. All parties are directed to notify the Court when the arbitration process is complete or if it has been abandoned. Signed by Magistrate Judge Roy S. Payne on 5/28/13. (mrm,) *****VACATED per 63 Memorandum Opinion and Order on 12/7/2016*****(jml). (Entered: 05/28/2013)
- 06/10/2013 45 MOTION for Reconsideration re 44 Order Staying Case [Plaintiff's Motion for Reconsideration of Magistrate Judge's May 28, 2013 Memorandum Order] by Archer and White Sales, Inc. (Attachments: # 1 Text of Proposed Order) (Beane, Jerry) (Entered: 06/10/2013)
- 06/20/2013 46 RESPONSE in Opposition re 45 MOTION for Reconsideration re

44 Order Staying Case. Plaintiff's Motion for Reconsideration of Magistrate Judge's May 28, 2013 Memorandum Order] MOTION for Reconsideration re 44 Order-Staying Case, [*Plaintiff's Motion for Reconsideration of Magistrate Judge's May 28, 2013 Memorandum Order*] *Manufacturer Defendants' Memorandum in Opposition to Plaintiff's Motion for Reconsideration of Magistrate Judge's May 28, 2013 Memorandum Order (Dkt. #44)* filed by Danaher Corporation, Dental Equipment LLC, Dental Imaging Technologies, Corporation, Instrumentarium Dental Inc., KaVo Dental Technologies, LLC. (Attachments: # 1 Exhibit Exhibits to Manufacturer Defendants' Memorandum in Opposition to Plaintiff's Motion for Reconsideration of Magistrate Judge's May 28, 2013 Memorandum Order (Dkt. #44)) (Pitt, Jonathan) (Entered: 06/20/2013)

06/20/2013 47 RESPONSE in Opposition re 45 MOTION for Reconsideration re 44 Order Staying Case, Terminate Motions, , , [*Plaintiff's Motion for Reconsideration of Magistrate Judge's May 28, 2013 Memorandum Order*] MOTION for Reconsideration re 44 Order

Staying Case, Terminate Motions, , , , [*Plaintiff's Motion for Reconsideration of Magistrate Judge's May 28, 2013 Memorandum Order*] filed by Henry Schein, Inc. (Attachments: # 1 Schuster Declaration, # 2 Exhibit A, # 3 Text of Proposed Order) (Schuster, Paul) (Entered: 06/20/2013)

06/27/2013 48 REPLY to Response to Motion re 45 MOTION for Reconsideration re 44 Order Staying Case, Terminate Motions, , , , [*Plaintiff's Motion for Reconsideration of Magistrate Judge's May 28, 2013 Memorandum Order*] MOTION for Reconsideration re 44 Order Staying Case, Terminate Motions, , , , [*Plaintiff's Motion for Reconsideration of Magistrate Judge's May 28, 2013 Memorandum Order*] [*Plaintiff's Reply in Support of Motion for Reconsideration of Magistrate Judge's May 28, 2013 Memorandum Order (DKT #44)*] filed by Archer and White Sales, Inc. (Beane, Jerry) (Entered: 06/27/2013)

* * * * *

07/03/2013 51 SUR-REPLY to Reply to Response to Motion re 45 MOTION for Reconsideration re 44 Order Staying Case, filed by Danaher

Corporation, Dental Equipment LLC, Dental Imaging Technologies, Corporation, Instrumentarium Dental Inc., KaVo Dental Technologies, LLC. (Pitt, Jonathan) (Entered: 07/03/2013)

07/03/2013 52 SUR-REPLY to Reply to Response to Motion re 45 MOTION for Reconsideration re 44 Order Staying Case, filed by Henry Schein, Inc. (Schuster, Paul) (Entered: 07/03/2013)

* * * * *

11/09/2016 61 ORDER VACATING REFERRAL OF PRETRIAL MATTERS. Signed by Judge Rodney Gilstrap on 11/8/2016. (nkl,) (Entered: 11/09/2016)

11/09/2016 62 Minute Entry for proceedings held before Judge Rodney Gilstrap: Status Conference held on 11/9/2016. (Court Reporter Shelly Holmes, CSR-TCRR.) (Attachments: # 1 Attorney Attendance Sheet) (jml) (Entered: 11/09/2016)

12/07/2016 63 MEMORANDUM AND OPINION- - It is therefore ORDERED that the Magistrate Judge's Order (Dkt. No. 44) is hereby VACATED. Accordingly, the Motions to Compel Arbitration filed by Defendant Schein and the Manufacturer Defendants are

DENIED, and the stay previously entered in this case is hereby LIFTED. The trial date for this action is hereby set for February 5, 2018, and the pre-trial hearing date is set for January 8, 2018. Accordingly, the Parties are ORDERED to meet and confer and thereafter jointly submit a proposed Docket Control Order to the Court within 14 days of this Order based on the above trial and pre-trial dates. Signed by Judge Rodney Gilstrap on December 7, 2016. (jml) (Entered: 12/07/2016)

* * * * *

12/13/2016	64	NOTICE OF APPEAL as to 63 Memorandum & Opinion,, by Danaher Corporation, Dental Equipment LLC, Dental Imaging Technologies, Corporation, Instrumentarium Dental Inc., KaVo Dental Technologies, LLC. Filing fee \$ 505, receipt number 0540-6069680. (Attachments: # 1 Exhibit Memorandum Opinion and Order) (Weingarten, James) (Entered: 12/13/2016)
12/14/2016	65	NOTICE OF APPEAL by Henry Schein, Inc. Filing fee \$ 505, receipt number 0540-6070414.

- (Schuster, Paul) (Entered: 12/14/2016)
- 12/14/2016 66 Joint MOTION to Stay *Proceedings Pending Appeal* by Danaher Corporation, Dental Equipment LLC, Dental Imaging Technologies, Corporation, Henry Schein, Inc., Instrumentarium Dental Inc., KaVo Dental Technologies, LLC. (Attachments: # 1 Text of Proposed Order Proposed Order) (Weingarten, James) (Entered: 12/14/2016)
- * * * * *
- 12/21/2016 70 RESPONSE in Opposition re 66 Joint MOTION to Stay *Proceedings Pending Appeal Plaintiff's Response in Opposition to Defendants' Motion to Stay Proceedings Pending Appeal filed by Archer and White Sales, Inc.* (Attachments: # 1 Text of Proposed Order Proposed Order) (Brumbaugh, Kay Lynn) (Entered: 12/21/2016)
- * * * * *
- 02/17/2017 88 MEMORANDUM OPINION AND ORDER re 66 Joint MOTION to Stay *Proceedings Pending Appeal* filed by Dental Equipment LLC, Henry Schein, Inc., KaVo Dental Technologies, LLC, Instrumentarium Dental Inc.,

Dental Imaging Technologies, Corporation, Danaher Corporation. Signed by Judge Rodney Gilstrap on 2/17/2017. (nkl,) (Entered: 02/17/2017)

* * * * *

10/30/2017 261 Sealed Document. SECOND AMENDED COMPLAINT (Baxter, Samuel) (Entered: 10/30/2017)

03/01/2019 409 MOTION to Stay *Pending Appeal* by Benco Dental Supply Co., Danaher Corporation, Dental Equipment LLC, Dental Imaging Technologies, Corporation, Henry Schein, Inc., Instrumentarium Dental Inc., KaVo Dental Technologies, LLC, Patterson Companies, Inc. (Attachments: # 1 Text of Proposed Order)(Flaherty, Scott) (Additional attachment(s) added on 3/4/2019: # 2 Revised Proposed Order) (nkl,). (Entered: 03/01/2019)

* * * * *

03/15/2019 413 RESPONSE in Opposition re 409 MOTION to Stay *Pending Appeal filed by Archer and White Sales, Inc.* (Attachments: # 1 Text of Proposed Order)(LeClair, Lewis) (Entered: 03/15/2019)

* * * * *

04/02/2019 418 ORDER granting 409 Motion to Stay Pending Appeal; denying 410 Motion to Amend/Correct. Signed by District Judge Rodney Gilstrap on 4/1/2019. (nkl,) (Entered: 04/02/2019)

* * * * *

09/18/2019 429 NOTICE by Benco Dental Supply Co., Danaher Corporation, Dental Equipment LLC, Dental Imaging Technologies, Corporation, Henry Schein, Inc., Instrumentarium Dental Inc., KaVo Dental Technologies, LLC, Patterson Companies, Inc. *NOTICE CONCERNING DEFENDANTS EN BANC PETITION* (Attachments: # 1 Exhibit A) (Doan, Jennifer) (Entered: 09/18/2019)

10/01/2019 430 ORDER LIFTING STAY – Pretrial Conference set for 1/22/2020 09:00 AM before District Judge Rodney Gilstrap., Jury Selection set for 2/3/2020 08:00AM before District Judge Rodney Gilstrap., Jury Trial set for 2/3/2020 08:00 AM before District Judge Rodney Gilstrap. Signed by District Judge Rodney Gilstrap on 9/30/2019. (nkl,) (Entered: 10/01/2019)

* * * * *

12/27/2019 458 MOTION to Stay *Pending Decision on Petition for Certiorari and Request for Expedited Briefing* by Henry Schein, Inc. (Attachments: #1 Text of Proposed Order) (Schuster, Paul) (Entered: 12/27/2019)

12/27/2019 458 MOTION to Stay *Pending Decision on Petition for Certiorari and Request for Expedited Briefing* by Henry Schein, Inc. (Attachments: #1 Text of Proposed Order) (Schuster, Paul) (Entered: 12/27/2019)

* * * * *

01/03/2020 465 RESPONSE in Opposition re 458 MOTION to Stay *Pending Decision on Petition for Certiorari and Request for Expedited Briefing filed by Archer and White Sales, Inc.* (Attachments: # 1 Text of Proposed Order) (Baxter, Samuel) (Entered: 01/03/2020)

01/03/2020 466 ORDER denying 458 Motion to Stay Pending Decision on Petition for Certiorari and Request for Expedited Briefing. Signed by District Judge Rodney Gilstrap on 1/3/2020. (nkl,) (Entered: 01/03/2020)

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- 01/23/2020 506 ANSWER to Complaint *Defendant Henry Schein, Inc.'s Answer to Plaintiff's Second Amended Complaint* by Henry Schein, Inc. (Schuster, Paul) (Entered: 01/23/2020)
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- 02/25/2020 518 STIPULATION of Dismissal *WITH PREJUDICE* by Archer and White Sales, Inc. (Attachments: # 1 Text of Proposed Order)(Baxter, Samuel) (Entered: 02/25/2020)
- 02/27//2020 519 ORDER re 518 Stipulation of Dismissal as to Dental Imaging Technologies, Corporation, Instrumentarium Dental Inc., KaVo Dental Technologies, LLC, Danaher Corporation and Dental Equipment LLC. Signed by District Judge Rodney Gilstrap on 2/27/2020. (ch,) (Entered: 02/28/2020)
- 03/31/2020 520 STIPULATION of Dismissal *WITH PREJUDICE* by Archer and White Sales, Inc. (Attachments: # 1 Text of Proposed Order)(Baxter, Samuel) (Entered: 03/31/2020)
- 04/02/2020 521 ORDER re 520 Stipulation of Dismissal filed by Archer and White Sales, Inc., Patterson Companies, Inc. terminated., Attorney Ruvin

S. Jayasuriya; James J. Long;
Jeremy D. Schildcrout; Jay W.
Schlosser; Mark G. Schroeder;
Clyde Moody Siebman; Jeffrey
Jack Burley and Scott M. Fla-
herty terminated. Signed by Dis-
trict Judge Rodney Gilstrap on
4/1/2020. (nkl,) (Entered:
04/02/2020)

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FILED UNDER SEAL
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

Civil Action No. 2:12-CV-00572-JRG

ARCHER AND WHITE SALES, INC.,

Plaintiff,

v.

HENRY SCHEIN, INC., DANAHER CORPORA-
TION, INSTRUMENTARIUM DENTAL, INC.,
DENTAL EQUIPMENT, LLC, KAVO DENTAL
TECHNOLOGIES, LLC, and DENTAL IMAGING
TECHNOLOGIES CORPORATION,
Defendants.

October 30, 2017

SECOND AMENDED COMPLAINT

Plaintiff Archer and White Sales, Inc. (“Archer Den-
tal”) files this action against Defendants Henry Schein,
Inc. (“Schein”), Patterson Companies, Inc. (“Patterson”),
Benco Dental Supply Co. (“Benco”), Danaher Corpora-
tion (“Danaher Corporation”), Instrumentarium Dental,
Inc. (“Instrumentarium”), Dental Equipment LLC d/b/a
Pelton & Crane (“Pelton & Crane”), Dental Equipment
LLC d/b/a Marus (“Marus”), Dental Equipment LLC

d/b/a DCI Equipment (“DCIE”), KaVo Dental Technologies, LLC (“KaVo”) and Dental Imaging Technologies, Corporation d/b/a Gendex Corp. (“Gendex”), (collectively, “Defendants”). Archer Dental seeks treble damages and injunctive relief for violations by all Defendants of Section 1 of the Sherman Act, 15 U.S.C. § 1, and the Texas Free Enterprise and Antitrust Act, TEX. BUS. & COMM. CODE § 15.01.

NATURE OF THE CASE

1. This is an antitrust case arising out of the contract, combination, and conspiracy in restraint of trade by Schein, Patterson, Benco, and Burkhart Dental Supply (“Burkhart”) (collectively “Cartel Members”), who are horizontal competitors in the distribution of dental equipment, to fix, maintain, and stabilize margins and their further agreement with each other to enlist their common suppliers, including Danaher Corporation and its subsidiaries Pelton & Crane, Marus, DCIE, KaVo, Gendex, and Instrumentarium (collectively, “Danaher”), Midmark, and Belmont to join their margin-fixing conspiracy by reducing the distribution territory of, and eventually terminating, their low-margin competing distributor Archer Dental. This territory reduction and termination was an illegal boycott, the purpose of which was to allow the Cartel Members to maintain and perpetuate their margin-fixing conspiracy. Danaher, Midmark, and Belmont, as common suppliers of dental equipment to the Cartel Members and Archer Dental, facilitated the reduction in competition to increase prices by knowingly joining the illegal conspiracy and boycott. Danaher, Midmark, and Belmont knowingly participated in the illegal conspiracy and boycott to ensure that Schein, a large and dominant distributor of dental products, and the other Cartel Members, also significant distributors of dental products, would continue

to sell and promote Danaher, Midmark, and Belmont lines. Danaher, Midmark, and Belmont joined the illegal conspiracy and boycott in response to threats from the Cartel Members, including threats that they would terminate their distribution of the manufacturers' products unless the manufacturers participated in the Cartel Members' conspiracy to fix margins and eliminate competition by refusing to deal with Archer Dental and other low-margin distributors. In direct response to the threats from Cartel Members, Danaher prohibited Archer Dental from selling dental equipment in areas and to customers that the distribution agreements between Archer Dental and Danaher (or its predecessors) permitted Archer Dental to sell, denied Archer Dental the discount structure to which Archer Dental was entitled based on its sales, and in 2014, terminated Archer Dental's distribution agreements with Danaher subsidiaries Instrumentarium, Pelton & Crane, Marus, DCIE, and KaVo (including Aribex). Midmark limited the products which Archer Dental was permitted to sell to only air vacuums and sterilizers. Belmont terminated Archer Dental's distribution rights entirely, and refused to respond to subsequent attempts by Archer Dental to regain the line. Archer Dental currently estimates its damages caused by Defendants to be approximately \$100 million.

2. Defendants, Burkhart, Midmark, and Belmont have carried out their conspiracy through a series of unlawful activities, including but not limited to agreements to fix, maintain and stabilize margins and boycotts of distributors who refused to comply. The conspiracy is continuing, and the conspirators have committed acts in furtherance of that conspiracy in the four years preceding the filing of the prior complaints.

3. Defendants and the other conspirators' conspiracy enables them to enjoy the economic benefits that flow from conspiring to operate an unlawful cartel that forecloses competition by low-margin distributors in the sale of dental products and fixes margins for dental products purchased by dental professionals throughout the United States.

**JURISDICTION, VENUE, AND INTERSTATE
COMMERCE**

4. This action is brought under Section 1 of the Sherman Act, 15 U.S.C. § 1, and the Texas Free Enterprise and Antitrust Act, TEX. BUS. & COMM. CODE § 15.05.

5. This Court has subject-matter jurisdiction over Plaintiff's claims pursuant to 28 U.S.C. §§ 1331 and 1337, and 15 U.S.C. §§ 15 and 26.

6. This Court has personal jurisdiction over Defendants because each of them systematically and continuously transacts substantial business in the United States, in Texas, and in the Eastern District of Texas.

7. Venue is proper in this District pursuant to 15 U.S.C. § 22 and 28 U.S.C. § 1391 because Defendants inhabit, transact business, reside, are found to have an agent in this District, and a substantial part of the events or omissions giving rise to the claim occurred in this District.

8. Defendants Danaher, KaVo, Instrumentarium, Gendex, Pelton & Crane, Marus and DCIE sell dental products across state lines, in Texas, and in this District. Defendants Schein, Patterson, and Benco market and sell dental products across state lines, in Texas, and in this District. All Defendants receive substantial payments

across state lines from the sale of dental products, including substantial payments based on sales in Texas and in this District. Defendants' business activities that are the subject of this Complaint are within the flow of, and substantially have affected, interstate trade and commerce.

PARTIES

Plaintiff

9. Plaintiff Archer Dental is located at 1107 Summit Avenue, Suite 1, in Plano, Collin County, Texas, in the Eastern District of Texas. Archer Dental is a family-owned business and has been in the business of distribution, sales, and service of dental equipment and supplies to dental professionals since 1983.

Defendants

10. Defendant Danaher Corporation is a for-profit corporation organized and existing under the laws of the State of Delaware with its principal place of business at 2200 Pennsylvania Avenue, NW, Suite 800W, Washington, DC 20037. Defendant Danaher Corporation may be served with process by serving its Registered Agent, Corporation Service Company, 2711 Centerville Rd., Suite 400, Wilmington, DE 19808. Danaher holds the largest market share of all dental equipment manufacturers in the United States. Danaher primarily sells and distributes its dental equipment through distributors such as Schein, Patterson, Benco, Burkhart, and (formerly) Archer Dental.

11. Defendant Instrumentarium is a for-profit corporation organized and existing under the laws of the State of Wisconsin with its principal place of business at 1245 W. Canal St., Milwaukee, Wisconsin 53233. Defendant Instrumentarium may be served with process by serving its

Registered Agent, CT Corporation System, 8040 Excelsior Drive, Suite 200, Madison, WI 53717. Instrumentarium is a wholly-owned subsidiary of Danaher. Instrumentarium primarily sells and distributes its dental equipment through distributors such as Schein, Patterson, Benco, Burkhart, and (formerly) Archer Dental.

12. Defendant Dental Equipment LLC does business under the names Pelton & Crane Marus, and DCI Equipment. Dental Equipment LLC is a for-profit corporation organized and existing under the laws of the State of North Carolina with its principal place of business at 11727 Fruehauf Drive, Charlotte, North Carolina 28273. Defendant Dental Equipment LLC may be served with process by serving its Registered Agent, CT Corporation System, 150 Fayetteville St., Box 1011, Raleigh, NC 27601. Dental Equipment LLC is a wholly-owned subsidiary of Danaher. Dental Equipment LLC primarily sells and distributes its dental equipment through distributors such as Schein, Patterson, Benco, Burkhart, and (formerly) Archer Dental.

13. Defendant KaVo is a for-profit corporation organized and existing under the laws of the State of North Carolina with its principal place of business at 1340 East Main Street, Lake Zurich, Illinois 60047. Defendant KaVo may be served with process by serving its Registered Agent, Secretary of State, 2 South Salisbury Street, Raleigh, NC 27601. KaVo is a wholly owned subsidiary of Danaher. KaVo primarily sells and distributes its dental equipment through distributors such as Schein, Patterson, Benco, Burkhart, and (formerly) Archer Dental.

14. Defendant Gendex is a for-profit corporation organized and existing under the laws of the State of Pennsylvania with its principal place of business at 1910 N. Penn Road, Hatfield, Pennsylvania 19440. Defendant Gendex

may be served with process by serving its Registered Agent, The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, DE 19801. Gendex is a wholly-owned subsidiary of Danaher. Gendex primarily sells and distributes its dental equipment through distributors such as Schein, Patterson, Benco, Burkhart, and (formerly) Archer Dental.

15. Defendant Schein is a for-profit corporation organized and existing under the laws of the State of Delaware with its principal place of business at 135 Duryea Road, Melville, New York 11747. Defendant Schein may be served with process by serving its Registered Agent, Department of State, New York City Location, 123 William Street, New York, NY 10038-3804. Schein is the largest dental distributor in the United States. In 2011, Schein's overall net sales were \$8.5 billion, with nearly \$2.9 billion in dental sales. In 2016, Schein's overall net sales were \$11.5 billion, with \$5.5 billion in dental sales. Additionally, Schein owns substantial equity interests in Darby Dental Supply, LLC ("Darby Dental"), another large distributor of dental supplies and equipment.

16. Defendant Patterson is a for-profit corporation organized and existing under the laws of the State of Minnesota with its principal place of business at 1031 Mendota Heights Road, St. Paul, Minnesota 55120. Defendant Patterson may be served with process by serving its Registered Agent, CT Corporation System, 1999 Bryan Street, Suite 900, Dallas, Texas 75201-3136. Patterson is the second-largest dental distributor in the United States. In 2011, Patterson's overall net sales were \$3.41 billion, with \$2.23 billion in dental sales. In 2017, Patterson's overall net sales were \$5.59 billion with \$2.39 billion in dental sales.

17. Defendant Benco is a for-profit corporation organized and existing under the laws of the State of Delaware with its principal place of business at 295 Centerpoint Blvd., Pittston, PA 18640. Defendant Benco may be served with process by serving its Registered Agent, National Registered Agents, Inc., 1999 Bryan Street, Suite 900, Dallas, Texas 75201-3136. Benco is the largest privately-owned distributor of dental supplies and equipment in the United States.

18. The Cartel Members distribute many of the same lines of dental products in the same geographic areas and are therefore horizontal “competitors,” but as described below, they have secretly agreed to fix, maintain, and stabilize margins and to eliminate the low-margin competitors who refuse to abide by the supra-competitive margins agreed to by the Cartel. Schein, Patterson, Benco and Burkhart comprise over 80% of the distribution of dental equipment and dental supplies in the United States. With respect to distribution of Danaher brands specifically, the Cartel Members are responsible for an average of over 87% of all of Danaher’s sales through dental distributors.

19. The acts charged in this Complaint as having been done by Defendants and the other conspirators were authorized, ordered, and/or done by their officers, agents, employees, and/or representatives, while actively engaged in the management of their business and affairs.

Co-Conspirators

20. Although not named as a defendant herein, Burkhart participated as a co-conspirator with Defendants and performed acts and made statements in furtherance of the conspiracy and boycott of low-margin distributors, including Archer Dental. Burkhart is a for-profit corporation organized and existing under the laws of the

State of Washington with its principal place of business at 2502 S. 78th Street Tacoma, Washington 98409. On information and belief, Burkhart provides over \$150 million a year in dental equipment, repair, supplies, consulting, continuing education, and other services to over 5,000 dentists. Plaintiff's original complaint referred to Burkhart as "Company X." Plaintiff did not use Burkhart's real name or the real name of Burkhart's manager because of certain confidentiality agreements that existed between Plaintiff and Burkhart and because the Defendants were (and are) aware of the participants to the communications and conduct described in this complaint. On January 17, 2017, Danaher identified Burkhart as "Company X" in a public filing in this matter (Dkt. No. 79).

21. Another unnamed co-conspirator is Takara Belmont USA, Inc. ("Belmont"). Belmont participated as a co-conspirator with Defendants and performed acts and made statements in furtherance of the conspiracy and boycott of low-margin distributors, including Archer Dental. Belmont is a for-profit corporation organized and existing under the laws of the State of New Jersey with a principal place of business at 101 Belmont Drive, Somerset, New Jersey 08873. Belmont is a manufacturer of dental equipment and, on information and belief, holds approximately 4.5% of the market for traditional dental equipment.

22. Midmark Corporation ("Midmark") is yet another unnamed co-conspirator. Midmark participated as a co-conspirator with Defendants and performed acts and made statements in furtherance of the conspiracy and boycott of low-margin distributors, including Archer Dental. Midmark is a for-profit corporation organized and existing under the laws of the State of Ohio with a principal

place of business at 1700 S. Patterson Boulevard, Suite 400, Dayton, Ohio 45409. Midmark is a manufacturer of dental equipment and, on information and belief, holds approximately 11.0% of the market for traditional equipment.

BACKGROUND

23. In 1963, James Archer, Sr. began working in the dental equipment sales and service industry as the college representative at Baylor Dental School in Dallas, Texas. After college, he worked for several companies in the dental business over the years.

24. In 1983, James Archer, Sr. started a dental equipment sales and service business which became Archer and White Sales, Inc. in Plano, Collin County, Texas. Archer Dental's primary customers are dentists. Mr. Archer was a pioneer of the discount full-service dental equipment supplier business. Mr. Archer's son, James Jr., started working in the family business when he was only 12 years old by repairing dental hand pieces. James Archer, Jr. took the company into national sales distribution of dental equipment in 1993 through catalog and later internet sales. James Archer, Jr. is now the President of Archer Dental.

25. Before 2004, there were a number of dental product manufacturers in the U.S., and Archer Dental was an authorized distributor for multiple manufacturers, including Gendex, KaVo, Pelton & Crane, Marus, Kerr, DCIE, and others. Beginning in or around 2004, Danaher Corporation embarked on a plan to consolidate the dental equipment manufacturing industry. Danaher has become the largest manufacturer of dental equipment, in part, by acquiring multiple smaller manufacturers of dental equip-

ment over the years. For example, in 2004, Danaher Corporation acquired the KaVo and Gendex dental equipment businesses. In 2005, Danaher Corporation acquired the Pelton & Crane, Marus, and DCIE dental equipment businesses. In 2009, Danaher Corporation acquired Pal-DEx Group, the owner of the Instrumentarium line of equipment. In 2012, Danaher Corporation acquired Aribex.

26. According to its 10-K SEC filing for 2016, “Danaher Corporation designs, manufactures, and markets professional, medical, industrial, and commercial products and services, which are typically characterized by strong brand names, innovative technology and major market positions.” Danaher Corporation exercises direction, management, and control over the business activities of the dental equipment companies it has acquired and that are identified herein. Danaher Corporation exercises this direction, management, and control through a variety of means including a single Board of Directors at Danaher Corporation. None of its dental equipment companies has its own Board of Directors.

27. According to Kirk Zambetti, the long-time Vice-President of Sales of Danaher Corporation’s dental equipment companies who left that position in 2016, there are approximately 100 Danaher Corporation employees at Danaher Corporation’s corporate headquarters in Washington, D.C. who work closely with the most senior executives of the dental equipment companies. The senior executives of Danaher Corporation, including its Chief Executive Officer, Chief Financial Officer, and others, work closely with the senior executives at the dental equipment companies at both the strategic and operational level. The executives at Danaher Corporation would coach, mentor, manage, and help the presidents of the dental equipment

companies drive and grow their business. This engagement occurred on a daily or weekly basis.

28. At the strategic level, the most senior executives of Danaher Corporation and the most senior executives at the dental equipment companies gather together annually for an in-person meeting for several days to discuss their strategic plans for the dental equipment companies. These strategic planning meetings include discussions centered on the three-year outlook for the dental equipment companies. The strategic planning meetings were collaborative efforts between the senior executives of Danaher Corporation and the dental equipment companies in which they would hash out the strategic vision of the companies together.

29. At the operational level, the most senior executives of Danaher Corporation and the most senior executives at the dental equipment companies likewise hold annual meetings to discuss the operations of the dental equipment companies. These operational meetings would include discussions of topics such as policy deployment, actions plans, root cause countermeasures, product innovation, marketing, and brand awareness. The president of the dental equipment companies also generates a monthly report called the president's letter that would be sent to the executives at Danaher Corporation. The president's letter would include a review of the dental equipment business, marketplace analysis, how the companies were doing against budget, and the like. There would then be follow-up discussions between the executives at Danaher Corporation and the president of the dental equipment companies to review the president's letter.

30. Given that it owns and now controls a substantial portion of the dental equipment manufacturing industry, doing business with Danaher is essential to the economic

success of dental equipment distributors such as Archer Dental. That is especially so because the traditional dental equipment segment is dominated by four “premier” brands in the “core equipment” segment that includes items such as dental chairs, lights, and cabinets—Pelton & Crane, A-dec, Midmark, and Belmont. Archer was denied access to any of these brands (with the exception of Midmark’s sterilizers and air vacuums), which comprise about 76% of the traditional equipment market. As such, without at least one of those premium lines, a distributor simply cannot compete effectively in the core equipment segment of the market. Moreover, certain Danaher brands have unique features and capabilities and are accepted by dentists in ways that other brands are not. Dentists’ equipment choices are extremely path-dependent; once the dentist becomes familiar with a particular brand, that dentist is extremely likely to stay loyal to that brand and to continue purchasing it due to level of comfort and high switching costs. Accordingly, losing the right to distribute a manufacturer’s products is detrimental to a distributor. For these reasons, the ability to distribute Danaher dental equipment brands is necessary for Archer Dental to compete effectively in the core equipment segment of the dental equipment market with the Cartel Members.

31. Similar to the core equipment segment, the dental technology and imaging segment (*i.e.*, x-rays) is dominated by a few key brands: Instrumentarium, Gendex, PlanMeca, Sirona, and Aribex. Danaher Corporation’s consolidation strategy extended into the technology and imaging segment as well. Danaher Corporation acquired Gendex (2003), Instrumentarium (2009), and Aribex (2012). Other manufacturers have entered into arrangements with the Cartel Members that preclude independent distributors like Archer Dental from distributing their

lines. For example, Patterson had the exclusive right to distribute certain Sirona equipment, a key manufacturer in the dental technology and imaging segment, for many years and only within recent months did this exclusive arrangement terminate. Likewise, until the last few months, Schein had the exclusive right to distribute Dexis, which sold intra-oral x-ray devices and intra-oral cameras, as well as the exclusive right to distribute I-Cat 3-D imaging devices. The same factors that exist in the core equipment segment also drive the technology and imaging segment—*i.e.*, certain brands have unique features and capabilities, and a dentist's equipment choices are extremely path-dependent. Just as in the core equipment segment, losing the right to distribute and/or being foreclosed from distributing a key manufacturer's products in the technology and imaging segment is detrimental to a distributor. As explained in more detail below, Archer Dental was extremely successful at distributing this type of equipment until its distribution rights were restricted and then terminated.

32. In the consumables submarket, Kerr (owned by Danaher), 3M, DentSply/Caulk, and Vivadent are the premier brands. Members of NDC (formerly known as the American Dental Cooperative)—a group buying cooperative that allows independent distributors to access critical equipment and consumables lines—receive access to nearly 400 manufacturers, including, on information and belief, 3M, Kerr, DentSply, and Vivadent. Archer Dental previously distributed Kerr products.

33. On information and belief, Danaher Corporation operated its dental subsidiaries essentially as divisions of the overall company. In 2005, Danaher Corporation's dental platform included its North American Dental busi-

nesses: KaVo, Gendex, Dexis, and Pelton & Crane. Danaher appointed Bob Joyce as the President of KaVo North America, with responsibility for all these dental businesses. Danaher also appointed Michael Weatherred as Vice President of Global Accounts for the entire Dental Platform. Between them, Weatherred and Zambetti were responsible for the key global accounts for all dental businesses, including the Cartel Members. Danaher continued to consolidate its dental business, as reflected in Danaher's consolidation of management in the dental platform business. In 2009, Danaher appointed Zambetti as the North American Vice President of Sales for KaVo, Pelton & Crane and Marus. Both Zambetti and Weatherred used @danaher.com email addresses to carry out their duties, including in the course of having discussions about dealer terminations. In December 2013, Zambetti, and Matt Garrett, Kavos's North American Vice President of Marketing, announced the consolidation of the Gendex, Nomad (Aribex), Sorodex, and Instrumentarium sales teams, marketing teams and commercial leadership structure under a new organization—KaVo Kerr Group Imaging. Additionally, the dental platform's senior leader reports to an executive at the Danaher Corporation. Further reinforcing Danaher Corporation's control over its subsidiaries and its treatment of them as mere divisions, on information and belief, the subsidiaries use a single distribution agreement for multiple Danaher brands, with the parties simply checking boxes next to the authorized lines. Executives at the highest levels of Danaher Corporation have communicated with dental distributors about Danaher's distribution strategy, such as when Larry Culp, Danaher Corporation's CEO, discussed Danaher's use of distributors with Stanley Bergman, Schein's CEO.

34. As Danaher Corporation was consolidating the dental products business, Archer Dental became known

nationally among dental professionals (who purchase and use dental equipment) for its low prices and high-quality service. Archer Dental's sales always grew significantly when it gained distribution rights to an equipment line or a new distribution territory. That growth, however, would eventually draw the attention and later the action of its competitors who disliked Archer Dental's lower prices. What Archer Dental would not know for some time was that its competitors, the Cartel Members, had enlisted Danaher in a conspiracy and group boycott designed to eliminate Archer Dental—and other low-margin distributors like it—as a competitive threat.

**The Cartel Members and Danaher Engaged
in a Conspiracy and Boycott to Thwart Archer
Dental's Regional Growth (in Texas, Oklahoma, and
Northwest Arkansas) and National Growth**

35. This case involves a nationwide conspiracy by the Cartel Members to protect their collective business from price competition and to fix, maintain, and stabilize their high margins for dental supplies and equipment across the United States. In furtherance of that conspiracy, they took actions to thwart price competitors, including Archer Dental and other low-margin independent dealers. The primary way that they accomplished this objective and succeeded in their conspiracy was by denying their competitors such as Archer Dental with access to the key manufacturers necessary to compete effectively. As discussed in detail below, Schein confirmed that the objective of this margin-fixing scheme was to ensure that dentists “get[] [dental products] for the same price no matter who they buy it from” so that “we all get paid,” and the scope of the margin-fixing scheme ran “unanimously across the industry [for] as long as [Schein's representative had]

been in the dental business.” The Cartel Members’ conspiracy continued until at least 2014 and, on information and belief, remains ongoing.

36. The Cartel Members’ conspiracy has allowed them to inflate the average margins on dental supplies and equipment to supra-competitive levels, at times above 38%. The Cartel Members were able to maintain these supra-competitive margins by actively conspiring to eliminate competition from Archer Dental and other independent distributors and potential competitors.

37. The Cartel Members have orchestrated this conspiracy through private meetings, phone calls, email messages, and intermediaries.

38. In one such private meeting, described in detail below, Schein and Burkhart attempted to enlist Archer Dental in the Cartel Members’ conspiracy. Other non-public documents that Archer Dental has only recently discovered as part of this matter establish the repeated, private communications between the sales representatives and executives of dental equipment manufacturers—including, in particular, Danaher—and the sales representatives and “upper management” of the Cartel Members. The same, recently-produced documents further demonstrate the threats made by Cartel Members to Danaher (and other manufacturers) and the manufacturers’ actions to further the Cartel Members’ conspiracy and boycott taken in response to those threats.

39. The Cartel Members have enforced their margin-fixing conspiracy by enlisting suppliers to join their boycott of Archer Dental and other low-margin, independent dental distributors and potential competitors that threaten the Cartel Members’ ability to charge supra-competitive prices and maintain supra-competitive profit

margins. Specifically, the Cartel Members successfully pressured Danaher to join their conspiracy and boycott against Archer Dental, cutting Archer off from critical products and suppliers, preventing Archer Dental's growth regionally and nationally, and eventually terminating all business between Archer Dental and Danaher. For example, Danaher's recently-discovered internal communications state that "complaints [from Cartel Members] finally reached the point of forcing [Danaher's] hands to restrict [Archer Dental] to his geographic location."

40. But for the conspiracy and boycott by the Cartel Members and Danaher, Archer Dental was poised for explosive growth both regionally and nationally. This boycott against Archer Dental has foreclosed Archer Dental from successfully competing with the Cartel Members and caused Archer Dental damage in the form of lost sales and lost growth.

41. Since the filing of Archer Dental's Original Complaint, the conspiracy and boycott complained of herein have been the subject of private litigation and active government investigations, including: (i) a class action filed on behalf of a group of dentists *In re Dental Supplies Antitrust Litigation*, E.D.N.Y, Case No. 1:16-cv-00696-BMC-GRB (the "dentist class action"), (ii) an antitrust suit filed by SourceOne Dental, Inc., an online distributor of dental supplies and equipment, *SourceOne Dental, Inc. v. Patterson Companies et al.*, E.D.N.Y, Case No. 2:15-cv-05440-BMC, (iii) an antitrust suit filed by IQ Dental Supply, Inc., a dental equipment and supply distributor, *IQ Dental Supply, Inc. v. Henry Schein, Inc. et al.*, E.D.N.Y. Case. No. 2:17-cv-04834-BMC (iv) enforcement actions by the Texas Attorney General's Office against Benco, *State of Texas v. Benco Dental Supply Co.*, Case No. D-1-6N-

15-001386 (District Court, 353rd Judicial District, Travis County, Texas), and Schein, *State of Texas v. Henry Schein, Inc.*, Case No. D-1-GN-17-003749 (District Court, 261st Judicial District, Travis County, Texas), both of which resulted in agreed final judgments and stipulated injunctions requiring Benco and Schein each to pay \$300,000 to the Texas Attorney General for its antitrust investigations, agree to refrain from participation in anti-competitive activities, and implement an antitrust training program in order to settle the allegations at issue in the cases, and (v) on information and belief, ongoing investigations of other Cartel Members by the Texas Attorney General, the Arizona Attorney General, and the Federal Trade Commission.

**Cartel Members Schein and Burkhart Confirm the
Cartel Members' Conspiracy**

42. In 2004, Archer Dental's authorized distribution territory in its dealer agreements with Danaher allowed it to sell equipment in Texas and parts of Oklahoma and Northwest Arkansas. In addition to its strong Texas sales, Archer Dental's sales of equipment into Oklahoma and Northwest Arkansas were strong. Looking to expand on its success, Archer Dental explored the possibility of partnering with a company that already had a physical location in Oklahoma to further expand its sales in Oklahoma and Northwest Arkansas. But when Burkhart Dental's manager in Oklahoma, Jack Powers, learned of Archer Dental's possible expansion plans, he called James Archer, Sr. and begged him not to enter into Oklahoma in a bigger way. Little did Archer Dental know at the time, but Powers's phone call was far more than just one old friend making a plea to another; Powers's call was part of a broader conspiracy to stifle competition in the dental equipment business.

43. In July 2004, Archer Dental entered into a business arrangement with Oklahoma-based dental distributor Dynamic Dental Solutions, Inc. (“Dynamic”) whereby Dynamic would act as a sales representative for Archer Dental for various equipment lines which Archer Dental was authorized to sell. Archer Dental was billed by Danaher for the equipment Dynamic sold on Archer Dental’s behalf, and Archer Dental paid Danaher for that equipment. Archer Dental had financial responsibility for the equipment that Dynamic sold on Archer Dental’s behalf and received a portion of Dynamic’s gross revenue. Archer Dental itself continued to make sales in significant volumes directly into Oklahoma and Northwest Arkansas after Dynamic became its sales representative.

44. Archer Dental also intended to benefit from its arrangement with Dynamic by virtue of Dynamic’s access to and experience with selling certain consumables. While Dynamic already had access to a few consumables lines, Dynamic intended to join the American Dental Cooperative (“ADC,” now known as NDC), a cooperative organization created to assist smaller, independent companies compete against large national companies. Through that membership, Dynamic and Archer Dental would receive access to many of the more popular consumables lines, including, on information and belief, 3M, Kerr, DentSply, and Vivadent.

45. At the time Archer Dental entered into its arrangement with Dynamic, Archer was an authorized dealer of several dental equipment manufacturers including Pelton & Crane, Marus, DCIE, DentalEZ, and others. Pelton & Crane, Marus, DCIE and others recognized Dynamic as an authorized branch location of Archer Dental.

46. As Archer Dental's sales agent, Dynamic practiced the same high-quality service, low-price philosophy practiced by Archer Dental. As a result, Dynamic's sales grew significantly in its first few years after its business arrangement with Archer Dental. Dynamic was so successful that, prior to being cut off by Pelton & Crane in February 2008, it became the top seller of Pelton & Crane equipment in the Oklahoma territory and the number five Pelton & Crane dealer in the entire country for 2007. While Dynamic's sales were growing at a substantial pace, Schein, Burkhart, and Danaher conspired to eliminate Dynamic's ability to compete with the Cartel Members in order to allow the Cartel Members to continue to earn their supra-competitive margins. Once Dynamic's annual sales of equipment for the Pelton & Crane equipment line reached almost a million dollars, the Cartel Members began to take notice, and they were not happy as Archer Dental and Dynamic's sales were cutting into their anti-competitive, inflated margins. Initially, the Cartel Members merely complained to the equipment manufacturers, such as Danaher, about Dynamic's competitive pricing. As Dynamic's sales continued to grow, however, Schein, Burkhart, and Danaher in particular, escalated their attacks on Dynamic and Archer Dental.

47. In September 2007, in accordance with Archer Dental's and Dynamic's plan to expand their consumables sales, Dynamic applied to membership in the ADC. ADC membership is vital to the ability of smaller, independent dealers to obtain access to various lines of dental supplies and equipment that these dealers could not otherwise obtain and was critical to Archer Dental's and Dynamic's business plan. Dynamic's membership application to ADC was accepted and verbally confirmed in December 2007 by ADC and further confirmed by ADC providing to Dynamic a complete set of confidential, exclusive ADC price

sheets for items that ADC makes available to its members.

48. In early 2008, following the threats from the Cartel Members, and before Dynamic could realize the benefits of its membership, ADC revoked Dynamic's membership on the basis of unspecified "input received." Archer Dental later discovered the "input received" came from Cartel Members, and included Burkhart's manager Powers's complaints to ADC about Dynamic's low prices and insistence that ADC terminate Dynamic's pending membership.

49. The Cartel Members and Danaher took other anti-competitive actions against Archer Dental and Dynamic during this same time period in late 2007 and early 2008. In Fall 2007, Dan Bump, Regional Sales Manager for Pelton & Crane, Marus, and DCIE, told the Archers that he had been dealing with Schein complaints about Dynamic and Archer Dental in Oklahoma. In a January 2008 email, Bump states that he would be meeting the following week with Schein and Burkhart, that both believed they had lost significant deals due to Archer Dental's and Dynamic's low pricing, and that in response Schein and Burkhart have "shown support to other manufacturers" (*i.e.*, had threatened to cease dealing with Danaher). Bump and Wilson, the Pelton & Crane sales representative for the Oklahoma and Arkansas region, had also been told repeatedly by Schein and Burkhart that they were tired of the low margins and would cease selling Pelton & Crane products unless Pelton & Crane stopped doing business with Dynamic.

50. In January 2008, Schein's Tulsa Manager Mark Lowery threatened Danaher's Pelton & Crane representative Don Givens. Lowery told Givens that Schein—Pelton & Crane's largest U.S. distributor—would stop

selling Pelton & Crane equipment if Pelton & Crane did not stop doing business with Dynamic and Archer Dental.

51. Consistent with the coordinated and conspiratorial scheme between Burkhart and Schein, in January 2008, Burkhart's manager Powers made the same threat to Givens and also to other dental equipment manufacturers, including Belmont. The threats from Schein and Burkhart were clear—either stop selling equipment to Archer Dental and Dynamic because they are interfering with Schein's and Burkhart's ability to continue to obtain anti-competitive, fixed prices from dental professionals to whom they were selling, or Schein and Burkhart will stop buying equipment from Danaher and Belmont. Nor was the conspiracy limited to just Cartel Members Schein and Burkhart. As discussed in detail below, Schein's representative, Lowery, admitted that the margin-fixing conspiracy had been implemented "unanimously across the industry [for] as long as [Schein's representative had] been in the dental business."

52. By the time the Cartel Members began their coordinated boycotting activities against Archer Dental and Dynamic, Danaher had acquired multiple lines of dental equipment that had previously been manufactured by independent companies, including Pelton & Crane, Marus, and DCIE. Danaher possessed, and continues to possess, a dominant position in the dental equipment market. Danaher took the threats from Schein, Burkhart, and the other Cartel Members seriously and agreed to join the illegal boycott, depriving Archer Dental of the ability to distribute dental equipment it needed to compete effectively.

53. In response to the threats from Schein and Burkhart, in January 2008, Pelton & Crane's Regional Sales Manager, Dan Bump met with Lowery of Schein

and Powers of Burkhart to discuss Archer Dental's and Dynamic's prices and what to do about them. Bump also met with Schein's Little Rock branch. At the meetings, Danaher, Schein and Burkhart collectively agreed that Dynamic and Archer Dental would be cut off from selling Pelton & Crane, Marus and DCIE dental equipment in Oklahoma and Northwest Arkansas. Not only was Dynamic cut off from selling the various Danaher equipment lines in Oklahoma and Northwest Arkansas, but Archer Dental, which had separately been selling into those states for years, was completely banned by Danaher from selling into Oklahoma and Northwest Arkansas and was restricted to selling in Texas only. With Dynamic and Archer Dental removed as competitors, Schein and Burkhart could continue their agreement to fix margins on dental equipment sold to dental professionals. As the quid pro quo for terminating Dynamic and cutting back Archer Dental's direct sales to Texas, Schein and Burkhart promised Danaher (i) to continue to distribute Danaher dental equipment brands, and (ii) to "make up" the sales volume that Danaher would lose as the result of restricting Archer Dental's and Dynamic's ability to sell Pelton & Crane, Marus, and DCIE equipment. In fact, in order to sufficiently make up the volume lost by restricting Archer Dental, Danaher secured promises for additional sales from Schein and Burkhart to make up for Danaher's sales that it would be losing by cutting off Archer Dental and Dynamic in the area. Pelton & Crane did not inform Archer Dental or Dynamic of the termination and restriction decisions at the time they were agreed to by Schein, Burkhart, and Danaher.

54. The decision to restrict and terminate Archer Dental and Dynamic was a collective decision between and among horizontal competitors, including at least Schein and Burkhart, as well as their common manufacturer,

Danaher. The way in which the decision was communicated underscores that the decision was the product of collusion. Dan Bump, Pelton & Crane's Regional Sales Manager, held a teleconference with Schein employees on February 25, 2008 and announced to them that Dynamic had been terminated from selling the Pelton & Crane line of equipment and that Archer Dental had been cut back. It was not until a week later, that Dynamic finally received written notification that it would no longer be able to distribute Pelton & Crane, Marus, or DCIE products, and Bump told Archer Dental that it could not sell past the Red River and was restricted to selling dental equipment within the State of Texas. Danaher restricted Archer Dental to Texas as part of the illegal boycott and despite Archer Dental's distribution agreement permitting sales in Oklahoma and Arkansas and its years of strong sales within those states.

55. During the Oklahoma Dental Association meeting on May 17, 2008, Skip Pettus of Dynamic was walking down an aisle at the meeting and ran into Jack Powers, the General Manager of Burkhart, and Ron Fernandez of Schein who were involved in a conversation. Powers told Pettus that the three of them should sit down and talk. Powers also told Pettus "You have got to raise your prices!" Then Mark Lowery of Schein walked up and joined the conversation. Lowery and Powers proceeded to explain the Cartel Members' ongoing margin-fixing agreement to Pettus and invited him to join it on behalf of Dynamic and Archer Dental.

56. Disturbed by the content of the May 17, 2008 meeting, Archer Dental set out to determine what had really been happening in the dental equipment industry. What it would learn and be told by participants in the Cartel would eventually lead to an investigation by the Federal

Bureau of Investigation into the margin-fixing activities of the Cartel Members, in which Pettus with Dynamic was enlisted as a confidential informant by the FBI.

57. On May 27, 2008, Pettus met with Burkhart manager Powers to investigate Archer Dental's concerns that anticompetitive conduct—conduct directed at Archer Dental and others—was occurring and that the ringleaders were Schein and Burkhart.

58. During the meeting, Powers described the “trust” relationship between Schein and Burkhart—an unusual adjective to describe the relationship between two companies that publicly present themselves to their customers as competitors. Powers further explained that Burkhart will not compete with Schein in situations in which Burkhart knows that Schein has already begun talking with a dental professional to sell dental equipment. Powers will simply tell the dental professional that they should buy their equipment from Schein. As Powers described it, his counterpart at Schein “knows that I’m not going to go behind his back and try to get that customer.” When a dental professional asks Burkhart to provide a price on an item that Schein has already offered to sell that customer, Burkhart simply tells the dental professional, “I want you to buy [the items] from Ron [a Schein salesman].”

59. Powers, like his counterpart at Schein, explained to Pettus that he wanted to be “on the same playing field” with his competitors—including Schein and the other Cartel Members Benco and Patterson. In an effort to facilitate bringing Archer Dental into their unlawful agreements, Powers even agreed to contact his counterparts at Schein to encourage a meeting with Pettus.

60. On June 2, 2008, Pettus met with Schein manager Mark Lowery. That meeting was even more revealing

about the ongoing anticompetitive agreements between Schein, Burkhart, and the other Cartel Members. Echoing the almost identical words of Powers, Lowery remarked to Pettus: “I think when everyone plays on the same playing field, it makes things a whole lot easier.” Lowery also explained that he “like[s] [Powers (Burkhart)]” and considers Powers (Burkhart) a “good competitor.”

61. Lowery explained in great detail how the Cartel Members enforce their unlawful agreements and stay on that same “playing field.” First, Lowery noted that the way that small companies, like Dynamic or Archer, can “start getting market share” is to lower their margins. He then explained that the Cartel Members would not tolerate such low-price competition, saying: “[w]e all have the ability to drop our drawers [lower prices] . . . [b]ut, you know, I think that’s . . . that’s part of the mutual respect with Jack [Powers, of Burkhart] and us, because we all know that: Do you know what? We all want to make a living . . . *we all . . . all are going to sell it at a . . . at a good price where we all get paid.*”

62. Lowery further explained how the Cartel Members implement their agreement using the example of a situation where, if Schein is talking to a customer and that customer calls Burkhart to check a price, Burkhart manager Powers “step[s] out of it . . . [he’s] not going to bid it” because Burkhart “wants to maintain a certain [gross profit].” Similarly, if Schein receives a request for price from a customer, in the interest of “keeping the integrity of margins,” (*i.e.*, the conspirators’ code phrase for keeping prices artificially high), Schein is “not going to talk about price” because Schein does not want to be “slugging it out [with competition] and killing each other on margins.”

63. Lowery also acknowledged the existence of the margin fixing agreement, where Cartel Members would not want to undercut one another's prices, stating: "If [customers are] price checking you . . . that's the time to drop your drawers . . . [but] that obviously muddies up the water . . . so, you know, I know probably Jack [of Burkhart] won't do that [drop his drawers (*i.e.*, lower prices and margins)]. . . . I think that's just keeping the *integrity of the margins* . . . If they [low-cost dealers] want to sell without [high] margin, I'm not even going to price it out."

64. Confirming Lowery's intentions, Pettus asked, "What I'm hearing you say from a company standpoint, . . . [our] margins [have] got to be better, especially on equipment." Lowery responded, "Yeah. . . . That seems to be the Achilles heel." Pettus confirmed: "[Our] [l]ow margins on [dental] equipment?" Lowery responded, "Yeah."

65. Pettus then "cut right to the . . . chase." He told Lowery ". . . We've got some you know, there's indicators by—by manufacturers that there's—there's been direct talk from you and others of: Hey . . . we just don't want him [Archer Dental and Dynamic] in existence. Don't open him. Don't do whatever." Then Pettus asked, point-blank: "If we raise our prices, can we get relief from that? . . . If I raise my margins on equipment to an acceptable level . . . can there be relief?"

66. Lowery responded, "What—what we don't want to do *is come across* that we're . . . dictating the price to the end user. *That will get us in a lawsuit . . . Guarantee you.* But you know, a couple things: one is I think *when everyone plays on the same field, it makes things a lot easier.*" In other words, Lowery did not want to get caught dictating price or margin, but that is exactly the "playing field"

he tried to have Dynamic (and Archer Dental) agree too for the rest of the conversation.

67. Lowery also told Pettus “if we’re both quoting a deal, let’s make sure that we’re both getting the same thing.” And Lowery confirmed that the conspiracy was not limited to just Schein and Burkhart, but extended to the other Cartel Members. Specifically, Lowery said: “I don’t [REDACTED] about the rest of it . . . And, you’re selling it . . . if you’re not going to be selling it, Jack’s [Burkhart] going to be selling it. If he isn’t going to be selling it, Patterson is going to be selling it.” In the same conversation, Lowery also said that this margin-fixing conspiracy was implemented “unanimously across the industry [for] as long as [he had] been in the dental business.”

68. Lowery further admitted that the purpose of getting Pettus (and therefore Dynamic and Archer Dental) to fall in line is to prevent competition that would have a downward effect on price.

So I’m going to compete against somebody there, but I just want to make sure we’re all on the same page we’re all on the same page . . . and we’re all doing . . . because the next time one of your good customers goes out and buys a piece of equipment, if they used to be our good customer and they shopped us, and somebody else was—you were lower on the price, much lower, dramatically lower, they quit doing business with us, they’re going to take your price and they’re going to shop you to someone else.

69. The Cartel Members enforce their unlawful agreement by staying in close contact. For example, when there are “issues [as in someone charging too low a margin],” Lowery [Schein] and Powers [Burkhart] call each other and ask “what’s going on?” Lowery confessed, “I have no

problem calling [Powers] up and going what the hell are you doing, Jack? Are you trying to screw me over here?"

70. Lowery also explained to Pettus how Schein and Burkhart have brought manufacturers, including Dana-her, into the fold by utilizing the manufacturer representatives to enforce the margin-fixing agreement in two ways: (1) agreeing with the manufacturers that they give all dealers the same deal so that all the dealers are "on the same playing field"; and (2) terminating or restricting competing dealers who refuse to play on the same field and sell at the same high prices at which Schein and Burkhart agree with each other to sell.

71. Lowery reiterated to Pettus that the only way that Schein would leave Dynamic alone and cease the boycotting agreement was for Dynamic to "play on the same field." In other words, so long as Dynamic maintained margins high, Lowery "[doesn't] care." He just wanted his competitors to "have the same goal in mind." Lowery bragged that he "knows [Powers]. You guys [Dynamic] are the unknown." He expressed concern that Dynamic will "give away margin" whereas Burkhart will not. He even went so far as to gloat that he thinks it is "terrific" when Burkhart gets "full boat [*i.e.*, fill profit margin]" on a sale; he's "happy" with that.

72. Acknowledging the need to keep the margin-fixing conspiracy secret, Lowery instructed Pettus to "make it invisible with the customer because we don't want to compromise that end of it and make it look like we are . . . having a big conspiracy going on . . ." Lowery observed that if Dynamic offered a price based on its usual margin percentage and Schein offered a price based on its usual margin percentage (a percentage significantly higher than Dynamic's), it just made the higher priced company "look like you're really trying to gouge the doctor." That

does not happen, however, when competitors are adhering to the unlawful agreement. Because of the anticompetitive agreements with competitors, Lowery boasted that he can give a customer a price “with confidence” and tell them to “go ahead” and do a price check because he secretly knows that the customer will not be offered a lower price by a competitor.

73. Lowery complained to Pettus that had Dynamic not made Schein “look stupid” by offering lower prices and had Dynamic been “upon the level playing field” (*i.e.*, charging the same high prices as Schein), then everything would have been “hunky dory”; Schein and Burkhart would not have complained to Pelton & Crane; they would not have entered into an agreement to cut off Dynamic; and Dynamic would still have the Pelton & Crane line.

**Danaher Joins the Conspiracy and Boycott to
Foreclose Archer’s Growth and Ability to Compete
Through Dynamic or Through its Own Operations**

74. In 2008, Danaher subsidiary Pelton & Crane terminated Dynamic as an Archer Dental branch location, ending Dynamic’s ability to carry Danaher products. Danaher also prevented Archer Dental from selling Danaher products in its contractual territory. As discussed in detail below, Danaher’s actions reflected its decision to join the Cartel Members’ conspiracy and boycott Archer Dental and Dynamic.

75. As a result of Defendants’ boycott, Dynamic was on the verge of closing its business by 2009. In May 2009, however, Benco, a Cartel Member, acquired Dynamic and subsumed Dynamic’s operations into Benco’s. Shortly thereafter, Danaher authorized its co-conspirator Benco to distribute its products in Dynamic’s former territory.

In other words, when Dynamic refused to join the conspiracy, Danaher and the Cartel Members boycotted Dynamic. Once the boycott effectively drove Dynamic out of business, Benco (a Cartel Member) acquired Dynamic. Danaher then re-authorized Dynamic (now owned by its co-conspirator Benco), to sell Danaher's product through the same representatives in the same territory.

76. But Archer Dental had carried Pelton & Crane, Marus, and DCIE products since the 1990s. Before entering the business relationship with Dynamic, Archer Dental sold these products in Texas, Oklahoma, Northwest Arkansas, and Southern Louisiana—Archer Dental's approved geographic territory. Accordingly, Archer Dental planned to continue to sell products in Oklahoma and Northwest Arkansas, as well as open a branch under its own name in the Tulsa area. Despite Archer Dental's contractual right to operate in these areas, however, Danaher told Archer Dental that it could not ship or sell any products outside of Texas.

77. On at least two occasions, Archer Dental confirmed that Danaher was prohibiting Archer from selling in outside of Texas. On one occasion, Archer Dental tried to sell LED lights into Tulsa. Defendant Pelton & Crane permitted this one sale, but told Archer Dental that it would be terminated if it tried to make future sales in Oklahoma. On the other occasion, Archer Dental tested whether it could sell a Marus product in Arkansas. Defendant Marus prohibited the sale. In addition to denying Archer access to its contractual territory in response to threats from Cartel Members Schein and Burkhart, Danaher agreed with Schein and Burkhart to have each of them make up the sales that otherwise would have been made by Archer Dental in Oklahoma and Arkansas.

78. In late 2008 or early 2009, Kirk Zambetti, Mark Skinner, and Don Givens, all from Defendant Pelton & Crane, met with Jim Archer Sr. and Jim Archer Jr. at Archer Dental office. Zambetti and Skinner were both relatively new to their positions. Zambetti was the North American VP of Sales for Defendants (and Danaher subsidiaries) KaVo, Pelton & Crane, and Marus. Skinner had replaced Dan Bump as Regional Sales Manager. During the meeting, the Archers raised the issue about Dynamic's termination and the territorial restriction placed on Archer Dental. Zambetti and Skinner said that Archer Dental was a good dealer, they were not sure why this happened, and they would look into it. During this meeting, Archer also inquired whether Danaher would open the Gendex line to Archer Dental. Pelton & Crane, through Zambetti, stated that it was prepared to offer Archer Dental a "worldwide" distributorship on the purchase of certain sterilizer products.

79. In May 2009, Zambetti forwarded a new-dealer agreement between Pelton & Crane and Archer Dental. This agreement authorized Archer Dental to sell Pelton & Crane products within a 250-mile radius of its location and West Texas, as well as to sell certain specified sterilizer products nationally.

80. After receiving the new dealer agreement, the Archers met again with Zambetti, Skinner, and Givens in Summer 2009. The 2009 agreement established Archer Dental's sales territory as a 250-mile radius from Archer Dental's offices in Plano, Texas. This gave Archer Dental the right to re-open sales in Oklahoma and Northwest Arkansas (among other places). In light of the new agreement, Archer Dental specifically raised the issue of the oral, "Texas Only" territorial restriction previously enforced by Danaher. Despite the new dealer agreement

granting Archer Dental authority to sell Pelton & Crane products in Oklahoma and Northwest Arkansas (and anywhere else within 250 miles of Plano, Texas), Zambetti told Archer Dental that “you cannot go back up there,” that “he [Zambetti] was not there when it [the restriction to Texas] happened,” that “it was not his fault,” and that Archer Dental should “get over it, move on and don’t bring it up anymore.”

81. In 2010, Pelton & Crane and Marus placed further restrictions on Archer Dental’s ability to compete with the Cartel Members in Texas—stating that Archer Dental was not to pursue any potential customer if Schein was already speaking with the potential customer.

82. Also in 2010, Pettus (formerly with Dynamic, now with Benco) spoke to Chuck Cohen, Benco’s Managing Director, and informed Cohen that Archer Dental was considering filing a lawsuit against Schein and Burkhart based on the conspiracy alleged herein. Despite Benco’s purported acquisition of Dynamic’s causes of action, it had no interest in pursuing claims against its fellow Cartel Members, Schein and Burkhart. Instead, in August 2010, Cohen called Archer Dental and offered to pay Archer Dental between \$600,000-\$1,000,000 if it did not file a lawsuit against Schein and Burkhart. While Archer Dental noted the oddity of Benco’s efforts to settle claims on behalf of its ostensible competitors, at the time, it did not have access to the non-public communications and other recently-discovered information that reveal the extent of Benco’s participation as a Cartel Member and co-conspirator. Now, having received some of those documents—including communications showing that Danaher’s decisions to curtail Archer’s geographic territory and terminate Dynamic were made in direct response to demands from Cartel Members (discussed *supra*) and

communications regarding Danaher's 2014 termination of Archer Dental in furtherance of the Cartel's ongoing conspiracy (discussed *infra*)—Archer is able to appreciate Benco's actions for what they were: an attempt by one Cartel Member to conceal its activities and those of its co-conspirators.

83. In 2012, Danaher compounded the restrictions on Archer Dental. Zambetti (Danaher's Vice President of sales for KaVo, Pelton & Crane, and Marus) told Archer Dental that it could not "steal Schein's customers," *i.e.*, doctors approached by Schein. Zambetti threatened that if he heard that Archer Dental had stolen a Schein customer or another dealer's customer, he would terminate all of Archer Dental's dealer agreements with Danaher companies. When asked how Zambetti knew whether a particular customer was a Schein customer, he responded that he knew. In other words, Danaher, through Zambetti, required Archer Dental to ask each potential customer whether the customer was speaking to another dealer and, if so, to forego any sales to that customer.

The Cartel Members and Danaher Agree to Restrict Archer Dental's Instrumentarium Distribution

84. During the time that the sales of Archer Dental's Oklahoma branch were growing exponentially, it was agreed in September 2007 during the American Dental Association meeting with Instrumentarium management, John Franz and Mike Null, that Archer Dental would be the first hybrid, national dealer of Instrumentarium dental imaging equipment. A hybrid dealer is one that sells nationally from a single location with no geographic restrictions, in contrast to the limited geographic territories that may be placed on other dealers. The announcement of Archer Dental's new status as the first national hybrid dealer was made by Instrumentarium management to all

Instrumentarium equipment sales representatives at the Instrumentarium national sales meeting in 2007. The appointment of Archer Dental as Instrumentarium's first national hybrid dealer was a significant achievement for Archer Dental. As an independent, family-owned business in Plano, Texas, it had established the type of reputation that enabled it to be permitted to sell the cutting-edge, high-end dental imaging equipment made by Instrumentarium, throughout the U.S.—a distinction no other small, independent dealer had been given. At the same meeting, Instrumentarium honored Archer Dental for becoming Instrumentarium's 5th largest U.S. distributor.

85. Archer Dental quickly demonstrated why it had received the national hybrid dealer appointment. Archer Dental experienced significant sales increases of Instrumentarium equipment. In fact, Archer Dental experienced 90% sales growth each year in the two years it was a national Instrumentarium distributor.

86. With the sales growth of Instrumentarium equipment by Archer Dental, it became obvious to Schein and the Cartel Members that they were continuing to lose business to Archer Dental. Due to Archer Dental's competitive pricing of Instrumentarium equipment, Schein's and the Cartel Members' margin-fixing agreement was threatened. Schein and the Cartel Members therefore decided to widen their anticompetitive campaign against Archer Dental to further restrict its distribution territory and decrease competition. They initially began complaining to Instrumentarium about Archer Dental's pricing. But as with their tactics in Oklahoma, Cartel Members Schein and Burkhart (at least) escalated their threats, telling Instrumentarium that they would not sell Instrumentarium products unless Instrumentarium boycotted Archer Dental.

87. Once again, the manufacturer—this time Instrumentarium—decided to join the conspiracy rather than exercise independent business judgment. Instrumentarium gave the Cartel Members veto power over Archer Dental’s sales. For example, in March 2008, Instrumentarium asked Archer Dental to “not quote” a dentist in Illinois because of complaints from Schein and Patterson. In October 2008, Archer Dental was directed to “back off” by the Director of Sales for Instrumentarium from a sale to a dentist in the State of Washington because Burkhart had been working with this dentist and Instrumentarium could not allow the dentist to insist on getting a “lower price out of a local dealer.” In other words, Instrumentarium prohibited Archer Dental from making a sale of Instrumentarium equipment in order to force the dentist to pay Burkhart’s higher price for dental equipment. Also, in October 2008, Instrumentarium instructed Archer Dental to “withdraw” a proposal for a California dentist if the proposal covered his California office, because Patterson also submitted a proposal and was “claiming foul.” In December 2008, Instrumentarium prohibited Archer Dental from selling equipment to a Wisconsin dentist. As the Director of Sales of Instrumentarium, Mike Null, explained to Archer Dental, “This is Schein’s backyard and Schein is raising hell about your current pricing.” Also in December 2008, Instrumentarium instructed Archer Dental to tell two doctors in Pennsylvania and Maryland that it could not sell the systems quoted to them. Instrumentarium said that the quotes were “considerably lower than the other dealers and considerably below the market prices for these system” and the quotes had “caused [Instrumentarium] a considerable problem for both of the dealer stores in those areas and with their management.” Null later told Archer Dental that the local dealers at issue were Patterson and Benco. Beginning in or around

late 2008, Instrumentarium required Archer Dental when selling outside of its traditional area to ask doctors whether they were already talking to “local dealers” (on information and belief, the Cartel Members) and to contact the Instrumentarium local representative when it appeared that the doctor was serious about moving forward with a purchase. Archer Dental believes that when it notified the Instrumentarium local representative regarding an opportunity with a doctor for pre-approval, the local representative would notify the “local dealers” (*i.e.*, Cartel Members) of that same opportunity, and Instrumentarium would then require Archer Dental to withdraw from pursuing the customer. Additionally, if the doctor said that he had talked with a “local dealer” (*i.e.*, Cartel Member) Instrumentarium required Archer Dental to decline making any type of bid or quote to the doctor.

88. Instrumentarium’s decision to join the Cartel Members’ conspiracy and to boycott Archer Dental is reflected in recently-discovered communications between Instrumentarium and Schein. For example, on December 12, 2008, John Franz, the General Manager of PaloDEX Group (Instrumentarium’s owner at the time), wrote an email to Don Hobbs, Schein’s Vice President of Equipment Sales, copying Mike Null, Instrumentarium’s Vice President of Sales. In the December 12, 2008, email, Franz states:

Don [Hobbs], *We heard you loud and clear*. Mike and I discussed the [Archer Dental] situation and *we will clip his wings*, just give us a few days to get it done. I’ll be back to you on this.

89. Franz’s December 12, 2008 email, that was only recently produced in this litigation, reveals what Archer had previously suspected, that Instrumentarium made the decision to “clip [Archer Dental’s] wings” (*i.e.*, the decision

to restrict Archer Dental's nationwide territory to Texas only) in direct response to the threats made by Schein—threats that Danaher “heard loud and clear.”

90. Instrumentarium's boycott continued in 2009. In March 2009, Schein and Patterson complained on the exact same day to Instrumentarium about an Archer Dental quote for a California dentist, which led Instrumentarium to prohibit Archer from making the sale. Mike Null also noted that Burkhart was pursuing this sale. Also in March 2009, a Nevada oral surgeon wanted to exchange an Instrumentarium product, an OP200D, that he had recently purchased and had been installed in January 2009, for another Instrumentarium product, a Scanora. After the installation of the OP200D, a software glitch was discovered that prevented it from providing a specific image that the doctor needed in his practice. Instrumentarium would agree to the exchange only if the doctor purchased the Scanora from a “local dealer” (later revealed to be Schein). Also in March 2009, Instrumentarium told Archer Dental that it could not make a sale to a California doctor because he was “a Henry Schein customer.” In April 2009, Instrumentarium revoked Archer Dental's nationwide dealer status and relegated Archer Dental to distributing only in Texas. Instrumentarium said that the decision was, in part, because “these situations always draw the attention and ire of the corporate management regardless of which dealer it may be. I received two calls of this nature today.”

91. These were not isolated incidents. Recently-discovered Instrumentarium emails reveal that Instrumentarium restricted Archer Dental's right to distribute Instrumentarium products as part of the Cartel Members' conspiracy, and in response to threats from the Cartel Members. For example, Instrumentarium required “local

dealer” involvement with the potential Scanora sale to the Nevada oral surgeon only after receiving complaints from Schein. A January 29, 2009, email from Roy Dickson (Schein) to Ryan Neilson (Instrumentarium) and Mike Null (Instrumentarium) concerned Schein’s objections to Archer Dental’s sales in Las Vegas, Nevada. In response, Mike Null warned John Franz that “[t]here’s a [REDACTED] brewing [at Schein]” and that Franz “may get a call from [Don] Hobbs.” This email followed Null’s 2008 comments to Archer Dental that, “You [Archer Dental] can’t believe what an issue you’ve become at Schein corporate.” In a second example, David Marchal (an Instrumentarium employee) sent an email to Mike Null and John Franz on March 27, 2009. Marchal’s email recounts Patterson’s reaction to Archer Dental’s authorization to sell Instrumentarium equipment in Florida. In that email, Marchal admits that Null met with Patterson in 2008 and “emphasized that [Null was] cleaning up the distribution chain,” *e.g.*, by eliminating Archer Dental and other independent distributors. According to Marchal’s email, Patterson’s representative in Florida “conveyed that message to me today [that Instrumentarium needs to eliminate Archer Dental]” in response to Instrumentarium allowing Archer Dental to distribute its products nationwide.

92. On April 3, 2009, John Franz, the General Manager of the PaloDEx Group (the group that oversaw Instrumentarium) sent an email to Tinna Holko also an employee of the PaloDEx Group, with the subject “Archer and White.” In that email, Franz confirmed that Instrumentarium’s restriction of Archer’s territory to the state of Texas was a direct response to “continuous complaints from our traditional dealers concerning Archer and White and their ability to sell at low prices based on not having the overhead of local stores, service personnel, etc. etc.”

93. On information and belief, these “traditional dealers” are a reference to the Cartel Members and demonstrates that Instrumentarium’s territorial restriction of Archer Dental was done at the behest of the Cartel Members, notwithstanding the pro-consumer and pro-competitive impact of Archer Dental’s low prices. Moreover, regarding the dealer complaints that Archer Dental did not have local stores and service personnel, Schein is a 45% owner of Darby Dental, and Darby Dental is an internet-based dealer of dental equipment that sells nationwide and, like Archer Dental, contracts with a network of independent service technicians.

94. As described in detail below, the so-called “complaints” referenced by Franz include direct threats that the Cartel Members would refuse to do business with Instrumentarium unless Instrumentarium refused to do business with Archer Dental. According to Franz’s email, as of 2009, the so-called “complaints” had “finally reached the point of forcing our hands to restrict [Archer Dental’s] selling to [Archer Dental’s] geographic location.” In the same email, Franz acknowledges that its actions were against Instrumentarium’s own financial interests as Franz projects that the Archer Dental will reduce the amount of sales to Archer Dental by approximately \$600,000 in 2009 alone.

95. Schein informed Instrumentarium representatives that they could not even set foot in Schein showrooms, and that Schein threatened that they would not sell Instrumentarium equipment, until Instrumentarium terminated Archer Dental’s ability to distribute Instrumentarium equipment on a national basis.

96. Ultimately, Instrumentarium caved to the threats from the Cartel Members, and terminated Archer Dental’s national distribution rights by letter dated April 2,

2009. Using language suspiciously similar to Schein manager Lowery's references to "margin integrity," Instrumentarium stated that it was reducing Archer Dental's distribution territory from national distribution to the State of Texas in part because of "the integrity of its end-user pricing." In one fell swoop, Archer Dental went from selling over \$1.2 million of Instrumentarium equipment in 2009 to \$100,000 in 2011. And dentists outside of Texas lost their competitive alternative and instead have been forced to pay prices fixed by agreement between the Cartel Members, with the knowledge and complicity of Instrumentarium. Later, Instrumentarium's Mike Null apologized for cutting back Archer Dental's national distribution rights. Null stated that he had been under pressure from Schein, Patterson, and the other Cartel Members to cut off Archer Dental's national distribution rights and that he had to send them copies of Instrumentarium's letter terminating Archer Dental's national distribution rights.

97. In October 2009, Danaher announced that it had entered into a definitive agreement to acquire the PaloDEx Group, including Instrumentarium.

The Cartel Members and Danaher Agree to Restrict Archer Dental's KaVo Distribution Rights

98. Archer Dental distributed KaVo hand pieces from at least the mid-1980s to the late 1990s or early 2000s. Archer Dental was highly successful selling KaVo hand pieces nationwide, and Schein was interested in purchasing Archer Dental to take over its nationwide sales. After Archer Dental declined Schein's purchase overtures, KaVo terminated Archer Dental's distribution rights.

99. In 2006, KaVo renewed its dealer relationship with Archer Dental. The 2006 agreement, however, restricted

Archer Dental's sales to a specified geographic area surrounding Archer Dental's office.

100. During a 2010 telephone call with Kirk Zambetti (a representative of the Danaher brands including KaVo), Archer asked whether Archer Dental could get back its nationwide distribution territory for KaVo products. Zambetti responded that there was no way he could do that because he could not figure out a way to protect the margins demanded by "other dealers" (on information and belief the Cartel Members). Zambetti made clear that there was no change in the restriction on Archer Dental's ability to distribute KaVo products, consistent with the territorial restriction on Pelton & Crane products. Zambetti also said that Schein had an exclusive right to market KaVo nationwide but that Archer Dental still might be able to market KaVo in various other states. Zambetti reiterated, however, that Danaher was concerned with how it could protect other dealers' margins.

The Cartel Members and Danaher Agree to Restrict Archer Dental's Distribution of Gendex Products

101. Archer Dental was an authorized Gendex dealer through 2005, when Gendex terminated Archer Dental's distribution rights. Starting in 2006, Archer Dental made numerous and continued attempts to regain the line. In 2008, Archer Dental asked Bump about reopening the Gendex line to Archer Dental. Also, in 2008 or 2009, Archer Dental asked Zambetti about a dealer agreement with Gendex. Zambetti responded that giving Archer Dental a Gendex line would destroy their Dallas market.

102. In 2009 or early 2010, Eric Beard, of Gendex, told a Pelton & Crane representative that he could never open Archer Dental because of the pressure from other dealers (on information and belief, the Cartel Members) and he

would lose all of his other business around town [Dallas]. Beard also said that Danaher management agreed with him on the exclusion of Archer Dental.

103. Upon information and belief, Zambetti's and Beard's comments about "destroying the market" and "pressure from other dealers" relate to Archer Dental's business model that included price competition, and the refusals to approve Archer Dental as a Gendex dealer were made in furtherance of the Cartel Members' conspiracy in order to protect their supra-competitive margins on Gendex products.

In 2014, Danaher Terminates Distribution Agreements with Low-Margin Distributors, Including Archer Dental, in Response to Threats from the Cartel Members

104. As described above, Danaher had received threats from "traditional dealers" (on information and belief, the Cartel Members) since 2009, at the latest. In fact, in 2009, the PaloDEx Group described those threats as "continuous" and as "finally reaching the point of forcing our hands." But the Cartel Members and Danaher did not abandon their conspiracy following the filing of the Original Complaint in this matter.

105. To the contrary, at 1:22 am on September 1, 2012—the day after Archer filed the original complaint—Schein employee Matt Zolfo sent an email to Don Givens, Danaher's Pelton & Crane representative; Kirk Zambetti, Danaher's North American VP of sales for Danaher's KaVo, Pelton & Crane, and Marus lines; and William Popek, on information and belief a sales director for Defendant KaVo. The subject line of Zolfo's email reads: [REDACTED]—Archer & White Proposal." In the email,

Zolfo notes that Archer Dental has offered a Marus Nustar Chair and Duo Delivery unit at a 14% and 17% margin. Zolfo also states that the offer referenced in the email is “[y]et another Archer & White Example” and that Archer Dental’s margins “doesn’t entice me to support Marus as a value line brand moving forward.” In other words, Zolfo threatened Danaher the day after Archer Dental filed its Original Complaint, clearly implying that if Danaher continued to do business with Archer Dental, it would not do business with Schein.

106. That same day, Zolfo sent an email to Mike Hall, Midmark’s regional manager, with the same subject line, complaining about Archer’s 19.71% margin. Similar to the Danaher email, he warned that “[i]f [Archer Dental is] truly a distributor for your product line, this doesn’t entice me to support your brand holistically as my go-to air & vac brand moving forward.” Hall responded, “If we cut Archer and White off in 90 days, which I can do, will we get more of your business, not only air/vac but also operator?” Zolfo then admitted that “[o]ur goal is to effectively price [Archer] out of business,” and he told Hall that though Midmark “may not legally have grounds to dictate [Archer’s] pricing structure,” they “sure as heck have an arsenal of other tactics to clean up their distribution.” He further informed Hall that “[o]ther manufacture[r]’s have tried the following just to name a few”: increasing their quota, lessening their discounts, delaying their shipments, denying them free goods, and encouraging “professional pricing strategies.” Josh Veltri responded, “We have your back dude. I will make sure we get this taken care of and have you protected!!” Zolfo responded simply, “We’ll need to discuss off line.” In other words, Zolfo made the same threat to Midmark as he did to Danaher and in return received Midmark’s assurance that it would “protect” him.

107. Benco also continued to make threats to Danaher. In or around 2012 to 2014, Archer Dental was competing with Benco for a sale of KaVo products. The Benco sales representative, Derek Hunt, eventually won the sale, but he had to reduce his margin to compete with Archer Dental's prices. Rather than lose the margin, however, he forced Danaher to make up for the reduced margin, threatening that if Danaher refused, Benco would stop purchasing Danaher products altogether.

108. Additional Danaher and Cartel Member emails—all of which were unknown to Archer Dental and were not discovered until they were produced over the past four months—establish that the conspiracy among the Cartel Members continued into 2012 and beyond, focusing on the boycott of independent distributors like Archer Dental. The same previously-secret emails also show that Danaher's decision to join the Cartel Members' conspiracy and boycott was made by Danaher senior management.

109. For example, Danaher's senior management reacted to threats from Cartel Members by pressuring its own employees to eliminate independent dealers like Archer Dental. Specifically, in October 2012, Mike Null, the Vice President of Sales for Instrumentarium, sent a series of emails to Steven Lezon, an Instrumentarium sales representative, copying John Franz. In these emails, Null pressured Lezon to reconsider his relationship with another independent dealer, Diversified Dental ("Diversified"). Specifically, in response to complaints from Schein and Burkhart, Null wrote that:

Fully realizing that a quarter of million in your sales YTD have come from Diversified Dental, I think that you still have to ask yourself if having Diversified as one of your dealers is a good business decision, considering that they are causing significant problems for

you in your territory, with your two largest dealers and with us as a company at the national level.

Null then expressly included Patterson in his direction to Lezon, stating:

You also need to start generating some sales at Patterson and if Diversified is going to be a problem with this, then it is your three largest dealers with which Diversified is causing problems.

110. Null also directed Lezon to “[k]eep [Null and Franz] posted so that we can keep upper management at Schein and Burkhart informed,” confirming ongoing coordination between at least Schein, Burkhart, and Danaher. In response, Lezon expressly linked the Schein and Burkhart statements to similar threats that Danaher received about Archer Dental. As discussed in greater detail below, the pressure from “upper management” of the Cartel Members eventually caused Danaher to terminate Archer in 2014. On information and belief, Danaher also terminated Diversified at or around the same time based on similar pressure from the Cartel Members. In 2013, Schein continued to complain to and threaten manufacturers, including Danaher and Midmark Corporation (“Midmark”), concerning Archer Dental’s margin-based competition. On October 14, 2013, Casey Schulin, a Schein Equipment Specialist, sent an internal email to Don Hobbs, and Dean Kyle, Schein’s Zone General Manager and National University Recruiter. Schulin’s internal email string forwarded a “Sales Order from Archer and White” and the corresponding complaint that Schulin sent to Jimmy Renfro, an Instrumentarium sales representative. In the email to Hobbs and others at Schein, Schulin states that Archer Dental is competing with Schein in Houston, Texas by quoting Danaher Products at “20% gp [gross profit]” and asks, “[i]s there anything we/you guys

can do to combat this?” Schulin also reveals that he had “emailed this quote to my Instrumentarium rep to see what he can do for us” and that Midmark had already agreed to exclude Archer from Houston in furtherance of the Cartel’s margin-fixing conspiracy.

111. The next day, October 15, 2013, Dean Kyle responded by complaining that Archer Dental “sell[s] cheap,” stating that as a result “[he] would advise that we not lead with [Danaher] gear that Archer can sell,” and instructing Schulin to “reach out to the [I]nstrumentarium rep.” After Schulin followed up with his Instrumentarium representative and reported the results, Hobbs instructed the other Schein employees to stop sending emails on the topic of Archer Dental. (“Enough email on this topic please.”) Hobbs then directed Schein employees Michael Herrin and Dean Kyle to “talk live tomorrow.”

112. Also on October 15, Dan Colombo (another Schein employee copied on the email exchange described above) sent an email to Danaher representative Renfro, stating:

This is ridiculous. We need help on this. I know it's not your fault that DANAHER chooses to sell through [REDACTED] dealers like Archer who don't even have people to service the unit down here in Houston but they do and you need to take part in this low [REDACTED] price like we do. 5% is just not good enough bud. Send this onto your manager and tell him we are in this situation because yall choose to sell through Archer and we need a much higher discount than 5%!

This email from Schein to Danaher reflects that Schein’s tactics in pressuring Danaher to terminate Archer Dental were also accompanied by a disparagement campaign where Schein referred to Archer Dental as a [REDACTED] dealer in its communications with Danaher. And

Schein falsely attacked Archer Dental's service capabilities as Archer Dental had a network of service technicians that it had used for years from coast-to-coast and had successfully provided high-quality, nationwide service to its customers.

113. Renfro responded on October 16, 2013, confirming that Danaher was on the verge of terminating Archer in response to Schein's threats: "Trust me I've been talking about this for years, *it's in the works for them [Archer Dental] to be done.*"

114. The Cartel Members did not limit their threats to Danaher's Instrumentarium line. They also targeted Aribex, a part of Defendant KaVo. Aribex manufactures the Nomad, an extremely popular handheld x-ray machine. Archer Dental had heard from two different Aribex representatives as early as 2012 that Schein and Patterson had "raised hell" about Archer Dental's pricing and were attempting to get Aribex to terminate its relationship with Archer Dental. An Aribex sales representative told Archer Dental that Matt Zolfo had threatened that Schein and Patterson would limit or cut off all purchases of Aribex products if Aribex did not require Archer Dental to raise its prices and increase its margins on Aribex Nomads. At the January 2013 or 2014 Dallas Midwinter Dental meeting, Zolfo relayed the same threat to Jim Archer Jr. Zolfo stated that Archer Dental needed to "get the price up on Nomads or it won't matter soon." Zolfo's threats to Aribex (Danaher) and Archer are also verified by recently-discovered communications between Schein and Aribex. Specifically, in 2013, Schein cited an Archer Dental deal for a Nomad and threatened that "[i]t's easier to handle this situation by not selling the Nomad!"

115. During the same time period, Benco pressured Danaher to eliminate other low-margin dealers like

Archer Dental. Danaher responded by terminating those dealers, just as Danaher terminated Archer Dental. For example, on November 1, 2013, Danaher representative Scott Hurlbut wrote to Zambetti (North American Vice President of Sales for KaVo, Pelton & Crane, and Marus) to complain that Pearson Dental (an independent, low-margin distributor like Archer) “has been low-balling pricing—particularly around the Marus and Dendex brands.” Hurlbut claimed that as a result, “[s]everal ESSs [Equipment Sales Specialists] refuse to sell Gendex.” He then says that “[t]hey [Pearson] are whoring up the sensor market big time,” and that “[w]ith them out of the way, it sets up higher-margin true competition between [Schein] and [Patterson] and Benco for Gendex.” Additionally, on November 22, 2013, Danaher employee Brian Broncatti wrote to Zambetti concerning Midco Dental. Broncatti said “[t]hey [Midco] are selling in many cases at a 20[%] margin causing issues with [Schein], Benco and Burkhart.” Zambetti’s response cut directly to the chase—he said “[t]hey won’t make the cut in 2014.”

116. Around the same time that Patterson and Danaher were discussing opening Danaher lines to Patterson, Danaher shared with Patterson its intent to make cuts to its dealer distribution network. On December 3, 2013, Patterson and Danaher held a joint “business review” to discuss their go-to-market strategies. Danaher shared that it intended to make changes to its distribution channels, most prominently by reducing the number of authorized dealers. It told Patterson that it would be implementing a total reduction of approximately 50 dealers, including “40+ local” distributors. Zambetti reported to his superiors that the “meeting went well-message and changes were very well received. They agreed 100% that our plans and changes ‘make sense’, ‘no heartburn.’” On infor-

mation and belief, within a few months of Danaher terminating Archer in February 2014, Danaher and Patterson reached agreement to open additional Danaher lines to Patterson.

117. When Danaher made its 2014 “cut,” it did so in direct response to the threats and pressure from the Cartel Members and in furtherance of the Cartel Members’ ongoing conspiracy and boycott. This fact is evidenced by the termination of each of the independent, low-margin dealers discussed above, including Archer Dental, Diversified Dental, Pearson Dental, and Midco Dental. It is further evidenced by the fact that Schein (through Hobbs) demanded that Danaher provide Schein with an advance copy of the termination list. Danaher recognized Schein’s behavior as threatening, and Zambetti even complained internally about Schein’s “bully mo[d]e.” But Danaher ultimately gave in to Schein’s threats and identified the dealers that were slated for termination.

118. Danaher also admits, in a February 17, 2014, email to Schein, that there was no legitimate basis for the termination of Archer and other the independent, low-margin dealers. Edward Dyer, Danaher’s Regional Sales Director, Imaging for the Kavo Kerr Group, sent an email to Joe Cavaretta, Kevin Upchurch, and Glenn Showgren (all Schein employees). The subject line of the email is “Dealer Terminations.” Dyer writes: “Guys, I wanted you to hear this from me. We have terminated several small and/or non-strategic aligned West Coast dealers.” He then lists Pearson Dental (discussed above) and refers to “a few others”—a list that includes Archer Dental. Dyer concludes his email with a request that Schein make up the lost business resulting from the terminations, saying “[t]his obviously opens a new regional strategy for both our businesses. I will reach out to each of you soon and

discuss our combined opportunity.” In response, Cavaretta (Schein) responds that “This is a big deal! Thanks for doing this Ed as we always hear about these local dealers low balling us. You will have our support for sure.” Then Dyer replies, noting that “[he] put [his] A\$% on the line for all this,” that “[t]here is no spreadsheet to justify this,” and “[a]fter many years I finally got what I wanted.” Cavaretta then forwards a portion of his email chain with Dyer to his boss, Hobbs (Schein’s Vice President of Equipment Sales). Cavaretta tells Hobbs, “I’m sure you are aware but didn’t want to assume. We are going to rally around this [termination of independent dealers by Danaher] . . . [w]e (Schein) have been asking for him to do this for years.” Hobbs agrees and notes that Schein will interface directly with Danaher through Zambetti and his teams. Cavaretta then replies, “[t]his is a big deal.”

119. Dyer sent the same email to Benco informing them of the dealer terminations. Upon receiving the email, Benco representatives said that it was “great news” and a “good play for us.” One of Benco’s representatives even responded, “Wow! That means I can sell these items above 20GP [gross profit].” Dyer promised to “outlin[e] this opportunity for your team and how we win together” later that week.

120. Danaher’s termination of Archer Dental and the other independent dealers was a “big deal.” And the Dyer-Cavaretta-Hobbs emails establish three facts:

- i. Danaher terminated Archer Dental in the culmination of a conspiracy and boycott that had lasted years and in direct response to pressure from Schein (and, on information and belief, the other Cartel Members);

- ii. Danaher had no independent justification for the terminations, belying the representation it has made to Archer Dental and others; and
- iii. Danaher used its termination of Archer Dental and other independent dealers to immediately ask Schein to make up the lost business.

121. At the February 2014 Chicago Dental Trade Show, Schein and Danaher confronted Archer Dental to gloat about the success of their conspiracy and boycott. Specifically, Zolfo (Schein) and Zambetti (Danaher) approached Jim Archer Sr. and Jim Archer Jr. Zolfo said “that it *had* been nice competing against you.” Zolfo and Zambetti both shook Jim Archer Sr.’s hand and walked away laughing. Archer Dental did not understand the implication of Zolfo’s comments at the time. The termination letters arrived just days later.

122. By letters dated February 27, 2014, Danaher terminated the distribution agreements between Archer Dental and Instrumentarium, Pelton & Crane, Marus, DCIE, KaVo, and Aribex.

123. Danaher’s decision to terminate Archer Dental on February 27, 2014, was a direct response to the threats made by the Cartel Members Schein, Patterson, Benco, and Burkhart. In fact, Danaher’s termination decision was exactly in accordance with repeated requests made by Matt Zolfo (Schein’s top salesman nationwide) and Don Hobbs (a senior Schein executive) to terminate Archer Dental. Zambetti admitted that Zolfo (repeatedly) and Hobbs (on several occasions) requested that Zambetti terminate Archer Dental from carrying the Danaher equip-

ment lines. Zambetti understood the gravity and impropriety of these requests by informing Danaher's legal department on multiple occasions that these Schein employees were improperly requesting Zambetti to terminate Archer Dental. Yet, that is precisely what Danaher ended up doing in terminating Archer Dental. Danaher's termination of Archer Dental in 2014 therefore represents an affirmative act in furtherance of the ongoing margin-fixing conspiracy and boycott entered into by the Cartel Members and Danaher, and the threats and pressure from Schein and the other Cartel Members represent additional, affirmative acts in furtherance of the same, ongoing conspiracy and boycott. Danaher's termination of Archer Dental (and other low-margin dealers) to further the Cartel Member's conspiracy and boycott is evidenced by the documents described above, showing coordination between at least Benco and Schein to eliminate independent, low-margin dealers; Danaher's decision to reveal the termination to at least Schein before notifying Archer Dental or any of the other independent dealers; Danaher's admission that it had no "spreadsheet" (*i.e.*, business case) to justify the terminations; Danaher's use of the terminations to immediately seek increased business from at least Schein; and Schein and Danaher's gloating about the elimination of Archer Dental as a competitor.

124. Schein reacted to Danaher's willingness to terminate Archer Dental and its competitors with gratitude, but it did not end the Cartel Member's or Danaher's conspiracy or boycott. To the contrary, internal Schein emails show that the Cartel Members immediately turned their attention to the remaining competitors. For example, on March 6, 2014, just days after Archer Dental's official termination, Joe Cavaretta (Schein) sent an email to Michael

Konesheck (a Schein Equipment Specialist) saying “Gendex [Danaher] is cutting off Archer.” Konesheck responds: “Great!!!! Thank you! The next thorn in Kyle’s side is Hewett Dental in Austin. Says they are selling Instrumentarium 10% less than his sales price.” On information and belief, the “Kyle” referred to in this email is Dean Kyle, Schein’s Zone General Manager and National University Recruiter.

**Cartel Members Attempt to Enlist Other Equipment
Manufacturers in Their Conspiracy and Boycott,
Including Midmark and Belmont**

125. The Cartel Members’ anticompetitive demands were not directed solely to Danaher. Other equipment manufacturers also suffered threats from the Cartel Members or terminated their relationships with Archer Dental at the demand Cartel Members.

126. In 2001, Archer Dental asked Midmark, to open its equipment line to Archer Dental as it already had Midmark’s sterilizer line. Midmark employee Michael Hall told Archer Dental that Midmark could not open the equipment line because of “politics,” explaining that Schein, Patterson, and Island Dental had all threatened to cut off Midmark if it gave the equipment line to Archer Dental. Periodically, Archer Dental would request that Midmark open the equipment line. Hall always responded that nothing had changed, *i.e.*, other dealers would stop promoting Midmark equipment if Archer Dental was allowed to sell it. As recently as 2014, Hall again told Archer Dental that he could not give it Midmark’s entire product line because of “politics.”

127. In 2008 after Pelton & Crane had terminated Dynamic and limited Archer Dental’s territory to the State of Texas, Archer Dental again approached Midmark

about opening its equipment line to Archer Dental for an area that would include Texas, Oklahoma, and Arkansas. Hall said that Midmark could not open the equipment line to Archer Dental because Midmark did not want to jeopardize its business in Tulsa.

128. For many years, Midmark had allowed Archer Dental and other dealers to sell Midmark sterilizer products nationwide. In Summer 2013, Archer Dental quoted equipment, including a Midmark M11 sterilizer for a new office of a doctor in Pennsylvania. In response, to pressure from a Benco representative competing for the doctor's business, Hall wrote an email stating that Archer Dental was not allowed to sell Midmark sterilizers outside of Texas and that if a doctor outside of Texas purchased a sterilizer from Archer Dental, Midmark would not honor any warranty or provide any rebates associated with the purchase. After the doctor called Midmark directly, she learned that Hall's email was not true and that Archer was authorized to sell the sterilizer nationwide and that Midmark would honor her warranty. In fact, she stated that Archer had handled the situation very well and that she did not think it was "right for [Benco] to try to lock you out of a market." She was forced to purchase the sterilizer from Benco, however, despite the higher price because she was required to purchase a certain amount of equipment with them, she wanted a single service person, and she could not purchase her Marus chairs or other large equipment from Archer. But she stated that if she lived in Texas, she would be dealing with Archer exclusively.

129. In November 2013, Patterson and Schein complained about the price at which Archer was quoting M11 sterilizers to an orthodontist in Louisiana. After receiving the complaints, Hall wrote that he would "make sure they stop." Approximately two months later, in January 2014,

Hall advised Archer Dental that Midmark had decided on a go forward basis to enforce geographical restrictions, if any, in their dealer agreements.

130. In January 2014, Midmark further confirmed the pressure being applied by the Cartel Members when Midmark threatened Archer Dental with termination if it did not raise its prices to non-competitive levels on Midmark sterilizers. Midmark told Archer Dental that it needed to raise its price to be close to Schein's price—an increase of approximately \$500. When Archer Dental did not raise its price to customers, Midmark raised the cost at which it sold the sterilizers to Archer Dental by approximately \$500. This price increase made it impossible for Archer Dental to competitively sell the sterilizer. Midmark undertook the price increase to allow Schein (Matt Zolfo) to sell the sterilizers to Breakaway Dental, a quasi-group buying organization with whom Archer Dental had done business in the past and was poised to do substantial future business. Midmark also told Archer Dental that it could not sell the sterilizers to Breakaway Dental. Midmark then allowed Schein to sell the sterilizers to Breakaway Dental below the price at which Midmark was requiring Archer Dental to sell them.

131. Belmont was also the recipient of threats from the Cartel Members. Ron Fernandez, a Schein sales representative, bragged that Schein had convinced Belmont to terminate Dynamic. Archer Dental also lost the Belmont line around 2008.

132. Recently-discovered communications also reveal significant pressure from Benco concerning low-margin distributors. On January 31, 2012, Benco sales representative Darius Somekhian complained to Regional Manager Matt Lewinson about losing a sale of Belmont equipment to Pearson because of pricing. Somekhian wrote,

“We got to somehow put pressure on Belmont. Matt you can use this as another example.” Lewinson forwarded the emailed to Chuck and Larry Cohen, who own Benco, explaining, “As we spoke at the [regional manager] meeting in California this is what is going on with Belmont in my region. I know there is nothing you can do but when you get in touch with the folks at Belmont *tell them it is sure hard to sell there [sic] product when we need to compete with these crazy prices.*” Benco must have gotten in touch with Belmont by January 23, 2013, when Lewinson emailed Paul Jackson, Benco’s Vice President of Marketing, to complain about another low-margin quote for Belmont equipment from Pearson. In that email, Lewinson referenced previous conversations that Jackson had with Belmont about Pearson’s pricing, writing, “I know you said you spoke to Belmont about Pearson’s pricing but this is what I am up against” and asking Jackson to “please look into this.” By May 2013, when Somekhian emailed Brian Evans, a Benco Director of Sales, to complain about another Pearson quote on Belmont equipment, explaining that “[i]ts [sic] very difficult to sell at 27 gp [gross profit] on this line with pearson next door,” Evans guaranteed Somekhian that “[t]he Belmont / Pearson pricing issue has been address[ed] and we were assure[d] is being handled. . . . [T]he special pricing issue has been address[ed] with Belmont. Should not see it moving forward.”

133. Also in 2012, Archer Dental emailed Wayne Watson at Belmont explaining that it would like to become a distributor of the Belmont equipment line to replace some of its current lines, which included Pelton & Crane, Marus, and Instrumentarium. Belmont never responded. In a 2016 email to Benco, however, Watson implied that he his actions with respect to Archer were at the behest

of the Cartel Members. In an email to Benco, Watson insisted that he should have “more opportunities” with Benco because he has “always been loyal through the years, and you all know what I did to our distribution model in the DFW area by shutting down SWMed, and Archer.”

134. In May 2008, Ivoclar Vivadent, Inc., a manufacturer of dental lasers, terminated Archer Dental’s national distribution agreement. At the Chicago Midwinter meeting, the Vivadent national sales managers admitted to Archer Dental that it was terminated because it was taking too many orders from Schein and Patterson, who did not want to compete with Archer Dental’s prices.

135. Also in 2008, SciCan Ltd. (“SciCan”), a large manufacturer of sterilizers, terminated Archer Dental’s national distribution rights and restricted sales to Texas. In 2011, SciCan terminated all Archer Dental’s distribution rights. Archer Dental had been a SciCan distributor since the 1990s. The termination occurred [sic] after several threats not to “steal” Schein’s and Patterson’s sales in Texas. SciCan sent Archer Dental a termination notice on a Friday. The following Monday, SciCan sent Schein an email with the re: line “SciCan ends distribution agreement with Archer & White.” In that email, Travis Hale (SciCan) wrote “I wanted to send you all a brief email informing you that effective last Friday, Archer & White is no longer an authorized SciCan distributor... The termination of this distribution agreement will hopefully alleviate some of the past challenges you may have incurred when competing for the sale of a SciCan product, and of course will eliminate any future ones. We anticipate this will only help strengthen the SciCan and Henry Schein relationship on a local level, and we can build a stronger

partnership moving forward. Hopefully, this should create some immediate opportunities for you all in the sale of parts and service with accounts that own a SciCan product, but now need an alternative solution to service their needs.” Hale sent an identical email to Patterson on the same day (with the exception of referencing a stronger relationship with Patterson rather than with Schein).

136. The SciCan threats are similar to threats made by Danaher the following year. In May 2012, Kirk Zambetti (Danaher) threatened Archer Dental that if it “steals” a customer (*i.e.*, competes with Schein or other horizontal competitors), Archer Dental will be terminated from selling all Danaher equipment.

137. In September 2010, a sales manager for another manufacturer, Coltene/Whaledent, Inc. (“Coltene-Whaledent”), told Archer Dental that because of complaints from several dealers, including Schein, Archer Dental needed to have equipment priced at a 28-30% margin.

138. Also in 2010, Brasseler USA Dental (“Brasseler”), the general distributor of NSK products, terminated the distribution rights of Archer Dental and numerous other smaller distributors. NSK manufactures high-quality hand pieces. Originally, NSK sold directly to its distributors. Around 2005, NSK made Brasseler the general distributor of NSK products. Archer Dental and other dealers ordered their NSK products from Brasseler. Brasseler sold the NSK hand pieces at competitive prices. In 2010, Schein purchased an interest in Brasseler. After Schein’s purchase, Brasseler increased the prices it charged Archer and other dealers for NSK hand pieces. Also, when Archer Dental tried to order NSK parts, Brasseler would routinely claim that the part was not in stock. When a dentist ordered the same part at the same time,

however, Brasseler would ship it immediately. In late 2011, Brasseler notified dealers, including Archer Dental, that Brasseler was entering into a new agreement with NSK, that Brasseler would no longer be able to sell NSK products to dealers, and that Archer Dental should contact NSK regarding future purchases. Archer Dental, an NSK dealer for more than 20 years, contacted NSK seeking to continue its distribution. NSK never responded to Archer Dental's inquiries. On information and belief, NSK sells directly to Schein, Patterson, Benco, and Burkhart. A former NSK employee told Archer Dental she believed NSK refused to re-authorize Archer Dental because of pressure from Schein, Patterson, Benco and Burkhart.

139. In or around 2005, a Patterson representative told a Royal Equipment representative that Royal "better not think about opening Phil [Salerno, Dynamic Dental] because that would be it." As the Patterson representative explained, "you better not, you better not" or "anyone who does is, you know, going to be blacklisted." When Royal opened Dynamic anyways, Patterson and Schein told Royal "like, you idiot, why are you are doing this?" A Schein representative offered to display Royal equipment in Schein's new showroom, but in exchange, Royal would have to shut Dynamic down.

140. In 2006, manufacturer Acteon terminated Archer Dental because it was selling products "well below the industry average in respect to gross margin" and Acteon felt the termination was necessary to protect Acteon's "established dealer relations." Wyatt Wilson, the author of the letter, later told the Archers that Schein and Patterson had complained that Archer Dental had taken numerous sales from them.

141. In or around 2009 and 2010, manufacturer Digi Doc came out with a very successful new camera. Archer Dental asked Digi Doc to re-open their distribution agreement so Archer Dental could sell the new camera. Digi Doc refused, however, because of too many complaints from Schein, Patterson, and Benco.

142. In 2012, Patterson management pressured manufacturer Bien Air to cut off Archer Dental. Patterson told Bien Air President Arthur Mateen that if Bien Air continued to do business with Archer Dental, Patterson would not continue to do business with Bien Air. At least in this case, the threat was unsuccessful.

The Cartel Members' Boycott Extends to Low-Price Consumables Competitors

143. The Cartel Members' agreement to fix, maintain, and stabilize margins extended to the dental consumables segment. As in the equipment segment, they have used their leverage over manufacturers to prevent low-price competitors from having access to manufacturer lines that are necessary to compete effectively.

144. Around 2014, there were rumors that Amazon would be entering the dental product distribution industry, especially in the consumables area. The Cartel Members, fearing price competition from Amazon, did not want that to happen and worked together to prevent or delay Amazon's entry. Indeed, Benco's Managing Director Chuck Cohen wrote that one of his objectives was to "[w]ork[] with our competitors to keep Amazon out." In another document, Cohen identified one item on a to-do list as "[f]igur[ing] out how to get the dental distributors to work together on a response to Amazon's entry into the market." Patterson and Schein endeavored to coordinate their responses to Amazon's potential entry; Patterson's

Paul Guggenheim called Schein's Jim Breslawski to discuss the situation. Benco had a plan for a response: Cohen identified one of the roadblocks to Amazon's entry as "securing access to the lines." In the same bulletpoint, he wrote, "woe to the first vendor who opens them up. . . ." Cohen later explained that he meant that Benco's, Schein's, and Patterson's sales representatives have "a fair amount of market clout" and that these representatives probably will "not want to go support that line of products" of any vendor to open Amazon. Cohen also indicated that Benco would "punish those [vendors] who choose another path," meaning that Benco would make sure that anyone choosing to work with Amazon would consider it a mistake. Several manufacturers, including Danaher and Coltene-Whaledent, called Schein to assure it that they did not intend to include Amazon in their distribution strategies. Schein reached out to other manufacturers, including DentSply and Hu-Freidy, to discuss their reactions. Amazon later complained that its progress had been hampered by the "dental duopoly" of Schein and Patterson. Indeed, a Northcoast Research document reported that pressure from Schein and Patterson likely had delayed Amazon's progress because manufacturers did not want to risk their relationships with the large distributors and that the distributors had "been very aggressive in preventing manufacturers from selling through [Amazon] by threatening to drop certain products or shift market share to competing brands."

145. Amazon was not the only target of the Cartel Members' efforts to keep price-cutting competitors out of the consumables marketplace. BuyNowDirect, a website selling dental consumables, was also the subject of discussions between the Cartel Members, apparently regarding an agreement to keep products off of their site. When Benco saw that BuyNowDirect was offering private-label

Schein products through Amazon, Benco's Managing Director Chuck Cohen emailed a link to Schein's Tim Sullivan. When Schein's products were removed from the website, Cohen observed in an internal Benco email, "Very interesting. An admission of guilt." Cohen later texted Sullivan, "Thanks for Amazon change," which he clarified to mean "[t]alking about BuyNowDirect."

146. State dental associations and their distributor-partners were also victims of the Cartel Members' boycotts. Around 2011, some state dental associations began partnering with low-price distributors to offer their members significant savings on their dental equipment and consumables purchases. The Cartel Members used their leverage to prevent those efforts from being successful, however. First, the Cartel Members attempted to prevent the programs from getting off of the ground. For example, in response to the Florida Dental Association proposing such a program, Benco's Chuck Cohen wrote that Benco's "policy is that we don't work with dental association buying groups." When the New Mexico Dental Association revealed that it had partnered with Patterson, Benco employees and Schein employees exchanged emails about it, and Benco's Managing Director Chuck Cohen said that he would reach out to his counterpart at Patterson (Paul Guggenheim) about the situation.

147. Second, the Cartel Members attempted to starve the programs of the products necessary to compete. For example, when Benco learned that Arnold Dental, another distributor to which it sometimes sold supplies, was supplying products to the Texas Dental Association's program, Benco discontinued its relationship with Arnold Dental. The Cartel Members also wrote to the manufac-

turers whose products appeared on the associations' websites and asked them about their involvement with the program.

148. Third, the Cartel Members organized boycotts of those associations' annual meetings. On information and belief, meeting attendance is critical to state dental organizations because most of their funding comes from booth rental fees and other annual meeting revenues. When the Arizona Dental Association partnered with SourceOne Dental, a Benco representative wrote that Benco needed to "get some pressure on the [Arizona Dental Association]" and suggested that Benco not attend the Association's next annual meeting. Benco Regional Manager Mike Wade replied, "I am on top of it . . . I will pull some local pressure . . . Playing phone tag with [Kevin] Upchurch at Schein and will get [Patterson] Manager involved . . ." The email chain reflects an example of the Cartel Members' efforts to organize a boycott of a state dental association in response to the association's partnership with a low-price dental distributor. The Cartel Members organized a similar boycott of the Texas Dental Association ("TDA") Annual Meeting in 2014 when the Association partnered with SourceOne to offer its members discounts on dental supplies and equipment through a program called TDA Perks Supplies. After the program was announced, Schein asked what "sanctions" Benco would be willing to apply. After a call between Benco and Schein representatives, the Schein representative reported that Benco was considering cutting off all TDA relations, wanted Schein to do the same, and asked if Schein had a relationship with the local Patterson manager to ask Patterson to agree as well. Ultimately, Schein, Patterson, and Benco all boycotted the 2014 Texas Dental Association meeting. Several manufacturers, including Belmont

and Royal, also boycotted the meeting to show their support for the manufacturers, and even offered special deals for the Cartel Members to advertise during the week of the TDA Annual Meeting.

149. As described above, the Cartel Members' actions handicapped Dynamic's and Archer Dental's ability to compete effectively in the consumables submarket as well via membership in the ADC. With access to manufacturers through ADC, Dynamic and Archer Dental would have been able to expand their consumables sales. Indeed, after ADC informed Dynamic of its acceptance and provided it with a confidential price list, Dynamic immediately set to work loading products and prices into its system so that it would be able to offer the new products and lower prices to its customers as soon as its ADC membership became effective. Before that came to pass, however, ADC informed Dynamic that its membership had been revoked due to "input received," which Dynamic learned came from Burkhart's Powers. ADC informed Dynamic that to regain its membership, it would have to receive the approval of other ADC members in Oklahoma, including Burkhart. When Dynamic's Skip Pettus approached Burkhart's Powers about obtaining such approval, Powers informed Pettus that Dynamic's prices were too low and that he did not want the competition.

**STATUTE OF LIMITATIONS, CONCEALMENT,
AND TOLLING**

150. As described above, Danaher terminated Archer Dental by letters dated February 27, 2014, in direct response to the threats and termination requests made by Schein and, on information and belief, similar threats made by the other Cartel Members: Patterson, Benco, and Burkhart. These threats, and Danaher's termination of Archer Dental, constitute actions in furtherance of the

Cartel Members' ongoing conspiracy and boycott for which all Defendants are jointly and severally liable.

151. Moreover, Defendants and Burkhart have affirmatively concealed from Archer Dental the facts concerning the unlawful combination, conspiracy, and agreement among them alleged in this Complaint. Defendants and Burkhart have conducted their conspiracy in secret. Upon information and belief, Defendants and Burkhart planned and implemented the conspiracy during non-public meetings, monitored and enforced the conspiracy in non-public meetings, agreed not to discuss or disclose the details of their conspiracy, falsely represented to Archer Dental that the reasons for the actions taken by Danaher with respect to Archer Dental's distribution rights were unilateral and based on legitimate business reasons, and falsely represented to customers that the prices they paid for dental equipment were fair and competitive.

152. Specifically, Defendants have concealed many of the facts recited herein concerning the extent of the conspiracy among the Cartel Members, Patterson and Benco's participation in the conspiracy as Cartel Members, the details concerning Danaher's participation in the conspiracy and boycott of Archer Dental, and Danaher's termination of Archer Dental's distribution agreements and business relationships with Instrumentarium, Pelton & Crane, Marus, DCIE, KaVo, and Aribex on February 27, 2014. With respect to Danaher's 2014 termination of Archer Dental, in particular, Danaher falsely represented that the reasons for the termination of Archer Dental's distribution rights were unilateral and based on legitimate business reasons.

153. The limited and recently-produced documents that Archer Dental has discovered in this matter belie De-

defendants' representations and reveal the scope of the Cartel Members' and Danaher's conspiracy and boycott. They also belie Danaher's representations concerning the 2014 termination of Archer Dental. This information was not known, and could not have been discovered, until Defendants Schein and Danaher began to produce documents as part of discovery in this matter. Those documents, including without limitation Danaher emails referenced in this Complaint, were produced on a rolling basis starting on June 16, 2017. Before production, these and other communications between the Defendants were kept secret and inaccessible to Archer Dental. Moreover, Schein, Danaher, and the other named Defendants have resisted Plaintiff's discovery efforts in an ongoing attempt to conceal the scope of the unlawful combination, conspiracy, and agreement among them alleged in this Complaint.

154. As a result of Defendants' concealment, any applicable statute of limitations affecting the rights of Archer Dental has been tolled. Archer Dental exercised due diligence to learn of its legal rights, and, despite the exercise of due diligence, did not discover and could not have discovered the unlawful conduct alleged herein at the time it occurred.

COUNT ONE
SHERMAN ACT SECTION 1 VIOLATION AGAINST
ALL DEFENDANTS

155. Archer Dental incorporates by reference paragraphs 1 through 150 as if fully alleged herein.

156. At all times relevant to this Complaint, Defendants, Burkhart, Belmont, and Midmark have combined and conspired to eliminate competition for the sale of dental equipment and supplies and to maintain margins on the sale of such equipment and supplies at anticompetitive

levels. In furtherance of their conspiracy, Defendants, Burkhart, Belmont, and Midmark have agreed to fix margins on equipment and supplies. In furtherance of their conspiracies and illegal agreements, Defendants Schein, Patterson, and Benco, as well as Burkhart, agreed with Danaher (and its predecessor companies), Midmark, and Belmont to boycott, terminate, and/or restrict the distribution territories of low-margin distributors, including Archer Dental.

157. These agreements are per se violations of Section 1 of the Sherman Act. More specifically, elimination by joint collaborative action of discounters from access to the market is a per se violation of the Sherman Act. The participation in the agreement by manufacturers Danaher, Midmark, and Belmont—the common suppliers to the Cartel Members, Burkhart, and Archer Dental—does not change the character of the conspiracy. Indeed, a conspiracy is horizontal in nature when a number of competitor firms agree with each other and at least one of their common suppliers or manufacturers to eliminate their price-cutting competition by cutting its access to supplies.

158. The agreements and understandings that Defendants, Burkhart, Belmont, and Midmark have entered, maintained, renewed, and enforced with one another have had the purpose and effect of eliminating competition for the sale of dental equipment and supplies by and among dealers of dental equipment and maintaining prices for such equipment and supplies above competitive levels. Furthermore, as the result of Defendants', Burkhart's, Midmark's, and Belmont's conduct, all dentists have been deprived of the competition offered by Archer Dental and other low-margin distributors and have overpaid for dental equipment and supplies.

159. As a direct and proximate result of Defendants', Burkhart's, Midmark's, and Belmont's past and continuing violations of Section 1 of the Sherman Act, Archer Dental has suffered injury and damages in an amount to be proved at trial.

160. Archer Dental seeks money damages from Defendants jointly and severally for these violations. These actual damages should be trebled under Section 4 of the Clayton Act, 15 U.S.C. § 15.

161. Archer Dental also seeks injunctive relief. The violations set forth above are continuing and will continue unless injunctive relief is granted.

COUNT TWO
VIOLATION OF TFEAA AGAINST
ALL DEFENDANTS

162. Archer Dental incorporates by reference paragraphs 1 through 150 as if fully alleged herein.

163. At all times relevant to this Complaint, Defendants, Burkhart, Belmont, and Midmark have combined and conspired to eliminate competition for the sale of dental equipment and supplies and to maintain margins on the sale of such equipment and supplies at anticompetitive levels. In furtherance of their conspiracy, Defendants Schein, Patterson, and Benco, as well as Burkhart, agreed with Danaher (and its predecessor companies), Midmark, and Belmont to boycott, terminate, and/or restrict the distribution territories of low-price distributors, including Archer Dental. The result of that illegal per se boycott has been to eliminate or restrict Archer Dental's ability to distribute and sell significant lines of dental equipment to dental professionals in Texas. As a result, Archer Dental is harmed, and Texas dental professionals are denied the benefit of competition.

164. These agreements are per se violations of Texas Free Enterprise and Antitrust Act (“TFEAA”). More specifically, elimination by joint collaborative action of discounters from access to the market is a per se violation of the TFEAA. The participation in the agreement by Danaher, Midmark, and Belmont—the common suppliers to Defendants, Burkhart, and Archer Dental—does not change the character of the conspiracy. Indeed, a conspiracy is horizontal in nature when a number of competitor firms agree with each other and at least one of their common suppliers or manufacturers to eliminate their price-cutting competition by cutting his access to supplies.

165. The agreements and understandings that Defendants, Burkhart, Midmark, and Belmont have entered, maintained, renewed, and enforced with one another have had the purpose and effect of eliminating competition for the sale of dental equipment and supplies by and among dealers of dental equipment and supplies and maintaining prices for such equipment and supplies above competitive levels in Texas. Furthermore, as the result of Defendants’, Burkhart’s, Midmark’s, and Belmont’s conduct, dentists in Texas have been deprived of the competition offered by Archer Dental and other low-margin distributors and have overpaid for dental equipment.

166. As a direct and proximate result of Defendants’, Burkhart’s, Midmark’s, and Belmont’s past and continuing violations of the TFEAA, Plaintiff has suffered injury and damages in an amount to be proved at trial.

167. Archer Dental seeks money damages from Defendants jointly and severally for these violations. Defendants’, Burkhart’s, Midmark’s, and Belmont’s violations were willful and flagrant. Archer Dental’s actual damages should therefore be trebled under Section 15.21 of the TFEAA.

168. Archer Dental also seeks injunctive relief. The violations set forth above are continuing and will continue unless injunctive relief is granted.

169. As required by Section 15.21(c) of the TFEAA, a copy of this Complaint shall be mailed to the Attorney General of Texas.

JURY TRIAL DEMANDED

Archer Dental demands a trial by jury pursuant to FED. R. CIV. P. 38(b) of all issues triable of right by jury.

PRAYER FOR RELIEF

Therefore, Archer Dental demands judgment as follows:

- a. Adjudge and declare that Defendants have engaged in unlawful conduct in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1;
- b. Adjudge and declare that Defendants have engaged in unlawful conduct in violation of Section 15.05(a) of the TFEAA, TEX. BUS & COMM. CODE § 15.05(a);
- c. Preliminarily and permanently enjoin Defendants from violating Section 1 of the Sherman Act, 15 U.S.C. § 1 and Section 15.05(a) of the TFEAA, TEX. BUS & COMM. CODE § 15.05(a);
- d. Against all Defendants, jointly and severally, award Archer Dental damages in an amount to be proved at trial, to be trebled with interest and the costs of this suit, including attorney's fees; and
- e. Award such other further relief as the Court deems just and proper.

Dated: October 30, 2017

Respectfully submitted,

By: /s/ Samuel Baxter

Samuel F. Baxter
Texas Bar No. 01938000
sbaxter@mckoolsmith.com
MCKOOL SMITH, P.C.
104 E. Houston, Suite 300
Marshall, Texas 75670
Telephone: (903) 923-9000
Facsimile: (903) 923-9099

Lewis T. LeClair
Texas Bar No. 12072500
lleclair@mckoolsmith.com

Gary Cruciani
Texas Bar No. 5177300
gcruciani@mckoolsmith.com

Phillip M. Aurentz
Texas Bar No. 24059404
paurentz@mckoolsmith.com

Travis DeArman
Texas Bar No. 24074117
tdearman@mckoolsmith.com
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
Telephone: (214) 978-4000
Facsimile: (214) 978-4044

Charles F. Fowler, Jr.
Texas Bar No. 24083014
cfowler@mckoolsmith.com
MCKOOL SMITH, P.C.
300 W. 6th Street, Suite 1700
Austin, Texas 78701
Telephone: (512) 692-8700
Facsimile: (512) 692-8744-4044

**ATTORNEYS FOR PLAINTIFF,
ARCHER AND WHITE SALES, INC.**

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served on all of counsel of record who receive service via electronic mail.

/s/ Travis DeArman
Travis E. DeArman

**CERTIFICATE OF AUTHORIZATION TO FILE
UNDER SEAL**

The undersigned certifies that the foregoing document is authorized to be filed under seal pursuant to the Protective Order entered in this case (Dkt. No. 116).

/s/ Travis DeArman
Travis E. DeArman

DEALER AGREEMENT

This Dealer Agreement (this “Agreement”) dated as of October 4, 2007, is made by and between Pelton & Crane (“Pelton & Crane”) and Archer and White Sales (“Dealer”).

RECITALS

- A. Pelton & Crane manufactures and sells Pelton & Crane brand dental equipment and products (the “Products”).
- B. Pelton & Crane wishes to sell the Products to dealers who demonstrate their ability to sell the Products in a professional manner that will preserve and enhance the valuable reputation and goodwill associated with the Products.
- C. Dealer wishes to serve as a Pelton & Crane dealer authorized to sell the Products.

AGREEMENT

The parties agree as follows:

1. DEALER APPOINTMENT

Pelton & Crane appoints Dealer as a nonexclusive authorized dealer for sale of the Products in the previously agreed-upon geographic sales territory subject to the terms and conditions set forth herein. Dealer accepts such appointment.

2. DEALER OBLIGATIONS

2.1 Dealer shall use its best efforts to sell the Products and to encourage the purchase of the Products by Dealer’s customers.

2.2 Dealer shall sell the Products only to: (a) licensed doctors of dental medicine; (b) accredited and/or licensed dental or medical clinics and hospitals; (c) accredited dental and medical schools; and (d) appropriate agencies of the federal, state provincial, or local governments (collectively referred to herein as “Qualified Customers”).

2.3 Dealer shall sell the Products only to Qualified Customers having their principal place of business: (a) within the previously agreed-upon geographic sales territory; (b) within the geographic area where Dealer’s sales force makes regular face-to-face visits and Dealer’s service staff performs service; and (c) within a reasonable distance of an authorized outlet showroom that displays the Products.

2.4 Dealer shall not, directly or indirectly, sell the Products by mail order.

2.5 Dealer shall not sell the products to any customer for resale. If Dealer learns of a resale by any of its customers, Dealer shall immediately notify Pelton & Crane.

2.6 Dealer shall employ and maintain its own full-time, experienced and knowledgeable sales staff that regularly makes face-to-face sales visits and presentations to customers and potential customers within Dealer’s geographic area. Dealer shall train its sales personnel concerning the products and their specifications, features, and benefits. Dealer shall perform such obligations only through Dealer’s own employees, and not through independent contractors.

2.7 Dealer shall make time available during Dealer’s sales meetings for Pelton & Crane representatives to present information regarding the Products.

Dealer agrees to conduct such sales meetings at least once every six months.

2.8 Dealer shall maintain at each authorized outlet a showroom for which it shall purchase and in which it shall display the Products according to Pelton & Crane's flooring and display programs. Pelton & Crane may change its flooring and display programs from time to time.

2.9 Dealer shall maintain records of each sale of the Products including the name and address of the purchaser, date of purchase, date of installation, and the model and serial numbers of the Products. Dealer shall deliver a copy of all such information to Pelton & Crane at no charge. Dealer shall not remove any serial numbers.

2.10 Dealer shall provide customer service including installation, instruction of Dealer's customers in the use of Products, warranty service, Product repairs, and other post-sale service. Dealer shall document all Product repairs, Product service, and customer complaints and forward all customer complaint information to Pelton & Crane.

2.11 Dealer shall employ and maintain its own full-time, experienced and knowledgeable service staff sufficiently trained to properly install and service the Products. Dealer shall adequately train their service personnel for service and installation as well as insure the individual(s) providing the training are adequately trained themselves prior to providing any such training. Upon Pelton & Crane's request, provide installation and service training records of service staff. Dealer shall not install, service, or maintain any of the Products by any person who is unqualified to perform such work.

2.12 Dealer shall purchase and maintain an inventory of spare parts sufficient to enable Dealer to promptly service the Products.

2.13 Dealer shall comply with all laws and regulations pertaining to the sale, assembly, installation and service of the Products by Dealer.

2.14 Dealer shall maintain sufficient product liability and other all risk liability insurance adequate to protect all risks associated with the sale, installation and service of the Products and, upon Pelton & Crane's request, provide Pelton & Crane with an insurance certificate or other evidence of insurance in form and in amounts satisfactory to Pelton & Crane.

2.15 Dealer shall take no action which will cause Pelton & Crane to be in violation of any law of any jurisdiction in the Territory or the United States, such laws including but not limited to the U.S. Foreign Corrupt Practices Act, the U.S. export control laws and the U.S. antiboycott laws. In this conjunction, Distributor agrees:

1.) To inform all customers that all Products are subject to the United States Export Administration Regulations. The following statement shown on invoices, packing lists, and bills of lading may be used for this purpose.

“These commodities, technology or software were exported from the United States in accordance with the Export Administration Regulations. Diversion contrary to the United States law prohibited.”

2.) To provide, upon request by Pelton & Crane, information by Pelton & Crane to obtain U.S. export licenses, including but not limited to formal end-use statements (Statements by Ultimate Consignee and Purchaser).

3.) To maintain all records relating to sale of the Products for not less than five (5) years;

4.) To comply with applicable laws of the Territory relating to the conduct of Distributor's business, including any requirements for registration or recording of this Agreement with governmental entities;

5.) Not to sell Products to customers listed on the current United States Department of Commerce Denied Persons List which shall be provided to Distributor periodically; and

6.) Not to supply any boycott related information concerning Pelton & Crane.

2.16 Dealer distributing product within the European Union (EU) has the responsibility of registering the product with a "Producer Compliance Scheme" in each country within the EU that product is shipped to in accordance with Directive 2002/96/EC of the European Parliament and the Council of 27 January 2003 on Waste Electrical and Electronic Equipment (WEEE) and liable for all costs associated with WEEE compliance.

3. MULTIPLE LOCATION DEALERS

If Dealer sells Products through more than one outlet, the obligations of Dealer set forth in this Agreement shall apply to each such outlet. Current authorized Dealer outlets are listed on exhibit A attached hereto. Additional outlets may be authorized only by the prior written agreement of Pelton & Crane.

4. PELTON & CRANE OBLIGATIONS

4.1 Pelton & Crane shall offer to sell Products to Dealer in accordance with the terms of this Agreement and Pelton & Crane's Terms and Conditions of Sale.

4.2 Pelton & Crane shall furnish to Dealer reasonable quantities of price lists, sales catalogs, installation instructions and service manuals to support Dealer's efforts to sell and service the Products.

5. TERMS AND CONDITIONS OF SALE

All sales of Products by Pelton & Crane shall be subject to Pelton & Crane's Terms and Conditions of Sale, incorporated herein by this reference. Pelton & Crane may change its Terms and Conditions of Sale from time to time by giving notice to Dealer. Dealer shall pay for Products pursuant to the Pelton & Crane Terms and Conditions of Sale.

6. MINIMUM SALES GOALS

[Minimum sales goals for Dealer for the initial twelve (12)-month term of this Agreement are set forth in Exhibit B, attached hereto and incorporated herein by this reference.] [Pelton & Crane may establish minimum annual sales goals for Dealer.] Pelton & Crane may adjust the minimum sales goal for Dealer from time to time.

7. NONEXCLUSIVE APPOINTMENT; PELTON & CRANE SALES

7.1 Dealer's appointment is nonexclusive. Pelton & Crane reserves the right to increase or decrease the number of authorized dealers for the Products in the vicinity of Dealer's outlet or outlets without prior notice to Dealer.

7.2 Pelton & Crane reserves the right to sell the Products directly to government agencies, dental schools, clinics, hospitals, original equipment manufacturers ("OEMs"), value-added resellers ("VARs"), distributors and other "house accounts" of Pelton & Crane.

8. TRADEMARKS

Dealer acknowledges that Pelton & Crane owns all rights to the trademarks “Pelton & Crane™”, and other logos, trademarks, service marks, trade names and design marks used by Pelton & Crane. Dealer shall not use any Pelton & Crane mark except in advertising or selling the Products and in a manner approved by Pelton & Crane. Upon termination of this Agreement, Dealer shall cease all use of Pelton & Crane’s marks.

9. LIMITED WARRANTY AND DISCLAIMER

9.1 Each of the Products is warranted by Pelton & Crane in accordance with Pelton & Crane’s warranty applicable to such Product set forth in the Pelton & Crane Terms and Conditions of Sale, product warranty registration card, or other Pelton & Crane literature pertaining to such Product.

9.2 EXCEPT FOR THE EXPRESS WARRANTY DESCRIBED IN SECTION 9.1 OF THIS AGREEMENT, Pelton & Crane MAKES NO WARRANTY, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, DESIGN OR SUITABILITY WITH RESPECT TO THE PRODUCTS OR ANY OTHER GOODS, SERVICES OR OTHER MATERIALS PROVIDED BY Pelton & Crane.

10. LIMITATION OF REMEDIES AND LIABILITY

10.1 Pelton & Crane SHALL NOT BE LIABLE TO DEALER OR ANY PERSON FOR Pelton & Crane’s FAILURE TO ACCEPT OR FILL ANY ORDER, FOR ERRORS IN FILLING ANY ORDER, OR FOR ANY DELAY IN DELIVERY.

10.2 Pelton & Crane SHALL NOT BE LIABLE FOR THE COST OF SUBSTITUTE GOODS, LOSS OF PROFITS, OR FOR ANY INDIRECT, SPECIAL, CONSEQUENTIAL, INCIDENTAL OR PUNITIVE DAMAGES, WHETHER BASED ON CONTRACT, TORT, OR ANY OTHER LEGAL THEORY, EVEN IF Pelton & Crane WAS ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

10.3 The liability of Pelton & Crane for any and all claims related to or arising out of this Agreement or any Products provided by Pelton & Crane shall be limited to the amount paid by Dealer to Pelton & Crane (for the purchase of Products) during the period of twelve (12) months immediately preceding the date on which any such claim is asserted against Pelton & Crane.

11. TERM AND TERMINATION

11.1 The term of this Agreement shall be effective as of the date set forth in the introductory paragraph and shall continue until terminated as described below unless terminated earlier pursuant to the provisions in this Agreement.

11.2 Either party may terminate this Agreement immediately: (a) upon breach of this Agreement by the other party if the breach is not cured within ten (10) days after written notice of such breach is given or, (b) upon either party's insolvency, bankruptcy or suspension of business.

11.3 Either party may terminate this Agreement for any reason or no reason by giving 60 days' prior written notice to the other party.

11.4 Sections 8, 9, 10, 12.6, 12.7, and 12.8, and all other provisions of this Agreement which may reasonably

be interpreted or construed as surviving the expiration, termination or cancellation of this Agreement, shall survive the expiration, termination or cancellation of this Agreement.

12. GENERAL PROVISIONS

12.1 Financial Statement. Dealer will from time to time, upon request by Pelton & Crane, furnish financial statements and information relating to its financial condition, including its current net worth.

12.2 Nonassignment. Dealer will not, directly or indirectly (through a transfer of ownership of Dealer or otherwise) assign, transfer, or sell its rights under this Agreement, or delegate its duties hereunder, without prior written consent of Pelton & Crane.

12.3 Independent Dealer. Dealer is an independent business and has no authority (nor will Dealer represent that Dealer has any authority) to bind Pelton & Crane or to assume or to create any obligation, express or implied, on behalf of Pelton & Crane. Nothing in this Agreement shall be construed as constituting Dealer and Pelton & Crane as partners, or as creating relationships of employer and employee or principal and agent between the parties.

12.4 Modification. This Agreement (together with the Pelton & Crane Terms and Conditions of Sale) contains the entire agreement between the parties. Unless otherwise provided in this Agreement, no modification of this Agreement shall be binding upon the parties unless made in writing and signed by both parties.

12.5 Waiver. Pelton & Crane may waive any obligation Dealer has under this Agreement, but such a waiver shall not be effective unless made in writing.

12.6 Indemnification. Dealer will indemnify and hold Pelton & Crane, its officers, directors, agents, employees, and affiliates harmless from any claims, demands, loss, damage, liability, or expense, including attorneys' fees and expenses, arising out of the acts or omissions of Dealer, its agents or employees.

12.7 Attorneys' Fees. In the event any suit or action is brought to enforce or interpret any terms of this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees and expenses incurred by it in connection therewith.

12.8 Disputes. This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets or other intellectual property of Pelton & Crane) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association. The place of arbitration shall be in Charlotte, North Carolina.

12.9 Notices. Notices shall be deemed given if delivered personally or sent by first class mail, postage prepaid, addressed to the other party at the address set forth in this Agreement or at such other address as designated by the party by written notice.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date set forth above.

Pelton & Crane

Dealer:

By: _____

By: Jim Archer

Title: VP Sales

Title: President

Address: 11727 Fruehauf Drive
Charlotte, NC 28273

Address: 1107 Summit
Plano TX 75074

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EXHIBIT A
TO
DEALER AGREEMENT
FOR

Archer and White Sales

Addresses of Authorized dealer outlets

Archer & White Sales
1107 Summit Ave
Plano, TX 75074

Dynamic Dental Solutions
89 E. 530 Road
Pryor, OK 74361

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EXHIBIT B
TO
DEALER AGREEMENT
FOR

Archer and White Sales

Minimum Annual Sales Goal
N/A

**Commercial Arbitration Rules
and Mediation Procedures**

Including Procedures for Large,
Complex Commercial Disputes

Rules Amended and Effective June 1, 2009
Fee Schedule Amended and Effective June 1, 2010

American Arbitration Association
Dispute Resolution Service Worldwide

www.adr.org

Commercial Arbitration Rules and Mediation Procedures

Important Notice

These rules and any amendment of them shall apply in the form in effect at the time the administrative filing requirements are met for a demand for arbitration or submission agreement received by the AAA. To ensure that you have the most current information, see our website at www.adr.org.

Introduction

Each year, many millions of business transactions take place. Occasionally, disagreements develop over these business transactions. Many of these disputes are resolved by arbitration, the voluntary submission of a dispute to an impartial person or persons for final and binding determination. Arbitration has proven to be an effective way to resolve these disputes privately, promptly, and economically.

The American Arbitration Association (AAA), a not-for-profit, public service organization, offers a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities, and all levels of government. Services are available through AAA headquarters in New York and through offices located in major cities throughout the United States. Hearings may be held at locations convenient for the parties and are not limited to cities with AAA offices. In addition, the AAA serves as a center for education and training, issues specialized publications, and conducts research on all forms of out-of-court dispute settlement.

Standard Arbitration Clause

The parties can provide for arbitration of future disputes by inserting the following clause into their contracts:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Arbitration of existing disputes may be accomplished by use of the following:

We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules the following controversy: (describe briefly). We further agree that the above controversy be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of any court having jurisdiction may be entered on the award.

In transactions likely to require emergency interim relief, the parties may wish to add to their clause the following language:

The parties also agree that the AAA Optional Rules for Emergency Measures of Protection shall apply to the proceedings.

These Optional Rules may be found on page 49.

The services of the AAA are generally concluded with the transmittal of the award. Although there is voluntary compliance with the majority of awards, judgment on the

award can be entered in a court having appropriate jurisdiction if necessary.

Administrative Fees

The AAA charges a filing fee based on the amount of the claim or counterclaim. This fee information, which is included with these rules, allows the parties to exercise control over their administrative fees. The fees cover AAA administrative services; they do not cover arbitrator compensation or expenses, if any, reporting services, or any post-award charges incurred by the parties in enforcing the award.

Mediation

The parties might wish to submit their dispute to mediation prior to arbitration. In mediation, the neutral mediator assists the parties in reaching a settlement but does not have the authority to make a binding decision or award. Mediation is administered by the AAA in accordance with its Commercial Mediation Procedures. There is no additional administrative fee where parties to a pending arbitration attempt to mediate their dispute under the AAA's auspices.

If the parties want to adopt mediation as a part of their contractual dispute settlement procedure, they can insert the following mediation clause into their contract in conjunction with a standard arbitration provision:

If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.

If the parties want to use a mediator to resolve an existing dispute, they can enter into the following submission:

The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Procedures. (The clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties.)

Large, Complex Cases

Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes, which appear in this pamphlet, will be applied to all cases administered by the AAA under the Commercial Arbitration Rules in which the disclosed claim or counterclaim of any party is at least \$500,000 exclusive of claimed interest, arbitration fees and costs.

The key features of these procedures include:

- > a highly qualified, trained Roster of Neutrals;
- > a mandatory preliminary hearing with the arbitrators, which may be conducted by teleconference;
- > broad arbitrator authority to order and control discovery, including depositions;
- > presumption that hearings will proceed on a consecutive or block basis.

Commercial Mediation Procedures

M-1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for mediation or conciliation of existing or future disputes under the auspices of the American Arbitration Association (AAA) or under these procedures, the parties and their representatives, unless agreed otherwise in writing, shall be deemed to have made these procedural guidelines, as amended and in effect as of the date of filing of a request for mediation, a part of their agreement and designate the AAA as the administrator of their mediation.

The parties by mutual agreement may vary any part of these procedures including, but not limited to, agreeing to conduct the mediation via telephone or other electronic or technical means.

M-2. Initiation of Mediation

Any party or parties to a dispute may initiate mediation under the AAA's auspices by making a request for mediation to any of the AAA's regional offices or case management centers via telephone, email, regular mail or fax. Requests for mediation may also be filed online via AAA WebFile at www.adr.org.

The party initiating the mediation shall simultaneously notify the other party or parties of the request. The initiating party shall provide the following information to the AAA and the other party or parties as applicable:

- (i) A copy of the mediation provision of the parties' contract or the parties' stipulation to mediate.
- (ii) The names, regular mail addresses, email addresses and telephone numbers of all parties to the

dispute and representatives, if any, in the mediation.

- (iii) A brief statement of the nature of the dispute and the relief requested.
- (iv) Any specific qualifications the mediator should possess.

Where there is no pre-existing stipulation or contract by which the parties have provided for mediation of existing or future disputes under the auspices of the AAA, a party may request the AAA to invite another party to participate in “mediation by voluntary submission.” Upon receipt of such a request, the AAA will contact the other party or parties involved in the dispute and attempt to obtain a submission to mediation.

M-3. Representation

Subject to any applicable law, any party may be represented by persons of the party’s choice. The names and addresses of such persons shall be communicated in writing to all parties and to the AAA.

M-4. Appointment of the Mediator

Parties may search the online profiles of the AAA’s Panel of Mediators at www.aaamediation.com in an effort to agree on a mediator. If the parties have not agreed to the appointment of a mediator and have not provided any other method of appointment, the mediator shall be appointed in the following manner:

- (i) Upon receipt of a request for mediation, the AAA will send to each party a list of mediators from the AAA’s Panel of Mediators. The parties are encouraged to agree to a mediator from the submitted list and to advise the AAA of their agreement.

- (ii) If the parties are unable to agree upon a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference and return the list to the AAA. If a party does not return the list within the time specified, all mediators on the list shall be deemed acceptable. From among the mediators who have been mutually approved by the parties, and in accordance with the designated order of mutual preference, the AAA shall invite a mediator to serve.
- (iii) If the parties fail to agree on any of the mediators listed, or if acceptable mediators are unable to serve, or if for any other reason the appointment cannot be made from the submitted list, the AAA shall have the authority to make the appointment from among other members of the Panel of Mediators without the submission of additional lists.

M-5. Mediator's Impartiality and Duty to Disclose

AAA mediators are required to abide by the *Model Standards of Conduct for Mediators* in effect at the time a mediator is appointed to a case. Where there is a conflict between the Model Standards and any provision of these Mediation Procedures, these Mediation Procedures shall govern. The Standards require mediators to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality.

Prior to accepting an appointment, AAA mediators are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual

would consider likely to create a potential or actual conflict of interest for the mediator. AAA mediators are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties' dispute within the time-frame desired by the parties. Upon receipt of such disclosures, the AAA shall immediately communicate the disclosures to the parties for their comments.

The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator, waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the mediator shall serve, or in the event that the mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall be replaced.

M-6. Vacancies

If any mediator shall become unwilling or unable to serve, the AAA will appoint another mediator, unless the parties agree otherwise, in accordance with section M-4.

M-7. Duties and Responsibilities of the Mediator

- (i) The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.
- (ii) The mediator is authorized to conduct separate or *ex parte* meetings and other communications with the parties and/or their representatives, before, during and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person or otherwise.

- (iii) The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.
- (iv) The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.
- (v) In the event a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation session(s), the mediator may continue to communicate with the parties, for a period of time, in an ongoing effort to facilitate a complete settlement.
- (vi) The mediator is not a legal representative of any party and has no fiduciary duty to any party.

M-8. Responsibilities of the Parties

The parties shall ensure that appropriate representatives of each party, having authority to consummate a settlement, attend the mediation conference.

Prior to and during the scheduled mediation conference session(s) the parties and their representatives shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.

M-9. Privacy

Mediation sessions and related mediation communications are private proceedings. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

M-10. Confidentiality

Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports or other documents received by a mediator while serving in that capacity shall be confidential.

The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding the following, unless agreed to by the parties or required by applicable law:

- (i) Views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute,
- (ii) Admissions made by a party or other participant in the course of the mediation proceedings,
- (iii) Proposals made or views expressed by the mediator; or

- (iv) The fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

M-11. No Stenographic Record

There shall be no stenographic record of the mediation process.

M-12. Termination of Mediation

The mediation shall be terminated:

- (i) By the execution of a settlement agreement by the parties; or
- (ii) By a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties' dispute; or
- (iii) By a written or verbal declaration of all parties to the effect that the mediation proceedings are terminated; or
- (iv) When there has been no communication between the mediator and any party or party's representative for 21 days following the conclusion of the mediation conference.

M-13. Exclusion of Liability

Neither the AAA nor any mediator is a necessary party in judicial proceedings relating to the mediation. Neither the AAA nor any mediator shall be liable to any party for any error, act or omission in connection with any mediation conducted under these procedures.

M-14. Interpretation and Application of Procedures

The mediator shall interpret and apply these procedures insofar as they relate to the mediator's duties and responsibilities. All other procedures shall be interpreted and applied by the AAA.

M-15. Deposits

Unless otherwise directed by the mediator, the AAA will require the parties to deposit in advance of the mediation conference such sums of money as it, in consultation with the mediator, deems necessary to cover the costs and expenses of the mediation and shall render an accounting to the parties and return any unexpended balance at the conclusion of the mediation.

M-16. Expenses

All expenses of the mediation, including required traveling and other expenses or charges of the mediator, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.

M-17. Cost of the Mediation

There is no filing fee to initiate a mediation or a fee to request the AAA to invite parties to mediate.

The cost of mediation is based on the hourly mediation rate published on the mediator's AAA profile. This rate covers both mediator compensation and an allocated portion for the AAA's services. There is a four-hour minimum charge for a mediation conference. Expenses referenced in section M-16 may also apply.

If a matter submitted for mediation is withdrawn or cancelled or results in a settlement after the agreement to mediate is filed but prior to the mediation conference, the cost is \$250 plus any mediator time and charges incurred.

The parties will be billed equally for all costs unless they agree otherwise.

If you have questions about mediation costs or services visit our website at www.adr.org or contact your local AAA office.

Conference Room Rental

The costs described do not include the use of AAA conference rooms. Conference rooms are available on a rental basis. Please contact your local AAA office for availability and rates.

Commercial Arbitration Rules

R-1. Agreement of Parties^{*+}

- (a) The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a demand for arbitration or submission agreement received by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator.

* The AAA applies the Supplementary Procedures for Consumer-Related Disputes to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are nonnegotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA will have the discretion to apply or not to apply the supplementary procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction, even in consumer arbitration cases filed by the business.

+ A dispute arising out of an employer promulgated plan will be administered under the AAA's Employment Arbitration Rules and Mediation Procedures.

- (b) Unless the parties or the AAA determines otherwise, the Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds \$75,000, exclusive of interest and arbitration fees and costs.

Parties may also agree to use these procedures in larger cases. Unless the parties agree otherwise, these procedures will not apply in cases involving more than two parties. The Expedited Procedures shall be applied as described in Sections E-1 through E-10 of these rules, in addition to any other portion of these rules that is not in conflict with the Expedited Procedures.

- (c) Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes shall apply to all cases in which the disclosed claim or counterclaim of any party is at least \$500,000, exclusive of claimed interest, arbitration fees and costs. Parties may also agree to use the procedures in cases involving claims or counterclaims under \$500,000, or in nonmonetary cases. The Procedures for Large, Complex Commercial Disputes shall be applied as described in Sections L-1 through L-4 of these rules, in addition to any other portion of these rules that is not in conflict with the Procedures for Large, Complex Commercial Disputes.

- (d) All other cases shall be administered in accordance with Sections R-1 through R-54 of these rules.

R-2. AAA and Delegation of Duties

When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby au-

authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices.

R-3. National Roster of Arbitrators

The AAA shall establish and maintain a National Roster of Commercial Arbitrators ("National Roster") and shall appoint arbitrators as provided in these rules. The term "arbitrator" in these rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

R-4. Initiation under an Arbitration Provision in a Contract

- (a) Arbitration under an arbitration provision in a contract shall be initiated in the following manner:
 - (i) The initiating party (the "claimant") shall, within the time period, if any, specified in the contract(s), give to the other party (the "respondent") written notice of its intention to arbitrate (the "demand"), which demand shall contain a statement setting forth the nature of the dispute, the names and addresses of all other parties, the amount involved, if any, the remedy sought, and the hearing locale requested.
 - (ii) The claimant shall file at any office of the AAA two copies of the demand and two copies of the arbitration provisions of the contract, together with the appropriate filing fee as provided in

the schedule included with these rules.

- (iii) The AAA shall confirm notice of such filing to the parties.
- (b) A respondent may file an answering statement in duplicate with the AAA within 15 days after confirmation of notice of filing of the demand is sent by the AAA. The respondent shall, at the time of any such filing, send a copy of the answering statement to the claimant. If a counterclaim is asserted, it shall contain a statement setting forth the nature of the counterclaim, the amount involved, if any, and the remedy sought. If a counterclaim is made, the party making the counterclaim shall forward to the AAA with the answering statement the appropriate fee provided in the schedule included with these rules.
- (c) If no answering statement is filed within the stated time, respondent will be deemed to deny the claim. Failure to file an answering statement shall not operate to delay the arbitration.
- (d) When filing any statement pursuant to this section, the parties are encouraged to provide descriptions of their claims in sufficient detail to make the circumstances of the dispute clear to the arbitrator.

R-5. Initiation under a Submission

Parties to any existing dispute may commence an arbitration under these rules by filing at any office of the AAA two copies of a written submission to arbitrate under these rules, signed by the parties. It shall contain a statement of the nature of the dispute, the names and addresses of all parties, any claims and counterclaims, the

amount involved, if any, the remedy sought, and the hearing locale requested, together with the appropriate filing fee as provided in the schedule included with these rules. Unless the parties state otherwise in the submission, all claims and counterclaims will be deemed to be denied by the other party.

R-6. Changes of Claim

After filing of a claim, if either party desires to make any new or different claim or counterclaim, it shall be made in writing and filed with the AAA. The party asserting such a claim or counterclaim shall provide a copy to the other party, who shall have 15 days from the date of such transmission within which to file an answering statement with the AAA. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent.

R-7. Jurisdiction

- (a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.
- (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
- (c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering

statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-8. Mediation

At any stage of the proceedings, the parties may agree to conduct a mediation conference under the Commercial Mediation Procedures in order to facilitate settlement. The mediator shall not be an arbitrator appointed to the case. Where the parties to a pending arbitration agree to mediate under the AAA's rules, no additional administrative fee is required to initiate the mediation.

R-9. Administrative Conference

At the request of any party or upon the AAA's own initiative, the AAA may conduct an administrative conference, in person or by telephone, with the parties and/or their representatives. The conference may address such issues as arbitrator selection, potential mediation of the dispute, potential exchange of information, a timetable for hearings and any other administrative matters.

R-10. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. If any party requests that the hearing be held in a specific locale and the other party files no objection thereto within 15 days after notice of the request has been sent to it by the AAA, the locale shall be the one requested. If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale, and its decision shall be final and binding.

R-11. Appointment from National Roster

- (a) If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner: The AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.
- (b) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 15 days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.
- (c) Unless the parties agree otherwise when there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators.

R-12. Direct Appointment by a Party

- (a) If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with the name and address of the arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any appointing party, the AAA shall submit a list of members of the National Roster from which the party may, if it so desires, make the appointment.
- (b) Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-17 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Section R-17(a) that the party-appointed arbitrators are to be non-neutral and need not meet those standards.
- (c) If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make the appointment within that period, the AAA shall make the appointment.
- (d) If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If within 15 days after such notice has been sent, an arbitrator has not been appointed by a party, the AAA shall make the appointment.

R-13. Appointment of Chairperson by Party-Appointed Arbitrators or Parties

- (a) If, pursuant to Section R-12, either the parties have directly appointed arbitrators, or the arbitra-

tors have been appointed by the AAA, and the parties have authorized them to appoint a chairperson within a specified time and no appointment is made within that time or any agreed extension, the AAA may appoint the chairperson.

- (b) If no period of time is specified for appointment of the chairperson and the party-appointed arbitrators or the parties do not make the appointment within 15 days from the date of the appointment of the last party-appointed arbitrator, the AAA may appoint the chairperson.
- (c) If the parties have agreed that their party-appointed arbitrators shall appoint the chairperson from the National Roster, the AAA shall furnish to the party-appointed arbitrators, in the manner provided in Section R-11, a list selected from the National Roster, and the appointment of the chairperson shall be made as provided in that section.

R-14. Nationality of Arbitrator

Where the parties are nationals of different countries, the AAA, at the request of any party or on its own initiative, may appoint as arbitrator a national of a country other than that of any of the parties. The request must be made before the time set for the appointment of the arbitrator as agreed by the parties or set by these rules.

R-15. Number of Arbitrators

If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed. A party may request three arbitrators in the demand or answer, which request the AAA will consider in exercising its discretion

regarding the number of arbitrators appointed to the dispute.

R-16. Disclosure

- (a) Any person appointed or to be appointed as an arbitrator shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.
- (b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.
- (c) In order to encourage disclosure by arbitrators, disclosure of information pursuant to this Section R-16 is not to be construed as an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

R-17. Disqualification of Arbitrator

- (a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for:
 - (i) partiality or lack of independence,
 - (ii) inability or refusal to perform his or her duties with diligence and in good faith, and

- (iii) any grounds for disqualification provided by applicable law. The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-12 shall be nonneutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.
- (b) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

R-18. Communication with Arbitrator

- (a) No party and no one acting on behalf of any party shall communicate ex parte with an arbitrator or a candidate for arbitrator concerning the arbitration, except that a party, or someone acting on behalf of a party, may communicate ex parte with a candidate for direct appointment pursuant to Section R-12 in order to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection.
- (b) Section R-18(a) does not apply to arbitrators directly appointed by the parties who, pursuant to Section R-17(a), the parties have agreed in writing are non-neutral. Where the parties have so agreed

under Section R-17(a), the AAA shall as an administrative practice suggest to the parties that they agree further that Section R-18(a) should nonetheless apply prospectively.

R-19. Vacancies

- (a) If for any reason an arbitrator is unable to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these rules.
- (b) In the event of a vacancy in a panel of neutral arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.
- (c) In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.

R-20. Preliminary Hearing

- (a) At the request of any party or at the discretion of the arbitrator or the AAA, the arbitrator may schedule as soon as practicable a preliminary hearing with the parties and/or their representatives. The preliminary hearing may be conducted by telephone at the arbitrator's discretion.
- (b) During the preliminary hearing, the parties and the arbitrator should discuss the future conduct of the case, including clarification of the issues and claims, a schedule for the hearings and any other preliminary matters.

R-21. Exchange of Information

- (a) At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct
 - (i) the production of documents and other information, and
 - (ii) the identification of any witnesses to be called.
- (b) At least five business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing.
- (c) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

R-22. Date, Time, and Place of Hearing

The arbitrator shall set the date, time, and place for each hearing. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall send a notice of hearing to the parties at least 10 days in advance of the hearing date, unless otherwise agreed by the parties.

R-23. Attendance at Hearings

The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person other than a party and its representatives.

R-24. Representation

Any party may be represented by counsel or other authorized representative. A party intending to be so represented shall notify the other party and the AAA of the name and address of the representative at least three days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

R-25. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

R-26. Stenographic Record

Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three days in advance of the hearing.

The requesting party or parties shall pay the cost of the record. If the transcript is agreed by the parties, or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.

R-27. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

R-28. Postponements

The arbitrator may postpone any hearing upon agreement of the parties, upon request of a party for good cause shown, or upon the arbitrator's own initiative.

R-29. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

R-30. Conduct of Proceedings

- (a) The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.
- (b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.
- (c) The parties may agree to waive oral hearings in any case.

R-31. Evidence

- (a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default or has waived the right to be present.
- (b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.
- (c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.
- (d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

R-32. Evidence by Affidavit and Post-hearing Filing of Documents or Other Evidence

- (a) The arbitrator may receive and consider the evidence of witnesses by declaration or affidavit, but shall give it only such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission.
- (b) If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for

transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

R-33. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the date and time and the AAA shall notify the parties. Any party who so desires may be present at such an inspection or investigation. In the event that one or all parties are not present at the inspection or investigation, the arbitrator shall make an oral or written report to the parties and afford them an opportunity to comment.

R-34. Interim Measures**

- (a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.
- (b) Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.
- (c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

R-35. Closing of Hearing

The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses

** The Optional Rules may be found on page 49.

to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed. If briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If documents are to be filed as provided in Section R-32 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the closing date of the hearing. The time limit within which the arbitrator is required to make the award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing.

R-36. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed on by the parties in the contract(s) out of which the controversy has arisen, the matter may not be reopened unless the parties agree on an extension of time. When no specific date is fixed in the contract, the arbitrator may reopen the hearing and shall have 30 days from the closing of the reopened hearing within which to make an award.

R-37. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

R-38. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good cause

extend any period of time established by these rules, except the time for making the award. The AAA shall notify the parties of any extension.

R-39. Serving of Notice

- (a) Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, for any court action in connection therewith, or for the entry of judgment on any award made under these rules may be served on a party by mail addressed to the party, or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard to the dispute is or has been granted to the party.
- (b) The AAA, the arbitrator and the parties may also use overnight delivery or electronic facsimile transmission (fax), to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by electronic mail (e-mail), or other methods of communication.
- (c) Unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-40. Majority Decision

When the panel consists of more than one arbitrator, unless required by law or by the arbitration agreement, a majority of the arbitrators must make all decisions.

R-41. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 days from the date of closing the hearing, or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.

R-42. Form of Award

- (a) Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the manner required by law.
- (b) The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.

R-43. Scope of Award

- (a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.
- (b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.
- (c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sec-

tions R-49, R-50, and R-51. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

- (d) The award of the arbitrator(s) may include:
 - (i) interest at such rate and from such date as the arbitrator(s) may deem appropriate; and
 - (ii) an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

R-44. Award upon Settlement

If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a "consent award." A consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses.

R-45. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at the last known addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

R-46. Modification of Award

Within 20 days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other parties shall be given 10

days to respond to the request. The arbitrator shall dispose of the request within 20 days after transmittal by the AAA to the arbitrator of the request and any response thereto.

R-47. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party, furnish to the party, at the party's expense, certified copies of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

R-48. Applications to Court and Exclusion of Liability

- (a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.
- (b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary or proper party in judicial proceedings relating to the arbitration.
- (c) Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.
- (d) Parties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.

R-49. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe an initial filing fee and a case service fee to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable. The filing fee shall be advanced by the party or parties making a claim or counterclaim, subject to final apportionment by the arbitrator in the award. The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

R-50. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

R-51. Neutral Arbitrator's Compensation

- (a) Arbitrators shall be compensated at a rate consistent with the arbitrator's stated rate of compensation.
- (b) If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the AAA and confirmed to the parties.
- (c) Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

R-52. Deposits

The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.

R-53. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

R-54. Suspension for Nonpayment

If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment. If such payments are not made, the arbitrator may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.

Expedited Procedures

E-1. Limitation on Extensions

Except in extraordinary circumstances, the AAA or the arbitrator may grant a party no more than one seven-day extension of time to respond to the demand for arbitration or counterclaim as provided in Section R-4.

E-2. Changes of Claim or Counterclaim

A claim or counterclaim may be increased in amount, or a new or different claim or counterclaim added, upon the agreement of the other party, or the consent of the arbitrator. After the arbitrator is appointed, however, no new or different claim or counterclaim may be submitted except with the arbitrator's consent. If an increased claim or counterclaim exceeds \$75,000, the case will be administered under the regular procedures unless all parties and the arbitrator agree that the case may continue to be processed under the Expedited Procedures.

E-3. Serving of Notices

In addition to notice provided by Section R-39(b), the parties shall also accept notice by telephone. Telephonic notices by the AAA shall subsequently be confirmed in writing to the parties. Should there be a failure to confirm in writing any such oral notice, the proceeding shall nevertheless be valid if notice has, in fact, been given by telephone.

E-4. Appointment and Qualifications of Arbitrator

- (a) The AAA shall simultaneously submit to each party an identical list of five proposed arbitrators drawn from its National Roster from which one arbitrator shall be appointed.

- (b) The parties are encouraged to agree to an arbitrator from this list and to advise the AAA of their agreement. If the parties are unable to agree upon an arbitrator, each party may strike two names from the list and return it to the AAA within seven days from the date of the AAA's mailing to the parties. If for any reason the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment from other members of the panel without the submission of additional lists.
- (c) The parties will be given notice by the AAA of the appointment of the arbitrator, who shall be subject to disqualification for the reasons specified in Section R-17. The parties shall notify the AAA within seven days of any objection to the arbitrator appointed. Any such objection shall be for cause and shall be confirmed in writing to the AAA with a copy to the other party or parties.

E-5. Exchange of Exhibits

At least two business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing. The arbitrator shall resolve disputes concerning the exchange of exhibits.

E-6. Proceedings on Documents

Where no party's claim exceeds \$10,000, exclusive of interest and arbitration costs, and other cases in which the parties agree, the dispute shall be resolved by submission of documents, unless any party requests an oral hearing, or the arbitrator determines that an oral hearing is necessary. The arbitrator shall establish a fair and equitable procedure for the submission of documents.

E-7. Date, Time, and Place of Hearing

In cases in which a hearing is to be held, the arbitrator shall set the date, time, and place of the hearing, to be scheduled to take place within 30 days of confirmation of the arbitrator's appointment. The AAA will notify the parties in advance of the hearing date.

E-8. The Hearing

- (a) Generally, the hearing shall not exceed one day. Each party shall have equal opportunity to submit its proofs and complete its case. The arbitrator shall determine the order of the hearing, and may require further submission of documents within two days after the hearing. For good cause shown, the arbitrator may schedule additional hearings within seven business days after the initial day of hearings.
- (b) Generally, there will be no stenographic record. Any party desiring a stenographic record may arrange for one pursuant to the provisions of Section R-26.

E-9. Time of Award

Unless otherwise agreed by the parties, the award shall be rendered not later than 14 days from the date of the closing of the hearing or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.

E-10. Arbitrator's Compensation

Arbitrators will receive compensation at a rate to be suggested by the AAA regional office.

Procedures for Large, Complex Commercial Disputes

L-1. Administrative Conference

Prior to the dissemination of a list of potential arbitrators, the AAA shall, unless the parties agree otherwise, conduct an administrative conference with the parties and/or their attorneys or other representatives by conference call. The conference will take place within 14 days after the commencement of the arbitration. In the event the parties are unable to agree on a mutually acceptable time for the conference, the AAA may contact the parties individually to discuss the issues contemplated herein. Such administrative conference shall be conducted for the following purposes and for such additional purposes as the parties or the AAA may deem appropriate:

- (a) to obtain additional information about the nature and magnitude of the dispute and the anticipated length of hearing and scheduling;
- (b) to discuss the views of the parties about the technical and other qualifications of the arbitrators;
- (c) to obtain conflicts statements from the parties; and
- (d) to consider, with the parties, whether mediation or other nonadjudicative methods of dispute resolution might be appropriate.

L-2. Arbitrators

- (a) Large, complex commercial cases shall be heard and determined by either one or three arbitrators, as may be agreed upon by the parties. If the parties are unable to agree upon the number of arbitrators and a claim or counterclaim involves at least \$1,000,000, then three arbitrator(s) shall hear and determine the case. If the parties are unable to agree on the number of arbitrators and each

claim and counterclaim is less than \$1,000,000, then one arbitrator shall hear and determine the case.

- (b) The AAA shall appoint arbitrator(s) as agreed by the parties. If they are unable to agree on a method of appointment, the AAA shall appoint arbitrators from the Large, Complex Commercial Case Panel, in the manner provided in the regular Commercial Arbitration Rules. Absent agreement of the parties, the arbitrator(s) shall not have served as the mediator in the mediation phase of the instant proceeding.

L-3. Preliminary Hearing

As promptly as practicable after the selection of the arbitrator(s), a preliminary hearing shall be held among the parties and/or their attorneys or other representatives and the arbitrator(s). Unless the parties agree otherwise, the preliminary hearing will be conducted by telephone conference call rather than in person. At the preliminary hearing the matters to be considered shall include, without limitation:

- (a) service of a detailed statement of claims, damages and defenses, a statement of the issues asserted by each party and positions with respect thereto, and any legal authorities the parties may wish to bring to the attention of the arbitrator(s);
- (b) stipulations to uncontested facts;
- (c) the extent to which discovery shall be conducted;
- (d) exchange and premarking of those documents which each party believes may be offered at the hearing;
- (e) the identification and availability of witnesses, including experts, and such matters with respect to

witnesses including their biographies and expected testimony as may be appropriate;

- (f) whether, and the extent to which, any sworn statements and/or depositions may be introduced;
- (g) the extent to which hearings will proceed on consecutive days;
- (h) whether a stenographic or other official record of the proceedings shall be maintained;
- (i) the possibility of utilizing mediation or other non-adjudicative methods of dispute resolution; and
- (j) the procedure for the issuance of subpoenas.

By agreement of the parties and/or order of the arbitrator(s), the pre-hearing activities and the hearing procedures that will govern the arbitration will be memorialized in a Scheduling and Procedure Order.

L-4. Management of Proceedings

- (a) Arbitrator(s) shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of large, complex commercial cases.
- (b) Parties shall cooperate in the exchange of documents, exhibits and information within such party's control if the arbitrator(s) consider such production to be consistent with the goal of achieving a just, speedy and cost-effective resolution of a large, complex commercial case.
- (c) The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrator(s) may place such limitations on the conduct of such discovery as the arbitrator(s) shall deem appropriate. If the parties cannot agree on

production of documents and other information, the arbitrator(s), consistent with the expedited nature of arbitration, may establish the extent of the discovery.

- (d) At the discretion of the arbitrator(s), upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator(s) may order depositions of, or the propounding of interrogatories to, such persons who may possess information determined by the arbitrator(s) to be necessary to determination of the matter.
- (e) The parties shall exchange copies of all exhibits they intend to submit at the hearing 10 business days prior to the hearing unless the arbitrator(s) determine otherwise.
- (f) The exchange of information pursuant to this rule, as agreed by the parties and/or directed by the arbitrator(s), shall be included within the Scheduling and Procedure Order.
- (g) The arbitrator is authorized to resolve any disputes concerning the exchange of information.
- (h) Generally hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

Optional Rules for Emergency Measures of Protection

O-1. Applicability

Where parties by special agreement or in their arbitration clause have adopted these rules for emergency measures of protection, a party in need of emergency relief prior to the constitution of the panel shall notify the AAA and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by facsimile transmission, or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.

O-2. Appointment of Emergency Arbitrator

Within one business day of receipt of notice as provided in Section O-1, the AAA shall appoint a single emergency arbitrator from a special AAA panel of emergency arbitrators designated to rule on emergency applications. The emergency arbitrator shall immediately disclose any circumstance likely, on the basis of the facts disclosed in the application, to affect such arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the AAA to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

O-3. Schedule

The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application

for emergency relief. Such schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceeding by telephone conference or on written submissions as alternatives to a formal hearing.

O-4. Interim Award

If after consideration, the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage will result in the absence of emergency relief, and that such party is entitled to such relief, the emergency arbitrator may enter an interim award granting the relief and stating the reasons therefore.

O-5. Constitution of the Panel

Any application to modify an interim award of emergency relief must be based on changed circumstances and may be made to the emergency arbitrator until the panel is constituted; thereafter such a request shall be addressed to the panel. The emergency arbitrator shall have no further power to act after the panel is constituted unless the parties agree that the emergency arbitrator is named as a member of the panel.

O-6. Security

Any interim award of emergency relief may be conditioned on provision by the party seeking such relief of appropriate security.

O-7. Special Master

A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate. If the AAA is directed by a judicial authority to nominate a special master to consider and report on an application for emergency relief, the AAA shall proceed

as provided in Section O-1 of this article and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.

O-8. Costs

The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the panel to determine finally the apportionment of such costs.

**Administrative Fee Schedules
(Standard and Flexible Fee)**

The AAA has two administrative fee options for parties filing claims or counterclaims, the Standard Fee Schedule and Flexible Fee Schedule. The Standard Fee Schedule has a two payment schedule, and the Flexible Fee Schedule has a three payment schedule which offers lower initial filing fees, but potentially higher total administrative fees of approximately 12% to 19% for cases that proceed to a hearing. The administrative fees of the AAA are based on the amount of the claim or counterclaim. Arbitrator compensation is not included in this schedule. Unless the parties agree otherwise, arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the award.

In an effort to make arbitration costs reasonable for consumers, the AAA has a separate fee schedule for consumer-related disputes. Please refer to Section C-8 of the Supplementary Procedures for Consumer-Related Disputes when filing a consumer-related claim. Note that the Flexible Fee Schedule is not available on cases administered under these supplementary procedures.

The AAA applies the Supplementary Procedures for Consumer-Related Disputes to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA will have the discretion to apply or not to apply the Supplementary

Procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction, even in consumer arbitration cases filed by the business.

Fees for incomplete or deficient filings: Where the applicable arbitration agreement does not reference the AAA, the AAA will attempt to obtain the agreement of the other parties to the dispute to have the arbitration administered by the AAA. However, where the AAA is unable to obtain the agreement of the parties to have the AAA administer the arbitration, the AAA will administratively close the case and will not proceed with the administration of the arbitration. In these cases, the AAA will return the filing fees to the filing party, less the amount specified in the fee schedule below for deficient filings.

Parties that file demands for arbitration that are incomplete or otherwise do not meet the filing requirements contained in these Rules shall also be charged the amount specified below for deficient filings if they fail or are unable to respond to the AAA's request to correct the deficiency.

Fees for additional services: The AAA reserves the right to assess additional administrative fees for services performed by the AAA beyond those provided for in these Rules which may be required by the parties' agreement or stipulation.

Standard Fee Schedule

An Initial Filing Fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. A Final Fee will be incurred for all cases that proceed to their first hearing. This fee will be payable in advance at

the time that the first hearing is scheduled. This fee will be refunded at the conclusion of the case if no hearings have occurred. However, if the Association is not notified at least 24 hours before the time of the scheduled hearing, the Final Fee will remain due and will not be refunded.

These fees will be billed in accordance with the following schedule:

Amount of Claim	Initial Filing Fee	Final Fee
Above \$0 to \$10,000	\$775	\$200
Above \$10,000 to \$75,000	\$975	\$300
Above \$75,000 to \$150,000	\$1,850	\$750
Above \$150,000 to \$300,000	\$2,800	\$1,250
Above \$300,000 to 500,000	\$4,350	\$1,750
Above \$500,000 to \$1,000,000	\$6,200	\$2,500
Above \$1,000,000 to \$5,000,000	\$8,200	\$3,250
Above \$5,000,000 to \$10,000,000	\$10,200	\$4,000
Above \$10,000,000	Base fee of \$12,800 plus .01% of the amount above \$10,000,000 Fee Capped at \$65,000	\$6,000
Nonmonetary Claims ¹	\$3,350	\$1,250
Deficient Claim Filing Fee ²	\$350	
Additional Services ³		

¹ *This fee is applicable when a claim or counterclaim is not for a monetary amount. Where a monetary claim amount is not known, parties will be required to state a range of claims or be subject to a filing fee of \$10,200.*

² *The Deficient Claim Filing Fee shall not be charged in cases filed by a consumer in an arbitration governed by the Supplementary Procedures for the Resolution of Consumer-Related Disputes, or in cases filed by an Employee who is submitting their dispute to arbitration pursuant to an employer promulgated plan.*

³ *The AAA may assess additional fees where procedures or services outside the Rules sections are required under the parties' agreement or by stipulation.*

Fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Fees are subject to decrease if the amount of a claim or counterclaim is modified before the first hearing.

The minimum fees for any case having three or more arbitrators are \$2,800 for the Initial Filing Fee, plus a \$1,250 Final Fee. Expedited Procedures are applied in any case where no disclosed claim or counterclaim exceeds \$75,000, exclusive of interest and arbitration costs.

Parties on cases filed under either the Flexible Fee Schedule or the Standard Fee Schedule that are held in abeyance for one year will be assessed an annual abeyance fee of \$300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be administratively closed.

For more information, please contact your local AAA office, case management center, or our Customer Service desk at 1-800-778-7879.

Refund Schedule for Standard Fee Schedule

The AAA offers a refund schedule on filing fees connected with the Standard Fee Schedule. For cases with claims up to \$75,000, a minimum filing fee of \$350 will not be refunded. For all other cases, a minimum fee of \$600 will not be refunded. Subject to the minimum fee requirements, refunds will be calculated as follows:

- > 100% of the filing fee, above the minimum fee, will be refunded if the case is settled or withdrawn within five calendar days of filing.
- > 50% of the filing fee will be refunded if the case is settled or withdrawn between six and 30 calendar days of filing.

- > 25% of the filing fee will be refunded if the case is settled or withdrawn between 31 and 60 calendar days of filing.

No refund will be made once an arbitrator has been appointed (this includes one arbitrator on a three-arbitrator panel). No refunds will be granted on awarded cases.

Note: The date of receipt of the demand for arbitration with the AAA will be used to calculate refunds of filing fees for both claims and counterclaims.

Flexible Fee Schedule

A non-refundable Initial Filing Fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. Upon receipt of the Demand for Arbitration, the AAA will promptly initiate the case and notify all parties as well as establish the due date for filing of an Answer, which may include a Counterclaim. In order to proceed with the further administration of the arbitration and appointment of the arbitrator(s), the appropriate, non-refundable Proceed Fee outlined below must be paid.

If a Proceed Fee is not submitted within ninety (90) days of the filing of the Claimant's Demand for Arbitration, the Association will administratively close the file and notify all parties.

No refunds or refund schedule will apply to the Filing or Proceed Fees once received.

The Flexible Fee Schedule below also may be utilized for the filing of counterclaims. However, as with the Claimant's claim, the counterclaim will not be presented to the arbitrator until the Proceed Fee is paid.

A Final Fee will be incurred for all claims and/or counterclaims that proceed to their first hearing. This fee will be payable in advance when the first hearing is scheduled,

but will be refunded at the conclusion of the case if no hearings have occurred. However, if the Association is not notified of a cancellation at least 24 hours before the time of the scheduled hearing, the Final Fee will remain due and will not be refunded.

All fees will be billed in accordance with the following schedule:

Amount of Claim	Initial Filing Fee	Proceed Fee	Final Fee
Above \$0 to \$10,000	\$400	\$475	\$200
Above \$10,000 to \$75,000	\$625	\$500	\$300
Above \$75,000 to \$150,000	\$850	\$1250	\$750
Above \$150,000 to \$300,000	\$1,000	\$2125	\$1,250
Above \$300,000 to \$500,000	\$1,500	\$3,400	\$1,750
Above \$500,000 to \$1,000,000	\$2,500	\$4,500	\$2,500
Above \$1,000,000 to \$5,000,000	\$2,500	\$6,700	\$3,250
Above \$5,000,000 to \$10,000,000	\$3,500	\$8,200	\$4,000
Above \$10,000,000	\$4,500	\$10,300 plus .01% of claim amount over \$10,000,000 up to \$65,000	\$6,000
Nonmonetary ⁴	\$2,000	\$2,000	\$1,250
Deficient Claim Filing Fee	\$350		
Additional Services ⁵			

⁴ This fee is applicable when a claim or counterclaim is not for a monetary amount. Where a monetary claim amount is not known, parties will be required to state a range of claims or be subject to a filing fee of \$3,500 and a proceed fee of \$8,200.

⁵ The AAA reserves the right to assess additional administrative fees for services performed by the AAA beyond those provided for in these Rules and which may be required by the parties' agreement or stipulation.

For more information, please contact your local AAA office, case management center, or our Customer Service desk at 1-800-778-7879. All fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Fees are subject to decrease if the amount of a claim or counterclaim is modified before the first hearing.

The minimum fees for any case having three or more arbitrators are \$1,000 for the Initial Filing Fee; \$2,125 for the Proceed Fee; and \$1,250 for the Final Fee.

Under the Flexible Fee Schedule, a party's obligation to pay the Proceed Fee shall remain in effect regardless of any agreement of the parties to stay, postpone or otherwise modify the arbitration proceedings. Parties that, through mutual agreement, have held their case in abeyance for one year will be assessed an annual abeyance fee of \$300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be closed.

Note: The date of receipt by the AAA of the demand for arbitration will be used to calculate the ninety (90) day time limit for payment of the Proceed Fee.

There is no Refund Schedule in the Flexible Fee Schedule.

Hearing Room Rental

The fees described above do not cover the cost of hearing rooms, which are available on a rental basis. Check with the AAA for availability and rates.