

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS

PUBLISHED BY THE COMMISSION

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**MEMBERS OF THE FEDERAL TRADE COMMISSION
DURING THE PERIOD
JANUARY 1, 2007 TO JUNE 30, 2007**

DEBORAH PLATT MAJORAS, *Chairman*
Took oath of office August 16, 2004.

PAMELA JONES HARBOUR, *Commissioner*
Took oath of office August 4, 2003.

JON LEIBOWITZ, *Commissioner*
Took oath of office September 3, 2004.

WILLIAM E. KOVACIC, *Commissioner*
Took oath of office January 4, 2006.

J. THOMAS ROSCH, *Commissioner*
Took oath of office January 5, 2006.

DONALD S. CLARK, *Secretary*
Appointed August 28, 1988.

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FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS

JANUARY 1, 2007 TO JUNE 30, 2007

IN THE MATTER OF

JOHNSON & JOHNSON AND PFIZER INC.

CONSENT ORDER, ETC. , IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL
TRADE COMMISSION ACT

Docket C-4180; File No. 061 0220

Complaint, December 12, 2006 – Decision, January 16, 2007

This consent order addresses the acquisition by respondent Johnson & Johnson of voting securities and assets comprising respondent Pfizer Inc.'s Consumer Healthcare Division. The acquisition would eliminate substantial competition between the respondents in the research, development, manufacture, and sale of certain over-the-counter consumer healthcare products. The order requires the divestiture of all assets relating to certain Pfizer products, including research and development, intellectual property, and customer and supply contracts: all assets relating to Zantac⁷ H-2 blockers (heartburn and acid indigestion drugs) to Boehringer Ingelheim Pharmaceuticals, Inc., and all assets relating to Cortizone⁷ hydrocortisone anti-itch products, Unisom⁷ sleep aids, and Balmex⁷ diaper rash treatment products to Chattem, Inc. The order also requires that Johnson & Johnson and Pfizer maintain the viability of the assets to be divested until the divestitures take place.

Participants

For the *Commission*: John D. Carroll, Jacqueline K. Mendel, and James E. Southworth.

For the *Respondents*: Steven A. Newborn, Ann Malester, and Steven K. Bernstein, Weil, Gotshal & Manges LLP; and Paul T. Dennis, Stephen A. Stack, Jr., and Gorav Jindal, Dechert LLP.

Complaint

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Johnson & Johnson (“J&J”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire certain assets and voting securities of Respondent Pfizer Inc. (“Pfizer”) (collectively “Respondents”), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT JOHNSON & JOHNSON

1. Respondent J&J is a corporation organized, existing, and doing business under and by virtue the laws of the state of New Jersey, with its office and principal place of business located at One Johnson & Johnson Plaza, New Brunswick, New Jersey 08933.

2. Respondent J&J is engaged in, among other things, the research, development, manufacture, distribution, and sale of over-the-counter (“OTC”) consumer healthcare products, including H-2 blockers, hydrocortisone anti-itch products, nighttime sleep-aids, and diaper rash treatments.

3. Respondent J&J is, and at all times herein has been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

Complaint

II. RESPONDENT PFIZER

4. Respondent Pfizer is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its offices and principal place of business located at 235 E.42nd St., New York, New York 10017.

5. Respondent Pfizer is engaged in, among other things, the research, development, manufacture, distribution, and sale of OTC consumer healthcare products, including H-2 blockers, hydrocortisone anti-itch products, nighttime sleep-aids, and diaper rash treatments.

6. Respondent Pfizer is, and at all times herein has been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. §12, and is a corporation whose business is in or affects commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED ACQUISITION

7. Pursuant to a Stock and Asset Purchase Agreement dated June 25, 2006 (the “Agreement”), J&J proposes to acquire certain voting securities and assets comprising Pfizer’s Consumer Healthcare Division in a transaction valued at approximately \$16.6 billion (the “Acquisition”).

IV. THE RELEVANT MARKETS

8. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the acquisition are the research, development, manufacture, and sale of: (a) OTC H-2 blockers; (b) OTC hydrocortisone anti-itch products; (c) OTC nighttime sleep-aids; and (d) OTC diaper rash treatments.

9. OTC H-2 blockers are a class of drugs available without a prescription for the treatment of heartburn and acid indigestion.

Complaint

H-2 blockers work by blocking histamine from stimulating the gastric parietal cells, thereby suppressing secretion of stomach acid.

10. OTC hydrocortisone anti-itch products are topical medications available without a prescription that contain 0.25 to 1.0 percent hydrocortisone, a corticosteroid that reduces skin inflammation. These products are used to relieve skin inflammation that is associated with a variety of skin conditions such as dermatitis, eczema, psoriasis and poison ivy.

11. OTC nighttime sleep-aids are drugs that are available without a prescription that are indicated solely for the relief of occasional sleeplessness by individuals who have difficulty falling asleep.

12. OTC diaper rash treatments are creams or ointments that are available without a prescription that are used to prevent and treat diaper rash.

13. For the purposes of this complaint, the United States is the relevant geographic area in which to analyze the effects of the acquisition in each of the relevant lines of commerce.

V. THE STRUCTURE OF THE MARKET

14. The relevant market for the manufacture, distribution, and sale of OTC H-2 blockers in the United States is highly concentrated whether measured by the Herfindahl-Hirschman Index (“HHI”) or two-or four-firm concentration ratios. Respondents J&J and Pfizer are the two largest suppliers of OTC H-2 blocker products in the United States. J&J is the market leader with its Pepcid® products, while Pfizer is the second leading supplier with its Zantac® products. Together, they account for over 70% of the sales in this highly concentrated market. Accordingly, the Acquisition would significantly increase the concentration levels in the United States for OTC H-2 blocker

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products, leaving J&J as the dominant supplier. Respondents are actual competitors in this relevant market.

15. The relevant market for the manufacture, distribution, and sale of OTC hydrocortisone anti-itch products in the United States is highly concentrated whether measured by the Herfindahl-Hirschman Index (“HHI”) or two-or four-firm concentration ratios. Respondents J&J and Pfizer are the only significant suppliers of branded OTC hydrocortisone anti-itch products in the United States. Pfizer is the market leader with its Cortizone[®] products, while J&J is the second leading supplier with its Cortaid⁷ products. Together, they account for over 55% of the sales in this highly concentrated market. Accordingly, the Acquisition would significantly increase the concentration levels in the United States for OTC hydrocortisone anti-itch products, leaving J&J as the dominant supplier. Respondents are actual competitors in this relevant market.

16. The relevant market for the manufacture, distribution, and sale of OTC nighttime sleep-aids in the United States is highly concentrated whether measured by the Herfindahl-Hirschman Index (“HHI”) or two-or four-firm concentration ratios. Respondents J&J and Pfizer are the two largest suppliers of OTC nighttime sleep-aids in the United States. Pfizer is the market leader with its Unisom[®] products, while J&J is the second leading supplier with its Simply Sleep[®] products. Together, they account for over 45% of the sales in this highly concentrated market. Accordingly, the Acquisition would significantly increase the concentration levels in the United States for OTC nighttime sleep-aids, leaving J&J as the dominant supplier. Respondents are actual competitors in this relevant market.

17. The relevant market for the manufacture, distribution, and sale of OTC diaper rash treatments in the United States is highly concentrated whether measured by the Herfindahl-Hirschman Index (“HHI”) or two-or four-firm concentration ratios. Respondents J&J and Pfizer are two significant suppliers of OTC diaper rash treatments in the United States. Pfizer is the market

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leader with its Desitin[®] products, while J&J is the third largest supplier with its Balmex[®] products. Together, they account for nearly 50% of the sales in this highly concentrated market. Accordingly, the Acquisition would significantly increase the concentration levels in the United States for OTC diaper rash treatments, leaving J&J as the dominant supplier. Respondents are actual competitors in this relevant market.

VI. ENTRY CONDITIONS

18. Entry into any relevant line of commerce would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition set forth in Paragraph 19 below. Entry into any of these markets would require the investment of extremely high sunk costs to, among other things, develop products, obtain regulatory approval, establish a brand name, and provide promotional funding and advertising to support the product(s), which would be difficult to justify given the market structure and sales opportunities in the affected markets. Even if a new entrant were willing to take on such investments, it would also face the difficult task of convincing retailers to carry its products. As a result, new entry into any of these markets sufficient to achieve a significant market impact within two years is unlikely.

VII. EFFECTS OF THE ACQUISITION

19. The effects of the Acquisition, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. by eliminating actual, direct, and substantial competition between Respondents J&J and Pfizer for the research, development, manufacture, and sale of OTC H-2 blockers,

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OTC hydrocortisone anti-itch products, OTC nighttime sleep-aids, and OTC diaper rash treatments in the United States;

b. by increasing the ability of the merged entity to unilaterally raise prices of OTC H-2 blockers, OTC hydrocortisone anti-itch products, OTC nighttime sleep-aids, and OTC diaper rash treatments in the United States; and

c. by reducing the merged entity's incentives to improve service or product quality for OTC H-2 blockers, OTC hydrocortisone anti-itch products, OTC nighttime sleep-aids, and OTC diaper rash treatments in the United States.

VIII. VIOLATIONS CHARGED

20. The Acquisition described in Paragraph 7 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

21. The Acquisition described in Paragraph 7, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twelfth day of December, 2006, issues its Complaint against said Respondents.

By the Commission, Commissioner Harbour, Commissioner Kovacic, and Commissioner Rosch recused.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Johnson & Johnson (“J&J”) of the Consumer Healthcare Division of Respondent Pfizer Inc. (“Pfizer”), hereinafter referred to as “Respondents,” and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

Decision and Order

1. Respondent J&J is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its headquarters address located at One Johnson & Johnson Plaza, New Brunswick, New Jersey 08933.
2. Respondent Pfizer is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address located at 235 E. 42nd St., New York, New York 10017.
3. The Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in the Order, the following definitions shall apply:

- A. "J&J" means Johnson & Johnson, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by J&J, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Pfizer" means Pfizer Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Pfizer, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. "Commission" means the Federal Trade Commission.

Decision and Order

- D. “Acquirer” means the following:
1. an entity that is specifically identified in this Order to acquire particular assets that the Respondents are required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission’s determination to make this Order final; or
 2. an entity that receives the prior approval of the Commission to acquire particular assets that the Respondents are required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.
- E. “Acquisition” means the acquisition of Pfizer’s Consumer Healthcare Division as contemplated by the AStock and Asset Purchase Agreement” dated June 25, 2006, between Johnson & Johnson and Pfizer Inc.
- F. “Acquisition Date” means the date the Respondents close on the Acquisition.
- G. “Agency(ies)” means any governmental regulatory authority or authorities in the world responsible for granting approvals, clearances, qualifications, licenses, or permits for any aspect of the research, Development, manufacture, marketing, distribution, or sale of the Divestiture Products. The term Agency includes, but is not limited to, the United States Food and Drug Administration (“FDA”).
- H. “Balmex Assets” means all of Respondent J&J’s rights, title and interest in and to all assets related to Respondent J&J’s United States business related to the Balmex Products to the extent legally transferable, including the research, Development, manufacture, distribution, marketing, and sale

Decision and Order

of the Balmex Products including, without limitation, the following:

1. all Product Intellectual Property related to the Balmex Products including, but not limited to the Balmex⁷ Product Trademark, or any variations or derivatives of such Product Trademark; *provided, however*, that Respondent J&J may receive a transitional license back for a limited period of time (as is approved by the Commission in the Remedial Agreements related to the Balmex Products) to the Balmex⁷ Product Trademark for the purposes of winding up the use of such Product Trademark in Respondent J&J's businesses associated with such Product Trademark);
2. a non-exclusive, perpetual, transferable, fully paid-up and royalty-free license(s) to all Retained Product Licensed Intellectual Property related to the Balmex Products to use, make, distribute, offer for sale, promote, advertise, sell, import, or have used, made, distributed, offered for sale, promoted, advertised, sold, or imported, the Balmex Products or any line extension thereof anywhere in the United States; *provided, however*, Respondents shall also grant an exclusive (even as to Respondents), perpetual, fully paid-up and royalty-free license(s) with rights to sublicense to the Balmex Patent Applications to use, make, distribute, offer for sale, promote, advertise, sell, import, or have used, made, distributed, offered for sale, promoted, advertised, sold, or imported, the Balmex Products or any line extensions thereof in the field of OTC diaper rash treatment products anywhere in the United States;
3. all Product Manufacturing Technology related to the Balmex Products;

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4. all Product Marketing Materials related to the Balmex Products;
5. all Website(s) related to the Balmex Products;
6. all Product Assumed Contracts to the extent related to the Balmex Products (copies to be provided to the Acquirer on or before the Divestiture Date);
7. all books, records, and files related to the Balmex Products;
8. a list of all customers and/or targeted customers for the Balmex Products and the pricing and promotions and/or planned or proposed pricing and promotions of the Balmex Products for such customers;
9. all inventory in existence as of the Divestiture Date including, but not limited to, raw materials, packaging materials, work-in-process and finished goods related to the Balmex Products;
10. all unfilled customer orders for finished goods as of the Divestiture Date related to the Balmex Products (“ list of such orders is to be provided to the Acquirer within two (2) days after the Divestiture Date); and
11. the Balmex Manufacturing Equipment;

Provided, however, that in cases in which documents or other materials included in the Balmex Assets contain information (1) that relates both to the Balmex Products and to Retained Products or other businesses of Respondent J&J and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Balmex Products or (2) for which Respondent J&J has a legal obligation to retain the original copies, Respondent

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J&J shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer, Respondent J&J shall provide the Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Respondent J&J provides the Acquirer with the above-described information without requiring Respondent J&J to completely divest itself of information that, in content, also relates to Retained Products and businesses other than the Balmex Products;

Provided further, however, that with respect to any contract or agreement included in the Balmex Assets that relates both to the Balmex Assets and to any of Respondent J&J Retained Products or businesses not divested pursuant to this Order, Respondent J&J shall assign to the Acquirer all such rights under the contract or agreement as are related to the Balmex Products, but concurrently may retain its rights under such contract or agreement for the purposes of the Retained Products and businesses not divested pursuant to this Order;

Provided further, however, that the assets described in Paragraphs I.H.6, I.H.9, and I.H.11 shall be at the Acquirer's option if the Commission approves a divestiture that excludes such assets.

- I. "Balmex Employees" means the persons listed in non-public Appendix D to this Order.
- J. "Balmex Manufacturing Equipment" means all manufacturing and other equipment, located at any facility, that:
 - 1. is owned by Respondent J&J; and

Decision and Order

2. was used, within the one (1) year period immediately prior to the Acquisition and/or within the one (1) year period immediately prior to the Divestiture Date, in the research, Development, manufacture, or packaging of the Balmex Products.

K. “Balmex Patent Applications” means:

1. USSN 11,216,441 (“nti-inflammatory composition);
2. USSN 11,215,912 (“nti-inflammatory method of use); and
3. US 20005/0202056 (Composition for reducing enzymatic irritation to skin).

L. “Balmex Products” means all Products Developed, in Development, manufactured, distributed, marketed or sold in the United States by Respondent J&J prior to the Acquisition that were marketed or sold or to be marketed or sold in the United States as OTC diaper rash treatment Products using the Product Trademark Balmex[®] or any variations or derivatives of such Product Trademark including, but not limited to, Balmex[®] Zinc Oxide Diaper Rash Cream and Balmex[®] Daily Skin Protectant; *provided however*, Balmex Products does not include any products with the Aveeno[®] or Johnson[®] Product Trademarks including, but not limited to, Johnson’s[®] No More Rash[®] Diaper Rash Cream and Aveeno[®] Diaper Rash Cream.

M. “BI” means Boehringer Ingelheim Pharmaceuticals, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its headquarters address at 900 Ridgebury Road, Ridgefield, Connecticut 06877-0368.

N. “BI Agreement” means the Asset Purchase Agreement among Johnson & Johnson, Pfizer Inc. and Boehringer Ingelheim Pharmaceuticals, Inc., dated as of October 12, 2006, and

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amended by letter agreement dated November 27, 2006, and all amendments, exhibits, attachments, agreements, and schedules thereto. The BI Agreement is attached to this Order and contained in non-public Appendix B.

- O. “cGMP” means current Good Manufacturing Practice as set forth in the United States Federal, Food, Drug, and Cosmetic Act, as amended, and includes all rules and regulations promulgated by the FDA thereunder.
- P. “Chattem” means Chattem, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its headquarters address at 1715 West 38th Street, Chattanooga, Tennessee 37409.
- Q. “Chattem Agreement” means the Asset Purchase Agreement among Johnson & Johnson, Pfizer Inc. and Chattem, Inc., dated as of October 5, 2006, and amended by letter agreement dated November 27, 2006, and all amendments, exhibits, attachments, agreements, and schedules thereto. The Chattem Agreement is attached to this Order and contained in non-public Appendix C.
- R. “Chattem Supply Agreement” means the Manufacturing and Supply Agreement among Johnson & Johnson, Pfizer Inc. and Chattem, Inc., appended to the Chattem Agreement as Exhibit D., and all amendments, exhibits, attachments, and schedules thereto.
- S. “Confidential Business Information” means all information owned by, or in the possession or control of, Respondents that is not in the public domain and that is related to the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, pricing, supply, sales, sales support or use of the Divestiture Products; *provided however*, that the restrictions contained in this Order regarding the use, conveyance, provision, or disclosure of “Confidential Business Information” shall not apply to the following:

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1. information that subsequently falls within the public domain through no violation of this Order or breach of confidentiality or non-disclosure agreement with respect to such information by Respondents;
 2. information related to the Balmex Products that Respondent Pfizer can demonstrate it obtained without the assistance of Respondent J&J prior to the Acquisition;
 3. information related to the Unisom Products, Cortizone10 Products, and Zantac Products that Respondent J&J can demonstrate it obtained without the assistance of Respondent Pfizer prior to the Acquisition;
 4. information that is required by Law to be publically disclosed; or
 5. information that does not relate to the Divestiture Products.
- T. "Cortizone 10 Assets" means all of Respondent Pfizer's rights, title and interest in and to all assets related to Respondent Pfizer's United States business related to the Cortizone 10 Products to the extent legally transferable, including the research, Development, manufacture, distribution, marketing, and sale of the Cortizone 10 Products including, without limitation, the following:
1. all Product Intellectual Property related to the Cortizone 10 Products including, but not limited to, the Cortizone 10[®] and Cortizone 5[®] Product Trademarks, or any variations or derivatives of such Product Trademarks; *provided, however,* that Respondents may receive a transitional license back for a limited period of time (as is approved by the Commission in the Remedial Agreements related to the Cortizone 10 Products) to these Product

Decision and Order

Trademarks for the purposes of winding up the use of such Product Trademarks in Respondents' businesses associated with such Product Trademarks;

2. a non-exclusive, perpetual, transferable, fully paid-up and royalty-free license(s) to all Retained Product Licensed Intellectual Property related to the Cortizone 10 Products to use, make, distribute, offer for sale, promote, advertise, sell, import, or have used, made, distributed, offered for sale, promoted, advertised, sold, or imported, the Cortizone 10 Products or any line extensions thereof anywhere in the United States;
3. all Product Manufacturing Technology related to the Cortizone 10 Products;
4. all Product Marketing Materials related to the Cortizone 10 Products;
5. all Website(s) related to the Cortizone 10 Products;
6. all Product Assumed Contracts to the extent related to the Cortizone 10 Products (copies to be provided to the Acquirer on or before the Divestiture Date);
7. all books, records, and files related to the Cortizone 10 Products;
8. a list of all customers and/or targeted customers for the Cortizone 10 Products and the pricing and promotions and/or planned or proposed pricing and promotions of the Cortizone 10 Products for such customers;
9. all inventory in existence as of the Divestiture Date including, but not limited to, raw materials, packaging materials, work-in-process and finished goods related to the Cortizone 10 Products;

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10. all unfilled customer orders for finished goods as of the Divestiture Date related to the Cortizone 10 Products (a list of such orders is to be provided to the Acquirer within two (2) days after the Divestiture Date); and
11. the Cortizone 10 Manufacturing Equipment;

Provided, however, that in cases in which documents or other materials included in the Cortizone 10 Assets contain information (1) that relates both to the Cortizone 10 Products and to Retained Products or other businesses of Respondents and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Cortizone 10 Products or (2) for which Respondents have a legal obligation to retain the original copies, Respondents shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer, Respondents shall provide the Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Respondents provide the Acquirer with the above-described information without requiring Respondents to completely divest itself of information that, in content, also relates to Retained Products and businesses other than the Cortizone 10 Products;

Provided further, however, that with respect to any contract or agreement included in the Cortizone 10 Assets that relates both to the Cortizone 10 Assets and to any of Respondents' Retained Products or businesses not divested pursuant to this Order, Respondents shall assign the Acquirer all such rights under the contract or agreement as are related to the Cortizone 10 Products, but concurrently may retain its rights under such contract or agreement for the purposes of the Retained Products and businesses not divested pursuant to this Order;

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Provided further, however, that the assets described in Paragraphs I.T.6, I.T.9, and I.T.11 shall be at the Acquirer's option if the Commission approves a divestiture that excludes such assets.

- U. "Cortizone 10 Employees" means persons listed in non-public Appendix E to this Order.
- V. "Cortizone 10 Manufacturing Equipment" means all manufacturing and other equipment, located at any facility, that:
1. is owned by Respondent Pfizer; and
 2. was used, within the one (1) year period immediately prior to the Acquisition and/or within the one (1) year period immediately prior to the Divestiture Date, in the research, Development, manufacture, or packaging of the Cortizone 10 Products.
- W. "Cortizone 10 Products" means all Products Developed, in Development, manufactured, distributed, marketed or sold in the United States by Respondent Pfizer prior to the Acquisition that were marketed or sold or to be marketed or sold in the United States as OTC hydrocortisone anti-itch products using the Cortizone 10[®] or Cortizone 5[®] Product Trademarks, or any variations or derivatives of such Product Trademarks, including, but not limited to, Cortizone 10[®] Quickshot Anti-Itch Spray, Cortizone 10[®] Creme, Cortizone 10[®] External Anal Itch Relief Creme, Cortizone 10[®] Ointment, Cortizone 10[®] Plus Maximum Strength Creme with 10 Moisturizers, and Cortizone 5[®] Ointment.
- X. "Designee" means any entity other than Respondents that will manufacture a Divestiture Product for an Acquirer.

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- Y. “Development” means formulation, design (including packaging design), process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, Product approval and registration. “Develop” means to engage in Development.
- Z. “Direct Cost” means a cost not to exceed the cost of direct labor and direct material used to provide the relevant assistance or service; *provided, however*, Direct Cost to the Acquirer for its use of any of the Respondents’ employees shall not exceed the average hourly wage rate for such employee.
- AA. “Divestiture Assets” means the Zantac Assets and the Non-Zantac Assets.
- BB. “Divestiture Date” means as to each Divestiture Product the date on which a Respondent (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver or otherwise convey assets related to such Divestiture Product to an Acquirer pursuant to this Order.
- CC. “Divestiture Product Employees” means the Balmex Employees, the Cortizone 10 Employees, the Unisom Employees, and the Zantac Employees.
- DD. “Divestiture Products” means any or all of the Zantac Products and the Non-Zantac Products.
- EE. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to Paragraph V. of this Order.
- FF. “Domain Name” means the domain names (universal resource locators) and registrations thereof, issued by any entity or authority that issues and maintains the domain name registration; *provided, however*, Domain Name shall not include any trademark or service mark rights to such domain names

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other than the rights to the Product Trademarks related to the Divestiture Products.

GG. “Excluded Assets” means:

1. The following trademarks, including names and logos: Pfizer Inc., Pfizer, Pfizer Consumer Healthcare, Warner-Lambert, Parke-Davis, Pharmacia, Johnson & Johnson, J&J, Johnson’s, Johnson & Johnson Consumer Companies, Inc., JJCCI, McNeil, McNeil-PPC, Inc., Personal Products Company, Aveeno, or the names or trade dress of any other corporations, companies, or brands owned or sold by Respondents or related logos to the extent used on or in Respondent J&J’s or Respondent Pfizer’s Retained Products or businesses not divested pursuant to this Order;
2. The following websites: www.pfizer.com, www.pfizerch.com, www.baby.com, www.jnj.com;
3. Content of Website(s) that is owned by Third Parties and other Product Intellectual Property not owned by Respondents that is incorporated in Website(s), such stock photographs used in the Website(s), *except* to the extent that Respondents can convey its rights, if any, therein;
4. Content of Website(s) that is unrelated to the Divestiture Products;
5. Cash or cash equivalents related to the Divestiture Assets;
6. Accounts receivable related to the Divestiture Assets;
7. Losses, loss carry-forwards, or rights to receive funds, credits or loss carry-forwards with respect to any and all taxes of Respondents that relate to any liability retained by Respondents;

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8. Rights, claims, or credits of Respondents relating to any assets or liability being retained by Respondents;
 9. Real property relating to the Divestiture Assets;
 10. Information management systems used by Respondents;
 11. Insurance policies relating to the Divestiture Assets and all rights of any nature with respect thereto;
 12. Attorney work product, attorney client communications and other items protected by the attorney-client privilege;
 13. Documents received from third-parties related to the divestiture of the Divestiture Assets;
 14. Equipment relating to the distribution of the Divestiture Assets including, but not limited to, equipment at Pfizer distribution facilities at Lititz, PA, Elk Grove, IL, and Reno, NV, and equipment at J&J distribution facilities at Mechanicsburg, PA, Memphis, TN, and Ontario, CA;
 15. Property and assets located outside of the United States;
 16. Non-finished goods inventory, including raw materials, packaging materials, and work-in-process not directly related to the Divestiture Products;
 17. All personnel records; *provided, however*, that the foregoing shall not affect obligations of Respondents under Paragraph II.M. of this Order; and
 18. Retained Product Licensed Intellectual Property.
- HH. "GSK" means GlaxoSmithKline plc, a corporation headquartered in the United Kingdom, with its principal United States Consumer Products division headquartered at 1000 GSK Drive, Moon Township, PA 15108.

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- II. “Governmental Entity” means any Federal, state, local or non-U.S. government, or any court, legislature, governmental agency, or governmental commission, or any judicial or regulatory authority of any government.
- JJ. “High Volume Retail Account” means any retailer or distributor whose annual and/or projected aggregate annual sales in units or in dollars of a Divestiture Product in the United States on a company-wide level was or is among the top twenty highest of such sales within the United States on any of the following dates: 1) the end of the last quarter that immediately preceded the date of the public announcement of the proposed Acquisition; 2) the end of the last quarter that immediately preceded the Acquisition Date; or 3) the end of the last quarter that immediately preceded the Divestiture Date for the relevant assets.
- KK. “Interim Monitor” means any monitor appointed pursuant to Paragraph IV. of this Order or Paragraph III. of the related Order to Maintain Assets.
- LL. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Governmental Entity having the effect of law.
- MM. “Non-Zantac Assets” means the Balmex Assets, the Cortizone 10 Assets, and the Unisom Assets; *provided, however*, that the Non-Zantac Assets shall not include the Excluded Assets.
- NN. “Non-Zantac Divestiture Agreement” means:
1. The Chattem Agreement; or
 2. Any agreement that receives the prior approval of the Commission between Respondents and an Acquirer for the divestiture of the Non-Zantac Assets entered into pursuant

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to Paragraph II.B. of this Order, and any attachments, agreements, and schedules related thereto.

OO. “Non-Zantac Products” means the Balmex Products, the Cortizone 10 Products, and the Unisom Products.

PP. “Non-Zantac Supply Agreement” means:

1. the Chattem Supply Agreement; or
2. any agreement that receives the prior approval of the Commission between Respondents and an Acquirer for the supply of Non-Zantac Products entered pursuant to Paragraph II.C. of this Order, and any attachments, agreements, and schedules thereto.

QQ. “OTC” means, with respect to any Product, an over-the-counter product that contains an active pharmaceutical ingredient and is sold without a prescription from a licensed practitioner.

RR. “Patents” means all United States patents, patent applications, and statutory invention registrations, in each case existing as of the Divestiture Date (*except* where this Order specifies a different time), and includes all reissues, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto in the United States, related to any Product of or owned by Respondents as of the Divestiture Date.

SS. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or governmental entity, and any subsidiaries, divisions, groups or affiliates thereof.

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TT. "Product" means a retail consumer good Developed, made, distributed, marketed or sold by Respondents.

UU. "Product Assumed Contracts" means all of the following contracts or agreements:

1. pursuant to which any Third Party purchases, or has the option to purchase without further negotiation, the Divestiture Products from the Respondents;
2. pursuant to which the Respondents purchase any materials from any Third Party for use in connection with the manufacture of the Divestiture Products;
3. relating to any quality control trials involving the Divestiture Products;
4. relating to the marketing of the Divestiture Products or educational matters relating to the Divestiture Products including, but not limited to, the slotting and/or shelf spacing assignments of the Divestiture Product with the High Volume Retail Accounts;
5. relating to the manufacture of the Divestiture Products;
6. constituting confidentiality agreements involving the Divestiture Products;
7. involving any royalty, licensing, or similar arrangement involving the Divestiture Products;
8. pursuant to which any services are provided with respect to the Divestiture Products or the Divestiture Products business, including consultation arrangements; and/or
9. pursuant to which any Third Party collaborates with the Respondents in the performance of research, Develop-

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ment, marketing or selling of the Divestiture Products or the Divestiture Products business.

VV. “Product Copyrights” means United States rights to all original works of authorship of any kind related to the Divestiture Products and any registrations and applications for registrations thereof existing as of the Divestiture Date, including, but not limited to, the following: all promotional materials for retailers; all promotional materials for customers; copyrights in Development data and reports relating to the research and Development of the Divestiture Products or of any materials used in the research, Development, manufacture, marketing or sale of the Divestiture Products, including all raw data relating to quality trials of the Products, customer information, promotional and marketing materials, the Divestiture Products sales forecasting models, Website content and advertising and display materials; all records relating to employees who accept employment with the Acquirer (excluding any personnel records the transfer of which is prohibited by applicable Law); all records, including customer lists, sales force call activity reports, vendor lists, sales data, slotting allowance data, speaker lists, manufacturing records, manufacturing processes, and supplier lists; all data contained in laboratory notebooks relating to the Divestiture Products.

WW. “Product Employee Information” means the following, as and to the extent permitted by the Law:

1. a complete and accurate list containing the name of each relevant employee (including former employees who were employed by Respondents within ninety (90) days of the execution date of any Remedial Agreement);
2. with respect to each such employee, the following information:
 - a. the date of hire and effective service date;

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- b. job title or position held;
 - c. a specific description of the employee's responsibilities related to the relevant Divestiture Product; *provided, however*, in lieu of this description, Respondents may provide the employee's most recent performance appraisal;
 - d. the base salary or current wages;
 - e. the most recent bonus paid, aggregate annual compensation for the Respondent's last fiscal year and current target or guaranteed bonus, if any;
 - f. employment status (*i.e.*, active or on leave or disability; full-time or part-time); and
 - g. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and
3. at the Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.

XX. "Product Intellectual Property" means all of the following related to a Divestiture Product (other than Retained Product Licensed Intellectual Property):

1. Patents;
2. Product Copyrights;
3. Product Trademarks, trade names, Product Trade Dress, trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary

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technical, business, research, Development and other information; and

4. rights to obtain and file for patents and registrations thereof.

YY. “Product Manufacturing Technology” means all technology, trade secrets, know-how, and proprietary information (whether patented, patentable or otherwise) related to the manufacture of (including, at the Acquirer’s option, information related to all equipment used to manufacture) the Divestiture Products including, but not limited to all product specifications, processes, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals, and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, and labeling and all other information related to the manufacturing process, and supplier lists.

ZZ. “Product Marketing Materials” means all marketing materials used anywhere in the United States related to the Divestiture Products as of the Divestiture Date, including, without limitation, all advertising materials, training materials, product data, price lists, mailing lists, sales materials (e.g., detailing reports; vendor lists; sales data), marketing information, (e.g., competitor information; research data; market intelligence reports; statistical programs (if any) used for marketing and sales research; customer information, including customer sales information; sales forecasting models; educational materials; Website content and advertising and display materials; speaker lists), promotional and marketing materials, artwork for the production of packaging components, television masters and other similar materials related to the Divestiture Products.

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- AAA. “Product Trade Dress” means the current trade dress of the Product, including but not limited to, Product packaging, and the lettering of the Product trade name or brand name.
- BBB. “Product Trademarks” means all United States proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for the Products.
- CCC. “Releasee(s)” means the Acquirer of the Divestiture Assets or any entity controlled by or under common control with such Acquirer, or any licensees, sub-licensees, manufacturers, suppliers, distributors, and customers of such Acquirer, of such Acquirer-affiliated entities.
- DDD. “Remedial Agreement” means:
1. Any agreement related to the Zantac Assets entered into pursuant to Paragraph II.A. of this Order;
 2. Any agreement related to the Non-Zantac Assets entered into pursuant to Paragraphs II.B. and II.C. of this Order; and
 3. Any agreement entered into by a Divestiture Trustee pursuant to Paragraph V. of this Order.
- EEE. “Respondents” means J&J and Pfizer, individually and collectively.
- FFF. “Retained Product” means any Product other than a Divestiture Product.
- GGG. “Retained Product Licensed Intellectual Property” means the following:

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1. Balmex Patent Applications; *provided, however*, Respondents may not use the Balmex Patent Applications for OTC diaper rash treatment Retained Products;
2. Zantac Patents; *provided, however*, Respondents may not use the Zantac Patents for OTC histamine H2-receptor antagonists Retained Products;
3. Patents that are related to a Divestiture Product that Respondents can demonstrate have been routinely used, prior to the Acquisition Date, by either Respondent J&J or Respondent Pfizer (as applicable) for a Retained Product: 1) that has been marketed or sold on an extensive basis by the relevant Respondent within the two-year period immediately preceding the Acquisition; or 2) for which, prior to the announcement of the Acquisition, there was an approved brand or marketing plan to market or sell such a Retained Product on an extensive basis by the Respondents; and
4. trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development, and other information, and all rights in any jurisdiction to limit the use or disclosure thereof, that are related to a Divestiture Product and that Respondents can demonstrate have been routinely used, prior to the Acquisition Date, by either Respondent J&J or Respondent Pfizer (as applicable) for Retained Products that: 1) have been marketed or sold on an extensive basis by the relevant Respondent within the two-year period immediately preceding the Acquisition; or 2) for which, prior to the announcement of the Acquisition, there was an approved brand or marketing plan to market or sell such a Retained Product on an extensive basis by the Respondents;

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Provided however, that, in cases where the aggregate retail sales in dollars within the two-year period immediately preceding the Acquisition of the Retained Products collectively are less than the aggregate retail sales in dollars within the same period of the Divestiture Products collectively, the above-described intellectual property shall be considered, at the Acquirer's option, Product Intellectual Property and, thereby, subject to assignment to the Acquirer;

Provided further, however, that in such cases, Respondents may take a license back from the Acquirer for such intellectual property for use in connection with the Retained Products.

HHH. "Third Party(ies)" means any private entity other than the following: (1) the Respondents; or (2) an Acquirer.

III. "Unisom Assets" means all of Respondent Pfizer's rights, title and interest in and to all assets related to Respondent Pfizer's United States business related to the Unisom Products to the extent legally transferable, including the research, Development, manufacture, distribution, marketing, and sale of the Unisom Products including, without limitation, the following:

1. all Product Intellectual Property related to the Unisom Products including, but not limited to, the "Bendy Girl" character, and the Unisom[®], SleepGels[®] and SleepTabs⁷ Product Trademarks, or any variations or derivatives of such Product Trademarks; *provided, however*, that Respondents may receive a transitional license back for a limited period of time (as is approved by the Commission in the Remedial Agreements related to the Unisom Products) to these Product Trademarks for the purposes of winding up the use of such Product Trademarks in

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Respondents' businesses associated with such Product Trademarks;

2. a non-exclusive, perpetual, transferable, fully paid-up and royalty-free license(s) to all Retained Product Licensed Intellectual Property related to the Unisom Products to use, make, distribute, offer for sale, promote, advertise, sell, import, or have used, made, distributed, offered for sale, promoted, advertised, sold, or imported, the Unisom Products or any line extension thereof anywhere in the United States;
3. all Product Manufacturing Technology related to the Unisom Products;
4. all Product Marketing Materials related to the Unisom Products;
5. all Website(s) related to the Unisom Products;
6. all Product Assumed Contracts to the extent related to the Unisom Products (copies to be provided to the Acquirer on or before the Divestiture Date);
7. all books, records, and files related to the Unisom Products;
8. a list of all customers and/or targeted customers for the Unisom Products and the pricing and promotions and/or planned or proposed pricing and promotions of the Unisom Products for such customers;
9. all inventory in existence as of the Divestiture Date including, but not limited to, raw materials, packaging materials, work-in-process and finished goods related to the Unisom Products;

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10. all unfilled customer orders for finished goods as of the Divestiture Date related to the Unisom Products (“ list of such orders is to be provided to the Acquirer within two (2) days after the Divestiture Date); and
11. the Unisom Manufacturing Equipment.

Provided, however, that in cases in which documents or other materials included in the Unisom Assets contain information (1) that relates both to the Unisom Products and to Retained Products or other businesses of Respondents and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Unisom Products or (2) for which Respondents have a legal obligation to retain the original copies, Respondents shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer, Respondents shall provide the Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Respondents provide the Acquirer with the above-described information without requiring Respondents to completely divest itself of information that, in content, also relates to Retained Products and businesses other than the Unisom Products;

Provided further, however, that with respect to any contract or agreement included in the Unisom Assets that relates both to the Unisom Assets and to any of Respondents’ Retained Products or businesses not divested pursuant to this Order, Respondents shall assign the Acquirer all such rights under the contract or agreement as are related to the Unisom Products, but concurrently may retain its rights under such contract or

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agreement for the purposes of the Retained Products and businesses not divested pursuant to this Order;

Provided further, however, that the assets described in Paragraphs I.III.6, I.III.9, and I.III.11 shall be at the Acquirer's option if the Commission approves a divestiture that excludes such assets.

JJJ. "Unisom Employees" means the persons listed in non-public Appendix F to this Order.

KKK. "Unisom Manufacturing Equipment" means all manufacturing and other equipment, located at any facility, that:

1. is owned by Respondent Pfizer; and
2. was used, within the one (1) year period immediately prior to the Acquisition and/or within the one (1) year period immediately prior to the Divestiture Date, in the research, Development, manufacture, or packaging of the Unisom Products.

LLL. "Unisom Products" means all Products Developed, in Development, manufactured, distributed, marketed or sold in the United States by Respondent Pfizer prior to the Acquisition that were marketed or sold or to be marketed or sold in the United States as OTC nighttime sleep-aid Products using the Unisom[®] Product Trademark, or any variations or derivatives of such Product Trademark, including, but not limited to, Unisom[®] SleepGels[®] Gelcaps[®] and Unisom[®] SleepTabs[®] Tablets.

MMM. "Website(s)" means the content of the Websites located at the Domain Names, and all copyrights in such Websites, to the extent owned by Respondents; *provided, however,* Website shall not include the following: (1) content owned by Third Parties and other Product Intellectual Property not owned by Respondents that are incorporated in such Website, such as stock photographs used in the Website, *except* to the extent

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that Respondents can convey its rights, if any, therein; or (2) content unrelated to the Divestiture Products.

NNN. “Zantac Assets” means all of Respondent Pfizer’s rights, title and interest in and to all assets related to Respondent Pfizer’s United States business related to the Zantac Products to the extent legally transferable, including the research, Development, manufacture, distribution, marketing, and sale of the Zantac Products including, without limitation, the following:

1. all Product Intellectual Property related to the Zantac Products including, but not limited to, the Zantac[®], Zantac 150[®], and Zantac 75[®] Product Trademarks, or any variations or derivatives of such Product Trademarks; *provided, however*, that Respondents may receive a transitional license back for a limited period of time (as is approved by the Commission in the Remedial Agreements related to the Zantac Products) to these Product Trademarks for the purposes of winding up the use of such Product Trademarks in Respondents’ businesses associated with such Product Trademarks;
2. a non-exclusive, perpetual, transferable, fully paid-up and royalty-free license(s) to all Retained Product Licensed Intellectual Property related to the Zantac Products to use, make, distribute, offer for sale, promote, advertise, sell, import, or have used, made, distributed, offered for sale, promoted, advertised, sold, or imported, the Zantac Products or any line extension thereof anywhere in the United States; *provided, however*, Respondents shall also grant an exclusive (even as to Respondents), perpetual, fully paid-up and royalty-free license(s) with rights to sublicense to the Zantac Patents to use, make, distribute, offer for sale, promote, advertise, sell, import, or have used, made, distributed, offered for sale, promoted, advertised, sold, or imported, the Zantac Products or any line extensions thereof in the field of OTC histamine H2-

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receptor antagonists products anywhere in the United States;

3. all Product Manufacturing Technology related to the Zantac Products;
4. all Product Marketing Materials related to the Zantac Products;
5. all Website(s) related to the Zantac Products;
6. all Product Assumed Contracts to the extent related to the Zantac Products (copies to be provided to the Acquirer on or before the Divestiture Date);
7. all books, records, and files related to the Zantac Products;
8. a list of all customers and/or targeted customers for the Zantac Products and the pricing and promotions and/or planned or proposed pricing and promotions of the Zantac Products for such customers;
9. all inventory in existence as of the Divestiture Date including, but not limited to, raw materials, packaging materials, work-in-process and finished goods related to the Zantac Products;
10. all unfilled customer orders for finished goods as of the Divestiture Date related to the Zantac Products (a list of such orders is to be provided to the Acquirer within two (2) days after the Divestiture Date); and
11. the Zantac Manufacturing Equipment.

Provided, however, that in cases in which documents or other materials included in the Zantac Assets contain information (1) that relates both to the Zantac Products and to Retained Products or other businesses of

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Respondents and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Zantac Products; or (2) for which Respondents has a legal obligation to retain the original copies, Respondents shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer, Respondents shall provide the Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Respondents provides the Acquirer with the above-described information without requiring Respondents to completely divest itself of information that, in content, also relates to Retained Products and businesses other than the Zantac Products;

Provided further, however, that with respect to any contract or agreement included in the Zantac Assets that relates both to the Zantac Assets and to any of Respondents' Retained Products or businesses not divested pursuant to this Order, Respondents shall assign the Acquirer all such rights under the contract or agreement as are related to the Zantac Products, but concurrently may retain its rights under such contract or agreement for the purposes of the Retained Products and businesses not divested pursuant to this Order;

Provided further, however, that the assets described in Paragraphs I.NNN.6, I.NNN.9, and I.NNN.11 shall be at the Acquirer's option if the Commission approves a divestiture that excludes such assets.; and

Provided further, however, that Zantac Assets shall not include the Excluded Assets.

OOO. "Zantac Divestiture Agreement" means:

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1. The BI Agreement; or
2. Any agreement that receives the prior approval of the Commission between Respondents and an Acquirer for the divestiture of the Zantac Assets entered into pursuant to Paragraph II.A. of this Order, and any attachments, agreements, and schedules related thereto.

PPP. “Zantac Employees” means the persons listed in non-public Appendix G to this Order.

QQQ. “Zantac Marketing Employees” means all salaried management level employees of Respondent Pfizer who directly have participated (irrespective of portion of working time involved, unless such participation was a part of a broad executive management portfolio, or of oversight of legal, accounting, tax or financial compliance) in the formulation of brand marketing or sales strategies, including pricing, discount, allowance, promotion, and advertising strategies relating to the Zantac Products in the United States within the eighteen (18) month period immediately prior to the Divestiture Date. These employees include, without limitation, employees involved in brand management, sales training, and market research, and the Zantac Employees.

RRR. “Zantac Manufacturing Equipment” means all manufacturing and other equipment, located at any facility, that:

1. is owned by Respondent Pfizer; and
2. was used, within the one (1) year period immediately prior to the Acquisition and/or within the one (1) year period immediately prior to the Divestiture Date, in the research, Development, manufacture, or packaging of the Zantac Products.

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SSS. “Zantac Patents” means:

1. U.S. Patent 5,098,715 (Flavor film-coated tablets); and
2. Any patent applications and patents issuing from Attorney Docket Number, PC 33462 (Dual-layer film-coated solid dosage form).

TTT. “Zantac Products” means all Products Developed, in Development, manufactured, distributed, marketed or sold in the United States by Respondent Pfizer prior to the Acquisition that were marketed or sold or to be marketed or sold as in the United States OTC histamine H₂-receptor antagonists Products using the Product Trademarks Zantac[®], Zantac 150[®], and Zantac 75[®], or any variations or derivatives of such Product Trademark including, but not limited to, Maximum Strength Zantac 150[®] Acid Reducer, and Zantac 75[®] Acid Reducer.

UUU. “Zantac Research and Development Employees” means all salaried employees of Respondent Pfizer who directly have participated (irrespective of the portion of working time involved, unless such participation was a part of a broad executive management portfolio, or of oversight of legal, accounting, tax or financial compliance) in the research, Development, or quality control approval process for the Zantac Products within the eighteen (18) month period immediately prior to the Divestiture Date.

II.

- A. Not later than fifteen (15) days after the Acquisition Date or January 2, 2007, whichever is later, Respondents shall divest the Zantac Assets, absolutely and in good faith, to BI pursuant to and in accordance with the Zantac Divestiture Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being

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understood that nothing in this Order shall be construed to reduce any rights or benefits of BI or to reduce any obligations of the Respondents under such agreement);

Provided, however, that if Respondents have divested the Zantac Assets to BI prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that BI is not an acceptable purchaser of the Zantac Assets, then Respondents shall immediately rescind the transaction with BI and shall divest the Zantac Assets within one hundred eighty (180) days from the date the Order becomes final, absolutely and in good faith, at no minimum price, to an Acquirer and only in a manner that receives the prior approval of the Commission;

Provided further, however, that if the Respondents have divested the Zantac Assets to BI prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies the Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct the Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Zantac Assets to BI (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order;

Provided further, however, that Respondents may not modify or amend the Zantac Divestiture Agreement without receiving the prior approval of the Commission.

- B. Not later than fifteen (15) days after the Acquisition Date or January 2, 2007, whichever is later, Respondents shall divest the Non-Zantac Assets, absolutely and in good faith, to Chattem pursuant to and in accordance with the Non-Zantac Assets Divestiture Agreement (which agreement shall not vary

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or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of Chattem or to reduce any obligations of the Respondents under such agreement);

Provided, however, that if Respondents have divested the Non-Zantac Assets to Chattem prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Chattem is not an acceptable purchaser of the Non-Zantac Assets, then Respondents shall immediately rescind the transaction with Chattem and shall divest the Non-Zantac Assets within one hundred eighty (180) days from the date the Order becomes final, absolutely and in good faith, at no minimum price, to an Acquirer and only in a manner that receives the prior approval of the Commission;

Provided further, however, that if the Respondents have divested the Non-Zantac Assets to Chattem prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies the Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct the Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Non-Zantac Assets to Chattem (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order;

Provided further, however, that Respondents may not modify or amend the Non-Zantac Divestiture Agreement without receiving the prior approval of the Commission.

- C. Not later than fifteen (15) days after the Acquisition Date or January 2, 2007, whichever is later, Respondents shall enter

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into a Non-Zantac Supply Agreement with the Acquirer for the supply of Non-Zantac Products for a period of eighteen (18) months to allow the Acquirer, or a Third Party affiliated with the Acquirer, to obtain all the relevant Agency approvals necessary to manufacture in commercial quantities, and in a manner consistent with cGMP, the Non-Zantac Products independently of Respondents.

Provided, however, that Respondents shall supply the Acquirer with Unisom Products sold and marketed under the Unisom SleepTabs[®] Trademark for a period of thirty (30) months after the Divestiture Date (“Unisom SleepTab Supply Period”);

Provided further, however, that if the Acquirer, using commercially reasonable efforts as determined by the Interim Monitor and in consultation with Commission staff, has not received the relevant Agency approvals necessary to manufacture (or to have a Third Party manufacture) in commercial quantities, and in a manner consistent with cGMP, the Unisom Products sold and marketed under the Unisom SleepTabs[®] Trademark by the end of the Unisom SleepTab Supply Period, then Respondents shall extend the Unisom SleepTab Supply Period for an additional six (6) months

Provided further, however, Respondents may not modify or amend the Non-Zantac Supply Agreement without receiving the prior approval of the Commission.

- D. In the event that Respondents divest the Non-Zantac Assets to an Acquirer other than Chattem, the Non-Zantac Supply Agreement shall require Respondents to:
1. deliver, in a timely manner and under reasonable terms and conditions, a supply of Non-Zantac Products;
 2. represent and warrant to the Acquirer that Respondents shall hold harmless and indemnify the Acquirer for any

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liabilities or loss of profits resulting from the failure by Respondents to deliver the Non-Zantac Products in a timely manner as required by the Non-Zantac Supply Agreement unless Respondents can demonstrate that their failure was entirely beyond the reasonable control of Respondents and was in no part the result of negligence or willful misconduct by Respondents;

3. represent and warrant to the Acquirer that the Non-Zantac Products supplied under the Non-Zantac Supply Agreement meet the Agency-approved specifications. For the Non-Zantac Products to be marketed or sold in the United States, Respondents shall agree to indemnify, defend and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged that result from the failure of the Non-Zantac Products to meet cGMP. This obligation may be made contingent upon the Acquirer giving Respondents prompt, adequate notice of such claim and cooperating fully in the defense of such claim. *Provided, however,* that Respondents may reserve the right to control the defense of any such litigation, including the right to settle the litigation, so long as such settlement is consistent with Respondents' responsibilities to supply the ingredients in the manner required by this Order; *provided further, however,* that this obligation shall not require Respondents to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by Respondents to the Acquirer;
4. make available to the Acquirer and the Interim Monitor all records that relate to the manufacture of the Non-Zantac Products that are generated or created after the Divestiture Date;

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5. include in the Non-Zantac Supply Agreement a representation from the Acquirer that such Acquirer shall use commercially reasonable efforts to secure the FDA approvals necessary to manufacture, or to have manufactured by a Third Party, in commercial quantities, the Non-Zantac Products and to do so independently of Respondents as soon as reasonably practicable; and
 6. not seek, pursuant to any dispute resolution mechanism incorporated in the Non-Zantac Supply Agreement, a result that would be inconsistent with the terms or the remedial purposes of this Order.
- E. Any Remedial Agreement relating to the Divestiture Assets shall be deemed incorporated into this Order, and any failure by Respondents to comply with any term of such Remedial Agreement as it relates to the Divestiture Assets shall constitute a failure to comply with this Order. Respondents shall include in each Remedial Agreement related to the Divestiture Products a specific reference to this Order, and the remedial purposes thereof.
- F. Prior to the Divestiture Date, Respondents shall secure all assignments, consents, and waivers from all Third Parties, including rights of approval and rights of first refusal, from all private and Governmental Entities including, but not limited to, GSK's approval for the divestiture of the Zantac Assets, that are necessary:
1. for the divestiture of the Divestiture Assets; or
 2. for the continued research, Development, manufacture, sale, marketing or distribution of the Divestiture Products;
- Provided, however,* Respondents may satisfy the requirements of this Paragraph II.F. by certifying that the relevant Acquirer has executed all such agreements directly with each of the relevant Third Parties;

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Provided further, however, that in the event Respondents are unable to satisfy all conditions necessary to divest any intangible asset that is a permit, license, or right granted by any Governmental Entity, Respondents shall provide such assistance as the relevant Acquirer may reasonably request in that Acquirer's efforts to obtain such permit, license, or right, or to obtain a comparable permit, license, or right.

- G. Respondents shall do the following and, in addition, include in the Zantac Divestiture Agreement and the Non-Zantac Divestiture Agreement the provisions to the following effect:
1. upon reasonable notice and request from the relevant Acquirer to the Respondents, Respondents shall provide in a timely manner at no greater than Direct Cost the following assistance or consultation related to the Divestiture Products:
 - a. assistance and advice to enable that Acquirer (or the Designee of that Acquirer) to obtain all necessary permits and approvals from any Agency or Governmental Entity to manufacture and sell the relevant Divestiture Products;
 - b. assistance to that Acquirer (or the Designee of that Acquirer) to manufacture the relevant Divestiture Products in substantially the same manner and quality employed or achieved by or on behalf of Respondents; and
 - c. consultation with knowledgeable employees of Respondents and training, at the request of that Acquirer and at a facility chosen by that Acquirer sufficient to satisfy management of that Acquirer that its personnel (or the Designee's personnel) are

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adequately trained in the manufacture of the relevant Divestiture Products;

2. upon reasonable notice and request from the relevant Acquirer to Respondents, Respondents shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of the Respondents to assist that Acquirer to defend against, respond to, or otherwise participate in any litigation related to the Product Intellectual Property;
3. Respondents shall covenant to the relevant Acquirer that Respondents shall:
 - a. not join, file, prosecute or maintain any suit, in law or equity, against the Acquirer under Patents that are owned or licensed by Respondents as of the Acquisition Date, if such suit would have the potential to interfere with that Acquirer's freedom to practice in the research, Development, manufacture, use, import, distribution, or sale of the relevant Divestiture Products; *provided, however*, that Respondents may receive a covenant from that Acquirer not to assert any Patent related to the Divestiture Products that is assigned to that Acquirer from the Respondents pursuant to this Order against the Respondents for Respondents' infringement of such Patent in connection with those Products marketed or sold by Respondents prior to the Acquisition Date;
 - b. not use any Confidential Business Information related to the Divestiture Products obtained by Respondents from any person who was an employee of (1) Respondent Pfizer if such employee was involved with the Zantac Assets, Cortizone 10 Assets, or the Unisom Assets, or (2) Respondent J&J if such employee was involved with the Balmex Assets, within the two (2) year period immediately prior to the

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Acquisition in any suit against that Acquirer under Patents that are owned or licensed by Respondents as of the Acquisition Date, if such suit would have the potential to interfere with that Acquirer's freedom to practice in the research, Development, manufacture, use, import, distribution or sale of the relevant Divestiture Products acquired by that Acquirer;

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4. Respondents shall covenant to the relevant Acquirer that:
(1) as a condition of any assignment, transfer or license to a Third Party of the Patents, as described in Paragraph II.G.3.a., the Third Party shall agree to provide a covenant whereby the Third Party covenants not to sue the Releasees under such Patents, if the suit would have the potential to interfere with that Acquirer's freedom to practice in the research, Development, manufacture, use, import, distribution, or sale of the relevant Divestiture Products; and (2) with respect to any Third Party rights licensed to Respondents as of or after the Acquisition Date, and as to which Respondents do not control the right of prosecution of any legal action, Respondents shall not actively induce, assist, or participate in any legal action or proceeding relating to the relevant Divestiture Products against the Releasees, unless required by Law or contract (such contract not to be solicited or entered into for the purpose of circumventing any of the requirements of this Order).

H. As related to the Divestiture Products, Respondents shall:

1. submit and deliver to the relevant Acquirer, at Respondents' expense, in good faith and as soon as practicable, in a manner that ensures its completeness and accuracy, all Confidential Business Information;
2. provide the relevant Acquirer and the Interim Monitor with access to all Confidential Business Information and to employees who possess or are able to locate or identify the books, records, and files that contain Confidential Business Information pending complete delivery of all the Confidential Business Information;

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3. not use, directly or indirectly, any Confidential Business Information related to the research, Development, manufacturing, marketing, or sale of the Divestiture Products other than to comply with the requirements of this Order;
 4. not disclose or convey any Confidential Business Information, directly or indirectly, to any person except the relevant Acquirer; and
 5. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the marketing or sales of the:
 - a. Balmex Products to Respondents' employees associated with Respondents' retained OTC diaper rash treatment business;
 - b. Unisom Products to Respondents' employees associated with Respondents' retained OTC nighttime sleep-aids business;
 - c. Cortizone 10 Products to Respondents' employees associated with Respondents' retained OTC hydrocortisone anti-itch products business; and
 - d. Zantac Products to Respondents' employees associated with Respondents' OTC histamine H₂-receptor antagonists products business.
- I. Not later than thirty (30) days after the Acquisition Date, Respondents shall provide written notification of the restrictions on the use of the Confidential Business Information by Respondents' personnel to all of Respondents' employees who:

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1. Are, or were, directly involved in the research, Development, manufacturing, distribution, sale or marketing of the Divestiture Products;
2. Are directly involved in the research, Development, manufacturing, distribution, sale or marketing of Respondents' Retained Products related to OTC diaper rash treatments, OTC nighttime sleep-aids, OTC hydrocortisone anti-itch products, or OTC histamine H2-receptor antagonists products; and/or
3. May have Confidential Business Information;

Provided, however, Respondents shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the relevant Divestiture Date. Respondents shall maintain complete records of all such agreements at Respondents' corporate headquarters, and provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied with. Respondents shall provide the relevant Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel relating to the Divestiture Products.

- J. Respondents shall prohibit any former Zantac Marketing Employees and former Zantac Research and Development Employees from participating in the sales, marketing, or research and Development of Respondents' OTC histamine H2-receptor antagonists Retained Products for a period of two (2) years after the Divestiture Date.
- K. Respondents shall not enforce any agreement against a Third Party or an Acquirer to the extent that such agreement may limit or otherwise impair the ability of that Acquirer to acquire the Product Manufacturing Technology related to the relevant

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Divestiture Products or related equipment from the Third Party. Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information related to such Product Manufacturing Technology.

- L. Not later than ten (10) days after the Divestiture Date, Respondents shall grant a release to each Third Party that is subject to an agreement as described in Paragraph II.K. that allows the Third Party to provide the relevant Product Manufacturing Technology or related equipment to an Acquirer. Within five (5) days of the execution of each such release, Respondents shall provide a copy of the release to the Acquirer.

M. Respondents shall:

1. for a period of at least six (6) months from the Divestiture Date (“Divestiture Product Employee Access Period”), provide the relevant Acquirer of the Divestiture Assets with the opportunity to enter into employment contracts with the related Divestiture Products Employees; and
2. provide the relevant Acquirer of the Divestiture Assets with the Product Employee Information related to the Divestiture Product Employees not later than the earlier of the following dates:
 - a. ten (10) days after notice by staff of the Commission to the Respondents to provide the Product Employee Information; or
 - b. ten (10) days after the Divestiture Date.

Failure by Respondents to provide the Product Employee Information for any relevant employee within the time provided herein shall extend the Divestiture Employee

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Access Period with respect to that employee in an amount equal to the delay.

N. Respondents shall:

1. during the Divestiture Product Employee Access Period, not interfere with the hiring or employing by the relevant Acquirer of the Divestiture Assets of Divestiture Product Employees and remove any impediments within the control of Respondents that may deter these employees from accepting employment with such Acquirer, including, but not limited to, any non-compete or nondisclosure provisions of employment or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by such Acquirer. In the case of the Divestiture Product Employees, Respondents shall waive, for the benefit of the relevant Acquirer of the Divestiture Assets, any attorney-client privilege as it pertains to the Divestiture Products. In addition, Respondents shall not make any counteroffer to any of the Divestiture Product Employees who receives a written offer of employment from the relevant Acquirer of Divestiture Assets;

Provided, however, that this Paragraph II.N.1 shall not prohibit the Respondents from making offers of employment to or employing any Divestiture Product Employees during the Divestiture Product Employee Access Period where the relevant Acquirer of the Divestiture Assets has notified the Respondents in writing that it does not intend to make an offer of employment to that employee;

Provided further, however, that if the Respondents notify the relevant Acquirer of the Divestiture Assets in writing of their desire to make an offer of employment to a particular Divestiture Product Employee, and that Acquirer does not make an offer of employment to such

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employee within twenty (20) days of the date that Acquirer receives such notice, the Respondents may make an offer of employment to that employee;

2. until the Divestiture Date, provide all Divestiture Product Employees with reasonable financial incentives to continue in their positions and to market and promote the Divestiture Products consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Divestiture Products and to ensure successful execution of the pre-Acquisition marketing plans related to the Divestiture Products. Such incentives shall include a continuation of all employee compensation and benefits offered by Respondents until the Divestiture Date for the divestiture of the Divestiture Assets has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

Provided, however, that nothing in this Order requires or shall be construed to require the Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of Divestiture Product Employees (other than those conditions contained in this Order) in connection with the Acquisition; and

3. for a period of one (1) year from the Divestiture Date, not:
 - a. directly or indirectly, solicit or otherwise attempt to induce any employee of an Acquirer with any amount of responsibility related to the Divestiture Products (“Acquirer Employee”) to terminate his or her employment relationship with that Acquirer; or
 - b. hire any Acquirer Employee; *provided, however,* Respondents may hire any former Acquirer Employee whose employment has been terminated by an

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Acquirer or who independently applies for employment with the Respondents, as long as such employee was not solicited in violation of the non-solicitation requirements contained herein;

Provided, however, Respondents may do the following: (1) advertise for employees in newspapers, trade publications or other media not targeted specifically at the Acquirer Employees; or (2) hire an Acquirer Employee who contacts Respondents on his or her own initiative without any direct or indirect solicitation or encouragement from the Respondents.

- O. Respondents shall require, as a condition of continued employment post-divestiture of the Divestiture Assets, that each Divestiture Product Employee retained by Respondents, the direct supervisor(s) of any such employee, and any other employee retained by Respondents and designated by the Interim Monitor, sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Confidential Business Information related to the Divestiture Products strictly confidential, including the nondisclosure of such information to all other employees, executives, or other personnel of Respondents (other than as necessary to comply with the requirements of this Order).
- P. Upon reasonable notice and request by the Acquirer, Respondents shall make available to the relevant Acquirer of the Divestiture Assets, at no greater than Direct Cost, such personnel, assistance, and training as that Acquirer might reasonably need to transfer the Divestiture Assets, and shall continue providing such personnel, assistance and training, at the request of such Acquirer until the Divestiture Assets are completely transferred to such Acquirer or its Designee in a manner that fully preserves their usefulness.
- Q. Pending divestiture of the Divestiture Assets, Respondents shall take such actions as are necessary to maintain the full

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economic viability and marketability of the business associated with the Divestiture Assets, to minimize any risk of loss of competitive potential for such business, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divestiture Assets except for ordinary wear and tear.

- R. Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against an Acquirer or the Releasee(s) for the research, Development, manufacture, use, import, distribution, or sale of the relevant Divestiture Products in connection with that Acquirer's research, Development, manufacture, use, import, distribution, or sale of the related Divestiture Products under the following:
1. any Patents owned or licensed by Respondents as of the Acquisition Date that claim the use of the Divestiture Products;
 2. any Patents owned or licensed at any time after the Acquisition Date by Respondents that claim any aspect of the research, Development, manufacture, use, import, distribution, or sale of the Divestiture Products, other than such Patents that claim inventions conceived by and reduced to practice after the Acquisition Date.
- S. Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against an Acquirer for the research, Development, manufacture, use, import, distribution, or sale of the relevant Divestiture Products in connection with that Acquirer's research, Development, manufacture, use, import, distribution, or sale of such Divestiture Products using any Confidential Business Information related to the Divestiture Products obtained by Respondents from any person who was an employee of (1) Respondent Pfizer if such employee was involved with the Zantac Assets, Cortizone 10 Assets, or the Unisom Assets, or (2) Respondent J&J if such employee was

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involved with the Balmex Assets, within the two (2) year period immediately prior to the Acquisition.

- T. Respondents shall not, in any jurisdiction throughout the United States (1) use the Product Trademarks related to the Divestiture Products or any mark confusingly similar to such Product Trademarks, as a trademark, trade name, or service mark; (2) attempt to register such Product Trademarks; (3) attempt to register any mark confusingly similar to such Product Trademarks; (4) challenge or interfere with the relevant Acquirer's use and registration of such Product Trademarks; or (5) challenge or interfere with the relevant Acquirer's efforts to enforce its trademark registrations for and trademark rights in such Product Trademarks against Third Parties; *provided however*, that nothing in this Order shall preclude Respondents from continuing to use those trademarks, trade names, or service marks related to the Retained Products as of the Acquisition Date.
- U. The purpose of the divestiture of the Divestiture Assets is to ensure the continued use of the Divestiture Assets in the same business, independent of Respondents, in which the Divestiture Assets were engaged at the time of the announcement of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that Respondents shall assure that, in any instance wherein their counsel (including in-house counsel under appropriate confidentiality arrangements) either retain unredacted copies of documents or other materials provided to the Acquirers or access original documents (under circumstances where copies of documents are insufficient or otherwise unavailable) provided to the Acquirers, that Respondents' counsel do so only in order to do the following:

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- A. comply with any Remedial Agreement, this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals), any data retention requirement of any applicable Government Entity, or any taxation requirements; or
- B. defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena, or other proceeding relating to the divestiture or any other aspect of the Divestiture Products or assets and businesses associated with those Divestiture Products; *provided, however,* that Respondents may disclose such information as necessary for the purposes set forth in this Paragraph pursuant to an appropriate confidentiality order, agreement, or arrangement;

Provided, however, that pursuant to this Paragraph III., Respondents shall: (1) require those (other than Governmental Entities) who view such unredacted documents or other materials to enter into confidentiality agreements with the relevant Acquirer (but shall not be deemed to have violated this requirement if that Acquirer withholds such agreement unreasonably); (2) inform any Governmental Entities who seek to view any documents or materials that are retained or accessed by Respondents of Respondents' obligation to keep such information confidential, and give the relevant Acquirer as much prior notice of complying with such request from the Governmental Entity as is reasonable in the circumstances, subject to any requirements of law; and (3) to use their best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

Provided further, however, that this Paragraph III. does not restrict the use by the Respondents of the documents retained by Respondents that may contain information about both the Divestiture Products, as described in the definitions of the Zantac Assets and Non-Zantac Assets in Paragraph I., and Respondents' Retained Products or other businesses.

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IV.**IT IS FURTHER ORDERED** that:

- A. David Painter of LECG shall serve as the monitor (“Interim Monitor”) to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order, the Order to Maintain Assets, and the Remedial Agreements.
- B. If Mr. Painter fails to serve, or if a new Interim Monitor must be selected, the Commission shall select the Interim Monitor, subject to the consent of Respondent J&J, which consent shall not be unreasonably withheld. If Respondent J&J has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent J&J of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.
- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents’ compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.
- D. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
 - 1. The Interim Monitor shall have the power and authority to monitor Respondents’ compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and

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carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission.

2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. The Interim Monitor shall serve until the later of:
 - a. the completion by Respondents of the divestiture of all relevant assets required to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed pursuant to this Order in a manner that fully satisfies the requirements of the Order and notification by the Acquirer to the Interim Monitor that it is fully capable of producing the relevant Products acquired pursuant to a Remedial Agreement independently of Respondents; or
 - b. the completion by Respondents of the last obligation under the Order pertaining to the Interim Monitor's service;

Provided, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Order.

4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with their obligations under the Order, including, but not limited to, their obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and

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shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Order.

5. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent J&J on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondent J&J, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.
6. Respondent J&J shall indemnify the Interim Monitor and Respondents shall hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
7. Respondents shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by the Acquirer with respect to the performance of Respondents' obligations under the Order or the Remedial Agreement. Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of

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their obligations under the Order.

8. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- F. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.
- G. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.
- H. The Interim Monitor appointed pursuant to this Order may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

V.

IT IS FURTHER ORDERED that:

- A. If Respondents have not fully complied with their obligations under Paragraph II. of this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant,

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license, divest, transfer, deliver, or otherwise convey the assets required to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed pursuant to each of the relevant Paragraphs in a manner that satisfies the requirements of each such Paragraph. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent J&J, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent J&J has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent J&J of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.

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- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed.
 2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.
 3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall Develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall

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extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an acquirer as required by this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent from among those approved by the Commission; and, *provided further, however,* that Respondents shall select such entity within five (5) days after receiving notification of the Commission's approval.
5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent J&J, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent J&J, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent J&J, and the Divestiture Trustee's power shall be terminated. The

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compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondent J&J shall indemnify the Divestiture Trustee and Respondents shall hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; *provided, however*, that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Interim Monitor pursuant to the relevant provisions of this Order and the Order to Maintain Assets in this matter.
8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

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- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

VI.**IT IS FURTHER ORDERED** that:

- A. Within five (5) days of the Acquisition, Respondent J&J shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
- B. Within thirty (30) days after the date this Order becomes final, and every sixty (60) days thereafter until Respondents have fully complied with the following:
 - 1. Paragraph II. of this Order; and
 - 2. all its responsibilities to render transitional services to the relevant Acquirer as provided by this Order and the Remedial Agreements;

Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondents shall submit at the same time a copy of their reports concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed. Respondents shall include in their reports, among other things that are required from time to time, a full

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description of the efforts being made to comply with the relevant Paragraphs of this Order, including a full description of all substantive contacts or negotiations related to the divestiture of the relevant assets and the identity of all Persons contacted, including, copies of all written communications to and from such Persons, all internal memoranda, and all reports and recommendations concerning completing the obligations.

- C. One (1) year after the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondent J&J shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order.

VII.

IT IS FURTHER ORDERED that Respondent J&J shall notify the Commission at least thirty (30) days prior to:

- A. any proposed dissolution of Respondent J&J;
- B. any proposed acquisition, merger or consolidation of Respondent J&J; or
- C. any other change in Respondent J&J including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

VIII.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondents made to their principal

Decision and Order

United States offices or headquarters address, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during business office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent related to compliance with this Order, which copying services shall be provided by Respondents at the request of the authorized representative(s) of the Commission; and
- B. to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on January 16, 2017.

By the Commission, Commissioner Harbour, Commissioner Kovacic, and Commissioner Rosch recused.

NON-PUBLIC APPENDIX A**MONITOR AGREEMENT**

**[Redacted From the Public Record
But Incorporated By Reference]**

Decision and Order

NON-PUBLIC APPENDIX B

**ZANTAC DIVESTITURE AGREEMENT
BI AGREEMENT**

**[Redacted From the Public Record
But Incorporated By Reference]**

NON-PUBLIC APPENDIX C

**NON-ZANTAC DIVESTITURE AGREEMENT
CHATTEM AGREEMENT**

**NON-ZANTAC SUPPLY AGREEMENT
CHATTEM SUPPLY AGREEMENT**

**[Redacted From the Public Record
But Incorporated By Reference]**

NON-PUBLIC APPENDIX D

BALMEX EMPLOYEES

**[Redacted From the Public Record
But Incorporated By Reference]**

Decision and Order

NON-PUBLIC APPENDIX E

CORTIZONE 10 EMPLOYEES

**[Redacted From the Public Record
But Incorporated By Reference]**

NON-PUBLIC APPENDIX F

UNISOM EMPLOYEES

**[Redacted From the Public Record
But Incorporated By Reference]**

NON-PUBLIC APPENDIX G

ZANTAC EMPLOYEES

**[Redacted From the Public Record
But Incorporated By Reference]**

Analysis to Aid Public Comment

**ANALYSIS OF AGREEMENT CONTAINING CONSENT
ORDERS TO AID PUBLIC COMMENT****I. Introduction**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Johnson & Johnson (“J&J”) and Pfizer Inc. (“Pfizer”), which is designed to remedy the anticompetitive effects that would otherwise result from J&J’s proposed acquisition of Pfizer Consumer Healthcare. Under the terms of the proposed Consent Agreement, the parties will be required to divest: (1) Pfizer’s Zantac[®] H-2 blocker business; (2) Pfizer’s Cortizone[®] hydrocortisone anti-itch business; (3) Pfizer’s Unisom[®] nighttime sleep-aid business; and (4) J&J’s Balmex[®] diaper rash treatment business.

The proposed Consent Agreement has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement and will decide whether it should withdraw from the proposed Consent Agreement, modify it, or make final the Decision and Order (“Order”).

Pursuant to a Stock and Asset Purchase Agreement dated June 25, 2006, J&J proposes to acquire certain voting securities and assets comprising Pfizer’s Consumer Healthcare business in a transaction valued at approximately \$16.6 billion (“Proposed Acquisition”). The Commission’s complaint alleges that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the United States markets for the research, development, manufacture, distribution, and sale of the following over-the-counter (“OTC”) medications: (1) H-2

Analysis to Aid Public Comment

blockers, (2) hydrocortisone anti-itch products, (3) nighttime sleep-aids, and (4) diaper rash treatments (the AProducts”).

II. The Parties

J&J is one of the largest and most diversified suppliers of branded consumer health care products in the world, as well as a manufacturer and supplier of pharmaceuticals, medical devices, and diagnostic products. In 2005, J&J had worldwide net sales of \$50.5 billion. The more than 230 J&J operating companies employ approximately 116,000 individuals in 57 countries and sell products throughout the world. In the consumer products segment, J&J manufactures and markets a broad range of OTC medications, women’s health products, nutritional products, oral care products, and products used for baby and skin care. With its Pepcid® line of products, J&J is the leading supplier of OTC H-2 blocker acid relief products in the United States. J&J is also a leading supplier of OTC hydrocortisone-based anti-itch medications under its Cortaid® and Aveeno® brands and of OTC nighttime sleep-aids under its Simply Sleep® brand. J&J is also a leading supplier of products for treating diaper rash under its Balmex®, Aveeno®, and Johnson’s® No More Rash® brands.

Pfizer is one of the largest pharmaceutical companies in the world. Pfizer researches, develops, manufactures, and markets leading prescription medicines for humans and animals, as well as consumer healthcare products. In 2005, Pfizer had worldwide net sales of \$51.3 billion. Pfizer Consumer Healthcare, which J&J proposes to acquire, is a global business that researches, develops, manufactures, and markets many well-known brands of OTC medications and oral care products to consumers throughout the world. In 2005, Pfizer Consumer Healthcare generated net sales of \$3.9 billion. Like J&J, Pfizer is one of the leading suppliers of OTC H-2 blocker acid relief products in the United States with its Zantac® product line. Pfizer is also the leading supplier in the United States of OTC hydrocortisone anti-itch medications under its Cortizone® brand, OTC nighttime sleep-aids under its

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Unisom[®] brand, and diaper rash products under its Desitin[®] brand.

III. OTC H-2 Blockers

One of the relevant markets in which to assess the competitive effects of the Proposed Acquisition is the United States market for OTC H-2 blockers. H2-receptor antagonists, more commonly known as “H-2 blockers,” are a class of drugs for the prevention and relief of heartburn associated with acid indigestion. Originally a prescription medicine, H-2 blocker products were later approved by the FDA for sale without a prescription. H-2 blockers work by blocking histamine from stimulating the gastric parietal cells, thereby suppressing secretion of stomach acid. Although there are other OTC acid relief medications, including antacids and proton pump inhibitors (“PPIs”), H-2 blockers are sufficiently different from these other products that they are not close economic substitutes. Currently, Prilosec OTC[®] is the only PPI available without a prescription. OTC PPIs are not a close substitute for OTC H-2 blockers because they are indicated for the relief of chronic heartburn and not for immediate relief of occasional heartburn or indigestion. Antacid tablets and liquids are not a close substitute for OTC H-2 blockers because they are less efficacious and do not provide as long relief as H-2 blockers.

The United States market for OTC H-2 blockers is highly concentrated. Today, this approximately \$360 million market comprises four branded products – J&J’s Pepcid[®], Pfizer’s Zantac[®], GlaxoSmithKline’s Tagamet[®], and Reliant Pharmaceutical’s Axid AR[®] – and private label versions of some Pepcid[®], Zantac[®], and Tagamet[®] products. J&J and Pfizer are the two largest suppliers in this market.

The Proposed Acquisition would significantly increase market concentration and eliminate substantial competition between the two leading suppliers of OTC H-2 blockers in the United States. Branded manufacturers of these products spend significant sums of money annually to create and maintain distinct brand equities.

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As a result of the acquisition, J&J would account for over 70% of the sales of OTC H-2 blocker in the United States. Here the evidence confirmed that Pepcid⁷ and Zantac⁷ are close substitutes. Consumers have benefitted from the competition between Pfizer and J&J on pricing, discounts, promotional trade spending, and product innovation. Thus, unremedied, the Proposed Acquisition likely would cause significant anticompetitive harm by enabling J&J to profit by unilaterally raising the prices of one or both products above pre-merger levels, as well as reducing its incentives to innovate and develop new products.

IV. OTC Hydrocortisone Anti-Itch Products

A second relevant product market in which to assess the competitive effects of the Proposed Acquisition is the United States market for OTC hydrocortisone anti-itch products. Hydrocortisone is a corticosteroid that reduces or inhibits the actions of chemicals in the body that cause inflammation, redness and swelling. OTC products containing up to 1.0 percent hydrocortisone are approved by the FDA for topical application to treat minor skin irritations, itching, and rashes due to various conditions, including dermatitis, eczema, and psoriasis. Although OTC topical anesthetic and antihistamine products are available to treat minor skin irritations, itching and rashes, these products are not close economic substitutes for hydrocortisone anti-itch products because they work differently than hydrocortisone products. While these products may relieve symptoms of pain or itching, unlike hydrocortisone, they do nothing to cure or prevent the actual underlying skin conditions such as eczema or psoriasis.

The United States market for OTC hydrocortisone anti-itch products is highly concentrated. There are only two significant branded competitors in this market: (1) Pfizer, with its Cortizone[®] products and (2) J&J, with its Cortaid[®] products. In addition, private label hydrocortisone anti-itch products account for a significant share of the market. Pfizer's Cortizone[®] is the market leader among branded products, while J&J's Cortaid[®] is the

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second leading branded product line. In 2005, sales of OTC hydrocortisone anti-itch products in the United States totaled approximately \$120 million.

The Proposed Acquisition would significantly increase market concentration and eliminate substantial competition between the two leading suppliers of OTC hydrocortisone anti-itch products in the United States. As a result of the acquisition, J&J would account for over 55% of the sales of OTC hydrocortisone anti-itch products in the United States. Evidence indicates that the parties' products compete on many levels, including pricing, shelf-space, and advertising. By eliminating competition between the two leading branded suppliers, the Proposed Acquisition would likely result in higher prices, less promotional spending, and reduced product innovation. Although private label OTC hydrocortisone anti-itch products account for a significant share of the market, private label products are less close substitutes for a significant share of customers, and it is unlikely that private label products would be able to reposition themselves to replace the competition between J&J and Pfizer, the two largest branded competitors in this market, that would be lost through the Proposed Acquisition. Thus, unremedied, the Proposed Acquisition likely would cause significant anticompetitive harm by enabling J&J to profit by unilaterally raising the prices of one or both products above pre-merger levels, as well as reducing its incentives to innovate and develop new products.

V. OTC Nighttime Sleep-Aids

A third relevant product market in which to assess the competitive effects of the Proposed Acquisition is the United States market for OTC nighttime sleep-aids. OTC nighttime sleep-aids are non-prescription drugs that are indicated solely for the relief of occasional sleeplessness by individuals who have difficulty falling asleep. The active ingredient in the best-selling sleep-aids is a sedating antihistamine, such as diphenhydramine hydrochloride or doxylamine succinate. Prescription sleep-aids, such as zolpidem ("mbien[®]), zaleplon (Sonata[®]) or eszopiclone

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(Lunesta[®]), are not close economic substitutes for OTC nighttime sleep-aids. Consumers of OTC nighttime sleep-aids likely would not switch to prescription sleep-aids in response to a 5 to 10 percent increase in the price of OTC nighttime sleep-aids because of the higher prices of prescription sleep-aids (particularly for those without insurance coverage) and the inconvenience and cost of a doctor's visit (including delays for consumers who have exhausted their prescriptions).

The United States market for OTC nighttime sleep-aids is highly concentrated. J&J and Pfizer are the two largest suppliers of branded OTC nighttime sleep-aids in the United States. Pfizer is the market leader with its Unisom[®] products, while J&J is the second leading supplier with its Simply Sleep[®] products. In 2005, sales of OTC nighttime sleep-aids in the United States totaled approximately \$100 million.

The Proposed Acquisition would significantly increase market concentration and eliminate substantial competition between the two leading suppliers of OTC nighttime sleep-aids in the United States. As a result of the acquisition, J&J would account for over 45% of the sales of OTC nighttime sleep-aids in the United States. In addition, the evidence confirmed that Unisom[®] and Simply Sleep[®] are close substitutes and have similar efficacy, brand equity, and brand positioning. Consumers have benefitted from the competition between Pfizer and J&J on pricing, discounts, promotional trade spending, and product innovation. Although private label OTC nighttime sleep-aids account for a significant share of the market, private label products are less close substitutes for a significant share of customers, and it is unlikely that private label products would reposition themselves to replace the competition between J&J and Pfizer, the two largest branded competitors in this market, that would be lost through the Proposed Acquisition. Thus, unremedied, the Proposed Acquisition likely would cause significant anticompetitive harm by enabling J&J to profit by unilaterally raising the prices of one

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or both products above pre-merger levels, as well as reducing its incentives to innovate and develop new products.

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VI. OTC Diaper Rash Treatments

A fourth relevant product market in which to assess the competitive effects of the Proposed Acquisition is the United States market for OTC diaper rash treatment products. Consumers use diaper rash creams or ointments to treat and prevent diaper rash and to protect sore or chafed skin from moisture or irritation. Most diaper rash products fall into one of two categories: (1) creams or pastes containing the active ingredient zinc oxide and (2) ointments containing the active ingredient petrolatum. There are no close substitutes for OTC diaper rash creams or ointments.

The United States market for OTC diaper rash treatments is highly concentrated. Today, three large, established brands — Pfizer's Desitin[®], Schering-Plough's A&D[®], and J&J's Balmex[®] — account for over 70% of sales in this approximately \$84 million market. The rest of the market is composed of several small, niche brands. Private label products account for a negligible share of the market. Pfizer is the largest supplier of OTC diaper rash treatment products with its Desitin[®] line of products, while J&J is the third largest supplier with its Balmex[®], Aveeno[®], and Johnson's[®] No More Rash[®] brands. Neither the Aveeno[®] nor the Johnson's[®] No More Rash[®] brands, however, account for a significant share of sales in this market.

The Proposed Acquisition would significantly increase market concentration and eliminate substantial competition between the two leading suppliers of OTC diaper rash treatment products in the United States. As a result of the acquisition, J&J would account for nearly 50% of the sales of OTC diaper rash treatment products in the United States. Although there are additional suppliers of branded OTC diaper rash treatment products in this market, the evidence confirmed that Desitin[®] and Balmex[®] are perceived to be close substitutes by consumers, and evidence suggests that they are similar in formulation, texture, and appearance. Consumers have benefitted from the competition between Pfizer and J&J on pricing, discounts, promotional trade

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spending, and product innovation. Thus, unremedied, the Proposed Acquisition likely would cause significant anticompetitive harm by enabling J&J to profit by unilaterally raising the prices of one or both products above pre-merger levels, as well as reducing its incentives to innovate and develop new products.

VII. Entry

Entry into the markets for the research, development, manufacture, and sale of the Products is unlikely to deter or counteract the anticompetitive effects of the Proposed Acquisition. Each of the relevant markets is relatively mature and dominated by a few well-established brand names. In such a market environment, a new entrant faces a difficult task of convincing retailers to carry its product, especially if the new product does not have a competitive advantage based on differentiated claims or efficacy. Developing and obtaining Food and Drug Administration approval for the manufacture and sale of a novel, differentiated medication takes at least two (2) years. Once product development is complete, a new entrant must invest extremely high sunk costs on marketing, advertising, and promotional allowances to create and maintain consumer awareness and acceptance of the new product. Given the sales opportunities available in the markets for the Products, coupled with the significant investment necessary to market and sell the Products, it is unlikely that a new competitor will enter any of the markets for the Products.

VIII. The Consent Agreement

The Consent Agreement effectively remedies the Proposed Acquisition's anticompetitive effects in the relevant markets discussed above. The Consent Agreement preserves competition in these markets by requiring the divestiture of: (1) all assets related to the Zantac[®] H-2 blockers to Boehringer Ingelheim Pharmaceuticals, Inc. ("Boehringer Ingelheim Pharmaceuticals"); and (2) all assets relating to Cortizone[®] hydrocortisone anti-itch

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products, all assets relating to Unisom[®] sleep-aids, and all assets relating to Balmex[®] diaper rash treatment products to Chattem, Inc. (“Chattem”) (the ADivested Assets”). These divestitures must take place within fifteen days after the closing of the Proposed Acquisition or January 2, 2007, whichever is later.

The Commission is satisfied that Boehringer Ingelheim Pharmaceuticals is a well-qualified acquirer of the Zantac[®] business. Boehringer Ingelheim Pharmaceuticals engages in the research, development, sale and marketing of branded pharmaceuticals and OTC drugs, including well known brands such as Dulcolax[®], Spiriva[®], Atrovent[®], Combivent[®], Flomax[®] and Mirapex[®]. Boehringer Ingelheim Pharmaceuticals is part of the Boehringer Ingelheim Group, which is a leading worldwide manufacturer of pharmaceuticals for humans and animals and the eighth largest manufacturer and marketer of OTC health care products worldwide. Boehringer Ingelheim Pharmaceutical’s Consumer Health Care business has an existing sales and distribution network that sells products through the same channels as Zantac[®] is currently sold, and has a strong record of integrating product acquisitions successfully.

The proposed Consent Agreement contains several provisions designed to ensure the successful divestiture of the Zantac[®] business to Boehringer Ingelheim Pharmaceuticals by requiring that: (1) J&J divest to Boehringer Ingelheim Pharmaceuticals all assets relating to Pfizer’s Zantac[®] line of products, including all research and development, intellectual property, and customer and supply contracts; (2) J&J and Pfizer take steps to ensure that confidential business information relating to Zantac[®] will not be obtained or used by J&J; (3) Boehringer Ingelheim Pharmaceuticals have the opportunity to enter into employment contracts with certain key individuals who have experience relating to Zantac[®]; and (4) certain management employees of Pfizer who were substantially involved in the research, development or marketing of Zantac[®] be precluded from working

Analysis to Aid Public Comment

on competitive H-2 blocker products at J&J for a period of two years.¹

The Commission is also satisfied that Chattem is a well-qualified acquirer of the Cortisone[®], Unisom⁷, and Balmex[®] businesses. Chattem is a leading manufacturer and marketer of a broad portfolio of branded OTC healthcare products, toiletries, and dietary supplements, including brands such as Icy Hot[®], Gold Bond[®], Selsun blue[®], Garlique[®], Pamprin[®], and BullFrog[®]. Chattem's products are among the market leaders in their respective categories across food, drug and mass merchandisers. Chattem has an experienced sales force with existing relationships with major retailers and has a strong record of integrating prior product acquisitions successfully.

The proposed Consent Agreement contains several provisions designed to ensure the successful divestiture of the Cortisone[®], Unisom[®], and Balmex[®] businesses to Chattem by requiring that: (1) J&J divest to Chattem all assets relating to the Cortisone[®], Unisom[®], and Balmex[®] line of products, including all research and development, intellectual property, and customer and supply contracts; (2) J&J and Pfizer take steps to ensure that confidential business information relating to Cortisone[®], Unisom[®], and Balmex[®] will not be obtained or used by J&J; and (3) Chattem have the opportunity to enter into employment contracts with certain key individuals who have experience relating to Cortisone[®], Unisom[®], and Balmex[®].

The Order to Maintain Assets that is included in the proposed Consent Agreement requires that J&J and Pfizer maintain the viability of the Divested Assets for the brief transition period between the time the Commission approves the proposed Order

¹ This firewall will prevent J&J from taking competitive advantage of know-how, product development, marketing, and sales plans relating to Zantac[®].

Analysis to Aid Public Comment

and when the divestitures take place, which will not be later than January 2, 2007. Even though such a period is relatively short, maintenance of current supply, advertising and promotional levels and activities at all times prior to divestiture is of paramount importance. The proposed Consent Agreement incorporates this plan in the Order to Maintain Assets, detailing requirements for the assets that must be held separate, services that may be shared with the ongoing business, and the employee positions that are necessary for the held separate business.

The Commission has appointed David Painter of LECG as Interim Monitor to oversee the transfer of assets, the establishment of appropriate firewalls to prevent the transfer or use of confidential business information and to ensure that J&J and Pfizer comply with all other provisions of the Order. To ensure that the Commission remains informed about the status of the Divested Assets and their transfer, the proposed Consent Agreement requires J&J and Pfizer to file reports with the Commission periodically until the divestitures are accomplished.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Decision and Order or the Order to Maintain Assets, or to modify their terms in any way.

Opinion of the Commission

IN THE MATTER OF
RAMBUS INCORPORATED

OPINIONS OF THE COMMISSION AND FINAL ORDER IN REGARD TO
ALLEGED VIOLATIONS OF SEC. 2 OF THE SHERMAN ACT AND SEC.
5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9302; File No. 011 0017

Opinion, February 2, 2007 – Final Order, February 2, 2007

In a unanimous opinion, the Commission overturned the Initial Decision dismissing the charges and ruled that Rambus's conduct constituted deception under Section 5 of the FTC Act and was exclusionary in violation of Section 2 of the Sherman Act. *Rambus, Inc.*, 142 F.T.C. 98 (2006). The Commission also issued an order requesting additional briefing to determine an appropriate remedy for Rambus's violations. 142 F.T.C. 1743. The Commission's remedy decision bars Rambus from making misrepresentations or omissions to standard-setting organizations. It also requires Rambus to license its SDRAM and DDR SDRAM technology, sets maximum allowable royalty rates it can collect for the licensing, bars Rambus from collecting or attempting to collect more than the maximum allowable royalty rates from companies that may already have incorporated its DRAM technology, and requires Rambus to employ a Commission-approved compliance officer to ensure that Rambus's patents and patent applications are disclosed to industry standard-setting bodies in which it participates. The order is designed to remedy the effects of the unlawful monopoly Rambus established in the markets for four computer memory technologies that have been incorporated into industry standards for dynamic random access memory – DRAM chips. DRAMs are widely used in personal computers, servers, printers, and cameras.

Opinion of the Commission

OPINION OF THE COMMISSION ON REMEDY

By Majoras, Chairman:

I.¹

On July 31, 2006, the Commission ruled that Rambus Inc.'s "acts of deception constituted exclusionary conduct under Section 2 of the Sherman Act, and that Rambus unlawfully monopolized the markets for four technologies"² incorporated into the Joint Electron Device Engineering Council ("JEDEC") standards in violation of Section 5 of the Federal Trade Commission Act ("FTC Act").³ The Commission further found "a sufficient causal link between Rambus's exclusionary conduct and JEDEC's adoption of the SDRAM and DDR-SDRAM standards (but not the subsequent DDR2-SDRAM standard)."⁴

We asked the parties to provide supplemental briefs on the question of remedy.⁵ The parties submitted initial briefs on

¹ This opinion uses the following abbreviations:

CCBR - Complaint Counsel's Brief on Remedy
CCRBR - Complaint Counsel's Reply Brief on Remedy
CX - Complaint Counsel's Exhibit
ID - Initial Decision of the Administrative Law Judge (ALJ)
JX - Joint Exhibits
Op. - Commission's Liability Opinion
RB - Respondent's Brief on Appeal and Cross-Appeal
RBR - Respondent's Brief on Remedy
RRBR - Respondent's Reply Brief on Remedy
RX - Respondent's Exhibit
Tr. - Trial Transcript

² Op. at 1.

³ 15 U.S.C. § 45.

⁴ Op. at 5.

⁵ *Id.* at 119.

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September 15, 2006, and reply briefs on September 30, 2006. Several interested parties also submitted amicus briefs.⁶ We heard oral argument on the issue of remedy on November 15, 2006.

The parties agree that the Commission has the authority to issue an injunction against future deceptive conduct by Rambus. Rambus acknowledged that the Commission has authority to “issue orders broad enough to prevent Rambus from misleading any [standard-setting organization (“SSO”)] from unknowingly adopting its proprietary technology.”⁷ To that end, Rambus submitted a proposed order that is limited to prohibiting repetition of the conduct in this case – that is “knowingly” engaging in a deceptive course of conduct as a member of an SSO.⁸ We believe the order should be broader. In Part IV, we summarize and explain the terms of the Commission’s Order, including the requirement that Rambus cease and desist from future deceptive conduct while a member or a participant in an SSO.

The fundamental question upon which the parties disagree is whether the Commission may order broader relief, and, if broader relief is authorized, on the scope of an appropriate remedy on the basis of the record before us. The Supreme Court has not yet addressed the scope of the Commission’s remedial authority

⁶ Brief for Amicus Curiae Broadcom Corporation and Freescale Semiconductor, Inc. on the Issue of Appropriate Remedy (Sept. 15, 2006); Brief for Amicus Curiae JEDEC Solid State Technology Association (Sept. 15, 2006); Brief for Amicus Curiae Gesmer Updegrove LLP and Andrew Updegrove on the Issue of Appropriate Remedy (Sept. 15, 2006); Brief for Amicus Curiae Nvidia Corporation, Micron Technology, Inc., Samsung Electronics Corporation, Ltd., and Hynix Semiconductor, Inc. on the Issue of Appropriate Remedy (Sept. 15, 2006); Brief for Amicus Curiae American Antitrust Institute on the Issue of Appropriate Remedy (Sept. 29, 2006).

⁷ RRBR at 12; *see also* RBR at 1.

⁸ RBR at 5. In our July 31, 2006, ruling, the Commission determined that Rambus’s deceptive course of conduct was “intentionally pursued,” Op. at 51, and that Rambus “intentionally and willfully engaged in deceptive conduct.” Op. at 68.

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where, as here, the Commission has applied the legal standards of Section 2 of the Sherman Act.⁹ This counsels caution but does not limit our ability to create a forward-looking remedy tailored to our liability findings. In assessing the appropriate remedy in this case, we have studied the principles that guide the courts in the exercise of their remedial authority in Sherman Act cases.

II.

The threshold issue is whether the Commission's remedial authority is limited to prohibitory "cease-and-desist" orders. Rambus argues that Section 5 of the FTC Act "gives the Commission authority [only] to issue forward-looking cease-and-desist orders that prevent conduct deemed to be unlawful and ensure against its repetition."¹⁰ Thus, Rambus concludes, even if it obtained monopoly power as a result of its deceptive course of conduct, the Commission is limited to a mere prohibitory injunction on any future deceptive conduct.¹¹ Rambus asserts that these limitations are supported by the language of Section 5, decisions of the U.S. Supreme Court and the U.S. Court of Appeals for the District of Columbia Circuit, and Commission testimony in support of the enactment of Section 13(b) of the FTC Act in 1973 to enable the Commission to seek broader relief from district courts.

Rambus's contention that the Commission is limited to prohibiting future deceptive conduct is mistaken. Insofar as the argument is premised on principles of Section 2, it is contrary to

⁹ 15 U.S.C. § 2. This is not surprising given that the Court has not considered a government Section 2 challenge for over thirty years. *See* *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

¹⁰ RRBR at 2; *see also* RBR at 1, 4-5.

¹¹ RBR at 2 ("Rambus does not believe . . . that the Commission has or should exercise the statutory authority to order" relief that would affirmatively alter current market conditions).

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clear Supreme Court precedent.¹² Insofar as the argument is based on the language of Section 5,¹³ it is inconsistent with long-established principles of implied agency authority.¹⁴ The Supreme Court's decision in *FTC v. Dean Foods Co.*¹⁵ recognized that the Commission possesses the ancillary powers essential to the effective discharge of its responsibilities. The Court relied on its earlier decision in *Pan American World Airways, Inc. v. United States*,¹⁶ which held that "the power to order divestiture need not be explicitly included in the powers of an administrative agency to be part of its arsenal of authority."¹⁷

Indeed, the Commission's authority to terminate the ill effects of a violation repeatedly has been confirmed. As the D.C. Circuit has held, "[I]t is clear that the Commission has the power to shape

¹² See *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 128 (1948) ("In this type of case we start from the premise that an injunction against future violations is not adequate to protect the public interest. If all that was done was to forbid a repetition of the illegal conduct, those who had unlawfully built their empires could preserve them intact. They could retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade they had inflicted on competitors.").

¹³ The FTC Act states that the Commission shall order an offending party "to cease and desist from using such method of competition or such act or practice." 15 U.S.C. § 45(b).

¹⁴ See Neil W. Averitt, *Structural Remedies in Competition Cases Under the Federal Trade Commission Act*, 40 OHIO ST. L.J. 781, 784 (1979) (concluding that "case law has clearly established the Commission's authority [under Section 5 of the FTC Act] to impose divestiture and other affirmative requirements").

¹⁵ 384 U.S. 597, 606-07 (1966) (rejecting an argument that the Commission needed express statutory authority to seek a preliminary injunction).

¹⁶ 371 U.S. 296 (1963).

¹⁷ *Dean Foods*, 384 U.S. at 606 n.4 (quoting *Pan Am.*, 371 U.S. at 312 n.17).

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remedies that go beyond the simple cease and desist order.”¹⁸ None of the cases cited by Rambus teaches otherwise. To the contrary, in *FTC v. National Lead Co.*,¹⁹ a case involving the Commission’s prohibition of specific conduct by which the effects of an unlawful agreement might be continued, the Court held that the Commission had “wide discretion” in bringing an end to the unfair practices at issue, but expressly indicated that it was *not* defining the full scope of Commission powers.²⁰ The Court also declared that the Commission “was not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than [it] requires.”²¹

Since *National Lead*, no court has held, or indicated, that the Commission is powerless to ensure that antitrust violations are

¹⁸ *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 757 (1977) (upholding the Commission’s corrective advertising order designed to terminate the otherwise continuing ill effects of false advertising). *See also* *Novartis Corp. v. FTC*, 223 F.3d 783, 787 (D.C.Cir. 2000) (upholding corrective advertising order); *Detroit Auto Dealers Ass’n, Inc. v. FTC*, 955 F.2d 457 (6th Cir. 1992) (upholding, with modification, an order requiring automobile dealers to maintain a minimum number of showroom hours per week in order to eliminate the continuing effects of an unlawful agreement to limit showroom hours); *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 23-24 (7th Cir. 1971) (upholding FTC order requiring divestiture as remedy for illegal monopolization); *Charles Pfizer & Co. v. FTC*, 401 F.2d 574, 586 (6th Cir. 1968) (upholding an order requiring compulsory licensing).

¹⁹ 352 U.S. 419 (1957).

²⁰ *Id.* at 430 n.7 (“We need not discuss the full scope of the powers of the Federal Trade Commission, nor their relative breadth in comparison with those of a court of equity.”).

²¹ *Id.* at 430 (quoting *Int’l Salt Co. v. United States*, 332 U.S. 392, 400 (1947)). The Court’s declaration in this respect is consistent with its repeated statements that an antitrust wrongdoer can — and should — be made to relinquish the fruits of his violation. *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 250 (1968); *United States v. U.S. Gypsum Co.*, 340 U.S. 76, 88 (1950).

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fully remedied.²² The only remedy issues in *FTC v. Colgate-Palmolive Co.*,²³ a case cited by Rambus in this regard,²⁴ involved the clarity of the order and the scope of the Commission's "fencing-in" authority.²⁵ Moreover, the D.C. Circuit in *United States v. Philip Morris USA Inc.*²⁶ did not speak to the Commission's remedial authority at all, as Rambus represents.²⁷ That case involved the RICO statute, not the different language of Section 5 of the FTC Act, and the decision rejected a disgorgement order, not an order prospectively terminating the ill effects of unlawful conduct.

Rambus relies on *Reynolds Metals Co. v. FTC*²⁸ and *Ford Motor Co. v. United States*²⁹ to argue that the courts have distinguished the Commission's Section 5 authority from a district court's purportedly broader equitable powers.³⁰ Neither case holds that the Commission's authority to eliminate the ill effects of a violation is narrower than that exercised by the district courts. Rather than ruling that the Commission's authority is more limited than that of the courts, *Reynolds Metals* merely

²² As the Supreme Court has recognized, in a monopolization case, there is a presumption that a mere prohibitory injunction allows a monopolist to retain the full dividends of [its] monopolistic practices" *Schine Chain Theatres*, 334 U.S. at 128; accord *United States v. Grinnell Corp.*, 384 U.S. 563, 577 (1966) ("We start from the premise that adequate relief in a monopolization case should . . . render impotent the monopoly power found to be in violation of the Act.").

²³ 380 U.S. 374, 395 (1965).

²⁴ See RBR at 4.

²⁵ *Id.* at 392-95. See *infra* Part IV (discussing "fencing-in" relief).

²⁶ *United States v. Philip Morris USA Inc.*, 396 F.3d 1190 (D.C. Cir. 2005).

²⁷ See RBR at 6 n.4.

²⁸ 309 F.2d 223 (D.C. Cir. 1962).

²⁹ 405 U.S. 562 (1972).

³⁰ See RRBR at 2-3.

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determined that the record did not support going *beyond* that by ordering divestiture of unrelated assets. The court of appeals in *Reynolds Metals* overturned a Commission order requiring divestiture of a factory acquired after a merger when the Commission had failed to demonstrate that there was “any nexus between the continued possession of [the factory] and the violation of Section 7 . . . or a need to divest the factory for restoration of the competitive status quo.”³¹ In rejecting a suggestion that *Reynolds Metals* limited remedies in a district court action brought by the United States, the Supreme Court’s *Ford Motor* opinion cursorily noted that *Reynolds Metals* concerned the enforcement powers of the Commission, not those of the courts; set that issue to the side, without further comment; and proceeded to focus on the appropriate remedy in the district court action before it.³² In sum, neither opinion provides a basis for Rambus’s claim that the Commission is confined to issuing prohibitive injunctions.

We turn next to the legislative history of the 1973 amendments to the FTC Act. Contrary to Rambus’s claim,³³ there is no basis for concluding that Congress, in enacting Section 13(b), or the Commission, in requesting the provision, effectively acknowledged the Commission’s inability to take action affirmatively to terminate the ill effects of a violation. To begin with, courts “will not construe an agency’s request for authorizing legislation as affirmative proof of no authority; ‘[p]ublic policy requires that agencies feel free to ask [for] legislation which will terminate or avoid adverse contentions and litigations.’”³⁴ Moreover, Congress intended Section 13(b) to provide a

³¹ 309 F.2d at 231.

³² 405 U.S. at 573 n.8.

³³ See RRBR at 3.

³⁴ *Warner-Lambert Co.*, 562 F.2d at 758 n.39 (quoting *Dean Foods*, 384 U.S. at 610, in rejecting a contention that a congressional grant of court remedial authority meant that the Commission itself lacked such authority).

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mechanism that would enable the Commission to obtain equitable relief from district courts without the delay that administrative proceedings entail.³⁵ Nothing in the legislation or the legislative history of Section 13(b) suggests that the Commission lacks power *after* administrative proceedings have concluded to issue an order requiring a violator to relinquish the “fruits” of its violation of Section 2.³⁶ Thus, the limitation that the legislation was designed to correct – the absence of a specific grant of authority to obtain ancillary and preliminary equitable relief in the district courts in aid of administrative adjudicative proceedings – was not a limitation on the remedies that are available to the Commission in crafting an administrative cease-and-desist order.

In sum, we do not agree with Rambus’s contention that the Commission’s remedial authority is limited to enjoining it from deceiving an SSO in the future. Instead, the Commission’s authority extends to restoring, to the extent possible, the

³⁵ See James T. Halverson, *The Federal Trade Commission’s Injunctive Powers Under the Alaskan Pipeline Amendments: An Analysis* 69 NW. U. L. REV. 872-73 (1974-75).

³⁶ Citing the testimony of Commissioner Elman during a 1969 Congressional hearing, Rambus argues that the Commission itself has recognized limits on its Section 5 authority. See RRBR at 3 n.4. Rambus’s reliance on the cited testimony is misplaced, however, because former Commissioner Elman’s statement relates to the FTC’s authority to administratively assess civil penalties and award so-called “civil damages” in consumer fraud cases. *Id.* at 57-70. Moreover, as Rambus conceded at oral argument, Commissioner Elman indicated that his testimony represented his own “separate statement” and not necessarily the views of the other Commissioners. See Oral Argument before the Commission on the Issue of Remedy (Nov. 15, 2006), at 42-43. Commissioner Elman provided that caveat during a colloquy with Senator Moss, which Rambus did not cite in its brief. See *Consumer Protection: Hearings on S.2246, et al., before the Consumer Subcomm. of the Comm. on Commerce*, 91st Cong. 57 (1969). Rambus also incorrectly relies on other former FTC commissioners’ statements, which do not address the Commission’s authority to restore competitive conditions after a finding of liability under Section 2. See RRBR at 3, n.4; *Agriculture-Environmental and Consumer Protection Appropriations for 1974: Hearings before a Subcomm. of the House Comm. on Appropriations*, 93rd Cong. 99 (1974); S. Rep. No. 93-151, at 10 (1973).

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competitive conditions that would have been present absent Rambus's unlawful conduct.³⁷ We now address the Commission's authority to order compulsory patent licenses.

A.

Rambus argues that even if the Commission has remedial power beyond the issuance of a cease-and-desist order, the Commission does not have the authority to order compulsory licensing on terms prescribed by the Commission.³⁸ Rambus would have us conclude that it can continue to reap the royalty rates it is now charging (and demanding in pending litigation).³⁹ Rambus asserts that this conclusion is supported by the Supreme Court's decision in *FTC v. Ruberoid Co.*,⁴⁰ in which the Court held that the Commission cannot order compensatory or punitive relief.⁴¹

We disagree with Rambus. The Commission enjoys "wide latitude for judgment" in fashioning a remedial order, subject to the constraint that the requirements of the order bear a reasonable relationship to the unlawful practices that the Commission has found.⁴² The Supreme Court's acknowledgment in *Ruberoid* that orders of the Commission "are not intended to impose criminal punishment or exact compensatory damages for past acts"⁴³ is not

³⁷ Ekco Products Co., 65 F.T.C. 1163, 1216 (1964), *aff'd*, 347 F.2d 745 (7th Cir. 1965).

³⁸ RBR at 6.

³⁹ *Id.* at 2, 16.

⁴⁰ 343 U.S. at 473 (1952).

⁴¹ RBR at 5 n.3.

⁴² *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613 (1946). *See also Colgate-Palmolive Co.*, 380 U.S. at 394-95; *FTC v. Nat'l Lead Co.*, 352 U.S. at 428-29; *Ruberoid Co.*, 343 U.S. at 473.

⁴³ 343 U.S. at 473.

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contrary authority. The Court in that case emphasized the Commission's wide discretion in its choice of remedy, and stated the expectation that the Commission would "exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices."⁴⁴ The district courts similarly exercise broad discretion in determining what kind of decree "will best remedy the conduct [they have] found to be unlawful This is no less true in antitrust cases."⁴⁵ The broad authority of the Commission and the district courts to remedy violations of the FTC Act and the other antitrust laws includes "mandatory selling on specified terms and compulsory licensing at reasonable charges."⁴⁶

Courts have blessed compulsory licensing orders in the past,⁴⁷ including at least one crafted by the Commission.⁴⁸ Following that precedent, the Commission has ordered licensing of intellectual property to remedy antitrust violations in litigated cases.⁴⁹ If

⁴⁴ *Id.*

⁴⁵ *United States v. Microsoft Corp.*, 253 F.3d 34, 105 (D.C. Cir. 2001) (*en banc*).

⁴⁶ *United States v. Glaxo Group*, 410 U.S. 52, 64 (1973). *See also* *Besser Mfg. Co. v. United States*, 343 U.S. 444, 447 (1952) ("compulsory patent licensing [on a fair royalty basis] is a well-recognized remedy where patent abuses are proved in antitrust actions and it is required for effective relief"); *Am. Cyanamid Co.*, 72 F.T.C. 623, 690 (1967) (requiring licensing at a specified, non-zero royalty rate), *aff'd*, *Charles Pfizer & Co. v. FTC*, 401 F.2d 574 (6th Cir. 1968).

⁴⁷ *See United States v. Nat'l Lead Co.*, 332 U.S. 319, 349 (1947) (upholding compulsory licensing remedy); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 351 (D. Mass. 1953) (same).

⁴⁸ *Am. Cyanamid Co v. FTC*, 363 F.2d 757, 772 (6th Cir. 1966) ("assuming the facts found by the Commission to be supported by substantial evidence, the Commission had jurisdiction to require as a remedy the compulsory licensing of tetracycline and aureomycin on a reasonable royalty basis.").

⁴⁹ *See Grand Calliou Packing Co., Inc.*, 65 F.T.C. 799 (1960), *rev'd in part on other grounds sub nom.*, *La Peyre v. FTC*, 366 F.2d 117 (5th Cir. 1966);

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prospective only (which Complaint Counsel agree it should be), such a compulsory licensing order is not Accommodatory.” Moreover, as discussed below, if the order attempts to replicate the “but for” world – *i.e.*, the circumstances that would exist had Rambus not engaged in its deceptive course of conduct – such an order is not “punitive.” It would simply stop Rambus from continuing to exploit its illegally acquired monopoly power in violation of Section 2 and terminate the anticompetitive effects of the deceptive course of conduct by which it acquired that monopoly power.

B.

Complaint Counsel ask the Commission to enjoin Rambus from enforcing its pre-1996 patents with respect to JEDEC-compliant products.⁵⁰ In effect, Complaint Counsel request that the Commission order royalty-free compulsory licenses for Rambus’s pre-1996 patent portfolio for those firms practicing JEDEC’s standards. Complaint Counsel argue that this remedy – “far from being extreme – merely restores, six years later, the competitive conditions that should have prevailed” had Rambus not engaged in deception.⁵¹ Moreover, Complaint Counsel argue that imposition of royalty-free compulsory licenses is well within the Commission’s broad discretion to restore competition and to deny Rambus the benefits of its illegal conduct.⁵² We agree that the Commission has that authority.

Am. Cyanamid Co., 63 F.T.C. 1747 (1963) — an early ruling in the series of *American Cyanamid* cases cited in footnotes 46 and 48.

⁵⁰ CCBR at 1-2.

⁵¹ CCBR at 2.

⁵² CCBR at 3, 11.

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Rambus argues that the Commission lacks the power to order any form of royalty-free licensing.⁵³ In support of this proposition, Rambus quotes *Hartford-Empire Co. v. United States*⁵⁴ that “it is difficult to say that, however much in the past such defendant has abused the rights thereby conferred [by a patent], it must now dedicate them to the public.”⁵⁵ Rambus also quotes from *United States v. National Lead*,⁵⁶ in which the Supreme Court stated that reducing all royalties automatically to a total of zero appears, on its face, to be inequitable without special proof to support such a conclusion.⁵⁷ Thus, Rambus would have us rule out a royalty-free licensing remedy, however limited, as a matter of law. We do not agree that the Commission is precluded from imposing such a remedy as a matter of law.

Compared to the extensive treatment of liability standards, antitrust courts have devoted relatively little attention to the question of remedies. The comparatively few modern cases that have addressed remedies have provided limited guidance about the suitability of specific cures for illegal monopolization.⁵⁸ In general terms, previous decisions have placed non-damage civil remedies on a spectrum. At one end of the spectrum are controls on conduct, which the cases tend to depict as relatively less drastic. At the other end are structural measures such as divestiture, which courts have tended to regard as being more drastic. Compulsory licensing often lies between the two ends of

⁵³ RBR at 7-8; RRBR at 3-4.

⁵⁴ 323 U.S. 386 (1945).

⁵⁵ *Id.* at 415.

⁵⁶ 332 U.S. 319 (1947).

⁵⁷ 332 U.S. at 349; *see also* RRBR at 4.

⁵⁸ *See* Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestitures in Network Industries*, 68 U. CHI. L. REV. 1, 45 (2001) (“The jurisprudence of the Sherman and Clayton Antitrust Acts does not enunciate grand principles for the design of optimal remedies. One can observe recurrent themes, but they must be teased out of the disparate cases.”).

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the spectrum, although courts sometimes have likened compulsory licensing to “structural” relief where the licensing at issue enables the licensee to compete against the defendant in the relevant product market.⁵⁹ As we discuss below, the cases appear to establish the broad proposition that, as the plaintiff’s demands for relief move across the spectrum from less drastic (conduct) solutions toward more drastic (structural) solutions, the plaintiff’s duty to establish the need for such remedial intervention increases.

Compulsory patent licensing on a reasonable royalty basis is a well-recognized remedy,⁶⁰ yet few litigated decisions have ordered royalty-free compulsory licensing. Each time the Supreme Court has considered royalty-free licensing, it has determined that, under the facts presented, a less powerful remedy would suffice to restore competition.⁶¹ We know of one litigated ruling in which royalty-free licensing was ordered.⁶²

⁵⁹ See, e.g., *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 186, 244 (D.D.C. 2002) (analogizing the proposed remedy, which included a requirement for royalty-free licensing of software, to a divestiture of assets and therefore as “structural” in nature), *aff’d sub nom. Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004). We note that the royalty-free compulsory licensing remedy that we are contemplating here would be more limited because it would apply only to certain JEDEC-compliant technologies; Rambus would be free to charge whatever royalties it wished otherwise.

⁶⁰ The availability of compulsory licensing at reasonable royalties is well-established in the Supreme Court’s jurisprudence on antitrust remedies. See *Glaxo Group*, 410 U.S. at 62; *Besser Mfg. Co.*, 343 U.S. at 448-49; *Nat’l Lead*, 332 U.S. at 348-49; *Hartford-Empire*, 323 U.S. at 418-19.

⁶¹ In *Hartford-Empire*, for example, the Supreme Court rejected royalty-free licensing as a remedy for Sherman Act and Clayton Act violations arising from a patent pooling arrangement. Concerned that the remedy went “beyond what is required to dissolve the combination and prevent future combinations of like character[.]” 323 U.S. 386 at 414, the Court allowed for a reasonable royalty instead of the requested royalty-free licensing. Similarly, the Court rejected the Government’s proposal for royalty-free licensing in *United States v. Nat’l Lead*, a case in which a “proliferation of patents” and related agreements led to the “domination of an entire industry” and a violation of Section 1

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Cases such as *Hartford-Empire* have expressed caution about royalty-free licensing,⁶³ but the Supreme Court has not foreclosed the availability of this form of relief. Two years after *Hartford-Empire*, the Supreme Court in *United States v. Nat'l Lead* explicitly left open the possibility that, under different facts, the remedy of royalty-free licensing might be necessary and appropriate.⁶⁴ Thus, the Commission has previously declared, and we agree, that "where the circumstances justify such relief, the Commission has the authority to require royalty-free licensing."⁶⁵

Although the Commission has the authority to require royalty-free licensing, the exercise of that power is subject to important limits. The courts, speaking in varying terms, have insisted on

of the Sherman Act. 332 U.S. at 327-28. The Court concluded that "licenses at uniform, reasonable royalties" would be sufficient to accomplish the discontinuance and prevention of the illegal restraints and patent misuse at issue. *Id.* at 348.

⁶² See *United States v. Gen. Elec. Co.*, 115 F. Supp. 835 (D.N.J. 1953).

⁶³ See *Hartford-Empire*, 323 U.S. at 414-15 (stating reservations about the imposition of royalty-free licensing and concluding that royalty-free licensing was not warranted in the case at hand).

⁶⁴ *United States v. Nat'l Lead*, 332 U.S. at 349. Compare *Schine Chain Theatres*, 334 U.S. at 128-30 (endorsing the availability of structural remedies of divestiture or dissolution to cure illegal monopolization).

⁶⁵ *Am. Cyanamid Co.*, *supra* at n.46. In a number of consent orders, the Commission has accepted the prohibition of enforcement of patents as a remedy. For example, in *Dell Computer Corp.*, 121 F.T.C. 616, 620-22 (1996) and *Chevron Corp.*, 140 F.T.C. 100 (2005), available at <http://www.ftc.gov/os/decisions/docs/volume140.pdf> (Aug. 2, 2005), the Commission approved consent orders that prohibited enforcement of patents against those practicing a standard. See also *Eli Lilly & Co.*, 95 F.T.C. 538, 546-52 (1980) (ordering royalty-free licensing of patents); *Xerox Corp.*, 86 F.T.C. 364, 373-83 (1975) (same). In addition, in the context of alleged violations of Section 7 of the Clayton Act, the Commission has approved consent orders that require divestiture or licensing of, or place other limitations on, patent rights. See, e.g., *Cephalon, Inc.*, 138 F.T.C. 583, 604 (2004), available at <http://www.ftc.gov/os/decisions/docs/volume138.pdf>.

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“special proof” for such remedies. This requirement is not well-specified in the cases. In the formative decision on this point, *United States v. Nat’l Lead*, the Supreme Court found that the “special proof” needed to justify royalty-free licensing was lacking, but the Court did not elaborate upon the meaning of this term.⁶⁶ Although the parties’ briefs provide no insights on this point, Complaint Counsel stated at oral argument that “special proof” means “proof of the competitive conditions [that] would have existed absent the conduct in question that would not have resulted in any enforcement of the patent.”⁶⁷ Accordingly, Complaint Counsel ask us to find that the “special proof” requirement is satisfied here by evidence that they believe demonstrates that Rambus would have received no royalties at all in the “but for” world. Without embracing a precise definition of “special proof,” we agree that, before ordering royalty-free licensing, Complaint Counsel must show that this form of relief is necessary to restore the competitive conditions that would have prevailed absent Rambus’s misconduct. We discuss whether Complaint Counsel have met that burden in Part III of this Opinion.

Rambus, on the other hand, argues that “the burden to justify a remedy that would restrict Rambus’s ability to license its patents is heavier than the burden to establish liability.”⁶⁸ In support of

⁶⁶ In *United States v. Nat’l Lead*, the Court observed that the growing strength of royalty-paying licensees demonstrated that royalty-free licenses were not essential to their ability to compete. 332 U.S. at 351. In contrast, the district court in *General Electric*, 115 F. Supp. at 844, found that, in light of GE’s vast arsenal of patents and the narrow cost margins that prevailed in the market for lamps and related parts, smaller firms would be unable to gain a foothold in the market if they had to bear any licensing fees. Therefore, the court determined that royalty-free licensing was necessary to restore competition. *Id.*

⁶⁷ Oral Argument before the Commission on the Issue of Remedy (Nov. 15, 2006), at 23.

⁶⁸ RBR at 7; *see also* RRBR at 6.

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this proposition, Rambus cites *United States v. Microsoft Corp.*,⁶⁹ in which the D.C. Circuit held that “structural relief, which is ‘designed to eliminate the monopoly altogether . . . require[s] a clearer indication of a *significant causal connection* between the conduct and creation or maintenance of the market power.’”⁷⁰ Most recently, in *Massachusetts v. Microsoft Corp.*,⁷¹ the D.C. Circuit, affirming the district court’s refusal to order royalty-free licensing, held that requiring Microsoft to license Internet Explorer on a royalty-free basis, as sought by the Commonwealth of Massachusetts, was a “de facto” divestiture that would require a more “significant causal connection.”⁷² Collectively, the case law appears to indicate that the farther remedies expand beyond simple prohibitions against future anticompetitive conduct (with divestiture at the other outer end), the stronger the proof that is needed to justify the remedy.

We reaffirm that the Commission has the authority to order royalty-free licensing when the factual circumstances justify it. With the guiding principles of the case law discussed above firmly in mind, we turn to determining the appropriate remedy in this case based on the record before us. Having found liability, we want a remedy strong enough to restore ongoing competition and thereby to inspire confidence in the standard-setting process. At the same time, we do not want to impose an unnecessarily

⁶⁹ 253 F.3d 34 (D.C. Cir. 2001).

⁷⁰ *Id.* at 111 (*quoting* 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶ 653b at 91-92) (2d ed. 2002) (emphasis in original)); *see also* AREEDA, ¶ 653c at 100 n. 8 (“Compulsory licensing of intellectual property rights could . . . constitute ‘structural’ relief, particularly when intellectual property rights make up a significant part of defendant’s output.”).

⁷¹ 373 F.3d 1199 (D.C. Cir. 2004).

⁷² *Id.* at 1233.

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restrictive remedy that could undermine the attainment of procompetitive goals.⁷³

III.**A.**

The question, then, becomes whether Complaint Counsel are correct that we should order royalty-free licensing here. Complaint Counsel contend that they have offered “special proof” that justifies requiring Rambus to license its technology royalty-free. Specifically, according to Complaint Counsel, enjoining enforcement of the relevant patents against JEDEC-compliant products is appropriate because, absent Rambus’s deception, JEDEC would have selected alternative technologies — including alternatives with inferior performance — in lieu of paying royalties, thus leaving Rambus with no claim to royalties.⁷⁴

Rambus, however, contends that there is no basis for the Commission to assume that Rambus — had it disclosed its patents — would have been left with no claim to royalties. According to Rambus, JEDEC selected, and thereby showed a preference for, Rambus technologies after serious and searching consideration of the alternatives.⁷⁵ Furthermore, Rambus contends, JEDEC also would have preferred Rambus’s technologies in the “but for” world in which Rambus had disclosed its patent position.⁷⁶ At

⁷³ Op. at 3, 33. The Commission has stressed the contribution of intellectual property to innovation and consumer welfare, and has cautioned against unwarranted antitrust enforcement activity that might undermine the patent system’s incentives for innovation. *See* FED. TRADE COMM’N, TO PROMOTE INNOVATION, THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY, ch.1 at 2 (2003).

⁷⁴ CCBR at 4-5.

⁷⁵ RBR at 8, 11.

⁷⁶ RBR at 10; RRBR at 9.

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most, according to Rambus, JEDEC would have requested a commitment to license on reasonable and nondiscriminatory (“RAND”) terms, and Rambus would have had no real choice but to comply.⁷⁷ Thus, according to Rambus, because Rambus would have received royalties for its patented technologies, Complaint Counsel lack adequate support for their contention that “a zero-royalty remedy flows directly from Rambus’s misconduct.”⁷⁸

We recognize that Rambus’s unlawful conduct makes it difficult to reconstruct the “but for” world, as is typically the case when a party has violated the antitrust laws. We conclude, however, that Complaint Counsel have not satisfied their burden of demonstrating that a royalty-free remedy is necessary to restore the competition that would have existed in the “but for” world — *i.e.*, that absent Rambus’s deception, JEDEC would not have standardized Rambus technologies, thus leaving Rambus with no royalties.

We have examined the record for the proof that the courts have found necessary to impose royalty-free licensing, but do not find it. Our liability opinion identified two realistic possibilities for what would have occurred had Rambus not engaged in deception of JEDEC members: either (i) JEDEC would have chosen alternative technologies, or (ii) JEDEC would have incorporated Rambus’s technologies into the standard but would have demanded, as a pre-condition of adopting Rambus’s technology, that Rambus agree to license the technology on RAND terms.⁷⁹ There is evidence in the record to support both possibilities.

As to the first possibility, it is true that if JEDEC had chosen to include other, non-Rambus technologies, its members would have paid no royalties to Rambus. But that does not mean that

⁷⁷ RRBR at 10.

⁷⁸ CCRBR at 6.

⁷⁹ Op. at 74.

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incorporating those technologies rather than the Rambus technologies would have been costless. Because Rambus's cost analysis was faulty,⁸⁰ and Complaint Counsel did not provide a cost-benefit comparison of the available technologies, we do not know what the costs might have been. We do know, however, that without knowledge that payment of royalties to Rambus would be required, JEDEC found the Rambus technologies desirable and chose them for the JEDEC DRAM standards. On the current record, we can neither confirm nor reject the possibility that JEDEC would have preferred Rambus's technologies over the alternatives, even with some reasonable royalty. Yet, for purposes of supporting the need for a zero-royalty remedy, it was Complaint Counsel's burden to show that Rambus would not have received reasonable royalties in the "but for" world.

⁸⁰ Although Rambus presented its analysis of relative costs and performance characteristics of the relevant Rambus technologies and their alternatives, the Commission found Rambus's calculations "fraught with uncertainty and potential for error" and concluded that Rambus had failed to demonstrate that alternatives would have been more expensive or that JEDEC would have standardized Rambus's technologies even if Rambus had disclosed its patent position. Op. at 94. With respect to these and other evaluations of the evidence in the record — both here and in the July 31, 2006, liability opinion — the Commission, to the extent necessary or desirable, exercise[s] all the powers which it could have exercised if it had made the initial decision." 16 C.F.R. 3.54(a). Thus, in particular, any Commission citation to any trial testimony, exhibit, or deposition segment — either in this opinion or in the July 31, 2006, opinion — constitutes a determination by the Commission that the cited testimony, exhibit, or deposition segment is relevant, material, and reliable evidence, and therefore admitted into the record of this proceeding. 16 C.F.R. 3.43(b). Each such determination shall be conclusive, with respect to determining the contents of the record of this proceeding, notwithstanding any objection or response thereto registered by either Complaint Counsel or Counsel for Respondent. The Commission also has determined that all exhibits listed on the Joint Exhibit Index filed by Complaint Counsel and Counsel for Respondent on September 29, 2003, whether or not marked as "pending," are admitted into the record of this proceeding, with any objections and responses thereto as to any exhibit marked "pending" going to the weight to be accorded that exhibit, rather than to its admissibility.

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Complaint Counsel suggest that the evidentiary gap can be closed because Rambus would not have issued the commitment to license on RAND terms required by JEDEC and EIA regulations. Complaint Counsel point to evidence that shows that Rambus did not want to license technology on RAND terms and that it even made statements that offering RAND terms was contrary to its business model.⁸¹ Rambus, however, had not disclosed its patents at the time of these statements. An unwillingness to comport with JEDEC policy while pursuing a hold-up strategy is not necessarily indicative of how Rambus would have acted after disclosure, when hold up no longer was attainable.

It is hardly surprising that Rambus would rather have the freedom to choose what license fees to charge than to be required to license on RAND terms. Indeed, Rambus was so desperate to avoid having to license on RAND terms that it chose to deceive JEDEC rather than to succumb. But that also shows how desperate Rambus was to have its technology incorporated into the standard. Rambus does not manufacture anything; it innovates, obtains patents, and then licenses.⁸² To conclude that, had Rambus “come clean,” it still would have refused JEDEC’s demand for RAND terms because it preferred licensing according to its own terms, is to conclude that Rambus, faced with two choices it did not like, would have chosen the path that resulted in no royalties from SDRAM and DDR and other technologies becoming the industry standard.⁸³ This is hard to square with the fact that “[r]oyalties are the lifeblood of Rambus⁸⁴ and its reiterated objective of “get[ting] royalties from competitive memory.”⁸⁵ Further, the record suggests that despite its

⁸¹ CCRBR at 10.

⁸² Op. at 7.

⁸³ See Teece, Tr. 10740-46.

⁸⁴ CX 2106 at 221 (deposition transcript at 220) (Farmwald FTC Dep.) (*in camera*). See also Farmwald, Tr. 8095, 8150, 8248; RX 82 at 18.

⁸⁵ CX 5110 at 2.

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protestations, Rambus was indeed willing to cater to the demands of powerful buyers,⁸⁶ and JEDEC, *ex ante*, was a very powerful potential source of business.⁸⁷ Given JEDEC's ability to turn to alternatives to Rambus's patented technologies and the historic importance of JEDEC standards to industry success, a choice by Rambus to forgo participation in the JEDEC standard at a reasonable royalty rate is not easily assumed without stronger evidence than Complaint Counsel have presented.⁸⁸

Both dissents express the view that Rambus would not have offered a RAND commitment because Rambus's proprietary DRAM technology, RDRAM, was a "flagship" product, and Rambus would not have torpedoed its flagship to secure royalties on SDRAM and DDR SDRAM.⁸⁹ Nothing in the record, however, suggests that SDRAM and DDR SDRAM would have foundered if Rambus had withheld its four patented technologies.⁹⁰ If the Rambus technologies in SDRAM and DDR SDRAM came at a royalty equal to their value-added, so that improved performance carried with it commensurately higher cost, it is not clear why RDRAM would have been disadvantaged by their adoption.

⁸⁶ For example, Rambus licensed its RDRAM technology at rates quite favorable to Samsung, a significant market participant. In the Samsung RDRAM license, the applicable royalty rate drops to zero five years after shipment of the 500,000th unit, provided that more than 10 million units had been shipped. CX 1592 at 23.

⁸⁷ *See Op.* at 78-79 (noting "the historical record of the predominant market position of DRAMs compliant with the JEDEC standards"). JEDEC was a "Abroad-based organization that included essentially all the DRAM manufacturers and their largest customers." *Id.* at 78.

⁸⁸ *See Teece, Tr.* 10740-46 (testifying that Rambus had economic incentives to offer RAND assurances in a "but for" world in which it had already disclosed its patent position).

⁸⁹ Rambus developed RDRAM as a proposed solution to the computer hardware industry's "memory bottleneck problem." *See Op.* at 6-7.

⁹⁰ Rambus documents evince a belief that development of SDRAM was inevitable. *See, e.g., CX* 672 at 1 ("SDRAMs will happen.").

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Moreover, the record suggests that Rambus was proceeding on *two* tracks — developing RDRAM *and* pursuing royalties through SDRAM/DDR SDRAM⁹¹ — and it seems unlikely that Rambus would have abandoned the latter track at the very time that royalties could have been secured.

As to the second possibility — that JEDEC would have standardized Rambus’s technologies upon receipt of a RAND commitment — the evidence shows, and in the liability opinion the Commission found, that JEDEC was reluctant to incorporate patented technologies.⁹² JEDEC’s minutes state, “If it is known that a company has a patent on a proposal then the Committee will *be reluctant* to approve it as a standard.”⁹³ This, too, is hardly surprising, given that all firms would strongly prefer to use technology without the cost of license fees. The minutes do not, however, state that the committee will *not* standardize a patented technology, and the basic JEDEC and EIA documents repeatedly spell out procedures under which patented technologies may be accepted.⁹⁴

⁹¹ See, e.g., CX 1267 (1995 Rambus document, identified at Diepenbrock, Tr. 6129-31, headed “IP Strategy” announcing, with equal weight, in one column a “Defensive” strategy built around protecting RDRAM and in the other column an “Offensive” strategy based on “[f]ind[ing] key areas of innovation in our IP that are essential to creating a competing device to [RDRAM]” and “claim[ing] these areas as broadly as possible within the scope of what we invented”); CX 543 at 16-17 (June 1992 Rambus business plan identifying the marketing of RDRAM as the number one strategy while simultaneously articulating a strategy of capturing royalties from SDRAMs by “be[ing] in a position to request patent licensing (fees and royalties) from any manufacturer of Sync DRAMs”).

⁹² Op. at 74-75.

⁹³ JX 5 at 4 (emphasis added).

⁹⁴ See CX 208 at 19 (JEDEC’s Manual of Organization and Procedure, JEP 21-I) (stating that “committees should ensure that no program of standardization shall refer to a product on which there is a known patent *unless* all the relevant technical information is known to the formulating committee[,] subcommittee, or working group” and specifically providing for including patented technologies on receipt of a written RAND assurance) (emphasis

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Moreover, the record identifies several occasions in which JEDEC incorporated patented technologies into some standards after securing agreement from the patent holder that the technologies would be licensed on RAND, or specific-royalty, terms: (1) JEDEC retained Texas Instruments's ("TI") Quad CAS patented technology in 1993 after TI provided written assurances complying with EIA patent policy⁹⁵; (2) JEDEC selected Motorola patented technology for the SDRAM standard in 1992 after Motorola provided a letter offering RAND assurances⁹⁶; and (3) JEDEC approved Digital Equipment Corporation's patented technology for an MPDRAM standard in 1990 after DEC agreed to license at a 1% royalty rate.⁹⁷ In addition, JEDEC's DRAM Task Group chairman, Gordon Kelley, testified that in "several instances[.]" JEDEC ceased consideration of alternatives once a RAND commitment letter on a patented technology had been received.⁹⁸ We have considered that on one occasion JEDEC rejected a technology known to be covered by a Rambus patent.⁹⁹ But that occurred nearly a year *after* Rambus had left JEDEC, leaving JEDEC with no way to impose the RAND requirement.

Complaint Counsel cite to the testimony of multiple JEDEC members that they likely would have opposed using the technologies in question and instead selected alternatives had they known of Rambus's patent applications.¹⁰⁰ While this testimony

added); *see also* EIA publications EP-7-A, CX 207a at 8, and EP-3-F, CX 203a at 11 (containing similar provisions).

⁹⁵ JX 25 at 5-6.

⁹⁶ JX 13 at 9-10, 136.

⁹⁷ JX 1 at 6, 24.

⁹⁸ G. Kelley, Tr. 2708-09.

⁹⁹ See Op. at 74 n.403 (describing JEDEC's reaction to a proposal for a "loop-back" clock system).

¹⁰⁰ CCBR at 5.

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has some persuasion, it is ambiguous at times and — because it is based on a “but for” hypothetical — necessarily speculative, albeit sincere. The testimony of market participants, especially customers, is always important in the Commission’s decisions. But we must look not only to what these members say they *would* have done, but also at what they actually have done. Here, the evidence shows that JEDEC members agreed to incorporate patented technologies into the SSO’s standards in several instances, described above.

We reiterate that we agree with our colleagues Commissioner Rosch and Commissioner Harbour that the Commission has the authority to order royalty-free licensing. We also respect their differing conclusion regarding the “but for” world, construction of which is no simple or certain task. If we shared their assessment of the facts on this issue, we might well have endorsed a more powerful form of relief. We conclude, however, that while there is some evidence that supports the possibility that JEDEC would have chosen alternative technologies, Complaint Counsel have not met the burden of demonstrating that restoring the competition that would have existed in the “but for” world requires that Rambus license its technology with no compensation.

B.

We therefore are left with the task of determining the maximum reasonable royalty rate that Rambus may charge those practicing the SDRAM and DDR-SDRAM standards.¹⁰¹ Royalty rates unquestionably are better set in the marketplace, but Rambus’s deceptive conduct has made that impossible. Although we do not relish imposing a compulsory licensing remedy, the facts presented make that relief appropriate and indeed necessary to restore competition.

¹⁰¹ Rambus argues that “if the Commission wishes now to replicate the conditions that would have existed in the but-for world, it should enter an order requiring Rambus to license the four relevant technologies to manufacturers of SDRAM or DDR SDRAM-compliant devices on RAND terms — that is, the

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There is no direct evidence as to what royalty rates would have resulted from *ex ante* SDRAM negotiations among the parties had Rambus not engaged in the unlawful conduct. Naturally, adjudicators rarely if ever have such direct proof of the “but for” world before them.¹⁰² An antitrust remedy, however, can be adequate even if knowledge of the “but for” world is imperfect. As the Supreme Court explained in *J. Truett Payne Co. v. Chrysler Motors Corp.*, “the vagaries of the marketplace usually deny [courts] sure knowledge of what [an antitrust] plaintiff’s situation would have been in the absence of the defendant’s antitrust violation.”¹⁰³ Indeed, to require the kind of detailed and concrete proof of injury that is available in other contexts would allow a wrongdoer to benefit from the uncertainty that its own unlawful conduct has created.¹⁰⁴

terms on which Rambus would have been obligated to license those technologies if it had given a RAND commitment when it was a member of JEDEC.” RBR at 14. To simply order Rambus to henceforth license on RAND terms undoubtedly would be fruitless, however. We already know that Rambus’s views about what RAND terms would be differs from the views of the licensees. Consequently, if we do not set the maximum rate now, we will simply invite more disputes that we likely will have to resolve eventually.

¹⁰² Even if we had a more complete record, we would not be able to apply a simple formula to predict “but for” royalties. In a “but for” world, the parties would have arrived at a rate on the basis of a number of factors that are not easily quantifiable — *e.g.*, the respective negotiating skills and strengths of the parties and their respective business plans. *Cf.* *Georgia Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1121 (S.D.N.Y. 1970) (economic significance of the factors relevant to establishing a reasonable royalty for purposes of calculating infringement damages cannot be “automatically transduced into their pecuniary equivalent”), *aff’d as modified*, 446 F.2d 295 (2d Cir. 1971).

¹⁰³ 451 U.S. 557, 566 (1981). *Accord* *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 794 (6th Cir. 2002).

¹⁰⁴ *J. Truett Payne Co.*, 451 U.S. at 566-67 (citing *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946)).

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Consistent with JEDEC policies and practices for the adoption of patented technologies in standards determinations, and our own findings in the liability opinion,¹⁰⁵ we conclude that in the “but for” world Rambus’s royalty rates would have been negotiated under the constraint of a RAND commitment. A reasonable royalty “is or approximates the outcome of an auction-like process appropriately designed to take lawful advantage of the state of competition existing *ex ante* . . . between and among available IP options.”¹⁰⁶ The parties agree that the “*ex ante* value of a technology is the amount that the industry participants would have been willing to pay to use a technology over its next best alternative prior to the incorporation of the technology into a standard.”¹⁰⁷

The adoption of Rambus’s technologies for the standard shows that JEDEC believed that — putting royalties aside — Rambus’s technologies were superior to alternatives. JEDEC members likely would have been willing to pay some amount reasonably reflecting that superiority. It is also true, however, that the record does not permit us precisely to quantify the closeness of substitution between Rambus’s technologies and the alternatives and the degree to which those alternatives would have entailed higher costs to achieve the same level of DRAM performance, higher costs in the form of decreased DRAM performance, or both.¹⁰⁸

¹⁰⁵ Op. at 97 (finding that JEDEC and EIA policies would have prohibited standardization of Rambus’s patented technologies absent a RAND commitment).

¹⁰⁶ Daniel G. Swanson and William J. Baumol, *Reasonable and Non-discriminatory (RAND) Royalties, Standards Selection, and Control of Market Power*, 73 ANTITRUST L.J. 1, 57 (2005).

¹⁰⁷ RBR at 12 (quoting Complaint Counsel’s Proposed Finding of Fact No. 2965 at 388).

¹⁰⁸ As discussed in our liability opinion, the evidence that Rambus provided was flawed and unreliable. Op. at 82-96.

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Lacking this information, we nevertheless consider and balance evidence that:

1. Alternative technologies were available, and it likely would have been possible for members to design around Rambus's patents, albeit possibly with some higher cost;¹⁰⁹
2. Absent any royalties, JEDEC members preferred Rambus's technology;
3. JEDEC had a stated preference for open, patent-free standards,¹¹⁰ and its members were highly cost-sensitive;¹¹¹ and
4. Rambus, despite its preference to avoid RAND commitments, had a strong economic incentive to do what was necessary to ensure that its technology was incorporated into JEDEC's standards.¹¹²

In determining what royalty rates likely would have resulted from *ex ante* SDRAM negotiations, the Commission may look to real-world examples of negotiations involving similar technologies. Rambus agrees that this is the correct approach, noting that "the best way to determine these [RAND] rates is by examining rates for other comparable licenses in the industry."¹¹³

¹⁰⁹ *Id.* at 76, 82-96.

¹¹⁰ *See, e.g.*, JX 5 at 4; CX 203a at 11; CX 207a at 8; CX 208 at 19.

¹¹¹ *Id.* at 74-75.

¹¹² *See, e.g.*, Teece, Tr. 10341-46. *See also* CX 2106 at 221 (deposition transcript at 220) (Farmwald FTC Dep.) (*in camera*) ("[r]oyalties are the lifeblood of Rambus"); CX 5110 at 2-3 (Rambus's business objective was "get[ting] royalties from competitive memory").

¹¹³ RBR at 16. As discussed below, Rambus disagrees with our specific application of the approach taken herein, but it nonetheless endorses the general methodology.

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Complaint Counsel seem to agree, at least by implication, because they argue that the October 2000 Samsung SDRAM/DDR SDRAM license agreement and the March 2005 Infineon SDRAM and DDR SDRAM license agreement with Rambus indicate that the highest possible royalty rate in the “but for” world would be less than 0.25% on JEDEC-compliant DRAMs.¹¹⁴ Similarly, the court in *Georgia Pacific*, a seminal source regarding the methodology for calculating a reasonable royalty owed to patent holders following a finding of infringement, identified several factors potentially pertinent to that exercise, including, prominently, “the rates paid by the licensee for the use of other patents comparable to the patent in suit.”¹¹⁵ That court looked to multiple factors, seeking to exercise “a discriminating judgment reflecting its ultimate appraisal of all pertinent factors in the context of the credible evidence.”¹¹⁶

C.

The Commission will extrapolate *ex ante* SDRAM and DDR SDRAM royalty rates using as its starting point the RDRAM license agreements found in the record. As we explained in our liability opinion, beginning in 1990, Rambus offered to license its RDRAM technology to manufacturers of DRAM chips and DRAM-compatible microprocessors, and it sought to “position RDRAM as the *de facto* standard.”¹¹⁷ RDRAM failed to achieve significant market success, however, as industry participants instead turned to standards promulgated by JEDEC — which they

¹¹⁴ CCBR at 19-20.

¹¹⁵ 318 F. Supp. at 1120. *Accord* Mobil Oil Corp. v. Amoco Chems. Corp., 915 F. Supp. 1333, 1354 (D. Del. 1994) (noting that parties’ experts agreed that the price of comparable technology was of primary importance in determining a royalty rate); *see also* Mahurkar v. C.R. Bard, Inc., 79 F.3d 1572, 1579 (Fed. Cir. 1996) (noting that the task of calculating reasonable royalty is simplified when the record shows an established rate for “related patents or products”).

¹¹⁶ *Georgia Pacific*, 318 F. Supp. at 1120-21.

¹¹⁷ *Op.* at 8.

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hoped would represent a better value proposition.¹¹⁸ RDRAM royalty rates nevertheless serve as an extraordinarily useful benchmark because they are the product of individual, arm's-length negotiations between Rambus and manufacturers of DRAM chips and DRAM-compatible components for the use of all of the technologies at issue in this case, and more.¹¹⁹ The manufacturers were aware early on that Rambus claimed patent protection for the RDRAM technologies,¹²⁰ and there was no lock-in at the time these agreements were negotiated. In our effort to restore competitive conditions to those that would have prevailed in the "but for" world, for the reasons described above, we deem the RDRAM license agreements as the best available evidence from which to base our estimate of the likely "but for" results of negotiation.¹²¹

¹¹⁸ *Id.*

¹¹⁹ *See* Op. at 115 n.624 ("RDRAM royalties cover all four of the technologies at issue in this proceeding, as well as additional proprietary technologies. *See, e.g.,* Horowitz, Tr. 8547-48; RX 2183; RX 81 at 8."); CX 2092 at 132 (Crisp *Infinion* Trial Tr.) (*in camera*) (stating that the ideas added to Rambus patent applications for the mode register and for programmable CAS latency were ideas [redacted]. Rambus has acknowledged this point. *See* Rambus Response to Complaint Counsel's Proposed Findings of Fact No. 723 at 285 (stating that "[w]hen first developed, RDRAM technology contained . . . the use of registers on the DRAM to store latency values, a variable burst length for data transfers, dual edge clocking in a synchronous memory device, and on-chip DLL or PLL.").

¹²⁰ *See, e.g.,* G. Kelley, Tr. 2504; Kellogg, Tr. 5053; Bechtelsheim, Tr. 5828-29, 5841-42; Lee, Tr. 6610-11; RX 279 at 8.

¹²¹ Rambus cites evidence of royalty rates for other semiconductor technologies as a basis for an appropriate remedy. RBR at 18-20. We examined this evidence in our liability decision and determined that Rambus had provided no basis for treating the referenced licensing arrangements as comparable to licenses for the technologies here at issue. Op. at 114-15 n.624 (quoting Rambus CEO Geoffrey Tate's testimony that comparing royalty rates for different technology licenses mixes "apples and oranges" because "[t]he royalty rate for one patent and the royalty rate for another patent, even in the [semiconductor] industry, can vary tremendously based on the value of the patent and the applications involved"). Clearly, RDRAM, with the *same*

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During the 1990s, Rambus licensed its proprietary RDRAM technologies at high-volume rates averaging 1-2% for use in DRAM chips,¹²² with the rates declining significantly over time and with increases in the number of shipped units.¹²³ In the Samsung RDRAM license, for example, the rate drops to zero five years after shipment of the 500,000th unit, provided that more than 10 million units had been shipped.¹²⁴

Rambus argues that 2% was its “standard rate” for RDRAM licenses, and that even this standard rate was an introductory, promotional rate reflecting an investment in the future. However, the 1-2% average RDRAM rate is corroborated by a November 1998 e-mail by Rambus CEO Geoff Tate (observing that three DRAM companies were “at 1% long term” and expressing the hope of *raising* their long-term rates to join three other “biggies” at 1.5%)¹²⁵ and by a November 2000 Rambus slide presented by Tate that reflects the company’s desire to “drive royalties from 1-2% average to 3-5%.”¹²⁶ These documents not only confirm the

technologies at issue in this case, offers a superior point of comparison than the disparate semiconductor technologies cited by Rambus.

¹²² See RDRAM licenses included in the record — CX 1592 (Samsung); CX 1600 (Hyundai); CX 1609 (Mitsubishi); CX 1612 (“mendment to Hyundai); CX 1617 (Siemens); CX 1646 (Micron); RX 538 (NEC).

¹²³ Although Commissioner Rosch’s dissenting opinion correctly notes that *initial* royalty rates set by the RDRAM licenses sometimes were higher, SDRAM and DDR SDRAM have been high-volume products for several years. See Rapp Tr. 10248-49; CX 2112 at 310-11 (deposition transcript at 309-10) (Mooring FTC Dep.) (*in camera*). Our goal — restoring competition — thus requires that we look to the royalties that the RDRAM licenses required for the later years in the life of a high-volume product.

¹²⁴ CX 1592 at 23.

¹²⁵ CX 1057.

¹²⁶ CX 1391A at 33 (emphasis added).

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1-2% average,¹²⁷ but reveal that that average held steady for the long term, not just for an introductory period as Rambus claims. Indeed, four alternative Rambus projections all assume RDRAM royalties of [redacted] on DRAM chips for each year from [redacted].¹²⁸

In making the required Adiscriminating judgment reflecting [our] ultimate appraisal of all pertinent factors in the context of the credible evidence,”¹²⁹ we must consider several factors, each of which points to a reasonable royalty rate lower than the typical RDRAM royalty. First, Rambus’s RDRAM licenses covered substantially more technologies than those relevant here;¹³⁰ consequently, the royalties that Rambus collected for RDRAM

¹²⁷ See also CX 1751 (*in camera*), a 1997 Rambus compilation in Rambus Vice President for Intellectual Property Joel Karp’s notebook, showing high-volume RDRAM rates [redacted].

¹²⁸ See CX 527-30 (*in camera*) (identified in the Joint Exhibit List as “Rambus spreadsheet re: 2000-2005 Royalty scenarios”). Rambus also argues that RDRAM rates were artificially constrained because an agreement giving Intel any proceeds from RDRAM licenses in excess of 2% eliminated any incentive for Rambus to negotiate for a higher royalty rate. See RBR at 22. For present purposes, however, the important point is that Rambus was unable to achieve even a 2% royalty across the market — many licensees negotiated rates below that level for high-volumes and out-years. See Op. at 115 n.624. The alleged arrangement with Intel would not explain why Rambus licensed RDRAM for less than 2%.

¹²⁹ *Georgia Pacific*, 318 F. Supp. 1116 at 1120-21.

¹³⁰ See, e.g., Farmwald, Tr. 8115-18, 8270, 8275-77; Horowitz, Tr. 8619-25, 8646-47; RX 81 at 6-14; CX 1451. Indeed, Rambus has argued that “RDRAM technology in the early 1990s included numerous inventions,” Rambus Response to Complaint Counsel’s Finding of Fact No. 717 at 282, and Rambus has criticized Complaint Counsel for suggesting that a change from the four patented technologies in DDR SDRAM would require “anywhere near the magnitude of change required for the industry to switch to RDRAM” or “anywhere near the time involved” for switching to RDRAM. See Rambus Response to Complaint Counsel’s Proposed Findings of Fact No. 2557 at 1032-1033, No. 2564 at 1037 (describing RDRAM as “an entirely new DRAM architecture”).

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provide too high an estimate of a reasonable royalty for just a subset of the RDRAM technologies.¹³¹ Second, RDRAM royalty rates typically declined substantially for high volumes and with the passage of time; for Samsung, a significant DRAM producer,¹³² the rates ultimately declined all the way to zero. Given the success of SDRAM and DDR SDRAM and the years that have passed since their introduction, we must take full account of the pattern of discounts specified in RDRAM licenses for high volumes and out-year production. Third, there is substantial evidence that market participants viewed the RDRAM royalties as too high for RDRAM to achieve a major presence in the market. For example, Intel regarded a royalty of less than .5% as appropriate for commodity RDRAM,¹³³ and JEDEC JC-42.3 subcommittee minutes from March 1997 reflect broad-based misgivings regarding RDRAM royalty rates.¹³⁴ Again, a rate below the RDRAM royalty range is appropriate for market-dominating products such as SDRAM and DDR SDRAM.¹³⁵ Finally, because it is Rambus's own unlawful conduct that

¹³¹ In terms of the criterion that both parties would apply, the additional technologies included in RDRAM licenses would have increased "the amount that the industry participants would have been willing to pay to use [RDRAM] over its next best alternative" and hence would have increased its *ex ante* value. See *supra* note 106 and accompanying text.

¹³² See CX 1057 (e-mail from Rambus CEO Tate describing Samsung as one of the "biggies").

¹³³ See CX 952; CX 961.

¹³⁴ See JX 36 at 7 ("Some Committee members did not feel that the Rambus [RDRAM] patent license fee fit the JEDEC requirement of being reasonable.").

¹³⁵ One Rambus document, CX 960, reflects Rambus CEO Tate's insistence that royalties on infringing DRAMs exceed royalties on RDRAM. By its terms, the document deals with a license of "all of our present and future patents for use for any infringing dram," a substantially more extensive license than at issue here. In any case, Tate's statement came in 1997, when Rambus was still pursuing its hold-up strategy. See Op. at 47. Rambus's preferences when hold-up was in the offing are not good evidence of royalties achievable in a "but for" world in which *ex ante* disclosure had occurred.

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prevents perfect replication of the “but for” licensing picture, plausible doubts should be resolved against Rambus.¹³⁶ Together, these factors point to a reasonable royalty substantially below the 1-2% RDRAM range.

On the other hand, RDRAM licenses, in addition to requiring per-unit royalties, obligated licensees to make up-front, lump-sum payments of licensing fees.¹³⁷ We deem it appropriate to trade off compensation payable up-front and compensation based on future usage, with an increase in one compensating for a decrease in the other. For purposes of our remedial Order, we couch Rambus’s compensation entirely in terms of per-unit royalties, with no up-front licensing fees. Although we have accounted for up-front licensing fees by increasing slightly our estimate of the maximum royalty rates consistent with restoring competition, our remedy’s coverage of a substantially shorter period than the RDRAM licenses and its exemption of a substantial portion of Rambus’s JEDEC-compliant business, suggest that the adjustment should be small.¹³⁸

Thus, starting at 1% — apart from the Samsung arrangement, the lower end of the RDRAM licensing range — and accounting for the factors presented above, we find that a maximum royalty rate of .5% for DDR SDRAM, for three years from the date the Commission’s Order is issued and then going to zero, is

¹³⁶ 3 AREEDA, ANTITRUST LAW & 653c.

¹³⁷ RDRAM licenses required up-front license fees ranging from \$1.25 million (CX 1646 at 10-11, 20) to \$5.5 million (CX 1617 at 11, Siemens license) for use of Rambus technology in DRAMs.

¹³⁸ The RDRAM licenses ran (or were renewable without additional license fees) for the life of Rambus’s patents. *See, e.g.*, CX 1592 at 31; CX 1600 at 17; CX 1609 at 15; CX 1617 at 16; CX 1646 at 17; RX 538 at 33. The RDRAM licenses contained no limitation comparable to our remedy’s exclusion of DDR2 SDRAM.

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reasonable and appropriate.¹³⁹ We also find that a corresponding .25% maximum rate for SDRAM is appropriate. Halving the DDR SDRAM rate reflects the fact that SDRAM utilizes only two of the relevant Rambus technologies, whereas DDR SDRAM uses four.¹⁴⁰ Moreover, Rambus's quality-adjusted cost comparison data indicate that alternatives to its two SDRAM technologies

¹³⁹ Complaint Counsel suggest that appropriate downward adjustments to RDRAM royalties yield a royalty rate of 0.1%, but it is not clear what assumptions they have made to support this calculation. Further, we cannot accept Complaint Counsel's arguments in favor of a maximum royalty rate of 0.25% or less drawn from extrapolations from terms of known or reported Rambus agreements with Samsung and Infineon. Neither the agreements nor the facts on which Complaint Counsel premise their extrapolations are in the record, and in each instance cited Rambus was at the most disadvantageous stage of its infringement litigation — *i.e.*, when it had lost its case at the trial court level.

Rambus, on the other hand, argues that it should be allowed to charge a royalty rate in excess of 2.5% — the rate agreed to in the “other DRAM” clause of the 1995 Hyundai-Rambus license agreement. RBR at 17-18. This is hardly a realistic estimate of reasonable royalty rates in the “but for” world: the Hyundai rate was not accepted by anyone other than Hyundai, and, at least according to Rambus, it was not even retained by that firm. *See* CX 1878 (Rambus answer and counterclaim alleging infringement by Hyundai for using Rambus technologies in JEDEC-compliant products); *Hynix Semiconductor Inc. v. Rambus Inc.*, 2006 WL 565893 at *3-4 (N.D. Cal. 2006) (finding of fact describing Rambus position that the “other DRAM” provision has been superseded and no longer is in effect). Thus, from a market perspective, the Hyundai rate was neither broadly accepted nor sustained. Moreover, the 2.5% figure may have been inflated as a result of trade-offs with other aspects of the license. For example, Rambus's SDRAM and DDR/SDRAM licenses normally include up-front licensing fees of \$3 million, and Rambus RDRAM licenses required licensing fees varying from \$1.25 million to \$5.5 million. The Hyundai license, CX 1600 at 11, conferred a license for purposes of RDRAM memories for a licensing fee of \$2 million, with no additional license fee for rights covering SDRAM and DDR/SDRAM — so that Hyundai received its SDRAM and DDR/SDRAM license without having to make the normal \$3 million up-front payment. Similarly, there may have been trade-offs between the royalties payable by Hyundai for various uses of RDRAM technologies (and the dates and volume levels specified for setting those royalty rates) and the 2.5% royalty payable by Hyundai on other DRAMs. Such trade-offs, within a single license agreement, could have affected the “other DRAM” rate.

¹⁴⁰ *Op.* at 9-12; CX 1363 at 3.

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would add *less than half* the cost of alternatives to the four Rambus technologies in DDR SDRAM.¹⁴¹ Applying Rambus's own cost figures to Rambus's own analytical paradigm—which looks to “the amount that the industry participants would have been willing to pay to use a technology over its next best alternative”¹⁴²—we find the .25% maximum rate for SDRAM to be both reasonable and fully supported. As with DDR SDRAM, this maximum rate would go to zero three years after the date the Commission's Order is issued.

It is true that we cannot calculate to the penny the downward adjustment from 1%. Yet these royalties certainly are within the range of reasonableness in approximating the result drawn from what we know of the *ex ante* negotiating positions of Rambus and the other JEDEC members. The royalty rates take account of the relevant parties' preferences (*i.e.*, JEDEC's cost-sensitivity and preference for open, patent-free standards on the one hand, and Rambus's disinclination to agree to RAND terms on the other hand). They reflect appropriate downward adjustments from the prevailing RDRAM rates based on the nature and extent of the technology at issue, and prevent Rambus from benefitting from the uncertainty that its unlawful actions generated. They also follow the negotiated RDRAM agreements pursuant to which the applicable royalty rate declined over time.¹⁴³ Setting a maximum royalty rate that is applicable for a period of three years before dropping to zero follows from the Samsung RDRAM agreement in particular; lends temporal and rate certainty to this remedy; and requires that the royalty rate decline to zero before the relevant patents expire, according to Complaint Counsel, in 2010.

¹⁴¹ Rapp, Tr. 9832, 9852. The Commission has questioned the accuracy of Rambus's cost data, but we have not suggested that this relationship is invalid. Op. at 95 n.532-33.

¹⁴² RBR at 12.

¹⁴³ *See, e.g.*, CX 1592; CX 1600; CX 1609; CX 1612.

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The Commission also must determine an appropriate maximum royalty rate for memory controllers and other components that use the relevant Rambus technologies in complying with JEDEC's SDRAM and DDR SDRAM standards. The RDRAM licenses in the record, cited above, either set a royalty of between 3% and 5% (but 2 to 3% for NEC¹⁴⁴) for the use of Rambus technologies in memory controllers, microprocessors, and other non-DRAM components, or they leave the rates open for future negotiation, generally specifying a maximum of between 3% and 5%. That is more than double the large-volume royalties for DRAMs. The SDRAM licenses charge [redacted] for the DRAM and [redacted] for the SDR Controllers; the DDR SDRAM licenses charge less [redacted] for the DRAMs and [redacted] for the DDR Controllers.¹⁴⁵ In addition, the record contains several exhibits that appear to provide Rambus's internal revenue projections based on anticipated royalties and licensing fees. In each, the stated royalty rate for RDRAM Controllers is [redacted], exactly [redacted] that for RDRAM devices.¹⁴⁶

Based on this evidence, we adopt a coefficient of two for determining the maximum royalty rate for memory controllers and other non-memory-chip components that use the relevant Rambus technologies. For such products compliant with the

¹⁴⁴ See RX 538 at 22.

¹⁴⁵ The SDRAM/DDR SDRAM licenses define "Controllers" broadly to include [redacted]. See, e.g., CX 1680 at 22 (*in camera*); CX 1681 at 7 (*in camera*); CX 1687 at 6-7 (*in camera*). Although the licenses in the record involve firms known as DRAM manufacturers, several of those licenses identify specific products of the licensees that pursuant to the licenses qualify, and give rise to royalties, as Controllers. See, e.g., CX 1681 at 7, 34 (*in camera*) (Hitachi license identifying approximately [redacted] Hitachi products as SDR and DDR Controllers); CX 1685 at 6 (*in camera*) (NEC license identifying [redacted] NEC products as SDR Controllers); CX 1689 at 6 (*in camera*) (Mitsubishi license identifying [redacted] Mitsubishi products as SDR Controllers).

¹⁴⁶ See CX 527-30 (*in camera*).

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SDRAM standard, this yields a maximum royalty of .5%, dropping to zero after three years; for such products compliant with the DDR SDRAM standard, this yields a maximum royalty of 1%, again dropping to zero after three years.

We also find it appropriate to define the scope of Rambus royalties when products such as memory controllers become integrated into larger products.¹⁴⁷ Absent some limitation, our remedy could have unintended consequences if product integration were to markedly raise the selling price of the unit subject to the percentage royalty. This is best avoided by articulating a rule that specifies controller royalties in terms of dollars per unit, based on historical experience. Using terms derived from existing RDRAM licenses, our Order limits Rambus to the controller royalties per unit that would result from applying the .5% or 1% royalty rate to the average net sales per unit for SDR Controllers and DDR Controllers, respectively, **[redacted]**. Such an approach places a cap on these royalties consistent with historical experience and based on reported and verifiable information.¹⁴⁸

Rambus points out that its RDRAM licenses entailed long-run, co-development efforts with licensees and argues for further compensation on that basis.¹⁴⁹ Given the importance that SDRAM and DDR SDRAM achieved in the market, and the retention of Rambus technologies in DDR2 SDRAM, Rambus already has largely secured the outcome sought by licensees' support without the *ex ante* risk that those efforts might fail.¹⁵⁰ No adjustment on this account appears necessary.

¹⁴⁷ See CCBR at 15.

¹⁴⁸ See, e.g., CX 1687 at 29 (showing licensees' **[redacted]** requirements) (*in camera*).

¹⁴⁹ RBR at 22.

¹⁵⁰ The RDRAM licenses also imposed corresponding duties on Rambus to ensure full technology transfer. See, e.g., CX 1592 at 19-21 (Samsung license

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Rambus's RDRAM licenses provided additional compensation in the form of non-exclusive cross licenses and grant-backs.¹⁵¹ These provisions, however, typically were limited to (i) patented technologies that would block Rambus from using its proprietary RDRAM technologies, and (ii) the licensee's improvements on RDRAM technologies.¹⁵² Given the limited nature of these terms, and subject to those limitations, we will permit Rambus to include comparable provisions in any SDRAM/DDR SDRAM licenses entered under the Commission's remedial Order.

IV.**A.**

As discussed above, the Commission has "wide latitude for judgment" in selecting a remedy, subject to the constraint that it must be reasonably related to the violation.¹⁵³ Furthermore, the Commission is not limited to merely proscribing unlawful conduct "in the precise form in which it [was] found to have existed in the past."¹⁵⁴ The Commission is authorized to both prohibit the practices that it has found unlawful and — in order to prevent future unlawful conduct — to "fence-in" the violator with

stating Rambus technology transfer obligations); CX 1646 at 8-10 (Micron license stating Rambus technology transfer obligations). These obligations would be unnecessary given the long-established nature of the SDRAM and DDR SDRAM standards.

¹⁵¹ See, e.g., CX 1600 at 16; CX 1609 at 14; CX 1646 at 15.

¹⁵² See CX 1600 at 4-5; CX 1609 at 3-4; CX 1646 at 4.

¹⁵³ *Jacob Siegel Co.*, 327 U.S. at 612-13; see *FTC v. Nat'l Lead Co.*, 352 U.S. at 428; *Ruberoid Co.*, 343 U.S. at 473.

¹⁵⁴ *Colgate-Palmolive Co.*, 380 U.S. at 395 (quoting *Ruberoid Co.*, 343 U.S. at 473).

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provisions that are broader in scope.¹⁵⁵ So long as the remedy has a reasonable relationship to the violation that the Commission has found, the Commission may “close all roads to the prohibited goal,” including proscribing conduct that is lawful.¹⁵⁶

As we explained most recently in *Telebrands Corp.*,¹⁵⁷ in determining the appropriate scope of fencing-in relief, the Commission considers three factors: (1) the seriousness and deliberateness of the violation; (2) the ease with which the violation may be transferred to other products; and (3) whether the respondent has a history of prior violations. No single factor is determinative, but “the more egregious the facts with respect to a single element, the less important is it that another negative factor be present.”¹⁵⁸

We find that Rambus’s intentional and willful deception,¹⁵⁹ described in detail in the Commission’s liability opinion, is sufficient, without more, to justify broad fencing-in relief. Furthermore, factors such as Rambus’s large portfolio of intellectual property and the company’s status as a developer and licensor of memory technologies (but not a manufacturer) could increase the incentive for Rambus to attempt to circumvent the Commission’s Order. Given these circumstances, we believe that merely prohibiting Rambus from “knowingly” engaging in a deceptive course of conduct as a member of an SSO — as

¹⁵⁵ See, e.g., *Colgate-Palmolive Co.*, 380 U.S. at 395; *Kraft, Inc. v. FTC*, 970 F.2d 311, 326-27 (7th Cir. 1992).

¹⁵⁶ *Ruberoid Co.*, 353 U.S. at 473.

¹⁵⁷ *Telebrands Corp.*, 140 F.T.C. 278, 334 (2005), available at <http://www.ftc.gov/os/decisions/docs/volume140.pdf>, *aff’d*, 477 F.3d 354 (4th Cir. 2006).

¹⁵⁸ *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 392 (9th Cir. 1982).

¹⁵⁹ In our liability opinion, we found that Rambus’s deceptive course of conduct was “intentionally pursued,” Op. at 51, and that Rambus “intentionally and willfully engaged in deceptive conduct.” Op. at 68.

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Rambus proposes — would provide inadequate incentive for it to put into place the procedures and policies that are necessary to ensure that its future participation in SSOs is conducted in an honest and forthright manner and that it does not simply circumvent the Commission's Order. The Order provisions described below represent the Commission's efforts to prohibit Rambus from engaging in the practices that we found in our liability opinion to violate Section 5 of the FTC Act, as well as to prevent future related conduct.

B.

Paragraph II of the Commission's Order prohibits Rambus from making any misrepresentations concerning its patents, or applications for patents, to any SSO, or its members, and constrains Rambus from taking any action, or refraining from taking any action, that would lead the SSO, or any of its members, to unknowingly infringe any current or future Rambus patent. Additionally, Paragraph II requires Rambus to abide by any requirement or policy of an SSO in which it participates to make complete, accurate, and timely disclosures. These prohibitions are substantially the same as those set forth in Rambus's proposed order, but the scope of our Order is drawn more broadly to protect the public against a repetition of the same deceptive conduct with respect to other products.

Paragraph III of the Order requires Rambus to employ a compliance officer, who shall be responsible for communicating Rambus's intellectual property rights relating to any standard that is under consideration by an SSO in which Rambus participates. The compliance officer shall also be responsible for verifying the contents of Rambus's periodic reports to the Commission, and to supplement such reports when it is necessary to provide a complete and accurate picture of the status of Rambus's compliance with the terms of this Order. We believe that such a provision is necessary and appropriate to ensure that Rambus will adhere to SSO rules and policies, and to facilitate the

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Commission's efforts to monitor its compliance with the instant Order.

Paragraphs IV-VII are designed to restore — to the extent possible — the competitive conditions that would have existed but for Rambus's unlawful conduct. Our remedy covers all technologies used in JEDEC-compliant products and protected by patents derived from applications that Rambus filed while it was a member of JEDEC. Rambus contends that our remedy must be limited to the four technology markets that are identified in the Commission's liability decision.¹⁶⁰ However, claims of infringement based on JEDEC-compliant use of any of these technologies would take advantage of the same deceptive conduct — indeed, the same intentional failure to disclose — identified in the Commission's liability decision.¹⁶¹ That is, the same violation condemned with regard to the four relevant technologies at issue in the liability decision (programmable CAS latency, programmable burst length, dual-edge clocking, and on-chip PLL/DLL) could be readily transferred to additional technologies covered by Rambus's undisclosed patent rights.¹⁶² Rambus repeatedly has indicated that it contemplates seeking infringement rulings against JEDEC-compliant uses of technologies other than

¹⁶⁰ See RBR at 9-10.

¹⁶¹ Op. at 28-68.

¹⁶² This would include both patents derived from Rambus's original '898 application and those derived from any other applications filed by Rambus prior to its withdrawal from JEDEC. Rambus was hard at work during the period of its JEDEC membership to obtain patent rights on technologies other than those directly at issue in the liability opinion. See, e.g., CX 1949 at 5, CX 711 at 58, and Crisp, Tr. 3247-48 (all relating to source synchronous clocking); CX 1932, CX 3125 at 279-80, (Vincent *Infineon* Dep.) (*in camera*), CX 3126 at 448-52 (Vincent *Infineon* Dep.) (*in camera*), CX 1963 at 4, and Crisp, Tr. 3046 (all relating to low voltage swing signaling); CX 702, CX 734 at 1, CX 1949 at 1, and Crisp, Tr. 3097-99 (all relating to multi-bank technologies); CX 734 at 1 and, CX 738 (both relating to auto precharge technology); CX 691 and Crisp, Tr. at 3190-91 (both relating to externally supplied reference voltage).

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the four at issue in the liability decision.¹⁶³ Consequently, coverage of all technologies used in JEDEC-compliant products and protected by patents derived from applications filed while Rambus was a member of JEDEC is necessary as fencing-in, in order to effectively close all roads to the prohibited goal, so that [the Commission's] order may not be by-passed with impunity."¹⁶⁴

Paragraph IV prohibits Rambus from collecting royalties relating to the sale, manufacture or use of any JEDEC-Compliant

¹⁶³ See, e.g., CX 1888 (May 2001 Rambus press release noting that “the Virginia case against Infineon [in which the trial court had dismissed infringement claims] involve[d] only four Rambus U.S. patents” but that “Rambus holds newly issued U.S. and European patents covering Rambus inventions used by SDRAMs and DDR SDRAMs that have not yet been asserted in any litigation and are not impacted by the [Infineon] Court’s decision”); CX 1403 at 30 (July 2001 Rambus Presentation stating, “Virginia decision involved only 4 patents; we have many others which are used by SDRAM/DDR.”); CX 1371 at 5 (April 2000 Rambus patent licensing presentation to nVIDIA listing numerous alleged “Rambus Innovations” involving technologies beyond the four specifically at issue in the liability decision); CX 1383 at 4 (September 2000 Rambus patent licensing presentation to ATI listing numerous alleged “Rambus Innovations” involving technologies other than the four specifically at issue in the liability decision); CX 1363 at 3 (January 2000 Rambus presentation claiming that DDR SDRAM used a patented Rambus innovation involving “two bit prefetch architecture” as well as alleged Rambus innovations involving two external clocks, low voltage signaling, quadrature data alignment and source synchronous signaling).

¹⁶⁴ See *Ruberoid*, 343 U.S. at 473. *New York v. Microsoft*, 224 F. Supp. 2d 76 (D.D.C. 2002), relied upon by Rambus, RRBR at 7, is fully consistent. In that case, the court shaped its remedy to ensure that Microsoft’s exclusionary conduct “broadly” defined was “fully enjoined.” *Id.* at 148 (quoting language now appearing in 3 AREEDA, ANTITRUST LAW & 653f at 102-03 (2d ed. 2002)), and stating that in cases involving a monopolist’s consummated exclusionary act, “equitable relief beyond a mere injunction against repetition of the act is generally appropriate” and must be tailored with “sufficient breadth to ensure that a certain ‘class’ of acts, or acts of a certain type or having a certain effect, not be repeated”). The fact that the identical deceptive conduct found in the Commission’s liability opinion also infected a broader range of technologies makes these fencing-in principles wholly apposite here.

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DRAM or Non-DRAM Products that are greater than those that Rambus is allowed to collect under the terms of the present Order. The purpose of this provision — which applies both to U.S. patents and, with respect to imports or exports to or from the United States, to foreign patents¹⁶⁵ — is to preclude Rambus from continuing to collect monopoly rents with respect to JEDEC-Compliant DRAM or Non-DRAM Products. Paragraph V requires Rambus to make available a worldwide, nonexclusive license — under the relevant U.S. patents only — to make, use, and sell JEDEC-compliant DRAM and non-DRAM products at rates that do not exceed the Maximum Allowable Royalty Rates, as defined

¹⁶⁵ The global nature of the DRAM industry requires that our remedy reach Rambus's enforcement of foreign patent rights with respect to imports and exports to and from the United States. DRAMs often are manufactured abroad, *see, e.g.*, Bechtelsheim, Tr. 5886; Appleton, Tr. 6267; CX 2107 at 15-16, 18-20 (Oh FTC Dep.) (*in camera*), and even when manufacturing occurs in the United States, some steps in the processing frequently take place abroad. *See* Appleton, Tr. 6268-70; CX 2107 at 19-20 (Oh FTC Dep.) (*in camera*). Moreover, major DRAM customers often incorporate DRAM chips into their products at foreign manufacturing facilities. *See* Bechtelsheim, Tr. 5886; Appleton, Tr. 6273-74. Because of the geographically dispersed nature of these activities, Rambus could use its foreign patents to collect royalties that would undermine a remedy confined to U.S. patents. *See* McAfee, Tr. 7521.

Although Rambus argues that the Commission lacks authority to extend its remedy to foreign patent rights, it cites no relevant support. RB at 133. For example, *Western Electric Co. v. Milgo Electronic Corp.*, 450 F. Supp. 835, 837 (S.D. Fla. 1978), actually ruled that the court possessed “the power to enjoin a party over whom it ha[d] personal jurisdiction from pursuing [patent] litigation before a foreign tribunal.” The Commission's remedy similarly would constrain the patent enforcement efforts of a party over which it has personal jurisdiction. *Medtronic, Inc. v. Catalyst Research Corp.*, 518 F. Supp. 946, 955 (D. Minn. 1981), *aff'd*, 664 F.2d 660 (8th Cir. 1981), supports the proposition that because U.S. and foreign patents confer distinct rights, parties cannot obtain injunctions against foreign claims on the basis of validity and infringement rulings regarding U.S. patents. The Commission's remedy, however does not affect determinations of validity or infringement. Like the *Medtronic* court, which went on to preliminarily enjoin the defendant from pursuing patent enforcement activities abroad, 518 F. Supp. at 956, the Commission's remedy governs only the actions of Rambus.

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and set forth in Paragraph I. To ensure that the Commission's efforts to restore competition are not undermined by the threat of patent infringement litigation, Paragraphs VI and VII prohibit Rambus from enforcing the royalty agreements that would be prohibited by the terms of the instant Order.

Paragraphs VIII through XI contain ancillary provisions that are designed to help the Commission oversee Rambus's compliance with this Order. Rambus is required, for example, to distribute copies of the Commission's Order, make periodic compliance reports to the Commission, and provide the Commission with access to its documents.

Finally, paragraph XII specifies that the Order will sunset in 20 years. As we noted in *Kentucky Household Goods Carriers Association*,¹⁶⁶ a 20-year sunset provision is common to most of the Commission's orders. Respondent, of course, may seek to modify or set aside the Order, pursuant to Section 2.51 of the Commission's Rules of Practice,¹⁶⁷ if at any time prior to the expiration of 20 years it is no longer in the public interest.

C.

We do not believe that the Commission's remedy should extend to Rambus's patents used in products that are compliant with JEDEC's DDR2 SDRAM or succeeding generations of JEDEC standards. There is no doubt that some relationship exists between Rambus's deceptive conduct and its position in the DDR2 SDRAM market. Nevertheless, in our liability decision, we concluded that Complaint Counsel had not proved a sufficient causal link between Rambus's deceptive course of conduct and the DDR2 standard and, indeed, between the issuance of the SDRAM and DDR SDRAM standards and the DDR2 standard

¹⁶⁶ 139 F.T.C. 420, 434 (2005), available at <http://www.ftc.gov/os/decisions/docs/volume139.pdf> (June 21, 2005).

¹⁶⁷ 16 C.F.R. § 2.51.

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(because there was insufficient evidence of lock in).¹⁶⁸ Absent a sufficient causal link, extending our remedy to cover DDR2 SDRAM would not restore competition lost because of Rambus's deceptive conduct. Nor do we believe that "fencing in" justifies extending our remedy to the DDR2 standard (or subsequent generations of JEDEC DRAM standards) under these circumstances. Indeed, absent the necessary causal links, applying our remedy to DDR2 SDRAM could conflict with the warnings in *Jacob Siegel*, *National Lead*, and *Ruberoid*, discussed above, that the Commission cannot issue an order that is not sufficiently related to the violation.

Commissioner Harbour's dissent emphasizes that the relief ordered—confined to products compliant with JEDEC's SDRAM and DDR SDRAM standards but not reaching products compliant with JEDEC's DDR2 SDRAM standard—will have declining impact as the market progressively shifts to DDR2. This follows not from any policy choice, but rather from the timing of underlying events. Rambus revealed its patents well before the DDR2 SDRAM standard was set, and we were unable to conclude in our liability opinion that in the relevant time frame lock in conferred durable monopoly power over DDR2.¹⁶⁹ Had the evidence demonstrated a sufficient causal link between Rambus's deceptive conduct and JEDEC's standardization of Rambus technologies in DDR2 SDRAM, our relief would have covered products compliant with that standard. The evidence, however, does not carry us that far, and we limit our order accordingly.

¹⁶⁸ Op. at 110, 114.

¹⁶⁹ Op. at 110-14.

Final Order

FINAL ORDER

This matter having been heard by the Commission upon the appeal of Counsel Supporting the Complaint and the cross-appeal of Respondent; and the Commission having determined that Respondent has violated Section 5 of the Federal Trade Commission Act, for the reasons stated in the Opinion of the Commission issued on July 31, 2006; and the Commission having reversed and vacated the Initial Decision, and vacated the Order accompanying the Initial Decision, by Order issued on July 31, 2006, for the reasons stated in the Opinion of the Commission; and the Commission having considered the briefs filed by, and oral arguments presented by, Counsel Supporting the Complaint and Respondent on the issues of remedy, the Commission has now determined to issue a Final Order to remedy Respondent's violations of Section 5 of the Federal Trade Commission Act. Accordingly,

It is ordered that the following Order to cease and desist be, and it hereby is, entered:

I.

IT IS ORDERED that for purposes of this Order, the following definitions shall apply:

- A. "Action" means any lawsuit or other action, whether legal, equitable, or administrative, as well as any arbitration, mediation, or any other form of private dispute resolution, in the United States or anywhere else in the world.
- B. "Compliance Officer" means the Person employed by Respondent pursuant to Paragraph III. of this Order.
- C. "DRAM" means Dynamic Random Access Memory.

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- D. "First Royalty Period" means the period that begins on the date this Order is issued and ends on the date three years after the date this Order is issued.
- E. "JEDEC" means the JEDEC Solid State Technology Association, originally known as the Joint Electron Device Engineering Council, a non-stock corporation organized and existing under the laws of the Commonwealth of Virginia.
- F. JEDEC-Compliant DRAM Product means:
1. JEDEC-Compliant SDRAM and
 2. JEDEC-Compliant DDR SDRAM.
- G. JEDEC-Compliant Non-DRAM Product means memory controllers or other non-memory-chip components that comply with:
1. the SDRAM Standards,
 2. the DDR SDRAM Standards, or
 3. both the SDRAM Standards and the DDR SDRAM Standards.
- H. JEDEC-Compliant DDR SDRAM means any DRAM that complies with the JEDEC DDR SDRAM specification, published as JESD 79, as revised (the "DDR SDRAM Standards").
- I. JEDEC-Compliant SDRAM means any DRAM that complies with the JEDEC SDRAM Standard, published as JC 21-C, Release 4, as revised; or the JEDEC SDRAM standard, published as JC 21-C, Release 9, as revised (the "SDRAM Standards").

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- J. "Maximum Allowable Royalty Rates" means
1. During the First Royalty Rate Period, the maximum allowable royalty rates shall be no greater than the following percentages of Net Sales of JEDEC-Compliant DRAM Products or JEDEC-Compliant Non-DRAM Products:
 - a. 0.25% for JEDEC-Compliant SDRAM;
 - b. 0.5% for JEDEC-Compliant DDR SDRAM;
 - c. 0.5% for JEDEC-Compliant Non-DRAM Products that comply with SDRAM Standards; and
 - d. 1.0% for JEDEC-Compliant Non-DRAM Products that comply with DDR SDRAM Standards.
 2. During the Second Royalty Rate Period, the maximum allowable royalty rate for JEDEC-Compliant DRAM Products and JEDEC-Compliant Non-DRAM Products shall be 0.0%.
 3. Notwithstanding the calculations described in Paragraph I.J.I. and Paragraph I.K., the royalties per unit for JEDEC-Compliant Non-DRAM Products shall be limited to the following:
 - a. For JEDEC-Compliant Non-DRAM Products that comply with the SDRAM Standards, royalties per unit shall not exceed the amount obtained by multiplying .005 by the average net sales per unit for single data rate controllers -as those products are defined in Rambus's licenses for JEDEC-Compliant Non-DRAM products in effect prior to July 31, 2006- that all licensees reported to

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Rambus, pursuant to those licenses, prior to July 31, 2006.

- b. For JEDEC-Compliant Non-DRAM products that comply with the DDR SDRAM Standards, royalties per unit shall not exceed the amount obtained by multiplying .01 by the average net sales per unit for double data rate controllers - as those products are defined in Rambus's licenses for JEDEC-Compliant Non-DRAM products in effect prior to July 31, 2006- that all licensees reported to Rambus, pursuant to those licenses, prior to July 31, 2006.
 4. JEDEC-Compliant Non-DRAM Products that comply with both the SDRAM Standards and the DDR SDRAM Standards shall all be treated, for purposes of calculating the Maximum Allowable Royalty Rates for such products pursuant to Paragraphs I.J.1.-3., as products that comply with DDR SDRAM Standards.
- K. "Net Sales" means the gross sales amount invoiced or otherwise charged to customers of a licensee or its subsidiaries, less amounts invoiced for returned goods for which a refund is given, less separately stated charges for insurance, handling, duty, freight, and taxes, where such items are included in the invoiced price, and less credit amounts invoiced; *provided, however*, that (1) for each JEDEC-Compliant DRAM Product sold by the licensee at a combined price covering both the JEDEC-Compliant DRAM Product and a module, board, or system, Net Sales shall be calculated based on the licensee's average gross selling price for the relevant JEDEC-Compliant DRAM Product alone, during the relevant calendar period, less the deductions specified above; and (2) for each JEDEC-Compliant Non-DRAM product sold by the licensee at a combined price covering both the JEDEC-Compliant Non-

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DRAM Product and a board or system, Net Sales shall be calculated based on the licensee's average gross selling price for the relevant JEDEC-Compliant Non-DRAM Product alone, during the relevant calendar period, less the deductions specified above.

- L. "Person" means natural person, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or legal entity, including any governmental entity.
- M. "Relevant Foreign Patents" means all current or future patents issued by a foreign government to Respondent that claim a priority date of June 17, 1996, or before.
- N. "Relevant U.S. Patents" means all current or future United States patents that claim priority back to U.S. Patent Application Number 07/510,898, filed on April 18, 1990, or to any other U.S. Patent Application filed by or on behalf of Rambus on or before June 17, 1996.
- O. "Respondent" or "Rambus" means Rambus Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Rambus Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- P. "Second Royalty Period" means a period to begin on the date after the First Royalty Period expires and to end on the date on which the last of Respondent's Relevant U.S. Patents and Relevant Foreign Patents expires.
- Q. "Standard-Setting Organization" means any group, organization, association, membership or stock corporation, government body, or other entity that, through voluntary participation of interested or affected parties, is engaged in the development, promulgation,

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promotion or monitoring of product or process standards for the electronics industry, or any segment thereof, anywhere in the world.

II.

IT IS FURTHER ORDERED that, while a member of or a participant in a Standard-Setting Organization, Respondent:

- A. Shall not make any misrepresentation or omission to the Standard-Setting Organization or its members concerning Respondent's patents or patent applications (including, but not limited to, failing to cooperate with the Compliance Officer in the satisfaction of his or her responsibilities as described in Paragraph III., below);
- B. Shall make complete, accurate, and timely disclosures to the Standard-Setting Organization or its members concerning Respondent's patents or patent applications to the extent the rules, practices, and policies of such Standard-Setting Organization require such disclosure (including, but not limited to, cooperating with the Compliance Officer's satisfaction of his or her responsibilities as described in Paragraph III., below); and
- C. Shall be prohibited from taking any other action or refraining from taking any other action that would lead the Standard-Setting Organization to develop a standard that would infringe a claim in any issued or future Rambus patents without knowledge by the Standard-Setting Organization of Respondent's patents and patent applications and of the potential scope thereof.

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III.

IT IS FURTHER ORDERED that:

- A. No later than thirty (30) days after the date this Order becomes final, Respondent shall employ, at Respondent's expense, a Compliance Officer, or shall include within the responsibilities of a current employee of Respondent all the responsibilities of a Compliance Officer, as described in this Paragraph III.
1. The employee serving as the Compliance Officer shall be employed subject to the approval of the Commission, which approval Respondent shall seek pursuant to § 2.41(f) of the Commission's Rules of Practice, 16 C.F.R. § 2.41(f).
 2. The Compliance Officer shall be the sole representative of Respondent for the purpose of communicating Respondent's existing and potential patent rights related to any standard under consideration by any and all Standard-Setting Organizations of which Respondent is a member or in which Respondent is a participant; *provided, however*, that the Compliance Officer may, subject to the approval of the Commission, delegate a portion of his or her responsibilities to another employee of Respondent if he or she is unable to satisfy his or her responsibilities as described in this Paragraph III. because of the large number of Standard-Setting Organizations of which Respondent is a member or in which Respondent is a participant or because of the large number of standards under consideration by the Standard-Setting Organizations at any one time.

B. Respondent shall:

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1. Provide the Compliance Officer with full and complete access to Respondent's books, records, documents, personnel, facilities and technical information relating to compliance with this Order, or to any other relevant information, as the Compliance Officer may reasonably request;
 2. Assure that the Compliance Officer has all information necessary to satisfy his or her responsibilities as described in this Paragraph III.;
 3. Cooperate with any reasonable request of the Compliance Officer, including, but not limited to, requests to develop or compile data and information for the Compliance Officer's use; and
 4. Take no action to interfere with or impede the Compliance Officer's ability to satisfy his or her responsibilities as described in this Paragraph III.
- C. Failure of the Compliance Officer to satisfy his or her responsibilities as described in this Paragraph III. shall be considered a violation of this Order by Respondent, except to the extent that such failure results from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Compliance Officer.
- D. If at any time the Commission determines that the Compliance Officer has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may require Respondent to employ a substitute to serve as Compliance Officer, or include within a different current employee's job responsibilities those of the Compliance Officer, in the same manner as provided by this Order.

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- E. Respondent shall, in its reports to the Commission submitted pursuant to Paragraph IX. of this Order, include a description of all disclosures made to all Standard-Setting Organizations pursuant to this Paragraph III., including the date of the disclosure, the patents and patent applications disclosed, the standards under consideration, and the Standard-Setting Organization to which it was made. The Compliance Officer shall verify each such report and submit supplemental reports directly to the Commission or its staff, on a confidential basis, to the extent the Compliance Officer considers such supplemental reports necessary.

IV.**IT IS FURTHER ORDERED** that:

- A. Respondent shall cease any and all efforts by any means, either directly or indirectly, in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, to seek to collect or to collect, under the Relevant U.S. Patents and, with regard to imports or exports to or from the United States, the Relevant Foreign Patents, any fees, royalties or other payments, in cash or in kind, relating to the manufacture, sale, or use of any JEDEC-Compliant DRAM Product or JEDEC-Compliant Non-DRAM Product after the date this Order becomes final, that are in excess of the Maximum Allowable Royalty Rates or are otherwise inconsistent with this Order.
- B. Respondent shall allow any party to a license agreement that requires payment, under the Relevant U.S. Patents and, with regard to imports or exports to or from the United States, the Relevant Foreign Patents, of any fees, royalties or other consideration, in cash or in kind, relating to the manufacture, sale, or use of any JEDEC-Compliant DRAM Product or JEDEC-Compliant Non-DRAM

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Product after the date this Order becomes final, that are in excess of the Maximum Allowable Royalty Rates of this Order or are otherwise inconsistent with this Order, to terminate or rescind that license agreement - at the option of the licensee – without penalty, and release that licensee from any further payments pursuant to that license agreement that are in excess of the Maximum Allowable Royalty Rates or are otherwise inconsistent with this Order.

V.**IT IS FURTHER ORDERED** that:

- A. No later than thirty (30) days after the date this Order becomes final, Respondent shall offer and make available to all interested persons, a worldwide, nonexclusive license under the Relevant U.S. Patents, to make, have made, use, offer to sell, or sell JEDEC-Compliant DRAM Products and JEDEC-Compliant Non-DRAM Products. Such licenses shall not seek to collect any fees, royalties or other consideration, in cash or in kind, in excess of or in addition to the Maximum Allowable Royalty Rates, other than fees in an amount not to exceed the fair market value of any services to be rendered by Respondent to the licensee to the extent such services have been rendered at the request of the licensee.
- B. Notwithstanding the provisions of Paragraph V.A. of this Order, Rambus may include in the licenses offered pursuant to Paragraph V.A.,
 1. a requirement that the licensee grant Rambus a royalty-free, nonexclusive license under the licensee's patents to make, have made, use, offer to sell, and sell any product, the manufacture, use, offer to sale, or sale of which would, if not authorized, infringe one of the

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licensee's patents by reason of the implementation or use of any Rambus interface technology or of any of the licensee's improvements to a Rambus interface technology (or by reason of the use of any apparatus required by (i) any Rambus interface technology or (ii) any of the licensee's improvements to a Rambus interface technology), where such infringement:

- a. would not have occurred but for the implementation of the Rambus interface technology or the licensee's improvement and
 - b. could not have been avoided by another commercially reasonable implementation or resulted from use of an example included in the Rambus interface technology or in the licensee's improvement; and
2. a right to sublicense Rambus's rights under the license provided pursuant to Paragraph V.B.1., to any and all of the other licensees of any Rambus interface technology that have provided reciprocal rights through Rambus to the licensee under Paragraph V.A. at no separate, additional royalty or other charge to that licensee, provided that such sublicensed rights shall be limited to the products as to which Rambus receives a license (as identified in Paragraph V.B.1.), and provided further that no sublicense shall be granted for the use of rights with respect to
- a. semiconductor manufacturing technology, and
 - b. any other portion of any integrated circuit including, without limitation, the core of a memory integrated circuit.
- C. A licensee pursuant to Paragraph V.A. may sublicense to its subsidiaries the rights that arise under a license

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pursuant to Paragraph V.A. at no additional royalty or charge to the licensee or sublicensee.

- D. The license described in Paragraph V.A. shall continue until expiration of the last to expire of the Relevant U.S. Patents; *provided, however*, that:
1. The licensee may, solely at the option of the licensee, terminate the license at any time upon sixty (60) days' written notice to Respondent; and
 2. If either party defaults in the performance of any material obligation under the license described in Paragraph V.A. and if any such default is not corrected within forty-five (45) days after the defaulting party receives written notice thereof from the non-defaulting party, the non-defaulting party, at its option, may, in addition to any other remedies it may have, terminate the license.
- E. Rambus shall not argue in any Action that a licensee's acceptance of, or participation in, a license pursuant to Paragraph V.A. of this Order bars the licensee from:
1. asserting that any Relevant U.S. Patent or Relevant Foreign Patent is invalid, unenforceable, or not infringed or
 2. offering any defense based on contentions that any Relevant U.S. Patent or Relevant Foreign Patent is invalid, unenforceable, or not infringed.

VI.

IT IS FURTHER ORDERED that Respondent shall cease and desist any and all efforts it has undertaken by any means, either directly or indirectly, in or affecting commerce as

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"commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, including, without limitation, the threat or prosecution of, or assertion of any affirmative defense in, any Action, to the extent that Respondent: (1) has asserted that any Person, by manufacturing, selling, or otherwise using any JEDEC-Compliant DRAM Product or JEDEC-Compliant Non- DRAM Product, infringes any Relevant U.S. Patents or by manufacturing, selling, or otherwise using any JEDEC-Compliant DRAM Product or JEDEC-Compliant Non-DRAM Product for import or export to or from the United States, infringes any Relevant Foreign Patents and (2) for periods after this Order becomes final, is seeking relief that would result in payments to Respondent in excess of the Maximum Allowable Royalty Rates or that would otherwise be inconsistent with the requirements of this Order.

VII.

IT IS FURTHER ORDERED that Respondent shall not undertake any new efforts by any means, either directly or indirectly, in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, including, without limitation, the threat or prosecution of, or assertion of any affirmative defense in, any Action, pursuant to which Respondent: (1) asserts that any Person, by manufacturing, selling, or otherwise using any JEDEC-Compliant DRAM Product or JEDEC-Compliant Non-DRAM Product any time after the date this Order becomes final, infringes any Relevant U.S. Patents or by manufacturing, selling, or otherwise using any JEDEC-Compliant DRAM Product or JEDEC-Compliant Non-DRAM Product for import or export to or from the United States any time after the date this Order becomes final, infringes any Relevant Foreign Patents, and (2) is seeking relief that would result in payments to Respondent in excess of the Maximum Allowable Royalty Rates or would otherwise be inconsistent with the requirements of this Order.

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VIII.**IT IS FURTHER ORDERED** that:

- A. No later than thirty (30) days after the date this Order becomes final, Respondent shall distribute a copy of this Order and the complaint in this matter to JEDEC, to those members of JEDEC that Respondent contacted regarding possible infringement of any of its patents by JEDEC-Compliant DRAM Products or JEDEC-Compliant Non-DRAM Products, and to any other Person that Respondent contacted regarding possible infringement of any of its patents by JEDEC-Compliant DRAM Products or JEDEC-Compliant Non-DRAM Products.
- B. No later than ten (10) days after the date this Order becomes final, Respondent shall distribute a copy of this Order and the complaint in this matter to every officer and director of Respondent, to every employee or agent of Respondent whose responsibilities include acting as Respondent's designated representative to any Standard-Setting Organization, and to every employee or agent having managerial responsibility for any of Respondent's obligations under this Order.
- C. Until ten (10) years after the date this Order becomes final, Respondent shall furnish a copy of this Order and the complaint in this matter to each new officer and director of Respondent and to every new employee or agent of Respondent whose responsibilities will include acting as Respondent's designated representative to any Standard-Setting Organization or who will have managerial responsibility for any of Respondent's obligations under the Order. Such copies must be furnished within thirty (30) days after any such persons assume their position as an officer, director or employee. For purposes of this Paragraph IX.C., "new employee" shall include without

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limitation any of Respondent's employees whose duties change during their employment to include acting as respondent's designated representative to any Standard-Setting Organization.

- D. Until ten (10) years after the date this Order becomes final, Respondent shall furnish each Standard-Setting Organization of which it is a member and which it joins a copy of this Order, and Respondent shall identify to each such organization the name of the Compliance Officer who will serve as Respondent's designated representative to the Standard-Setting Organization.

IX.

IT IS FURTHER ORDERED that:

- A. Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order:
1. no later than sixty (60) days after the date this Order becomes final; and
 2. annually for ten (10) years on the anniversary of the date this Order becomes final.
- B. Respondents shall include in its reports, among other things required by the Commission, a full description of the efforts being made to comply with this Order, a description of all substantive contacts or negotiations relating to Respondent's participation in any Standard-Setting Organization of which Respondent is a member, the identity of all parties contacted, copies of all written communications to and from such parties, internal documents and communications, and all reports and

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recommendations concerning Respondent's participation in any Standard-Setting Organization.

- C. Until ten (10) years after the date this Order becomes final, Respondent shall maintain records adequate to describe in detail any action taken in connection with the activities covered by this Order, including, but not limited to, the annual amount of royalties received from each licensee pursuant to Paragraph V. of this Order.

X.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to any matter contained in this Order; and
- B. Upon five days' notice to Respondent and without restraint or interference from Respondent, to interview the Compliance Officer and any other of Respondent's officers, directors, or employees, who may have counsel present, regarding any such matters.

XI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to (1) any proposed dissolution of Respondent; (2) any proposed acquisition, merger, or consolidation of Respondent; or (3) any other change in

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Respondent including, but not limited to, assignment or creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

XII.

IT IS FURTHER ORDERED that this Order shall terminate on February 7, 2027.

By the Commission, Commissioner Harbour and Commissioner Rosch dissenting.

**REMEDY STATEMENT OF
COMMISSIONER PAMELA JONES HARBOUR
CONCURRING IN PART AND DISSENTING IN PART¹**

I join Parts I, II, IV.A., and (subject to the exception described below) IV.B. of the majority's remedy opinion. In particular, I strongly agree that the Commission's remedial authority in Section 2 cases extends beyond narrowly constrained cease-and-desist orders and includes the ability to order compulsory, royalty-free licensing.

Along with Commissioner Rosch, I dissent from Part III of the majority opinion and the above-zero royalty rate licensing provisions described in Part IV.B. of the majority opinion (and also from the Order, to the extent it is based on those portions of the majority opinion), because I believe the Commission should have imposed a royalty-free remedy in this case. With one exception, I join Commissioner Rosch's dissenting statement, and I elaborate further in Part I below.

¹ This opinion uses the same abbreviations used in the majority's opinion on remedy (hereinafter Majority Remedy Opinion).

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As explained in Part II below, and unlike Commissioner Rosch, I also dissent from Part IV.C. of the majority opinion. I do not believe the remedy adopted by the majority goes far enough to restore competition. Given the Commission's remedial authority and the current "actual market realities"² for SDRAM technologies, the Commission can and should impose a remedy reaching the DDR2 generation of SDRAM. A remedy extending to DDR2 would be a legitimate and appropriate exercise of the Commission's remedial discretion.

I. THE REMEDY SHOULD BE ROYALTY-FREE

All five Commissioners agree that the Commission has the authority to require royalty-free licensing under certain circumstances.³ Commissioner Rosch sets forth compelling arguments why the Commission should exercise that authority in this case. I write separately to highlight one key reason why I concur with Commissioner Rosch on this point: Rambus's argument for an above-zero royalty rate is premised on a flawed logical construct regarding the incentives of Rambus and other JEDEC members in a plausible "but for" world.

Rambus would have us believe that - if faced with a choice between collecting RAND royalties or no royalties at all - Rambus would have offered JEDEC a RAND commitment, in order to entice JEDEC to adopt Rambus technologies as part of the SDRAM standards.⁴ Based on the record before us, I cannot agree.

² See *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466-67 (1992) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.").

³ Majority Remedy Opinion at II.A.-B.; Dissenting Statement of Commissioner J. Thomas Rosch [hereinafter Rosch Remedy Dissent].

⁴ RBR at 3, 10-12 & n.9; RRBR at 10-11.

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As noted by Commissioner Rosch in his dissenting statement,⁵ RDRAM was Rambus's flagship technology. In its unanimous liability opinion, the Commission found that Rambus's goal was the adoption of its proprietary RDRAM technology as the *de facto* industry standard.⁶ The Commission also found that a primary objective of the JEDEC standard-setting process was to establish a royalty-free alternative to RDRAM. The industry resisted RDRAM precisely because of the high royalties Rambus was expected to charge,⁷ in keeping with the company's business model of earning its revenue through patent licensing.⁸

If Rambus had decided to offer a RAND commitment to JEDEC, presumably Rambus would have offered something less than the full package of technology comprising RDRAM, because Rambus would have wanted to continue to push for industry adoption of RDRAM. Rambus also would have known that its RAND rates for this package of technology must be proportional to the anticipated cost of alternative technologies under consideration by JEDEC, or else the RAND commitment would not be an attractive proposition to manufacturers of DRAM components. The RAND rates for this technology package, however, would have represented a significant discount off of the RDRAM rates Rambus was expected to charge. As a result,

5 Rosch Remedy Dissent at 8.

6 Rambus Liability Opinion at 8.

7 *See, e.g.*, CX 961 at 1 (quoting a September 1997 Intel e-mail to Rambus Chief Executive Officer, expressing concern that "absolute cost is the critical factor" at least for the low end of the market and warning that, upon analyzing the royalty obligations attached to RDRAM, the industry would develop alternatives).

8 *See* Rambus Liability Opinion at 7 ("Rambus develops, secures patents on, and licenses technologies to companies that manufacture semiconductor memory devices. Rambus is not a manufacturing company; rather, Rambus earns its revenue through the licensing of its patents.") (citations omitted); CX 2106 (Farmwald FTC Dep.) at 220 (*in camera*) ("[r]oyalties are the lifeblood of Rambus"); *see also* Rosch Remedy Dissent, notes 29-30 and accompanying text.

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manufacturers would have been able to forgo the pricier RDRAM standard, yet still license some portion of Rambus's DRAM technology at the discounted RAND rates for incorporation into rival JEDEC-compliant devices. But this outcome would have been fundamentally inconsistent with the Rambus business model, because it would have reduced even further the industry's incentives to adopt RDRAM as a *de facto* standard. Therefore, it is difficult to conclude on this record that Rambus would have offered RAND terms in a plausible "but for" world.

Even if we were to suppose, nevertheless, that Rambus would have offered a RAND commitment, the inquiry cannot end there. We must ask, as well, how the JEDEC members would have responded. Again, based on the record before us, it is implausible to conclude that the JEDEC members would have accepted Rambus's RAND offer and incorporated Rambus technology into the JEDEC standards. The record demonstrates that JEDEC members not only were wary of adopting patented technology generally, but also went out of their way to avoid Rambus's patented technology specifically.⁹

Moreover, as the Commission's unanimous liability opinion explains in detail, the Commission assumes a "but for" world where lock-in had not yet occurred and where viable, cost-effective alternative technologies were available to JEDEC¹⁰

9 See, e.g., Rambus Liability Opinion at 74 & n.403 ("Indeed, the one time that JEDEC members had advance knowledge that a Rambus patent was likely to cover a standard under consideration, the members took deliberate steps to avoid standardizing the Rambus technology."); Rosch Remedy Dissent at II.C.

10 See, e.g., Rambus Liability Opinion at 76 ("Alternative technologies were available when JEDEC chose the Rambus technologies, and could have been substituted for the Rambus technologies had Rambus disclosed its patent position."), 82 ("We find that the evidence does not establish that Rambus's technologies were superior to all alternatives on a cost/performance basis."), 97-98 ("No matter what the specific outcome might have been [if Rambus had disclosed its patent position], the consequences of incorporating Rambus's

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- all the more reason why the JEDEC members likely would have rejected a RAND offer by Rambus in a plausible "but for" world.¹¹

II. THE REMEDY SHOULD EXTEND TO DDR2

All of the other Commissioners have chosen to limit the scope of the remedy to the SDRAM and DDR SDRAM standards. The Commission's unanimous liability opinion found lock-in only with respect to the two earlier standards; therefore, my colleagues conclude, the remedy should go no further. I disagree.

When the Commission fashions a remedy, it should strive to restore, as completely as possible, the competitive environment

patented technologies into the standards would have been identified and weighed *before* the standards were adopted, *when Rambus's technologies were competing with the alternatives*. That 'but for world' would have been more competitive than the current DRAM marketplace, in which Rambus has monopoly power and can charge whatever royalties it chooses." (emphasis in original).

11 See Rambus Liability Opinion at 63-65 (various industry participants believed that the JEDEC standards under consideration would be Rambus-free and royalty-free). Their beliefs were consistent with Rambus's behavior, in light of the Commission's findings regarding Rambus's course of exclusionary conduct. The Commission found that Rambus's business strategy included amending its patent applications to cover JEDEC-compliant products, based on information gleaned during Rambus's participation in JEDEC while the standards were under development. *Id.* at 4 ("through its participation in JEDEC, Rambus gained information about the pending standard, and then amended its patent applications to ensure that subsequently-issued patents would cover the ultimate standard"), 40-48 (detailing the chronology of Rambus's conduct, including relevant amendments), 67 (holding that Rambus's amendment program was deceptive); see also CX 837 at 2 (internal email advising Rambus management that the company should "redouble [its] efforts to get the necessary amendments completed, the new claims added and make damn sure this ship is watertight before we get too far out to sea."). It is entirely possible that the JEDEC standards *were* Rambus-free at some point, before Rambus repeatedly amended its patent applications to cover them.

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that would have existed in the "but for" world.¹² In this case, the Commission can and should impose a remedy that would apply to technologies included in all JEDEC standards that were developed, *or in development*, at the time Rambus began enforcing its patents. This test would yield a remedy covering DDR2 (but not DDR3 or successive generations).

This formulation would reflect an appropriate use of fencing-in relief consistent not only with existing jurisprudence regarding the scope of the Commission's remedial authority, but also with burden-of-proof requirements during the remedy phase. A DDR2 remedy would more completely and effectively mitigate the likely and foreseeable effects of Rambus's exclusionary conduct and would create an opportunity for the market to establish a competitive equilibrium.

The proposed test also recognizes the need for a clearly articulated limiting principle. The remedy would be purely prospective and reasonably bounded in breadth, yet aggressive enough to prevent Rambus from being unjustly enriched by the lingering effects of its unlawful conduct.

Finally, such a remedy would enhance the deterrent effect of the Commission's enforcement action by sending a forceful message: companies will not be allowed to profit from monopoly power obtained by hijacking a standard-setting organization.

A. The Commission's Liability Opinion Does Not Rule Out The Possibility of DDR2 Lock-In

In its unanimous liability opinion, the Commission held that "[t]he record does not support a finding that lock-in conferred

¹² See Majority Remedy Opinion at 6 ("[T]he Commission's authority extends to restoring, to the extent possible, the competitive conditions that would have been present absent Rambus's unlawful conduct.").

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durable monopoly power over DDR2 SDRAM by 2000"- subject . . . to the caveat expressed in footnote 621: "Although we do not, on this record, find durable monopoly power as to DDR2 SDRAM, neither do we rule it out. It is possible that Rambus did, in fact, obtain durable monopoly power over DDR2 SDRAM."¹³

As footnote 621 recognized, the Commission "might have found lock-in with respect to DDR2 SDR if the record had demonstrated, for example, that backward compatibility concerns were a substantial determinative factor in JEDEC's DDR2 SDRAM standard-setting decisions."¹⁴ For purposes of establishing liability, however, the record was deemed insufficient to make such a finding.

B. The Commission Has The Authority to Reach DDR2

When the Commission finds that the law has been violated, the Commission has three responsibilities: to stop the unlawful conduct; to prevent the unlawful conduct from recurring; and, importantly, to restore competition lost as a result of the unlawful conduct. As the majority opinion explains, the Commission has the authority to order relief that goes beyond a cease and desist order - including the prohibition of otherwise lawful conduct - if such relief is necessary to alleviate competitive harm and prevent future harm from occurring. The Commission is exercising this authority by prescribing maximum royalty rates that Rambus may charge for SDRAM and DDR SDRAM. The same core principles that support the majority's remedial choice also would justify a remedy extending to DDR2.

The Supreme Court in its 1946 *Jacob Siegel* decision described the Commission as "the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed."¹⁵ As discussed in the

13 Rambus Liability Opinion at 110, 114 & n.621.

14 *Id.* at 114 n.621.

15 *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612 (1946).

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majority opinion,¹⁶ the Court further stated that the Commission "has wide latitude for judgment"¹⁷ and "wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in ... trade and commerce."¹⁸ The Court concluded that "the courts will not interfere except where the remedy selected has no *reasonable relation* to the unlawful practices found to exist."¹⁹ The Supreme Court and lower courts consistently have affirmed the breadth of the Commission's remedial authority under Section 5 of the FTC Act.²⁰

As the majority opinion explains, the Court repeatedly has upheld the Commission's authority to go beyond a cease and desist order. The Commission may require relief that prohibits otherwise lawful conduct, if such relief is necessary to prevent ongoing harm to competition. As the Court explained in *Ruberoid*,

the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.²¹

16 Majority Remedy Opinion at 6-7.

17 *Siegel*, 327 U.S. at 613.

18 *Id.* at 611.

19 *Id.* at 613 (emphasis added).

20 *See, e.g.*, *FTC V. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965); *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428-30 (1957); *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

21 *Ruberoid*, 343 U.S. at 473.

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The Court later gave a name to this concept: "those caught violating the [FTC] Act must expect some fencing in."²² The Commission - with the approval of the courts - has included a variety of fencing-in provisions in its remedial orders.²³ The Commission may use its fencing-in authority as long as the relief is reasonably related to the illegal conduct and is not punitive.²⁴

In this case, extending the relief to the DDR2 SDRAM standard would be reasonably related to Rambus's deceptive and exclusionary conduct. The Commission's unanimous liability opinion found that Rambus's course of deceptive conduct was causally linked to Rambus's acquisition of a monopoly position in technologies used in products compliant with JEDEC's SDRAM and DDR SDRAM standards. By the time Rambus began enforcing its patents against JEDEC-compliant products, the industry already had begun to develop the third-generation SDRAM standard - *i.e.*, DDR2. DDR2 was based on the existing SDRAM and DDR SDRAM standards, reflecting JEDEC's preference for "evolutionary" progression from one generation to the next. Given the industry's desire for backward compatibility,²⁵ Rambus reasonably could have anticipated - and

22 *Nat'l Lead*, 352 U.S. at 431.

23 *See, e.g.*, *Litton Industries, Inc. v. FTC*, 676 F.2d 364, 370 (9th Cir. 1982) (quoting *ITT Continental Baking Co. v. FTC*, 532 F.2d 207, 223 (2d Cir. 1976)) (multi-product order to address "all products in a broad category, based on violations involving only a single product or group of products," to prevent respondent from transferring unlawful conduct to other products); *Toys "R" Us, Inc.*, 126 F.T.C. 415, 615 (1998), *aff'd*, 221 F.3d 928, 939-940 (7th Cir. 2000) (respondent enjoined from making certain otherwise lawful requests for information from suppliers, because the requests were "the means used by TRU to implement and police the illegal restraints of trade").

24 *See* Majority Remedy Opinion at 7 (a compulsory licensing order that attempts to replicate the "but for" world is not punitive).

25 *See* Rambus Liability Opinion at 112 & n.613-14 ("Several industry witnesses expressed concerns that changing DDR2 SDRAM to avoid Rambus's patents would have disrupted backward compatibility. One witness testified

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would have hoped- that its technologies also would be incorporated into DDR2.

In the "but for" world, the SDRAM and DDR SDRAM standards would have been Rambus- free. Due to the path-dependent nature of JEDEC standard-setting, the inclusion of Rambus technologies in the first- and second-generation standards made it all but inevitable that Rambus technologies also would be included in DDR2. Rambus's exclusionary conduct therefore facilitated the creation of Rambus's DDR2 monopoly. This would satisfy the "reasonable relation" test.

As for the "punitive" prong of the analysis, courts have upheld a variety of fencing-in provisions as not punitive²⁶ and a remedy reaching DDR2 also would pass muster. By extending the remedy to technologies included in all JEDEC standards developed or in development at the time Rambus began enforcing its patents against JEDEC-compliant products, the Commission would do no more than restore the competitive *status quo ante*. Rambus would not be deprived of the entire value of its intellectual property, because Rambus still would have total freedom to enforce its patents with respect to all non-JEDEC-compliant uses (such as RDRAM). True, a royalty-free remedy would "hurt" Rambus more than the remedy endorsed by the majority. But one must be careful not to equate financial pain with excessive punishment. If a remedy is proportional to the

that an effort to maintain backward compatibility after eliminating dual-edge clocking would have had 'a big impact' from the perspective of design and that a desire to maintain backward compatibility was the reason that a sub-unit of JEDEC's task group . . . chose to maintain dual-edge clocking.").

26 The courts have upheld fencing-in provisions that prohibit otherwise lawful conduct, finding that they are not punitive. *See, e.g.*, L.G. Balfour Co. v. FTC, 442 F.2d 1 (7th Cir. 1971) (affirming divestiture order in § 5 case, by implication finding remedy not punitive); Golden Grain Macaroni Co. v. FTC, 472 F. 2d 882 (9th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973) (same); *see also* Curtis Publ'g Co. 78 F.T.C. 1472 (1971) (Commission required restitution of monopoly profits, describing remedy as prospective only and not punitive).

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underlying offense, it is not punitive, regardless of whether it inflicts pain. In contrast, if a remedy is not proportional to the offense, the Commission's remedial goals are unlikely to be fully achieved. The wrongdoer will benefit; the remedy will not restore the *status quo ante*; and future violations may be encouraged rather than deterred.

C. The Burden Of Proof Must Be Properly Allocated

The Commission's unanimous liability opinion found insufficient proof of a causal linkage between Rambus's exclusionary conduct and its DDR2 monopoly. But the burden of proof in the remedial phase is less stringent than in the liability phase, and the evidence must be weighed accordingly. Finding a "reasonable relation" to the unlawful practices requires less evidence than would be needed to establish the violation.

For remedial purposes, Complaint Counsel should not bear the burden of proving the "but for" world with absolute certainty. Yet, the other Commissioners would limit the Commission's remedial reach to anticompetitive effects directly caused by the unlawful conduct. In effect, therefore, my colleagues seek to restore the "but for" world only to the extent Complaint Counsel has proven what that world would have looked like. I believe their approach incorrectly allocates the burden of proof.

In our liability opinion, the Commission unanimously agreed that, for purposes of establishing Section 5 liability, Complaint Counsel needed to prove a causal relationship between Rambus's unlawful conduct and Rambus's acquisition or maintenance of monopoly power in the relevant technology markets. The Commission found that Complaint Counsel had satisfied its burden with respect to the SDRAM and DDR SDRAM standards, but not with respect to DDR2. Significantly, however, the Commission found *no* proof of *Rambus's* portrayal of the "but for" world. The Commission explicitly rejected Rambus's contention that the JEDEC members would have chosen to include the Rambus technologies in the SDRAM standards, even if Rambus

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had not engaged in its course of deceptive conduct and JEDEC had full information about Rambus's intellectual property. Moreover, as discussed above, footnote 621 preserved the possibility that Rambus's exclusionary conduct might have been causally linked to Rambus's monopolization of the four relevant technologies with respect to the DDR2 standard.

It is black-letter Supreme Court law that "once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor."²⁷ Areeda and Hovenkamp reflect this principle when they state:

[T]he monopolist bears the risk of the uncertain consequences created by its exclusionary acts. Thus, at the least, equitable relief properly goes beyond merely "undoing the act"; the proper relief is to eradicate all the consequences of the act and provide deterrence against repetition; and any plausible doubts should be resolved against the monopolist.²⁸

As discussed, but not decided, in the Commission's unanimous liability opinion, Rambus intentionally destroyed a large volume of documents, including documents regarding Rambus's participation in JEDEC and Rambus's patent prosecution litigation.²⁹ While the Commission found it unnecessary to resolve the spoliation issue for purposes of determining liability, Rambus's alleged spoliation of evidence should not be wholly

²⁷ *United States v. E.I. DuPont de Nemours & Co.*, 366 U.S. 316, 334 (1961) (Commission entitled to decree directing complete divestiture in merger case, to remedy violations of Clayton Act § 7), *quoted in* *Ford Motor Co. v. United States*, 405 U.S. 562, 575 (1972) (upholding divestiture and various other injunctive provisions in Commission order in §7 case).

²⁸ III PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* 653f (2d ed. 2002).

²⁹ Rambus Liability Opinion at 115-18.

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ignored for remedy purposes. Rambus destroyed contemporaneous records that might have corroborated Complaint Counsel's position on remedy. In particular, on July 17, 2000, Rambus Vice President and in-house counsel Neil Steinberg instructed Rambus executives to destroy all documents, other than executed contracts, that referred or related to patent licensing negotiations.³⁰ Clearly, such records would have been particularly relevant to the Commission's consideration of what the real world might have looked like and, thus, what the "but for" world should be. Instead, Rambus's systematic and successful document destruction campaign has enhanced doubts regarding how DDR2 should be treated in the "but for" world.

The proper relief in this case must eradicate all consequences of Rambus's exclusionary conduct. Rambus's monopoly power with respect to DDR2 is reasonably related to Rambus's exclusionary conduct. Because "any plausible doubts" are to be resolved against Rambus - especially doubts exacerbated by Rambus's destruction of documents - the Commission may extend its remedy to DDR2.

D. Marketplace Realities: A DDR2 Remedy Will More Effectively Restore Competition

Enforcement litigation in complex antitrust cases presents an inherent paradox: by the time any remedy is achieved, the market may have moved on. This is especially true in fast-moving technology markets. The *Rambus* case was worthwhile, irrespective of remedial issues, because the Commission's unanimous liability opinion will provide valuable guidance.³¹

30 CX 5020(July 17, 2000 email from Neil Steinberg to "exec"). This directive was issued after Rambus had begun to enforce its patents against DRAM manufacturers and only days before Rambus filed an additional enforcement action against Infineon.

31 *Cf.* *United States v. Microsoft Corp.*, 253 F.3d 34,48-49 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001):

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But having said that - and given that the Commission *can* rightfully reach DDR2 - the Commission *should* do so.

It is impossible to ignore what has happened in the SDRAM marketplace since the Commission voted out its administrative complaint in June 2002. The market is now rapidly migrating to DDR2. Therefore, the Commission's remedial order applies only to products that soon will be obsolete. A quick check of retail websites of major computer system manufacturers confirms that even entry-level computers targeted to the price-sensitive consumer segment of the market overwhelmingly feature DDR2 components.³² It has been projected that DDR2 will achieve a market share of over 77 percent of DRAM revenues in 2007, and over 84 percent by 2008.³³

[It] is somewhat problematic ... that just over six years have passed since Microsoft engaged in the first conduct plaintiffs allege to be anticompetitive. As the record in this case indicates, six years seems like an eternity in the computer industry. By the time a court can assess liability, firms, products, and the marketplace are likely to have changed dramatically. This, in turn, threatens enormous practical difficulties for courts considering the appropriate measure of relief in equitable enforcement actions, both in crafting injunctive remedies in the first instance and reviewing those remedies in the second.... [But we] do not mean to say that enforcement actions will no longer play an important role in curbing infringements of the antitrust laws in technologically dynamic markets, nor do we assume this in assessing the merits of this case. Even in those cases where forward-looking remedies appear limited, the Government will continue to have an interest in defining the contours of the antitrust laws so that law-abiding firms will have a clear sense of what is permissible and what is not.

32 As of January 2007, the lowest-priced "home and home office" desktop computers from Dell, Hewlett Packard, Gateway, and Apple all featured DDR2 SDRAM, according to their retail websites.

33 Semico Research Corp., *Computing Applications Dominate DRAM Volume: The Growth of White Box*, Appx. Table 6 (June 2004, Report No. VM-102-04). According to this report, DDR2 DRAM has been projected to account for nearly \$25 billion out of a total of \$32.2 billion in DRAM revenues in 2007, and \$33.6 billion out of \$39.9 billion in 2008.

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If the Commission's remedy does not reach DDR2, it will fail to eradicate the lingering effects of Rambus's illegal conduct.³⁴ Consumers deserve more effective and complete relief, wherever possible. Complaint Counsel correctly assert³⁵ that a DDR2 remedy would help to "creat[e] a breathing spell during which independent pricing might be established without the hang-over of the long existing pattern of [anticompetitive conduct]."³⁶ By extending the remedy to DDR2, the Commission would give the market an opportunity to consider alternative technologies for DDR3 and subsequent standards.

E. Unjust Enrichment and Deterrence: Rambus Should Not Be Allowed to Profit From Its Unlawful Conduct

A remedy that fails to reach DDR2 will leave Rambus free to extract royalties on sales of a vast majority of JEDEC-compliant components currently, and soon to be, in the SDRAM marketplace. If Rambus is allowed to keep all of its DDR2 royalties on a going-forward basis, Rambus's exclusionary conduct will continue to be rewarded, as it already has been. This constitutes unjust enrichment, which is unfair to consumers.

It also may hamper effective deterrence, which should be one of the primary objectives of any remedy. As Areeda and Hovencamp state, "the goal of antitrust remedies is general deterrence, not simply destruction of a single monopoly for

34 "A public interest served by such civil [antitrust] suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause." *Int'l Salt Co. v. United States*, 332 U.S. 392, 401 (1947), *quoted in Ekco Products Co.* 1964 FTC LEXIS 115, 125 (1964)

35 CCBR at 18.

36 *Assoc. of Conference Interpreters*, 123 F.T.C. 465, 659-60 (1997) (quoting *FTC v. Nat'l Lead*, 352 U.S. 419, 425 (1957)).

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whatever social good that in itself might impose."³⁷ The Commission has sent a strong message in its liability opinion, and most participants in standard-setting organizations will take this message to heart. But the bottom-line result of the Commission's remedy is this: Rambus will continue to reap financial benefits that are reasonably related to its successful subversion of JEDEC's standards.

37 III AREEDA & HOVENCAMP, *supra* note 28, at ¶710b4(C).

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**STATEMENT OF COMMISSIONER J. THOMAS ROSCH,
CONCURRING IN PART AND DISSENTING IN PART****I.**

I concur in Parts I, II and IV of the majority decision, with the exception of the above zero royalty rate licensing provisions of the majority's decree that are described in Part IV — of the decision.¹ I respectfully dissent from Part III of the decision and from those above zero royalty rate provisions of the decree.

With respect to the majority's discussion of the Commission's remedial authority in Part II of its decision, I would only add that the Section 2 violation the Commission has found is a *continuing* violation of Section 2. The Commission found not just that Rambus engaged in a deceptive course of conduct, but that Rambus obtained enduring monopoly power by virtue of that deceptive course of conduct. Rambus continues to exploit that monopoly power by seeking royalties from those who practice the SDRAM and DDR-SDRAM standards. When a monopoly position is wrongfully acquired, exploitation of that monopoly position constitutes monopolization violative of Section 2.² Thus, by continuing to exploit its unlawfully acquired monopoly position, Rambus is engaging in a continuing violation of Section 2.

1 This opinion uses the same abbreviations used in the majority opinion.

2 *See In re American Cyanamid Co.*, 72 F.T.C. 623,690 (1967), *aff'd* *Charles Pfizer & Co. v. Federal Trade Commission*, 401 F.2d 574, 579-80 (6th Cir. 1968) (upholding Commission finding that defendants engaged in attempted monopolization by exploiting a patent acquired by withholding information from the Patent Office); *see also Warner-Lambert Co. v. Federal Trade Commission*, 562 F.2d 749,766, note 3 (D.C. Cir. 1977) (dissenting opinion) (distinguishing between an order eliminating the effects of a violation from an order stopping a continuing violation and stating with respect to the latter that while "[a] legally obtained patent permits a valid monopoly for the period of the patent; an illegally obtained patent shelters an invalid monopoly which can be 'broken up' by requiring the patent holder to license its patents to competitors.").

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Rambus does not deny that when there is a continuing violation, the Commission can issue whatever order is reasonably necessary to stop the violation from continuing. For example, Rambus admits that when a merger violates Section 7 of the Clayton Act, the Commission is not limited to enjoining future acquisitions violative of Section 7, but can order divestiture of the merged assets.³ This admission is not gratuitous. Courts may issue whatever order is reasonably necessary to stop a monopolist from continuing to exploit its unlawfully acquired monopoly power. There is no principled reason why the Commission's power to remedy a Section 2 violation should be more cramped than the remedial authority of a district court to deal with such a continuing violation.

I agree with the majority's discussion in Part II — of the legal principles governing the Commission's authority to order royalty free licensing. Specifically, I acknowledge that there are significant limiting principles on the Commission's power to require royalty-free licensing. First, as the majority states, that remedy cannot go beyond what is reasonably necessary to stop a continuing violation of Section 2 and/or to terminate the ill effects of the violation.⁴ That means in this case that the Commission must conclude on the basis of the record that in the "but for world" - *i.e.*, the world that would have existed had Rambus not engaged in its deceptive course of conduct - Rambus would not have obtained any royalties. The parties agree on this limiting principle.⁵

3 See RRB at 1.

4 See *Ford Motor Co. v. United States*, 405 U.S. 562, 573 n. 8 (1972); *Reynolds Metals Co. v. Federal Trade Commission*, 309 F.2d 223, 231 (D.C. Cir. 1962).

5 See CCB at 1; RBR at 6; RRB at 1.

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Second, as the majority says, there is a spectrum of remedies with controls on conduct at one end and structural measures such as divestiture at the other end. The Commission should impose an order based on the record which is as close to the "conduct" end of the spectrum as possible so long as that remedy will insure that Rambus cannot continue to exercise its monopoly power and/or retain the fruits of its violation. That means that, having determined what the "but for world" would have looked like, the Commission must consider whether there is a more "conduct-like" remedy than royalty-free licensing which will reflect the conditions of the "but for world."

Third, the majority is correct in asserting that there must be "special proof" of the need for that remedy. Rambus is also correct that Complaint Counsel bears the burden of proving what the "but for world" would have looked like.⁶ Rambus's counsel conceded at oral argument that it is unclear what proof would suffice.⁷ Areeda and Hovenkamp state that where the relief sought is necessary "to eradicate all the consequences of the act, . . . any plausible doubts should be resolved against the monopolist."⁸ That said, however, I agree that there must be strong proof that Rambus would not have reaped royalties in the "but for world" in order to support royalty-free licensing, and that proof must substantially outweigh the evidence of the "but for world" proffered by Rambus.⁹

6 See 16 C.P.R. § 3.43 (a).

7 Oral Argument before the Commission on the Issue of Remedy (Nov. 15, 2006), at 70-71.

8 AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 653(f), at 104 (2002).

9 The majority expresses itself somewhat differently, concluding that "Complaint Counsel must show that this form of relief is necessary to restore competitive conditions that would have prevailed absent Rambus's misconduct." Majority Opinion at 10. I do not discern any daylight between our views in this respect. Under both formulations, Complaint Counsel must bear the ultimate burden of proving that the compulsory licensing remedy they seek is needed to restore the conditions that would have existed but for Rambus's misconduct.

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II.**A.**

To begin with, it bears emphasis that the parties have stipulated to three points related to the appropriate remedy.¹⁰ First, assuming the Commission's remedial authority extends beyond entry of an order requiring Rambus to cease and desist engaging in deceptive conduct, the Commission must seek to restore conditions to those that would have existed in the "but for world." Second, the remedy should address only patents with respect to JEDEC-compliant products. Third, the Commission should adopt a remedy expeditiously and based on the existing record. The third stipulation is especially important here, reinforcing the Commission's obligation to insure that the remedy adopted is firmly grounded in the record. Based on the record before the Commission in this case, I would issue a royalty-free decree more limited in scope than that sought by Complaint Counsel, ordering Rambus to license its technologies royalty free to those practicing JEDEC's SDRAM and DDR SDRAM standards. I therefore respectfully dissent from the majority's decree in that respect.

B.

Rambus insists that the fact that JEDEC adopted standards incorporating its four patented technologies establishes that JEDEC and its members preferred those technologies over alternatives and that this preference would have enabled Rambus to obtain substantial royalties in the "but for world."¹¹ Complaint Counsel, on the other hand, insist that the Commission has already found that but for Rambus's deceptive course of conduct, JEDEC would have selected unpatented technologies over

¹⁰ See RRBR at 1, CCBR at 1, 23-24.

¹¹ See RBR at 3-4, 8, 22; RRBR at 9-10.

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Rambus's patented technologies.¹² Both sides overstate the record and the Commission's earlier findings.

Rambus's argument that JEDEC and its members would have selected its technologies even if they were fully informed about Rambus's patents and patent applications is not supported by the fact that they did so when they were *not* informed about those patents and patent applications. On the other hand, Complaint Counsel are wrong in asserting that the Commission has already concluded that a fully informed JEDEC and its members would not have incorporated the patented technologies in the standards. The Commission has, to be sure, concluded that Rambus failed to establish that the costs of alternatives exceeded the costs of Rambus's patented technologies, but in that analysis the Commission included as a portion of Rambus's costs the royalties Rambus has been demanding.¹³ The Commission did not hold that a fully-informed JEDEC would have adopted the alternatives if Rambus's technologies were demonstrably superior to them on a net cost/performance basis. Thus, I reject both of these contentions.

C.

However, there is strong evidence in the record that if JEDEC had been aware of the potential scope of Rambus's patent portfolio, it would have adopted standards that would have avoided Rambus's patents. JEDEC's rules, the expectations of its membership, and the market's concerns with costs generally and the cost of Rambus's technologies in particular all strongly support a finding that a fully informed JEDEC would have adopted standards that did not read on Rambus's patents.

JEDEC's written policies reflected deep concern with incorporating patented technologies into standards.¹⁴ Those

¹² See CCBR at 4-5.

¹³ See Op. at 95-96.

¹⁴ See CX 207a at 8 (1990 EIA Style Manual that governed standards issued by JEDEC [one of EIA's units], stated that JEDEC should "[a]void

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concerns were echoed by JEDEC's members who repeatedly testified about their opposition to incorporating patents into JEDEC standards.¹⁵ The record demonstrates that the consensus needed to adopt Rambus's patented technologies could not have been achieved because some of JEDEC's most powerful members (*e.g.*, Sun Microsystems) were especially loathe to adopt patented technologies.

The record also demonstrates that JEDEC's membership was particularly concerned with incorporating technologies into JEDEC's standards that could potentially read on Rambus's patents. JEDEC members testified that if they had known of Rambus's patents and patent applications at the time, they would not have voted to incorporate those technologies into the

requirements in EIA standards that call for the exclusive use of a patented item or process"); CX 208 at 19 (1993 JEDEC Manual of Organization stated that "committees should ensure that no program of standardization shall refer to a product on which there is a known patent unless all of the relevant technical information covered by the patent is known"); JX 53 at 11 (1993 EIA Manual stated that "[r]equirements in EIA Standards which call for the use of patented items should be avoided"); *see also* JX 5 at 4 (JEDEC minutes stated, "If it is known that a company has a patent on a proposal then the Committee will be reluctant to approve it as a standard."); J. Kelly, Tr. 2073-2074 ("JEDEC, however, is concerned and I said before that JEDEC and EIA do not have a preference for including intellectual property in standards because of the fact that there may be a royalty that may increase the cost. The goal is always to try to produce a standard which is going to gain marketplace acceptance, and if the cost of the product is going to -- is likely to be increased by intellectual property, that's a general concern. That doesn't go to the licensing terms, however. That goes to the basic question of whether to include the IP at all or not.").

¹⁵ *See* Bechtelsheim, Tr. 5813-14; *see also* Sussman, Tr. 1417 (Sanyo's JEDEC representative testified, "If I understood that there was IP on the programmable, I would have voted- changed my direction and voted to take the fixed one."); G. Kelley, Tr. 2576 (IBM's JEDEC representative noting that "[p]atent issues are a concern on every JEDEC proposal" and that when a technology was considered for the first time "it was especially valuable to have the consideration of patents so that we could possibly avoid them").

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standard.¹⁶ That testimony is consistent with the real world behavior of JEDEC and its membership. For example, several members objected to a proposal for the DDR SDRAM standard because they were concerned that it might be covered by Rambus's '703 patent - the one patent that Rambus had disclosed while it was a member of JEDEC.¹⁷ JEDEC immediately dropped the proposal and turned to consideration of technologies that it believed avoided Rambus's patent.¹⁸ Another example was the reaction of the marketplace to Rambus's proprietary DRAM standard- RDRAM. Rambus failed in its efforts to position RDRAM as the de facto market standard, at least in part, because the DRAM manufacturers' concerns about cost led them to adopt standards that they believed were not proprietary.¹⁹

Rambus tried to rebut this evidence by pointing to evidence that JEDEC sometimes adopted patented technologies into its

16 *See, e.g.*, Landgraf, Tr. 1714 (liP's JEDEC representative testified that if Rambus had disclosed its patent applications, and "[i]f we knew in advance that they were not going to comply with the JEDEC patent policy, we would have voted against it"); Lee, Tr. 6686, 6717 (Micron's JEDEC representative testified that knowledge of Rambus's patent applications would have caused Micron to oppose on-chip PLL/DLL and dual-edge clocking).

17 *See* JX 36 at 7; Lee, Tr. 6695-96 ("Many other people in the room also objected. There was a variety of comments from quite a few people from the committee who were -- strongly objected to the consideration of this proposal for the standard").

18 *See* Rhoden, Tr. 527-28; CX 368 at 2 (Micron presentation to JEDEC proposing an alternative standard to avoid Rambus's technology noted that "[I]oop-back strobe could have intellectual property problems"). Rambus would have the Commission ignore JEDEC's rejection of its patented technology because it occurred after Rambus left JEDEC. Rambus argued that at that point JEDEC could not seek or enforce a RAND commitment from Rambus. There is nothing in the record to suggest that JEDEC could seek or enforce a RAND commitment only from its members.

19 *See* CX 961 at 1 (September 1997 Intel e-mail to Rambus CEO Tate stating the concern that, for at least the low end of the market, "absolute cost is the critical factor" and alternatives "need not be equivalent performance," and warning that, upon analyzing the royalty obligations attached to RDRAM, the industry would develop alternatives); RX 1482 at 12.

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standards after it received RAND assurances.²⁰ However, in all but one instance (Mosaid, whose patents were not essential to the standard), the evidence shows that the holders of those patents were, unlike Rambus, manufacturers, and that JEDEC viewed manufacturers differently from non-manufacturers, believing that the former had incentives to cross-license their technology for *de minimis* or no royalties.²¹ Thus, it does not follow that because JEDEC was willing to adopt the technologies of those manufacturer patent holders it would have been willing to do so in Rambus's case.

It is also suggested that the testimony of JEDEC members should not be credited because their testimony is, *inter alia*, "necessarily speculative even if sincere."²² However, in the context of mergers the Commission has embraced unimpeached

20 See JX 1 at 6 (DEC's patented technology was incorporated into the SDRAM standard after DEC agreed in writing to a 1% royalty); JX 13 at 9, 136 and CX 54 at 8 (Motorola's patented technology was incorporated into the standard after it agreed to RAND terms); JX 19 at 12, 28 (JEDEC adopted a standard that could incorporate a Texas Instruments patent. Several members had voiced concerns but those concerns were assuaged after Texas Instruments wrote that "a review of TI's patent makes clear that, while the TI patent presents advantages in making Quad CAS memories, it is not essential."); CX 400 at 2 (JEDEC adopted a standard that incorporated Mosaid's patent after Mosaid stated that it would license its technology on RAND terms); Sussman Tr. 1423-1424 (Mosaid also stated that its patent applied only to particular implementations of the technology and consequently "you can design around it").

21 See Lee, Tr. 6717 ("We have a responsibility in JEDEC to try to avoid the use of patents whenever possible in creating a standard, and also our company has a similar policy, as we try to avoid the use of patents whenever possible. Particularly I'd have to say in the case where Rambus is not a manufacturer, it wouldn't have even been a situation where we could have cross-licensed. So, we would have been strongly opposed [to using the technology in the standard]."); G. Kelley, Tr. 2640-41 ("I believe that IBM was concerned, ... with licensing the royalties for companies that it was not cross-licensed with."); see also McAfee, Tr. 7493-94.

22 See Majority Opinion at 16.

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customer testimony as powerful evidence of the "but for world."²³ Where, as here, customer testimony is not only given under oath but is supported by the actions of the customers before the controversy has arisen, and is otherwise unimpeached, there is no reason not to credit it. Although it is also said that the testimony of JEDEC's members is contrary to their agreement "to incorporate patented technologies into the SSO's standard in several instances," that is not supported by the record respecting the actions of JEDEC's members where Rambus or companies like Rambus that were pure inventors (as contrasted with manufacturers) were involved.²⁴

In short, the record seems to me strongly to support the conclusion that in the "but for world" JEDEC and its principal stakeholders (the DRAM manufacturers), if fully informed about Rambus's patents and pending patents, would not have incorporated Rambus's technologies in the SDRAM and DDR SDRAM standards. In a world with alternative technologies, which was the real world here,²⁵ Rambus would not be in a position to collect royalties from those practicing those standards. That conclusion in turn would support a decree requiring Rambus to license on a royalty-free basis the patents that were not disclosed to those practicing the SDRAM and DDR SDRAM standards.

D.

It also seems to me that on this record there is no remedy which comports with the "but for world" but which, at the same

23 See Deborah Platt Majoras, Chairman Federal Trade Comm'n, "Recent Actions at the Federal Trade Commission," Remarks Before the Dallas Bar Association's Antitrust and Trade Regulation Section at 2 n. 4 (January 18, 2005) available at <http://www.ftc.gov/speeches/majoras/050126recentactions.pdf>.

24 See Majority Opinion at 16.

25 See Op. at 76 (discussing the presence of alternative technologies at the time JEDEC made its standard decisions).

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time, is closer to the "conduct" end of the remedy spectrum than is the limited compulsory licensing remedy I would adopt. Rambus claims otherwise, contending that the evidence respecting the "but for world" described above is outweighed by evidence of a "but for world" in which Rambus and a fully informed JEDEC and its members would have agreed to licenses of Rambus's patents at royalty rates above zero. I do not agree.

Specifically, Rambus argued that, at a minimum, in the "but for world" it would be able to collect a 2.5% royalty from those practicing JEDEC's SDRAM and DDR SDRAM standards.²⁶ Rambus's claims about the "but for world" are threefold. First, Rambus asserts that if it had disclosed its potential patent portfolio, JEDEC would have requested a RAND commitment from Rambus ("commitment to license its technology on reasonable and non-discriminatory terms), and Rambus would have obliged.²⁷ To be sure, JEDEC policies permitted (but did not require) JEDEC to incorporate patented technologies into its standards when RAND commitments were given.²⁸ However, the record shows that Rambus was strongly opposed to RAND terms because they were contrary to its business model.²⁹ There is also

²⁶ See RBR at 3-4.

²⁷ See RBR at 10-11; RRBR at 9-10.

²⁸ See ex 208 at 27 (1993 JEDEC Manual of Organization and Procedure states that "[s]tandards that call for use of a patented item or process may not be considered by a JEDEC committee unless all of the relevant technical information covered by the patent or pending patent is known to the committee, subcommittee, or working group," and the patent holder submits written assurance that it will license without charge or under "reasonable terms and conditions that are demonstrably free of any unfair discrimination"); see also J. Kelly, Tr. 1885-86; ex 208 at 19 (noting that "the word 'patented' also includes items and processes for which a patent has been applied and may be pending"); ex 203a at 11 (1981 EIA Manual); ex 207a at 8 (1990 EIA Manual) (1990); JX 55 at 28 (1995EIA Manual).

²⁹ See ex 873 ("Rambus Inc. cannot agree to the terms of the JEDEC patent [licensing] policy"); ex 874 ("the patent [licensing] policy of JEDEC does not comport with our business model"); ex 888 ("Rambus plans to

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evidence that on at least two occasions, Rambus made it clear that it would not commit to RAND terms in the standard setting context.³⁰

Rambus urged the Commission to ignore what it said because its statements and documents do not mean what they say. It cites testimony from its expert, Dr. Teece, that Rambus had every incentive to commit to RAND terms.³¹ However, Dr. Teece's

continue to license its proprietary technology on terms that are consistent with the business plan of Rambus, and those terms may not be consistent with the terms set by standards bodies, including JEDEC"); Diepenbrock, Tr. 6228-29 ("RAND terms [were] inconsistent with Rambus's existing business practices").

30 Rambus's June 17, 1996 letter resigning from JEDEC stated that "Rambus plans to continue to license its proprietary technology on terms that are consistent with the business plan of Rambus." ex 887; *see* ex 3129 at 488-489 (Vincent). The IEEE, another SSO working on DRAM, sought to get a RAND commitment from Rambus for its RamLink and SyncLink standards. *See* CX 487 (letter from an IEEE standards committee asking Rambus whether a proposed standard infringed on any of Rambus's patents and if so whether Rambus was willing to commit to RAND licensing terms.). In noting that it was not a member of the IEEE, Rambus refused to make a RAND commitment. *See* CX 855 (Rambus's letter responding that it will "continue to license its technology in accordance with [Rambus's] existing business practices."); CX 853 ("draft of Rambus's response made its position on RAND even clearer, "Rambus will not, however, issue the letter of assurance that you have requested regarding a non-discriminatory license. Indeed, Rambus is offering no such license. Rambus reserves all rights to enforce its intellectual property on whatever terms Rambus decides."); *see also* CX 490; CX 869.

31 Teece, Tr. at 10341-10351. Dr. Teece's testimony assumed that Rambus would have been desperate to be included in JEDEC's standards because Rambus would have been left with nothing if they were left out of those standards. Yet at the time those standards were adopted, it was not clear that they would be the marketplace standards. Thus in the "but for world" Rambus would not have been desperate to be included in JEDEC's standards. *See, e.g.,* Macri, Tr. 4620-21 (discussing CX1315, he states, "[U]sually in the DRAM world, there is only one choice. You know, it's not a matter of what; it's a matter of when. So, users, they can plan their transition based on their own--you know, their own internal decision-making process, plan their transition to meet their own business needs. The suppliers, they know making the investment up front is going to be realized, because they know the users will eventually move over. It may not all be at once, but over a period of time, they can count on the market slowly building up. In this particular case [when both

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testimony was the only evidence in the record that contradicted the position staked out in Rambus's documents and the testimony of its own executives that it would not consent to licensing on RAND terms. Rambus's counsel could not cite the testimony of a single percipient witness, nor a single document in the record, to support its position that Rambus would have offered a RAND commitment.³² Thus, while it is arguable that, as a matter of logic, Rambus might have accepted something rather than nothing, it is another matter to say that is what would have happened in a "but for world" when there is no *factual evidence* to support that conclusion.

The record also shows that Rambus was willing to act contrary to its own self-interest in setting its RDRAM royalty rates; its RDRAM royalty rates were substantially above those that the industry participants like Intel felt were necessary to make RDRAM successful.³³ Moreover, it is not clear, even as a matter of logic, that committing to RAND terms for SDRAM and DDR SDRAM would necessarily have been in Rambus's self-interest. The record shows that Rambus considered RDRAM to be its

DDR SDRAM and RDRAM could have become the dominant standard], there were two choices, and it was very unclear which way the world would go.")

32 See Oral Argument before the Commission on the Issue of Remedy (Nov. 15, 2006), at 60-61. The assertion was made that Dr. Teece's testimony about Rambus's incentives to agree to RAND terms in the "but for world" was uncontroverted. See *id.* at 59-61. But see McAfee, Tr. 11311 ("In my understanding of Rambus's business strategy -- and I should say the business strategy that one uses in the 'but for world' should mimic the business strategy one sees in the actual world, and so the actual business strategy would be the relevant strategy -- I see not a certainty but a significant likelihood that Rambus would refuse to issue a RAND letter. In fact, I think more likely than not they may refuse to issue a RAND letter, based on their business strategy.").

33 See CX 952 (Rambus executive Geoff Tate reported in an email that "they [Intel] want us to have license deals that reward time to market, etc (old request) AND have long term reduction of royalty based on volume going to less than Y2% [0.5%] for rdrams ("t this point i choked/gasped)").

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flagship technology.³⁴ A RAND commitment in return for the incorporation of Rambus's technology into JEDEC's standards would have been counter to Rambus's economic interest because it would have facilitated the acceptance of SDRAM and DDR SDRAM, rather than RDRAM, as the dominant industry standard.³⁵

34 See ex 533 at 9-10; ex 535 at 1, 4-5; ex 543a at 11-12, 16; Farmwald, Tr. 8204-8205.

35 The majority reasons that since the adoption of SDRAM and DDR SDRAM standards was inevitable, RDRAM would not have been disadvantaged if Rambus made a RAND commitment to license its SDRAM and DDR SDRAM technology at royalties limited to the "value added" of those technologies. See Majority Opinion at 14. But the record shows that is not how Rambus felt. Rambus expressly rejected a RAND commitment because it "does not comport with our business model." See sources cited *supra* note 30. That is not surprising. However "inevitable" the adoption of the SDRAM standards was, there is nothing in the record to support a hypothesis that it was inevitable that those standards, instead of RDRAM, would be the dominant standards. Had Rambus offered a low royalty rate for its SDRAM and DDR SDRAM technologies, it not only would have been competing against itself (*i.e.*, against its higher RDRAM royalty rates) but it would have insured that the SDRAM standards, instead of RDRAM, would become the dominant standard.

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Second, Rambus contends that in the "but for world" it would have been able to negotiate royalties that would "compensate it for the incremental value of its patented inventions over the alternatives."³⁶ However, there is no evidence that JEDEC or its members had ever negotiated a royalty rate based on a patented technology's "incremental value" *ex ante* in return for incorporating a patented technology into its standards. Nor is there evidence that JEDEC or its members even had the expertise to do that.

Beyond that, the evidence relied on by Rambus to support this argument was shown to be unreliable and without foundation. Rambus's expert, Dr. Rapp, presented a cost-benefit analysis that purported to show that Rambus's patented technologies had "incremental value" as compared with alternative technologies.³⁷ Rambus used that to argue that it should be compensated for that "incremental value." However, Dr. Rapp's testimony was rooted in the opinion of Rambus's cost expert, Mr. Geilhufe. Mr. Geilhufe's cost estimates were largely without foundation - he admitted that in formulating those estimates he failed to review JEDEC records, interview JEDEC members or review cost information from DRAM manufacturers.³⁸ He also admitted that he had no identifiable methodology, much less one with general acceptance among DRAM developers and manufacturers, and that there was no way to test his conclusions.³⁹ Thus, it appears that his testimony did not measure up to the standards for expert testimony described by the Supreme Court in *Kumho Tire Co. v. Carmichael*.⁴⁰ Rambus's reliance on a flawed cost-benefit

36 RBR at 10.

37 Rapp, Tr. 9815-9827.

38 Geilhufe, Tr. at 9617-23.

39 Geilhufe, Tr. at 9622, 9665-9666.

40 526 U.S. 137, 149-150 (1999).

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analysis is juxtaposed against Complaint Counsel's "but for world" that is supported by contemporaneous documents and testimony and buttressed by the testimony of their experts.

Mention is made that Complaint Counsel did not submit a cost-benefit analysis of their own. Insofar as that is considered to undercut Complaint Counsel's challenge to Rambus's position that it would have been compensated for the "incremental value" of its technology in the "but for" world, the contention fundamentally misconceives of the way that a fact is proved at trial. One way to prove what would have happened in the "but for world" is by the submission of direct evidence. However, there is no such direct evidence of what would have happened had Rambus fully informed JEDEC and its members of its patent and patent applications because Rambus did not do so. Hence, the "but for world" must of necessity be proved by circumstantial evidence.⁴¹

One kind of circumstantial evidence is an after-the-fact cost-benefit analysis by an expert witness. However, it is only one kind. Complaint Counsel were not obligated to submit the same kind of circumstantial evidence, and that is especially true here. Rambus having failed to show that JEDEC would (or could) conduct an *ex ante* cost-benefit analysis and Complaint Counsel having impeached the after-the-fact analysis submitted by Rambus, there was no need for Complaint Counsel to submit a dueling cost-benefit analysis. Complaint Counsel could submit the other forms of circumstantial evidence that they did - *i.e.*, evidence of the contemporaneous views and actions of JEDEC and its members vis-a-vis patented technologies and of Rambus's antipathy toward a RAND commitment - in order to prove the ultimate fact regarding what would have happened in the "but for world." In short, there is no basis in the record for concluding that JEDEC would have embraced Rambus's technology in any event.

41 *See In re Citric Acid Litig.*, 191 F.3d 1090, 1093 (9th Cir. 1999).

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Third, Rambus argues that the best record evidence of the royalty rate that it would have charged after an *ex ante* negotiation with JEDEC members is the 2.5% royalty rate for "other DRAM" in its 1995 RDRAM license agreement with Hyundai.⁴² However, the Hyundai agreement was predominantly a *RDRAM* license agreement and the record provides little context for the negotiation of that clause.⁴³ For example, as the majority opinion points out, the 2.5% figure may have been inflated as a result of trade-offs with other aspects of the license.⁴⁴ There is also evidence in the record that this provision was nothing more than "insurance" against what Hyundai considered improbable claims by Rambus based on other unknown patents.⁴⁵ Finally, the "other DRAM" clause was unique to the Hyundai agreement, and it was not retained by Hyundai when it renegotiated its license with Rambus.

E.

Nor can I subscribe to the royalties above zero that are ordered in the majority's mandatory licensing decree. Specifically, the decree would order Rambus to license its SDRAM technologies to DRAM manufacturers at a royalty rate of .25% and to license its DDR SDRAM technologies to those manufacturers at a royalty rate of .50% for three years, after which the royalty rates would drop to zero; the decree's mandatory rates for controller

42 RBR at 17-18; RRBR at 13. Rambus asserts elsewhere that any attempt by JEDEC members to fix *ex ante* royalty rates collectively would have been in violation of the antitrust laws. See RBR at 23-25.

43 See CX 782; CX 711 at 61-63.

44 See Majority Opinion at note 139.

45 See CX1599 ("Semiconductor Technology License Agreement between Hyundai Electronics Industries Co., Ltd. and Rambus, Inc." dated December 1995); CX2107 at 84-85, 91-96, 99-102 (Oh FTC Dep.) (*in camera*).

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manufacturers and others would be 2x those rates.⁴⁶ Those royalty rates represent an 80% discount for DDR SDRAM and a 90% discount for SDRAM from the rates proposed by Rambus. Those above zero royalty rates are arguably a more "conduct-like" remedy than the limited zero based royalties I favor ("t least for three years). However, I am mindful of the Supreme Court's admonition that "each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record."⁴⁷ I am also mindful of Rambus's admonition that the Commission should not involve itself in speculative price administration.⁴⁸ The decree's above zero royalty rates, and the underlying premise that in the "but for world" Rambus would have agreed to them *ex ante*, seem to me to be contrary to the record as it relates to Rambus's positions and conduct.

First, the decree's royalty rates above zero assume that Rambus would have agreed *ex ante* (*i.e.*, in 1996 and 2000 respectively when Rambus technology was incorporated into JEDEC's SDRAM and DDR SDRAM standards) to RAND terms. As discussed above, Dr. Teece, who was not a percipient witness, is the sole support in the record for this assumption; the record established that Rambus insisted both privately and publicly it would not commit to RAND terms; and Dr. Teece's opinion that, notwithstanding those repeated declarations, Rambus would not

46 The royalty rates for controllers and devices other than DRAMs are extrapolated from royalties that Rambus negotiated with DRAM manufacturers if and to the extent that those manufacturers also made controllers or other downstream devices. There is no basis in the record for determining royalty rates for independent manufacturers of controllers or other downstream devices.

47 *Maple Flooring Mfg. Ass'n v. United States*, 268 U.S. 563, 579 (1925); *see also Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 467 (1992)

48 *See RBR* at 15, (citing Judge (now Justice) Breyer's decision in *Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17,25 (1st Cir. 1990) and *United States v. Addystone Pipe & Steel Co.*, 85 F. 271,283-84 (6th Cir. 1898).

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have acted contrary to its self-interest, is contrary to its RDRAM pricing conduct.⁴⁹ Rambus's fundamental goal was to make RDRAM the industry standard. A RAND commitment to JEDEC would have made it even more difficult for Rambus to get the industry to adopt its competing product - RDRAM - as the marketplace standard.⁵⁰

Second, the decree's above zero royalty rates use RDRAM royalty rates as the starting point for calculating *ex ante* "reasonable" royalty rates for SDRAM and DDR SDRAM.⁵¹ However, Rambus has repeatedly asserted that RDRAM rates are not appropriate benchmarks to use in calculating SDRAM or DDR SDRAM royalty rates⁵² because, *inter alia*, the RDRAM rates Rambus negotiated were lower than they would have been had it not been necessary to "jump-start" demand for this new technology in order to make a market for it.⁵³ This contention is supported by the record, which shows that Rambus's initial RDRAM royalty rates started out at 1% in 1991 and rose to 2.5% after RDRAM appeared to gain traction in the market due to

49 See Oral Argument before the Commission on the Issue of Remedy (Nov. 15, 2006), at 60-61; *supra* notes 29-31, 33 and accompanying text.

50 See discussion *supra* pp. 8-9.

51 This assumption is based on a Samsung licensing agreement, which is just one of many different RDRAM licensing agreements in the record.

52 RBR at 21-22; RRBR at 15.

53 See RX 1532 at 1 (Intel timeline "December '95: chose RDRAM as the direction we [Intel] would pursue."); Hampel, Tr. 8677-78 (Rambus saw an increase in customer interest after Intel endorsed RDRAM: "There were more customers interested. We did increase kind of the workload ... to support the effort"); Appleton, Tr. 6345 ("once Intel endorsed [] RDRAM, then the probabilities of customers in the marketplace actually using it increased quite a bit, and as a result, we also then believed that some customers would use RDRAM and that we needed to then engage to negotiate for a license."); CX 2107 at 117 (Oh FTC Dep.) (*in camera*).

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Intel's endorsement of RDRAM in late 1995.⁵⁴ Nor has Complaint Counsel asserted that RDRAM rates are appropriate benchmarks for calculating SDRAM or DDR SDRAM rates. Thus, the use of RDRAM rates as the starting point for calculating SDRAM and DDR SDRAM rates in the "but for world" is not supported by either party.

Third, the decree's royalty rates above zero assume that Rambus would have been willing to agree to *discount* its *lowest* initial RDRAM royalty rate by more than 50% to 75% in calculating "reasonable" SDRAM and DDR SDRAM royalty rates. More specifically, the lowest initial RDRAM royalty rate given to a DRAM manufacturer was 1% and that was given to NEC alone.⁵⁵ The decree's "but for world" royalty rates are .25% for SDRAM manufacturers and .50% for DDR SDRAM manufacturers (or 25% and 50% of NEC's RDRAM royalty rates). Moreover, NEC (and all other RDRAM licensees) were obliged to pay substantial up-front fees in addition to the royalty rate.⁵⁶

54 See RX 538 at 22 (In 1991, NEC was one of the first to license RDRAM. Its agreement with Rambus provided for a 1% rate); CX 1592 at 23 (In November 1994, Samsung licensed RDRAM. Its agreement with Rambus provided for an initial 2% royalty rate on the first ten million units); CX1600 at 12 (In December 1995, Hyundai signed its RDRAM licensing agreement with Rambus. Hyundai agreed to pay an initial 2.5% royalty on sales made between 1995 and 2000); CX 1609 at 11 (In February 1997, Mitsubishi licensed RDRAM from Rambus. That agreement provided for an initial 2.5% royalty until 2000); CX 1617 at 11-12 (Siemens/Infineon signed a RDRAM licensing agreement with Rambus in July 1997. That agreement provided for an initial 2.5% royalty rate.).

55 See sources cited *supra* note 54.

56 See RX 538 at 21 (1991 NEC RDRAM license agreement included a \$2 million up-front license fee in addition to royalties on sales); ex 1592 at 21 (1994 Samsung RDRAM license agreement included a \$3 million up-front license fee); ex 1600 at 11-12 (1995 Hyundai RDRAM license agreement included a \$2 million up-front license fee and \$1.5 million "Design Fee."); ex 1609 at 10 (1997 Mitsubishi RDRAM license agreement included a \$2 million up-front license fee and a \$3.5 million "Direct Rambus DRAM Engineering Fee."); ex 1617 at 11 (1997 Siemens/Infineon RDRAM license agreement included a \$5.5 million up-front license fee and a \$4 million "Engineering Fee.").

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After accounting for those up-front fees, the decree's royalty rates assume that Rambus would have been willing to agree to discount its lowest initial RDRAM royalty rate by *more* than 50%-75% in calculating a "reasonable" royalty rate for JEDEC's principal stakeholders.⁵⁷ As previously discussed, the record shows that Rambus considered RDRAM to be its flagship technology. There is nothing in the record to suggest that Rambus would have been willing to make RDRAM less desirable by giving such better licensing terms to those practicing competitive standards such as SDRAM and DDR SDRAM.⁵⁸

Fourth, the decree's above zero royalty rates assume that, as part of its RAND commitment, Rambus would have agreed not to discriminate against any JEDEC stakeholder in calculating "reasonable" SDRAM and DDR SDRAM royalty rates. The assumption that Rambus would charge all JEDEC stakeholders the same royalty rate is contradicted by the record as it respects Rambus's RDRAM licensing practice. As previously noted, it shows that Rambus's RDRAM license agreements contained initial royalty rates ranging between 1 and 2.5%.⁵⁹

57 See ex 960 (Rambus executive Geoff Tate stated in an email that "i advised clearly that if a chip co wants to license all of our present and future patents for use for any infringing dram, then the only acceptable deal is the royalty on infringing drams must be greater than the royalty on rambus drams.").

58 It is argued that these discounted royalty rates reflect the fact that SDRAM and DDR SDRAM demand has matured and products using those technologies are being manufactured in volume. However, there is no evidence that Rambus would have agreed *ex ante* to such deeply discounted royalty rates based on *current demand* (which was hypothetical in 1996 and 2000).

59 See sources cited *supra* note 54. Rambus asserts elsewhere that any attempt by JEDEC members to fix *ex ante* royalty rates collectively would have been in violation of the antitrust Jaws. See RBR at 23-25.

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Finally, I am not convinced that a royalty rate above zero is more desirable on policy grounds. I take seriously the majority's concerns that a zero-based royalty might stifle innovation and/or participation in SSOs. However, the existence of complete and accurate information in the marketplace can stimulate output and competition.⁶⁰ If that is so, it is equally plausible that honest inventors would be more, rather than less, inclined to innovate if they felt that rivals who engaged in deceptive conduct during the standard-setting process would be denied the fruits of their wrongdoing in their entirety.

Ultimately, I conclude that licensing on terms above zero would enable Rambus to obtain royalties it would not have obtained in the "but for world." That would enable Rambus to continue to reap the fruits of its ongoing violation of Section 2.

F.

Rambus asserts that the Commission has described this conclusion as "extreme."⁶¹ However, that misdescribes the Commission's liability decision. In its decision the Commission described the parties' positions as being at "opposing extremes."⁶² We (or at least I) meant by that that the positions of the parties respecting the royalties Rambus would have obtained in the "but for world" were at opposite ends of the spectrum. On the basis of this record, the limited royalty free license that I favor is not extreme.

⁶⁰ See *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n. 16 (1978); see also U.S. DEPT OF JUSTICE AND FED. TRADE COMM'N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE 1-7 (August 18, 1996), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,153.

⁶¹ See RBR at 5.

⁶² See Op. at 119.

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In rejecting Rambus's characterization of the remedy as extreme, I must emphasize that the royalty free licensing order I would issue would not run against any patents in their entirety. To the contrary, as previously discussed, I would only order royalty free licensing with respect to patents reading on SDRAM and DDR SDRAM standards in favor of those who are practicing those standards. Thus, for example, Rambus would be able to collect royalties on any patents reading on DDR2 SDRAM and all other JEDEC standards from those who practice those standards.

III.

I do not wish to exaggerate my differences with the majority. The majority has done its best to try to construct above zero royalty rates. I simply believe that the assumptions the majority has made in doing that are contrary to the evidence in the record - particularly the evidence related to Rambus's positions and conduct - both in terms of whether *ex ante* negotiations would have occurred in the "but for world" and in terms of the royalty rates such negotiations would have yielded. However, if I agreed with the majority's assumptions, I would subscribe to the majority's decree because I agree entirely that the Commission has the authority to issue such a mandatory licensing decree.

Complaint

IN THE MATTER OF

ADVOCATE HEALTH PARTNERS, ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4184; File No. 031 0021
Complaint, February 7, 2007 — Decision, February 7, 2007

This consent order addresses horizontal agreements to fix prices, engage in collective bargaining, and refuse to deal individually with health plans by competing independent physicians and physician practice groups in the Chicago metropolitan area. Respondents Advocate Health Partners and its members, eight physician-hospital organizations, orchestrated and implemented these agreements; respondents Advocate Health Centers, Inc., and Dreyer Clinic, Inc., participated in the agreements. Respondents' actions restrained price and other forms of competition among physicians; increased prices for physician services; and deprived health plans, employers, and individual consumers of the benefits of competition among physicians. The consent order prohibits respondents from entering into or facilitating any agreement among physicians with respect to their provision of physician services, exchanging information among physicians concerning any physician's terms or conditions of dealing with a payor, attempting to engage in any of these prohibited actions, or attempting to induce any person to engage in any of these actions. In addition, for three years from the date of this order, respondents shall notify the Commission before entering into any arrangement to act as a messenger or as an agent on behalf of any physicians with payors regarding contracts. Also, for three years, respondents shall notify the Commission before participating in contracting with health plans on behalf of a qualified risk-sharing joint arrangement or a qualified clinically integrated joint arrangement.

Participants

For the Commission: *John P. DeGeeter, Connie Salemi, Garth Huston, Jonathan Lutinski, and Daniel P. Ducore.*

For the Respondents: *Robert Leibenluft, Sharis Pozen, and Tracy Weir, Hogan & Hartson L.L.P. ; and John Marren and Thomas J. Babbo, Hogan & Marren, Ltd.*

COMPLAINT

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Advocate Health Partners (“Respondent AHP” or AAHP); Respondents Advocate Bethany Health Partners, Advocate Christ Hospital Health Partners, Advocate Good Samaritan Health Partners, Ltd., Advocate Good Shepherd Health Partners, Ltd., Advocate Illinois Masonic Health Partners, Advocate Lutheran General Health Partners, Inc., Advocate-South Suburban Health Partners, Advocate Trinity Health Partners (the “PHO Respondents”); and Advocate Health Centers, Inc. and Dreyer Clinic, Inc. (the “Advocate System Respondents”), hereinafter referred to collectively as “Respondents,” have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges in that respect as follows:

NATURE OF THE CASE

1. This action challenges horizontal agreements to fix prices, engage in collective bargaining, and refuse to deal individually with health plans by competing independent physicians and physician practice groups that account for over 2,900 physicians in the Chicago metropolitan area (“Advocate Physicians”). Respondent AHP and the PHO Respondents orchestrated and carried out these illegal agreements, and the Advocate System Respondents participated in these illegal agreements, which had no legitimate justification.

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RESPONDENTS**A. Respondent AHP**

2. Respondent AHP is a not-for-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal address at 1661 Feehanville, Suite 200, Mount Prospect, IL 60058.

3. AHP is a type of organization commonly referred to in the health-care industry as a “Asuper physician-hospital organization” because its members consist of multiple physician-hospital organizations (“PHOs”). AHP’s members include each of the PHO Respondents and Advocate Health Care Network, a not-for-profit hospital system that operates eight general acute-care hospitals in the Chicago metropolitan area.

B. The PHO Respondents

4. Each of the following eight PHO Respondents is a physician-hospital organization operating at one of the eight Advocate Health Care Network hospitals. Each PHO Respondent has as its members a non-profit hospital subsidiary of Advocate Health Care Network and a number of physicians who have medical-staff privileges at the respective Advocate Health Care Network hospital.

- a. Respondent Advocate Bethany Health Partners is a not-for-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal address at 1661 Feehanville, Suite 200, Mount Prospect, IL 60058. Approximately 65 physicians with medical-staff privileges at Advocate Bethany Hospital are members of Advocate Bethany Health Partners.
- b. Respondent Advocate Christ Hospital Health Partners is a not-for-profit corporation organized, existing, and

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doing business under and by virtue of the laws of the State of Illinois, with its principal address at 1661 Feehanville, Suite 200, Mount Prospect, IL 60058. Approximately 560 physicians with medical-staff privileges at Advocate Christ Medical Center are members of Advocate Christ Hospital Health Partners.

- c. Respondent Advocate Good Samaritan Health Partners, Ltd. is a for-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal address at 1661 Feehanville, Suite 200, Mount Prospect, IL 60058. Approximately 315 physicians with medical-staff privileges at Advocate Good Samaritan Hospital are members of Advocate Good Samaritan Health Partners, Ltd.
- d. Respondent Advocate Good Shepherd Health Partners, Ltd. is a not-for-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal address at 1661 Feehanville, Suite 200, Mount Prospect, IL 60058. Approximately 300 physicians with medical-staff privileges at Advocate Good Shepherd Hospital are members of Advocate Good Shepherd Health Partners, Ltd.
- e. Respondent Advocate Illinois Masonic Health Partners is a not-for-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal address at 1661 Feehanville, Suite 200, Mount Prospect, IL 60058. Approximately 375 physicians with medical-staff privileges at Advocate Illinois Masonic Medical Center are members of Advocate Illinois Masonic Health Partners.

Complaint

- f. Respondent Advocate Lutheran General Health Partners, Inc. is a not-for-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal address at 1661 Feehanville, Suite 200, Mount Prospect, IL 60058. Approximately 615 physicians with medical-staff privileges at Advocate Lutheran General Hospital are members of Advocate Lutheran General Health Partners, Inc.
- g. Respondent Advocate South-Suburban Health Partners is a not-for-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal address at 1661 Feehanville, Suite 200, Mount Prospect, IL 60058. Approximately 215 physicians with medical-staff privileges at Advocate South Suburban Hospital are members of Advocate South-Suburban Health Partners.
- h. Respondent Advocate Trinity Health Partners is a not-for-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal address at 1661 Feehanville, Suite 200, Mount Prospect, IL 60058. Approximately 160 physicians with medical-staff privileges at Advocate Trinity Hospital are members of Advocate Trinity Health Partners.

C. The Advocate System Respondents

5. Respondent Advocate Health Centers, Inc. is a for-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal address at 2545 S. Dr. Martin Luther King Drive, Chicago, IL 60616. It is a for-profit subsidiary of a for-profit subsidiary of Advocate Health Care Network and employs approximately 165 physicians. Respondent Advocate Health Centers, Inc. participated in the

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illegal conduct alleged herein by utilizing Respondent AHP to negotiate contract terms for the services of its employed physicians jointly with the independent-physician members of the PHO Respondents, with whom Advocate Health Centers, Inc. otherwise competes.

6. Respondent Dreyer Clinic, Inc. is a for-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal address at 1877 West Downer Place, Aurora, IL 60506. It is a for-profit subsidiary of a for-profit subsidiary of Advocate Health Care Network corporation and contracts with payors to provide physician services. Respondent Dreyer Clinic, Inc. participated in the illegal conduct alleged herein by utilizing Respondent AHP to negotiate contract terms for the services of physicians affiliated with Dreyer Clinic, Inc. jointly with the independent-physician members of the PHO Respondents, with whom Dreyer Clinic, Inc. otherwise competes.

JURISDICTION

7. Respondent AHP is a corporation within the meaning of Section 4 of the FTC Act. At all relevant times, AHP engaged in substantial activities, including the contract negotiations described herein, for the pecuniary benefit of independent, profit-seeking physicians who were members of the PHO Respondents, which, in turn, were members of AHP.

8. The physician members of the PHO Respondents are members of AHP within the meaning of Section 4 of the Federal Trade Commission Act. AHP is governed by a Board of Directors that includes physicians elected by and from the physician members of the PHO Respondents. AHP committees, including the committee that makes contracting decisions on behalf of physicians, include physician representatives of the PHO Respondents' physician members. AHP's operations are funded in substantial part by the PHO Respondents, which are funded in

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substantial part by the PHO Respondents' member physicians. AHP regularly and in the ordinary course of business refers to these physicians as Amembers" of AHP.

9. The PHO Respondents are corporations within the meaning of Section 4 of the FTC Act. At all relevant times, the PHO Respondents engaged in substantial activities for the pecuniary benefit of their member physicians, a substantial majority of whom are independent, profit-seeking physicians.

10. Respondent Good Samaritan Health Partners, Ltd. and the Advocate System Respondents are for-profit corporations and, therefore, corporations within the meaning of Section 4 of the Federal Trade Commission Act.

11. The general business practices of all Respondents, including the acts and practices herein alleged, are in or affect commerce as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

OVERVIEW OF PHYSICIAN CONTRACTING WITH PAYORS

12. Physicians often contract with health plans and other third-party payors ("payors") to establish the terms and conditions, including price terms, under which they render physician services to the payors' enrollees. Physicians entering into such contracts often agree to lower compensation to obtain access to additional patients made available by the payors' relationships with enrollees. These contracts may reduce payors' costs and enable them to lower the price of insurance, and thereby result in lower medical-care costs for enrollees.

13. Absent agreements among competing physicians on the prices and other terms on which they will provide services to payors' enrollees, competing physicians decide unilaterally whether to participate in payors' provider networks based on the terms and conditions, including price, offered by the payors.

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Competition among physicians generally results in lower prices to the individuals enrolled in health-insurance plans.

ANTICOMPETITIVE CONDUCT

14. AHP and the PHO Respondents, acting as a combination of their physician members and the Advocate System Respondents, and in conspiracy with them, have acted to restrain competition by, among other things, facilitating, entering into, and implementing agreements, express or implied, to fix the fee-for-service prices and other terms on which their physician members and the Advocate System Respondents would contract with payors; to engage in collective bargaining on behalf of their physician members and the Advocate System Respondents over terms and conditions of dealing with payors; and to refrain from negotiating individually with payors. Except to the extent that competition has been restrained as alleged herein, a substantial majority of those physicians have been, and are now, in competition with each other.

A. Respondents' Contracting Process

15. AHP's contracting activity is controlled by the PHO Respondents and the Advocate System Respondents and, ultimately, by otherwise competing physicians. As corporate members of AHP, each PHO Respondent and each Advocate System Respondent holds a seat on AHP's Board of Directors. Each PHO Respondent, in turn, is controlled by a Board of Directors that includes physicians elected by and from the PHO Respondent's physician members.

16. From 1995 through 2000, each PHO Respondent negotiated through AHP and made contracting decisions collectively on behalf of its respective physician members. Each PHO Respondent's Board of Directors established a minimum acceptable rate for fee-for-service contracts and communicated that rate to AHP.

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17. Utilizing those rates, AHP negotiated rates and other terms with payors collectively on behalf of each PHO Respondent's physicians and, at times, collectively on behalf of all Advocate Physicians.

18. After AHP reached an agreement on the price and other terms of the contract, the contract was transmitted to each PHO Respondent's Board of Directors, which had the authority to accept or reject the contract or to make a counteroffer. If a PHO Respondent's Board of Directors accepted a payor's contract, AHP would execute the contract. AHP or the PHO Respondent would then, for the first time, transmit the contract to the PHO Respondent's physician members, who could opt in or opt out of the contract. AHP did not transmit to individual physicians any rates proposed by the payors during negotiations, and transmitted only the rates that their PHO Board of Directors approved.

19. From 1995 through 2000, AHP negotiated contracts with at least 16 payors using this process.

20. Effective January 1, 2001, AHP restructured its operations and assumed complete responsibility for contracting on behalf of each PHO Respondent and its physician members and, at times, the Advocate System Respondents. As part of this reorganization, AHP established a centralized Contract and Finance Committee to oversee contracting activity. The Contract and Finance Committee was comprised of physician representatives from each of the eight PHO Respondents, a representative from each Advocate System Respondent, and a representative from Advocate Health Care Network hospital system.

21. The Contract and Finance Committee's responsibilities included developing and approving physician contracting strategies and terms acceptable to the group as a whole — *i.e.*, collectively acceptable to the PHO Respondents, acting on behalf of their physician members; the Advocate System Respondents; and Advocate Health Care Network. In order to establish minimum acceptable reimbursement rates, the Contract and

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Finance Committee requested and received input from each PHO's Board of Directors as to its minimum acceptable rate for physician fees. Based on this input, the Contract and Finance Committee established a single benchmark for the entire group that was higher than the minimum rate that some PHO Boards of Directors were willing to accept. The Contract and Finance Committee was also responsible for authorizing AHP staff to finalize contracts that met those terms.

22. In carrying out its responsibilities, the Contract and Finance Committee reviewed contract proposals, decided whether to submit counterproposals to payors, and made decisions collectively on behalf of the over 2,900 Advocate Physicians about whether to accept or reject price and other contract terms offered by payors. Once the Contract and Finance Committee accepted a contract offer, AHP executed the contract. AHP would then transmit the contract to the PHO Respondents' physician members, who could opt in or opt out of the contract. AHP did not transmit any rates proposed by the payors during negotiations, and transmitted only the rates that the Contract and Finance Committee approved.

23. From 2001 through 2004, AHP negotiated contracts with at least 12 payors using this process.

B. Advocate Physicians' Refusal to Deal with Blue Cross Blue Shield of Illinois ("Blue Cross")

24. In December 2001, AHP identified Blue Cross as a target for negotiating a group contract. At the time, Blue Cross held individual contracts with the majority of the Advocate Physicians at rates that were lower than AHP typically had been able to negotiate by bargaining collectively with other payors.

25. In early 2002, AHP began developing a strategy for negotiating a group contract with Blue Cross that would result in higher rates than the physicians would otherwise receive through

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their individual contracts. In publicizing this strategy to the physicians, AHP noted that "a major part of [AHP's] value has been your access to the favorable rates negotiated by AHP for many of your fee-for-service contracts" and that "Advocate fully expects to negotiate rate increases that will bring reimbursement levels for [Blue Cross] products closer to reasonable market rates."

26. In order to pursue its strategy, AHP solicited from all Advocate Physicians, and obtained from more than 1,700 of them, what AHP termed "Agency Agreements." The Agency Agreements authorized AHP to act as the physicians' agent in the negotiations with Blue Cross and permitted AHP to terminate and collectively renegotiate the physicians' existing individual contracts with Blue Cross.

27. When some physicians attempted to rescind their Agency Agreements, AHP's President instructed AHP staff in an internal e-mail to inform the physicians that if they rescind there is no hope of getting increases going forward and it will impact everyone's ability to get increases from other payors as "[other payors] won't be able to compete" with Blue Cross.

28. On October 1, 2002, AHP terminated, effective January 1, 2003, Blue Cross's individual contracts with the over 1,700 physicians who signed the Agency Agreements and attempted to negotiate a group contract on their behalf.

29. In response to this mass termination, Blue Cross filed a lawsuit against AHP, alleging price fixing, group boycott, and various other claims. After extensive negotiations, and while an investigation of AHP by the Office of the Attorney General of Illinois was pending, the parties settled their dispute. AHP dropped its efforts to negotiate a group contract on behalf of its 1,700 physicians, Blue Cross dismissed its lawsuit, and Blue Cross agreed to make certain payments to AHP.

30. Although the parties' agreement specified that Blue

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Cross's payments to AHP were to encourage outcome-based reimbursement" and to support efforts to implement electronic-claim-submission capabilities for all AHP physicians, AHP distributed the money only to physicians who signed the Agency Agreements.

**C. Negotiations with United Healthcare of Illinois, Inc.
("United")**

31. Shortly after the Contract and Finance Committee was formed, in April 2001, it began planning AHP's strategy for negotiations with United. According to internal AHP documents, AHP's goals included standardization of fee schedule[s] across all physician groups and PHOs." After receiving input from each PHO's Board of Directors as to its minimum acceptable rate for physician fees, the Contract and Finance Committee established a single benchmark for the entire group and voted to terminate AHP's existing contract with United if United's offer did not satisfy the benchmark.

32. On June 5, 2001, AHP staff met with United and presented a proposal for physician services based upon the recommendation of the [Contract and Finance Committee]." United told AHP that the proposal was significantly over market" and made no counteroffer. On June 15, 2001, AHP terminated United's physician and hospital contracts.

33. United continued to negotiate with AHP over hospital rates, but it solicited individual contracts from Advocate Physicians. In response, AHP threatened that United would not be able to contract for hospital services unless it ceased its efforts to contract individually with Advocate Physicians and agreed to a group contract with an increase in physician fees.

34. In August 2001, United agreed to a group contract with a physician fee increase. The fees were approximately 20 percent to

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30 percent higher than United's direct contracts with individual doctors in the Chicago area.

RESPONDENTS= CONDUCT IS NOT JUSTIFIED

35. With respect to the acts and practices described in paragraphs 15 through 34, the Advocate Physicians did not integrate their practices in any economically significant way, nor did they create efficiencies sufficient to justify their acts or practices described in the foregoing paragraphs.

RESPONDENTS= ACTIONS HAVE HAD SUBSTANTIAL ANTICOMPETITIVE EFFECTS

36. Respondents' actions have had, or tend to have had, the effect of unreasonably restraining trade and hindering competition in the provision of physician services in the Chicago metropolitan area in the following ways, among others:

- a. Unreasonably restraining price and other forms of competition among physicians;
- b. Increasing prices for physician services; and
- c. Depriving health plans, employers, and individual consumers of the benefits of competition among physicians.

VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

37. The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Such combination, conspiracy, acts, and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

Decision and Order

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this seventh day of February, 2007, issues its Complaint against Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of Advocate Health Partners (“AHP”), Advocate Bethany Health Partners, Advocate Christ Hospital Health Partners, Advocate Good Samaritan Health Partners, Ltd., Advocate Good Shepherd Health Partners, Ltd., Advocate Health Centers, Inc., Advocate Illinois Masonic Health Partners, Advocate Lutheran General Health Partners, Inc., Advocate-South Suburban Health Partners, Advocate Trinity Health Partners, and Dreyer Clinic, Inc., hereinafter referred to collectively as “Respondents,” and Respondents having been furnished thereafter with a copy of the draft of Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order to Cease and Desist (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged

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in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues the following Order:

1. Respondent AHP is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal address at 1661 Feehanville, Suite 200, Mount Prospect, IL 60058.
2. Respondent Advocate Bethany Health Partners is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal address at c/o Health Partners Operations - Advocate Health Partners, 1661 Feehanville, Suite 200, Mount Prospect, IL 60058.
3. Respondent Advocate Christ Hospital Health Partners is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal address at c/o Health Partners Operations - Advocate Health Partners, 1661 Feehanville, Suite 200, Mount Prospect, IL 60058.
4. Respondent Advocate Good Samaritan Health Partners, Ltd. is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal address at c/o Health Partners

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Operations - Advocate Health Partners, 1661 Feehanville, Suite 200, Mount Prospect, IL 60058.

5. Respondent Advocate Good Shepherd Health Partners, Ltd. is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal address at c/o Health Partners Operations - Advocate Health Partners, 1661 Feehanville, Suite 200, Mount Prospect, IL 60058.
6. Respondent Advocate Health Centers, Inc. is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal address at 2545 S. Dr. Martin Luther King Drive, Chicago, IL 60616.
7. Respondent Advocate Illinois Masonic Health Partners is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal address at c/o Health Partners Operations - Advocate Health Partners, 1661 Feehanville, Suite 200, Mount Prospect, IL 60058.
8. Respondent Advocate Lutheran General Health Partners, Inc. is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal address at c/o Health Partners Operations - Advocate Health Partners, 1661 Feehanville, Suite 200, Mount Prospect, IL 60058.
9. Respondent Advocate-South Suburban Health Partners is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal address at c/o Health Partners Operations - Advocate Health Partners, 1661 Feehanville, Suite 200, Mount Prospect, IL 60058.

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10. Respondent Advocate Trinity Health Partners is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal address at c/o Health Partners Operations - Advocate Health Partners, 1661 Feehanville, Suite 200, Mount Prospect, IL 60058.
11. Respondent Dreyer Clinic, Inc. is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal address at 1877 West Downer Place, Aurora, IL 60506.
12. Advocate Health and Hospitals Corporation is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal address at 2025 Windsor Drive, Oak Brook, IL 60523.
13. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. "Respondent AHP" means AHP, its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.

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- B. “Respondent Advocate Bethany Health Partners” means Advocate Bethany Health Partners, its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- C. “Respondent Advocate Christ Hospital Health Partners” means Advocate Christ Hospital Health Partners, its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- D. “Respondent Advocate Good Samaritan Health Partners, Ltd.” means Advocate Good Samaritan Health Partners, Ltd., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- E. “Respondent Advocate Good Shepherd Health Partners, Ltd.” means Advocate Good Shepherd Health Partners, Ltd., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- F. “Respondent Advocate Health Centers, Inc.” means Advocate Health Centers, Inc. its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it,

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and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.

- G. “Respondent Advocate Illinois Masonic Health Partners” means Advocate Illinois Masonic Health Partners, its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- H. “Respondent Advocate Lutheran General Health Partners, Inc.” means Advocate Lutheran General Health Partners, Inc., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- I. “Respondent Advocate-South Suburban Health Partners” means Advocate-South Suburban Health Partners, its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- J. “Respondent Advocate Trinity Health Partners” means Advocate Trinity Health Partners, its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- K. “Respondent Dreyer Clinic, Inc.” means Dreyer Clinic, Inc., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the

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respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.

- L. AAdvocate Health and Hospitals Corporation” means Advocate Health and Hospitals Corporation, its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- M. AAdvocate Hospital” means Advocate Bethany Hospital, Advocate Christ Medical Center, Advocate Good Samaritan Hospital, Advocate Good Shepherd Hospital, Advocate Illinois Masonic Medical Center, Advocate Lutheran General Hospital, Advocate South Suburban Hospital, or Advocate Trinity Hospital.
- N. AAdvocate System Physicians” means those physicians whose physician services are provided to payors by Advocate Health and Hospitals Corporation, Advocate Health Centers, Inc., or Dreyer Clinic, Inc. and for which such entity receives all financial remuneration from the payor for the physician services.
- O. ANon-exclusive arrangement” means an arrangement that does not restrict the ability of, or facilitate the refusal of, physicians who participate in it to deal with payors on an individual basis or through any other arrangement.
- P. AMedical group practice” means a bona fide, integrated firm in which physicians practice medicine together as partners, shareholders, owners, or employees, or in which only one physician practices medicine.

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- Q. AParticipate” in an entity or an arrangement means (1) to be a partner, shareholder, owner, member, or employee of such entity or arrangement, or (2) to provide services, agree to provide services, or offer to provide services to a payor through such entity or arrangement. This definition applies to all tenses and forms of the word Aparticipate,” including, but not limited to, Aparticipating,” Aparticipated,” and Aparticipation.”
- R. APayor” means any person that pays, or arranges for payment, for all or any part of any physician services for itself or for any other person, as well as any person that develops, leases, or sells access to networks of physicians.
- S. APerson” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- T. APhysician” means a doctor of allopathic medicine (“M.D.”), a doctor of osteopathic medicine (“D.O.”), or a doctor of podiatric medicine (“D.P.M.”).
- U. APreexisting contract” means a contract for the provision of physician services that was in effect on the date of the receipt by a payor that is a party to such contract of notice sent by Respondent AHP pursuant to Paragraph V.A.2. of this Order, or by any Respondent pursuant to Paragraph VII. of this Order, of such payor’s right to terminate such contract.
- V. APrincipal address” means either (1) primary business address, if there is a business address, or (2) primary residential address, if there is no business address.
- W. The AProgram” means the non-exclusive arrangement that AHP refers to as its Clinical Integration Program, which was implemented by AHP on January 1, 2004, with respect to fee-for-service contracts with payors, and which requires

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participating physicians to agree to adhere to certain health care information technology, quality, and cost/utilization initiatives, as well as to being monitored and subjected to a system of enforcement mechanisms consisting of financial incentives and sanctions, including termination from the Program; *provided further*, that the Program includes modifications to those initiatives and those monitoring and enforcement mechanisms that are related to improving quality of care or reducing health care costs.

- X. A“Qualified clinically-integrated joint arrangement” means an arrangement to provide physician services in which:
1. all physicians who participate in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the physicians who participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and
 2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies that result from such integration through the arrangement.
- Y. A“Qualified risk-sharing joint arrangement” means an arrangement to provide physician services in which:
1. all physicians who participate in the arrangement share substantial financial risk through their participation in the arrangement and thereby create incentives for the physicians who participate jointly to control costs and improve quality by managing the provision of physician services such as risk-sharing involving:

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- a. the provision of physician services at a capitated rate,
 - b. the provision of physician services for a predetermined percentage of premium or revenue from payors,
 - c. the use of significant financial incentives (*e.g.*, substantial withholds) for physicians who participate to achieve, as a group, specified cost-containment goals, or
 - d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, when the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors; and
2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies that result from such integration through the arrangement.
- Z. A "Qualified arrangement" means a qualified clinically-integrated joint arrangement or a qualified risk-sharing joint arrangement.

II.

IT IS FURTHER ORDERED that each Respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

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- A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians with respect to their provision of physician services:
1. To negotiate on behalf of any physician with any payor;
 2. To deal, refuse to deal, or threaten to refuse to deal with any payor;
 3. Regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms; or
 4. Not to deal individually with any payor, or not to deal with any payor other than through any Respondent(s);
- B. Exchanging or facilitating in any manner the exchange or transfer of information among physicians concerning any physician's willingness to deal with a payor, or the terms or conditions, including price terms, on which the physician is willing to deal with a payor;
- C. Attempting to engage in any action prohibited by Paragraphs II.A. or II.B. above; and
- D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A. through II.C. above.

PROVIDED, HOWEVER, that nothing in this Paragraph II. shall prohibit any agreement or conduct:

- (a) involving any Respondent that, subject to the requirements of Paragraph IV. of this Order, is reasonably necessary to form, participate in, or take any action in furtherance of, a

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qualified arrangement, so long as, for three years from the date this Order becomes final, such qualified joint arrangement is a non-exclusive arrangement;

- (b) solely involving Advocate System Physicians; or
- (c) where such agreement or conduct is solely related to Respondents' participation in the Program;

provided further that: (1) nothing in this Order shall be construed as a determination by the Commission, or its staff, that the Program is, or was at any time, a qualified arrangement; and (2) this proviso (c) to Paragraph II. of the Order is a determination by the Commission, and its staff, only that participation in the Program shall not constitute a violation of this Order and is not a determination that such participation does or does not violate any law enforced by the Commission.

III.

IT IS FURTHER ORDERED that, for three (3) years from the date this Order becomes final, for any arrangement under which any Respondent would act as an agent, or as a messenger, on behalf of any physician, or any medical group practice, with any payor regarding contracts, such Respondent shall notify the Secretary of the Commission in writing ("Paragraph III. Notification") at least sixty (60) days prior to participating in the arrangement for which Paragraph III. Notification is required. The Paragraph III. Notification shall include the number of proposed physician participants in the proposed arrangement; the proposed geographic area in which the proposed arrangement would operate; a copy of any proposed physician participation agreement; a description of the proposed arrangement's purpose and function; a description of any resulting efficiencies expected to be obtained through the proposed arrangement; and a description of procedures to be implemented to limit possible

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anticompetitive effects of the proposed arrangement, such as those prohibited by this Order.

PROVIDED FURTHER that:

(a) if, within sixty (60) days from the date of the Commission's receipt of the Paragraph III. Notification, a representative of the Commission makes a written request for additional information to the Respondent providing such notification, then that Respondent shall not participate in the proposed arrangement prior to the expiration of thirty (30) days after substantially complying with such request, or such shorter waiting period as may be granted in writing from the Bureau of Competition;

(b) the expiration of any waiting period described herein without a request for additional information, or without the initiation of an enforcement proceeding, shall not be construed as a determination by the Commission, or its staff, that the proposed arrangement does or does not violate this Order or any law enforced by the Commission;

(c) the absence of notice that the proposed arrangement has been rejected, regardless of a request for additional information, shall not be construed as a determination by the Commission, or its staff, that the proposed arrangement has been approved;

(d) receipt by the Commission of any Paragraph III. Notification is not to be construed as a determination by the Commission, or its staff, that the proposed arrangement does or does not violate this Order or any law enforced by the Commission; and

(e) Paragraph III. Notification shall not be required prior to participating in any arrangement described at Paragraph III. of this Order pursuant to: (i) the Program; (ii) an arrangement

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solely involving Advocate System Physicians; or (iii) participation in any arrangement for which Paragraph III. Notification has previously been given.

IV.

IT IS FURTHER ORDERED that for three (3) years from the date this Order becomes final, pursuant to each qualified arrangement in which any Respondent is a participant, that Respondent shall notify the Secretary of the Commission in writing (“Paragraph IV. Notification”) at least sixty (60) days prior to:

- A. Participating in, organizing, or facilitating any discussion or understanding with or among any physicians, or medical group practices, in such qualified arrangement relating to price or other terms or conditions of dealing with any payor; or
- B. Contacting a payor, pursuant to a qualified arrangement, to negotiate or enter into any agreement concerning price or other terms or conditions of dealing with any payor, on behalf of any physician or medical group practice in such qualified arrangement.

PROVIDED FURTHER that Paragraph IV. Notification shall include the following information regarding the qualified arrangement pursuant to which any Respondent intends to engage in the above identified conduct:

- a. the number of physicians in each specialty participating in the qualified arrangement;
- b. a description of the qualified arrangement, including its purpose and geographic area of operation;
- c. a description of the nature and extent of the integration and the efficiencies resulting from the qualified arrangement;

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- d. an explanation of the relationship of any agreement on prices, or contract terms related to price, to furthering the integration and achieving the efficiencies of the qualified arrangement;
- e. a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from the qualified arrangement or its activities; and
- f. all studies, analyses, and reports that were prepared for the purpose of evaluating or analyzing competition for physician services in any relevant market, including, but not limited to, the market share of physician services in any relevant market.

PROVIDED FURTHER that:

(a) if, within sixty (60) days from the Commission's receipt of the Paragraph IV. Notification, a representative of the Commission makes a written request for additional information to the Respondent providing such Paragraph IV Notification, that Respondent shall not participate in any arrangement described in Paragraph IV.A. or Paragraph IV.B. of this Order prior to the expiration of thirty (30) days after substantially complying with such request for additional information, or such shorter waiting period as may be granted in writing from the Bureau of Competition;

(b) the expiration of any waiting period described herein without a request for additional information, or without the initiation of an enforcement proceeding, shall not be construed as a determination by the Commission, or its staff, that the proposed arrangement does or does not violate this Order or any law enforced by the Commission;

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(c) the absence of notice that the qualified arrangement has been rejected, regardless of a request for additional information, shall not be construed as a determination by the Commission, or its staff, that the qualified arrangement has been approved;

(d) receipt by the Commission of any Paragraph IV. Notification regarding participation pursuant to a qualified arrangement is not to be construed as a determination by the Commission that any such qualified arrangement does or does not violate this Order or any law enforced by the Commission; and

(e) Paragraph IV. Notification shall not be required prior to participating in: (i) the Program; or (ii) any arrangement described at Paragraph IV.A. or Paragraph IV.B. of this Order solely involving Advocate System Physicians or any qualified arrangement for which Paragraph IV Notification has previously been given.

V.

IT IS FURTHER ORDERED that Respondent AHP shall:

- A. Within thirty (30) days after the date on which this Order becomes final, send a copy of this Order and the Complaint by:
 1. first-class mail with delivery confirmation or electronic mail with return confirmation to:
 - a. every physician, excluding Advocate System Physicians, who participates, or has participated, in any Respondent at any time since January 1, 2001;
 - b. each current officer, director, manager, and employee, excluding Advocate System Physicians, of each Respondent; and

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- c. each current officer, director, and manager of Advocate Health and Hospitals Corporation, Advocate Health Centers, Inc., or Dreyer Clinic, Inc.; and
 2. first-class mail, return receipt requested, and with the letter attached as Appendix 1 to this Order, to the chief executive officer of each payor with whom any Respondent has a record of being in contact since January 1, 2001, regarding contracting for the provision of physician services; *provided, however*, that a copy of Appendix 1 need not be included in the mailings to those payors identified at Appendix 2.
- B. Terminate, without penalty or charge, and in compliance with any applicable laws, any preexisting contract with any payor for the provision of provider services, excluding those payors identified at Appendix 2, at the earlier of: (1) receipt by Respondent AHP of a written request to terminate such contract from any payor that is a party to the contract, or (2) the earliest termination date, renewal date (including any automatic renewal date), or the anniversary date of such contract; *provided, however*, a preexisting contract may extend beyond any such termination date, renewal date, or anniversary date no later than one (1) year after the date that the Order becomes final if, prior to such termination, renewal, or anniversary date, (a) the payor submits to Respondent AHP a written request to extend such contract to a specific date no later than one (1) year after the date that this Order becomes final, and (b) Respondent AHP has determined not to exercise any right to terminate under the terms of the contract; *provided further*, that any payor making such request to extend a contract retains the right, pursuant to part (1) of Paragraph V.B. of this Order, to terminate the contract at any time.

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- C. Within ten (10) days of receiving a written request from a payor, pursuant to Paragraph V.B. of this Order, distribute, by first-class mail, return receipt requested, a copy of that request to each physician, excluding Advocate System Physicians, participating in such contract as of the date that Respondent AHP receives such request.
- D. For three (3) years from the date this Order becomes final:
1. Distribute by first-class mail, return receipt requested, a copy of this Order and the Complaint to:
 - a. each physician, excluding Advocate System Physicians, who begins participating in any Respondent, and who did not previously receive a copy of this Order and the Complaint from a Respondent within thirty (30) days of the time that such participation begins;
 - b. each payor who contracts with a Respondent for the provision of physician services, and who did not previously receive a copy of this Order and the Complaint from a Respondent, within thirty (30) days of the time that such payor enters into such contract;
 - c. each person who becomes an officer, director, manager, or employee, excluding Advocate System Physicians, of any Respondent, and who did not previously receive a copy of this Order and the Complaint from a Respondent, within thirty (30) days of the time that he or she assumes such position; and
 - d. each person who becomes an officer, director, or manager of Advocate Health and Hospitals Corporation, Advocate Health Centers, Inc., or Dreyer Clinic, Inc., and who did not previously receive a copy of this Order and Complaint from a Respondent,

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within thirty (30) days of the time that he or she assumes such position; and

2. Annually publish in any official report or newsletter sent to all physicians who participate in any Respondent, excluding Advocate System Physicians, a copy of this Order and the Complaint with such prominence as is given to regularly featured articles.
- E. Notify the Commission at least thirty (30) days prior to any proposed: (1) dissolution of any Respondent; (2) acquisition, merger, or consolidation of any Respondent; or (3) other change in any Respondent that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in any Respondent.

VI.

IT IS FURTHER ORDERED that Respondent AHP shall file verified written reports within sixty (60) days from the date this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each report shall include, among other information that may be necessary:

- A. the name, address, and telephone number of each payor with which each Respondent has had any contact during the one (1) year period preceding the date for filing such report;
- B. the identity of each payor sent a copy of the letter attached as Appendix 1, the response of each payor to that letter, and the status of each contract to be terminated pursuant to that letter;
- C. copies of the delivery confirmations or electronic mail with return confirmations required by Paragraph V.A.1., and copies

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of the signed return receipts required by Paragraphs V.A.2., V.B.; and

- D. a detailed description of the manner and form in which each Respondent has complied and is complying with this Order. Such report is to include, for the calendar year prior to that in which the report is filed, among other required information that may be required, data and documents described at Appendix 3 of this Order.

VII.

IT IS FURTHER ORDERED that, if Respondent AHP fails to comply with all or any portion of Paragraph V. or Paragraph VI. of this Order, within sixty (60) days of the time set forth in such paragraph, then each Respondent shall, within thirty (30) days thereafter, comply with each portion of Paragraph V. and Paragraph VI. of this Order with which Respondent AHP did not comply, with regard to that Respondent.

VIII.

IT IS FURTHER ORDERED that, for three (3) years from the date this Order becomes final, each Respondent shall notify the Commission of any change in its respective principal address within twenty (20) days of such change in address.

IX.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, including but not limited to the implementation of the Program:

- A. Respondents shall permit any duly authorized representative of the Commission access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in

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the possession, or under the control, of Respondents relating to any matter contained in this Order;

- B. Upon five (5) days' notice, and in the presence of counsel, and without restraint or interference from it, to interview officers, directors, or employees of Respondents.

X.

IT IS FURTHER ORDERED that this Order shall terminate on February 7, 2027.

By the Commission.

Appendix 1

[letterhead of AHP]

[name of payor's CEO]
[address]

Dear _____:

Enclosed is a copy of a complaint and a consent order ("Order") issued by the Federal Trade Commission against Advocate Health Partners ("AHP") and others.

Pursuant to Paragraph V.B. of the Order, AHP must allow you to terminate, upon your written request, without any penalty or charge, any contracts with AHP that are in effect as of the date you receive this letter.

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If you do not make a written request to terminate the contract, Paragraph V.B. further provides that the contract will terminate on the earlier of the contract's termination date, renewal date (including any automatic renewal date), or anniversary date, which is [date].

You may, however, ask AHP to extend the contract beyond [date], the termination, renewal, or anniversary date, to any date no later than [date], one (1) year after the date the Order becomes final.

If you choose to extend the term of the contract, you may later terminate the contract at any time.

Any request either to terminate or to extend the contract should be made in writing, and sent to me at the following address: [address].

Sincerely,

[AHP to fill in information in brackets]

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Appendix 2

UniCare Health Plans

CIGNA HealthCare

Aetna Health Plans

HFN, Inc.

Great-West Healthcare

Blue Cross Blue Shield of Illinois

Health Care Services Corporation d/b/a Blue Cross Blue Shield
of Illinois

Humana Health Plans

Advocate Associates

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Appendix 3

Document and Data Request

1. In mutually agreeable electronic format:
 - a. for each physician, each medical group practice, and any other aggregation of physicians participating in the Program for which data relevant to performance in the Program is collected, data sufficient to determine such performance for each measurement of performance analyzed by AHP pursuant to the Program. Such measurements of performance may include, but are not limited to any reports or report cards that compare physician performance against benchmarks or guidelines/protocols. Production of the AHP Clinical Integration Program Database will satisfy this requirement, provided that such database is in substantially the same format and contains substantially the same fields of data as the AHP Clinical Integration Program Database provided to Commission staff by letter dated June 30, 2006.
 - b. for each physician participating in the Program, his or her (i) medical group practice name; (ii) practice location; (iii) specialty; (iv) AHP's identification number used to track or report performance under the Program; and (v) and affiliation with a physician-hospital organization or any other group whose performance is analyzed under the Program. Production of the AHP Provider Relations Database will satisfy this requirement, provided that such database is in substantially the same format and contains substantially the same fields of data as the AHP Provider Relations Database provided to Commission staff by letter dated June 30, 2006.

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- c. with regard to the incentive funds under the Program: (i) data sufficient to determine the amounts to be allocated, paid, and withheld for (a) each physician and (b) each group of physicians whose performance is analyzed under the Program on a group or aggregated basis; and (ii) documents, data, or a written explanation sufficient to determine the method of and formulas used in calculating such amounts and the numerical inputs for each physician or group of physicians. Production of the AHP Annual Clinical Integration Incentive Distribution Report will satisfy this requirement, provided that such report is in substantially the same format and contains substantially the same fields of data as the AHP Annual Clinical Integration Incentive Distribution Report provided to Commission staff by letter dated June 30, 2006.
2. All documents in the nature of strategic and business plans and budgets which relate to the Program.
3. Documents sufficient to identify all changes to the Program.
4. All analyses of the Program or of physician performance under the Program that are published or provided to: (i) payors; and (b) Respondents' Boards of Directors.
5. For those measurements of performance analyzed by AHP under the Program, any data or documents created or maintained in the ordinary course of business that compare the performance of physicians participating in the Program and who have medical staff privileges at an Advocate Hospital with the performance of all other physicians with medical staff privileges at the same Advocate Hospital.
6. For each measurement of performance analyzed by AHP under the Program, any data or documents created or maintained in the ordinary course of business that compare the performance of physicians under the Program with the

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performance of those physicians under any capitated contracts.

7. Data reflecting the performance of physicians under clinical quality initiatives conducted by AHP under its agreement with HMO Illinois.

**ANALYSIS OF AGREEMENT CONTAINING CONSENT
ORDER TO AID PUBLIC COMMENT**

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with Advocate Health Partners (“AHP”) and other related parties. The agreement settles charges that the proposed respondents violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by orchestrating, implementing, and participating in agreements among physician practices to fix prices and other terms on which they would deal with health plans and to refuse to deal with certain health plans except on collectively determined terms.

The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order, or to modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by the proposed respondents that they

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violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

The Complaint

The allegations of the complaint are summarized below.

AHP is a “super physician-hospital organization” whose members consist of the non-profit Advocate Health Care Network (“AHCN”) hospital system and eight physician-hospital organizations organized at each of the AHCN hospital sites (the PHO Respondents”). Each PHO Respondent, in turn, consists of a hospital member (a non-profit subsidiary of AHCN) and a portion of physicians on staff at the hospital. Approximately 2,600 independently practicing physicians in the Chicago metropolitan area belong to the PHO Respondents. In addition, two AHCN for-profit subsidiaries named in the complaint (the “Advocate System Respondents”) contract with health plans, often through AHP, to provide the services of approximately 300 physicians who are employed by or under contract to provide services exclusively to the Advocate System Respondents.

The complaint challenges conduct during the period 1995 to 2004, during which the respondents negotiated the prices and other terms at which their otherwise competing member physicians would provide services to the subscribers of health plans without any efficiency-enhancing integration of their practices sufficient to justify their conduct. Between 1995 and 2001, AHP staff negotiated contracts on behalf of each PHO Respondent, with each PHO Respondent retaining authority to approve offers and counteroffers. Ultimately, each PHO Respondent would approve a negotiated contract on behalf of its member physicians, who could then opt in or opt out of the negotiated contract. In 2001, the respondents centralized contract approval at the super-PHO level. AHP staff continued to negotiate contracts, but AHP (rather than each PHO Respondent) had the

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authority to approve offers and counteroffers and, ultimately, to approve negotiated contracts on behalf of the AHP physicians, who could then opt in or opt out of the negotiated contract. At various times, the Advocate System Respondents participated in these collective negotiations by utilizing AHP to negotiate on their behalf, jointly with AHP's independent physicians. Under both approaches, AHP acted as the collective bargaining agent for physician practices that would otherwise compete.

By 2002, AHP had served as the collective bargaining agent for member physicians in numerous contracts with health plans. Blue Cross Blue Shield of Illinois, however, was one of a few payors that had not contracted with AHP. Instead, Blue Cross contracted directly with the vast majority of AHP physicians. In early 2002, AHP began developing a strategy to force Blue Cross to replace those individual contracts with a group AHP contract, at higher rates than Blue Cross was paying AHP physicians under their individual contracts.

To carry out its strategy to increase the prices Blue Cross paid to AHP physicians, AHP requested that all of its physicians submit what it termed "Agency Agreements," which authorized AHP to terminate the physicians' existing individual contracts with Blue Cross, and to collectively negotiate new contract terms on their behalf. In seeking this authority, AHP reminded its physicians that "[a] major part" of the value AHP offers "has been your access to the favorable rates negotiated by AHP for many of your fee-for-service managed care contracts." Moreover, AHP's President instructed AHP staff to warn physicians attempting to rescind their Agency Agreement that if they rescind there is no hope of getting increases going forward and it will impact everyone's ability to get increases from other payors as [other payors] won't be able to compete [with Blue Cross]." AHP obtained signed Agency Agreements from approximately 1,700 physicians and, on October 1, 2002, terminated the physicians' individual contracts with Blue Cross, effective January 1, 2003.

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AHP ultimately abandoned its plan to coerce Blue Cross to negotiate a group contract on price terms set by AHP, but only after Blue Cross sued AHP for violating the antitrust laws and agreed to make certain payments to AHP as part of the settlement of that dispute. Although Blue Cross's payments to AHP were supposed to be used by AHP to "encourage outcome-based reimbursement" and to support efforts to implement electronic-claim-submission capabilities for all AHP physicians, in fact AHP distributed the money only to physicians that had collectively threatened not to deal with Blue Cross.

The complaint also discusses AHP's dealings with United Healthcare of Illinois, Inc. in 2001, as an example of AHP's collective bargaining on behalf of its member physicians. In order to establish a minimum acceptable rate for the United negotiations, AHP obtained input from each PHO Respondent's Board of Directors and established a single benchmark for the entire group that was higher than the minimum rate that some PHO Respondent's Boards were willing to accept. Ten days after United failed to agree to AHP's benchmark price for physician services, AHP terminated United's contracts not only with the AHP physicians, but also with the AHCN hospitals. After United attempted to enter into direct contracts with AHP physicians, AHP threatened that United would be unable to contract for AHCN hospital services unless United agreed to a group contract for AHP physician services. United ultimately agreed to a group contract containing fees for physician services that were 20 to 30 percent higher than United's direct contracts with individual physicians in the Chicago area.

As the complaint alleges, the respondents engaged in no efficiency-enhancing integration sufficient to justify the conduct challenged in the complaint. Accordingly, the complaint alleges that they violated Section 5 of the FTC Act.

Analysis to Aid Public Comment

The Proposed Consent Order

The proposed order is designed to remedy the illegal conduct charged in the complaint and prevent its recurrence. It is similar to recent consent orders that the Commission has issued to settle charges that physician groups engaged in unlawful agreements to raise fees they receive from health plans.

The proposed order's specific provisions are as follows:

Paragraph II.A. prohibits the respondents from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payors on any physician's behalf; (2) to deal, not to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving the respondents.

Other parts of Paragraph II. reinforce these general prohibitions. Paragraph II.B. prohibits the respondents from facilitating exchanges of information between physicians concerning whether, or on what terms, to contract with a payor. Paragraph II.C. bars attempts to engage in any action prohibited by Paragraph II.A. or II.B., and Paragraph II.D. proscribes the respondents from inducing anyone to engage in any action prohibited by Paragraphs II.A. through II.C.

As in other Commission orders addressing providers' collective bargaining with health-care purchasers, Paragraph II excludes certain kinds of agreements from its prohibitions. First, the respondents are not precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing physicians in a "Qualified risk-sharing joint arrangement" or a "Qualified clinically-integrated joint arrangement." The arrangement, however, must not, for three years, restrict the ability of, or facilitate the refusal of, physicians who participate in it to contract with payors outside of the arrangement.

Analysis to Aid Public Comment

As defined in the proposed order, a “Qualified risk-sharing joint arrangement” possesses two key characteristics. First, all physician participants must share substantial financial risk through the arrangement, such that the arrangement creates incentives for the physician participants jointly to control costs and improve quality by managing the provision of services. Second, any agreement concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

A “Qualified clinically-integrated joint arrangement,” on the other hand, need not involve any sharing of financial risk. Instead, as defined in the proposed order, physician participants must participate in active and ongoing programs to evaluate and modify their clinical practice patterns in order to control costs and ensure the quality of services provided, and the arrangement must create a high degree of interdependence and cooperation among physicians. As with qualified risk-sharing arrangements, any agreement concerning price or other terms of dealing must be reasonably necessary to achieve the efficiency goals of the joint arrangement.

Second, the respondents are not precluded by Paragraph II. from engaging in conduct that solely involves the Advocate System Respondents, which are subsidiaries of the AHCN hospital system, and other physicians employed by AHCN because they are all part of a single entity.

Finally, the order does not prohibit the respondents from engaging in conduct solely related to their participation in a program that AHP refers to as its “Clinical Integration Program” (the “Program”). The complaint does not allege a violation of the FTC Act with respect to that conduct, and the Commission has made no determination with respect to its legality. The order, while not prohibiting conduct related to the Program, ensures that the illegal conduct charged in the complaint does not continue or recur. In

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addition, Paragraph VI.D. provides certain mechanisms designed to allow the Commission to monitor the further development, implementation, and results of the Program. The Commission retains the ability to challenge conduct related to the Program if it later determines that such a challenge is warranted and would be in the public interest.

Paragraph III., for three years, requires the respondents to notify the Commission before entering into any arrangement to act as a messenger, or as an agent on behalf of any physicians, with payors regarding contracts. Paragraph III. also sets out the information necessary to make the notification complete.

Paragraph IV., for three years, requires the respondents to notify the Commission before participating in contracting with health plans on behalf of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement. The contracting discussions that trigger the notice provision may be either among physicians or between AHP and health plans. Paragraph IV. also sets out the information necessary to satisfy the notification requirement.

Paragraph V. imposes certain notification obligations on AHP and requires the termination of contracts that were entered into illegally. Paragraphs V.A. and V.D. require AHP to distribute the complaint and order to (1) physicians who have participated in AHP and the PHO Respondents in the past or who do so within the next three years; (2) to various past and future personnel of the respondents and AHCN subsidiaries that offer physician services to payors; and (3) to payors with whom the respondents have dealt in the past or deal with in the next three years. Paragraph V.B. requires AHP, at any payor's request and without penalty, or, at the latest, within one year after the order is made final, to terminate its existing contracts for the provision of physician services to payors, other than those contracts covering the program which AHP refers to as its Clinical Integration Program. Paragraph V.B. also allows any such contract currently in effect to be extended, upon mutual consent of AHP and the contracted

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payor, to any date no later than one year from when the order became final. This extension allows both parties to negotiate a termination date that would equitably enable them to prepare for the impending contract termination. Paragraph V.C. requires AHP to distribute payor requests for contract termination to physicians who participate in the respondents. Paragraph V.E. requires AHP to notify the Commission of certain organizational changes to any respondent or other changes that may affect compliance with the order.

Paragraphs VI., VIII., and IX. impose various obligations on the respondents to report or provide access to information to the Commission to facilitate the monitoring of compliance with the order. Because Paragraphs V. and VI. impose on AHP, in the first instance, obligations to provide notice and reporting on behalf of all respondents, Paragraph VII. requires that any respondents for which AHP has not acted fulfill those obligations.

Finally, Paragraph X. provides that the order will expire in 20 years.

Complaint

IN THE MATTER OF

GENERAL DYNAMICS CORPORATION

CONSENT ORDER, ETC. , IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL
TRADE COMMISSION ACT

Docket C-4181; File No. 061 0150

Complaint, December 27, 2006 — Decision, February 7, 2007

This consent order addresses the acquisition by respondent General Dynamics Corporation of SNC Technologies, Inc. SNC is engaged in the provision of high-explosive melt-pour load, assemble and pack services for artillery shells and mortar rounds. General Dynamics is engaged in providing munitions to the U.S. military and participates in the provision of melt-pour load, assemble and pack services for artillery shells and mortar rounds through its 50% ownership of American Ordnance LLC, a joint venture of General Dynamics and Day & Zimmerman, Inc. The acquisition may substantially lessen competition and create a monopoly in the relevant markets because General Dynamics would own 100% of SNC and 50% of American Ordnance, two of only three competitors in the market for these specific munitions services in the United States and Canada, and because actual, direct, and substantial competition between General Dynamics and American Ordnance would be reduced. The order requires General Dynamics to divest its entire interest in American Ordnance to a buyer approved by the Commission in order to ensure the continuing, viable, and competitive operation of American Ordnance. An order to hold the American Ordnance business separate is included. The hold separate order requires that, prior to divestiture, General Dynamics keep the American Ordnance business separate and apart from its other General Dynamics businesses, and that the company refrain from involvement in the direction, oversight, or influence of American Ordnance's business.

Participants

For the *Commission*: *Christina Perez* and *Tammy L. Imhoff*.

For the *Respondent*: *Janet McDavid* and *Joseph G. Krauss*,
Hogan & Hartson.

Complaint

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent General Dynamics Corporation, a corporation subject to the jurisdiction of the Commission, has agreed to acquire SNC Technologies Inc. and SNC Technologies Corp, corporations subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. DEFINITIONS

1. “Commission” means the Federal Trade Commission.
2. “General Dynamics” or “Respondent” means General Dynamics Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by General Dynamics Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
3. “SNC” means, individually and collectively, SNC Technologies, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by SNC Technologies, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each; and SNC Technologies Corp., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by SNC Technologies Corp., and the

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respective directors, officers, employees, agents, representatives, successors, and assigns of each.

4. “American Ordnance” means American Ordnance LLC.

5. “Day & Zimmerman” means Day & Zimmerman, Inc. a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, having its principal place of business located at 1818 Market Street, Philadelphia, Pennsylvania 19103.

II. RESPONDENT

6. Respondent General Dynamics is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2941 Fairview Park Drive, Suite 100, Falls Church, Virginia 22042. General Dynamics, among other things, is engaged in providing munitions to the U.S. military. General Dynamics participates in the provision of melt-pour load, assemble and pack services for artillery shells and mortar rounds through its ownership of American Ordnance

7. Respondent is, and at all times relevant herein has been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE ACQUIRED COMPANIES

8. SNC are wholly-owned subsidiaries of SNC-Lavalin Inc. SNC are corporations organized, existing, and doing business under and by virtue of the laws of Delaware whose registered principal offices are located at 65 Sandscreen Street, Avon, Connecticut 06001. SNC is engaged in, among other things, the

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provision of high explosive melt-pour load, assemble and pack services for artillery shells and mortar rounds.

9. SNC is, and at all times relevant herein has been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

IV. AMERICAN ORDNANCE

10. American Ordnance is a limited liability company organized, existing, and doing business under and by virtue of the laws of Delaware whose registered principal office is located at 207 East 29th Street, Pittsburgh, Kansas 66762. American Ordnance is engaged in, among other things, the provision of high explosive melt-pour load, assemble and pack services for artillery shells and mortar rounds, from the plants it operates in Milan, Tennessee and Burlington, Iowa.

11. American Ordnance is a joint venture of General Dynamics and Day & Zimmerman. General Dynamics and Day & Zimmerman each own fifty percent of American Ordnance.

12. American Ordnance is, and at all times relevant herein has been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

V. THE PROPOSED ACQUISITION

13. Pursuant to a purchase agreement dated February 23, 2006, two divisions of General Dynamics, General Dynamics Land Systems-Canada, Inc. and General Dynamics Ordnance and

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Tactical Systems, Inc., will acquire all of the voting securities of SNC, in a transaction valued at approximately \$275 million.

VI. THE RELEVANT MARKET

14. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the acquisition is the provision of high explosive melt-pour load, assemble and pack services for artillery shells and mortar rounds.

15. The United States Military purchases high explosive melt-pour load, assemble and pack services for artillery shells and mortar rounds. There is no alternative technology or method to provide artillery shells or mortar rounds.

16. For the purposes of this Complaint, North America is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant lines of commerce.

VII. THE STRUCTURE OF THE MARKET

17. The relevant markets are highly concentrated as measured by the Herfindahl-Hirschman Index (“HHI”).

18. Currently, only three firms, American Ordnance, SNC and Day & Zimmerman, provide high explosive melt-pour load, assemble and pack services for artillery shells and mortar rounds customers in the relevant market.

19. Under the 2005 Base Closure and Realignment legislation, the Kansas Army Ammunition plant operated by Day & Zimmerman must close no later than September 15, 2011, and, it may, in fact, cease operations within the next two years. Therefore, after the closure of the Kansas facility, American Ordnance and SNC would be the only two firms providing high explosive melt-pour load, assemble and pack services for artillery shells and mortar rounds consumers in the relevant market.

Complaint

VIII. ENTRY CONDITIONS

20. New entry into the relevant markets is costly and would not occur in a timely manner sufficient to deter or counteract the likely adverse competitive effects of the acquisition. It would take over two years and over ten million dollars for an entrant to build and equip a high explosive melt-pour load, assemble and pack facility. This investment is significant given the limited number of contracts for high explosive melt-pour load assemble and pack services for mortar rounds and artillery shells the U.S. military does each year.

IX. EFFECTS OF THE ACQUISITION

21. The effects of the Acquisition, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. By reducing actual, direct, and substantial competition between Respondent and American Ordnance because Respondent will own all of SNC and half of American Ordnance; and
- b. By increasing the likelihood that:
 - (1) General Dynamics will be able to unilaterally exercise market power in the market;
 - (2) coordinated interaction would occur between General Dynamics and Day & Zimmerman; and
 - (3) the U.S. military would be forced to pay higher prices for the provision of high explosive melt-pour load, assemble and pack services for mortar

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rounds and artillery shells in the relevant geographic areas.

X. VIOLATIONS CHARGED

21. The Acquisition described in Paragraph 6 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

22. The Acquisition described in Paragraph 6, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-seventh day of December, 2006, issues its Complaint against said Respondents.

By the Commission.

ORDER TO HOLD SEPARATE

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent General Dynamics Corporation (“GD” or “Respondent”) of SNC Technologies, Inc. and SNC Technologies Corp. (collectively, “SNC”), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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Respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place such Consent Agreement containing the Decision and Order on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Hold Separate (“Hold Separate”):

1. Respondent GD is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 2941 Fairview Park Drive, Suite 100, Falls Church, Virginia 22042.

2. SNC Technologies, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 65 Sandscreen Street, Avon, Connecticut 06001. SNC Technologies Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware,

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with its offices and principal place of business located at 65 Sandscreen Street, Avon, Connecticut 06001.

3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Hold Separate, the following definitions, and all other definitions used in the Consent Agreement and the proposed Decision and Order (and when made final, the Decision and Order), shall apply:

A. “GD” or “Respondent” means General Dynamics Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by General Dynamics Corporation (including, but not limited to, General Dynamics Ordnance and Tactical Systems, Inc. (“GD-OTS”)), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition Date, the term “GD” shall include SNC.

B. “SNC” means, individually and collectively, SNC Technologies, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by SNC Technologies, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each; and SNC Technologies Corp., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by SNC Technologies Corp., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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- C. “Commission” means the Federal Trade Commission.
- D. “Acquisition” means the acquisition of SNC by GD.
- E. “Acquisition Agreement” means the Share Purchase Agreement by and among General Dynamics Land Systems - Canada Inc., General Dynamics Ordnance and Tactical Systems, General Dynamics Corporation, SNC-Lavalin Group Inc. and The SNC-Lavalin Corporation, dated February 23, 2006, whereby GD proposes to acquire SNC.
- F. “Acquisition Date” means the earlier of the following dates:
1. the date the Respondent closes on the Acquisition Agreement; or
 2. the date the merger contemplated by the Acquisition Agreement becomes effective by filing articles of merger with the Secretary of State of the State of Delaware.
- G. “AO” means American Ordnance LLC, a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, a joint venture between GD-OTS and Mason & Hanger Corporation, a subsidiary of DZI.
- H. “AO Agreement” means the Formation Agreement by and between GD and Mason & Hanger Corporation, a subsidiary of DZI, dated July 21, 1998, and all amendments, exhibits, attachments, agreements, and schedules thereto, including, but not limited to, the Operating Agreement. The AO Agreement is attached to this Order as non-public Appendix I.

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I. "Closing Date" means the date on which Respondent (or a Divestiture Trustee) and a Commission-approved Acquirer consummate a transaction to divest GD's interest in AO.

J. "Commission-approved Acquirer" means an entity that receives the prior approval of the Commission to acquire GD's interest in AO.

K. "Confidential Business Information" means competitively sensitive, proprietary and all other business information of any kind that is not in the public domain owned by or pertaining to AO or GD, as the case may be (including, but not limited to, financial statements, financial plans and forecasts, operating plans, price lists, cost information, supplier and vendor contracts, marketing analyses, customer lists, customer contracts, employee lists, salary and benefits information, technologies, processes, and other trade secrets), except for any information that the recipient demonstrates (i) was or becomes generally available to the public other than as a result of a disclosure by the recipient, or (ii) was available, or becomes available, to the recipient on a non-confidential basis, but only if, to the knowledge of the recipient, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information.

L. "Decision and Order" means the:

1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance and service of a final Decision and Order by the Commission; and
2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission.

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- M. "Divestiture Trustee" means a trustee appointed by the Commission pursuant to the relevant provisions of the Decision and Order.
- N. "DZI" means Day & Zimmermann, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, having its principal place of business located at 1818 Market Street, Philadelphia, Pennsylvania, 19103.
- O. "Hold Separate" means this Order to Hold Separate.
- P. "Hold Separate Period" means the time period during which the Hold Separate is in effect, which shall begin on the Acquisition Date and terminate pursuant to Paragraph VII hereof.
- Q. "Interim Monitor" means the person appointed pursuant to Paragraph III of this Hold Separate.
- R. "Orders" means the Decision and Order and this Hold Separate.

II.**IT IS FURTHER ORDERED** that:

- A. During the Hold Separate Period, Respondent shall hold AO separate, apart, and independent as required by this Hold Separate and shall vest AO with all rights, powers, and authority necessary to conduct its business. Respondent shall not exercise direction or control over, or influence directly or indirectly, AO or any of its operations, or the Interim Monitor, except to the extent that Respondent must exercise direction and control over AO to assure compliance with this Hold Separate, the Consent Agreement, the Decision and Order, and all applicable laws.

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- B. During the Hold Separate Period, Respondent shall:
1. Take such actions (consistent with GD's rights and responsibilities under the AO Agreement) as are necessary to maintain the full economic viability, marketability and competitiveness of AO and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets of AO except for ordinary wear and tear; and
 2. Not sell, transfer or encumber any interest in AO or otherwise impair the full economic viability, marketability or competitiveness of AO.
- C. From the date Respondent executes the Consent Agreement until the Hold Separate Period begins, Respondent shall take such actions as are necessary to maintain and assure the continued maintenance of the full economic viability, marketability and competitiveness of AO, and prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets of AO, except for ordinary wear and tear.
- D. Not later than three (3) days after the Acquisition Date, Respondent shall delegate to DZI all its rights and authority to appoint the Ordnance Systems Managers pursuant to Section 5.1(a) of the Operating Agreement, with the limitation that DZI not appoint any person who is, or at any time during the year prior to the issuance of this Hold Separate has been, an officer, director, employee, agent, partner, or limited liability company member of Respondent or a person who controls, directly or indirectly, more than 1% of the outstanding capital stock of Respondent or of any affiliate of Respondent to serve as an Ordnance Systems Manager. During the Hold Separate Period, Respondent shall not permit any of its employees, officers, or directors to be involved in the operations of AO.
- E. Respondent shall only remove the Treasurer of AO for cause, and any replacement Treasurer shall be a person who is not,

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and at no time during the year prior to appointment has been, an officer, director, employee, agent, partner, or limited liability company member of Respondent or a person who controls, directly or indirectly, more than 1% of the outstanding capital stock of Respondent or of any affiliate of Respondent.

- F. Except as necessary to fulfill the requirements of the Orders, Respondent shall not provide any services to AO, including, but not limited to, any marketing services pursuant to Section 2.1 of the Ordnance Systems Services Agreement, Exhibit F to the AO Agreement.
- G. Respondent's employees shall not receive, or have access to, or use or continue to use any Confidential Business Information of AO not in the public domain except:
1. as required by law; and
 2. to the extent that necessary information is exchanged:
 - a. in negotiating agreements to divest assets pursuant to the Decision and Order and engaging in related due diligence;
 - b. in complying with the Orders;
 - c. in obtaining legal advice; or
 - d. as necessary in connection with any existing contracts between GD and AO.

Nor shall Respondent allow or permit AO employees to receive or have access to, or use or continue to use, any Confidential Business Information not in the public domain about Respondent and relating to Respondent's businesses, except such information as is necessary to maintain and

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operate AO. Respondent may receive aggregate financial and operational information relating to AO only to the extent necessary to allow Respondent to comply with the requirements and obligations of the laws of the United States and other countries, to prepare consolidated financial reports, tax returns, reports required by securities laws, and personnel reports, and to comply with this Hold Separate. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

- H. The purpose of this Hold Separate is to: (1) preserve AO as a viable, competitive, and ongoing business independent of Respondent until the divestiture required by the Decision and Order is achieved; (2) assure that no Confidential Business Information is exchanged between Respondent and AO, except in accordance with the provisions of this Hold Separate; (3) prevent interim harm to competition pending the relevant divestiture and other relief; and (4) maintain the full economic viability, marketability and competitiveness of all of the business(es) associated with AO, and prevent the destruction, removal, wasting, deterioration, or impairment of any of AO's assets except for ordinary wear and tear.

III.**IT IS FURTHER ORDERED** that:

- A. At any time after Respondent signs the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that Respondent expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order.
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of a

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proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor.

- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondent's compliance with the relevant requirements of this Order in a manner consistent with the purposes of this Order.
- D. If an Interim Monitor is appointed, Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
1. The Interim Monitor shall have the power and authority to monitor Respondent's compliance with the requirements of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission.
 2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 3. The Interim Monitor shall serve until the day after the Closing Date. *Provided, however,* that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of this Order.
 4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent's and to AO's personnel, books, documents, records kept in the normal course of business, facilities

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and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondent's compliance with its obligations under this Order, including, but not limited to, its obligations related to the relevant assets. Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with this Order.

5. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of the Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.
6. Respondent shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
7. Respondent shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondent, and any reports submitted by the Commission-approved

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Acquirer with respect to the performance of Respondent's obligations under this Order. Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondent of its obligations under this Order.

8. Respondent may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- F. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.
- G. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.
- H. The Interim Monitor appointed pursuant to this Order may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

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IV.**IT IS FURTHER ORDERED** that:

- A. Within five (5) days of the Acquisition, Respondent shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
- B. Within thirty (30) days after the date this Order becomes final, and every sixty (60) Days thereafter until the end of the Hold Separate Period, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Hold Separate. Respondent shall submit at the same time a copy of its report concerning compliance with this Hold Separate to the Interim Monitor, if any Interim Monitor has been appointed. Respondent shall include in its reports, among other things that are required from time to time, a full description of the efforts being made to comply with this Hold Separate.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to:

- A. any proposed dissolution of such Respondent;
- B. any proposed acquisition, merger or consolidation of Respondent;
- C. any proposed dissolution of AO; or
- D. any other change in the Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

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VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent made to its principal United States offices, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent related to compliance with this Order; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Hold Separate shall terminate at the earlier of:

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The day after the Closing Date.

By the Commission.

Decision and Order

**APPENDIX I
NON-PUBLIC**

AO AGREEMENT

**[Redacted From Public Record But Incorporated By
Reference]**

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent General Dynamics Corporation (“GD” or “Respondent”) of SNC Technologies, Inc. and SNC Technologies Corp. (collectively, “SNC”), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

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The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent GD is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 2941 Fairview Park Drive, Suite 100, Falls Church, Virginia 22042.

2. SNC Technologies, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 65 Sandscreen Street, Avon, Connecticut 06001. SNC Technologies Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 65 Sandscreen Street, Avon, Connecticut 06001.

3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

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- A. “GD” or “Respondent” means General Dynamics Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by General Dynamics Corporation (including, but not limited to, General Dynamics Ordnance and Tactical Systems, Inc. (“GD-OTS”)), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition Date, the term “GD” shall include SNC.
- B. “SNC” means, individually and collectively, SNC Technologies, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by SNC Technologies, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each; and SNC Technologies Corp., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by SNC Technologies Corp., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Commission” means the Federal Trade Commission.
- D. “Acquisition” means the acquisition of SNC by GD.
- E. “Acquisition Agreement” means the Share Purchase Agreement by and among General Dynamics Land Systems - Canada Inc., General Dynamics Ordnance and Tactical Systems, General Dynamics Corporation, SNC-Lavalin Group Inc. and The SNC-Lavalin Corporation, dated February 23, 2006, whereby GD proposes to acquire SNC.

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- F. “Acquisition Date” means the earlier of the following dates:
1. the date the Respondent closes on the Acquisition Agreement; or
 2. the date the merger contemplated by the Acquisition Agreement becomes effective by filing articles of merger with the Secretary of State of the State of Delaware.
- G. “AO” means American Ordnance LLC, a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, a joint venture between GD-OTS and Mason & Hanger Corporation, a subsidiary of DZI.
- H. “AO Agreement” means the Formation Agreement by and between GD and Mason & Hanger Corporation, a subsidiary of DZI, dated July 21, 1998, and all amendments, exhibits, attachments, agreements, and schedules thereto, including, but not limited to, the Operating Agreement.
- I. “Closing Date” means the date on which Respondent (or a Divestiture Trustee) and a Commission-approved Acquirer consummate a transaction to divest GD’s interest in AO.
- J. “Commission-approved Acquirer” means an entity that receives the prior approval of the Commission to acquire GD’s interest in AO.
- K. “Divestiture Trustee” means a trustee appointed by the Commission pursuant to the relevant provisions of this Order.

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- L. “DZI” means Day & Zimmermann, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, having its principal place of business located at 1818 Market Street, Philadelphia, Pennsylvania, 19103.
- M. “Interim Monitor” means the person appointed pursuant to Paragraph III of the Order to Hold Separate in this matter.
- N. “Iowa Facility” means the Iowa Army Ammunition Plant located in Middletown, Iowa, operated by AO, which loads, assembles, packs, demilitarizes, manufactures and tests ordnance for the United States Army and others.
- O. “Milan Facility” means the Milan Army Ammunition Plant located in Milan, Tennessee, operated by AO, which loads, assembles, packs, demilitarizes, manufactures and tests ordnance for the United States Army and others.
- P. “Operating Agreement” means the American Ordnance LLC Operating Agreement by and between GD and Mason & Hanger Corporation, a subsidiary of DZI, dated July 21, 1998, and all amendments, exhibits, attachments, agreements, and schedules thereto.
- Q. “Remedial Agreement” means any agreement between Respondent and a Commission-approved Acquirer (or between a Divestiture Trustee and a Commission-approved Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, and all amendments, exhibits, attachments, agreements, and schedules thereto, that have been

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approved by the Commission to accomplish the requirements of this Order.

- R. “Third Party(ies)” means any private entity other than the following: (1) the Respondent, or (2) the Commission-approved Acquirer.

II.**IT IS FURTHER ORDERED** that:

- A. Not later than four (4) months after the Acquisition Date, Respondent shall divest, absolutely and in good faith and at no minimum price, its entire interest in AO. Respondent shall divest only to an acquirer who receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.
- B. Any Remedial Agreement that has been approved by the Commission between Respondent (or a Divestiture Trustee) and a Commission-approved Acquirer shall be deemed incorporated into this Order, and any failure by Respondent to comply with any term of such Remedial Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order) shall constitute a failure to comply with this Order.
- C. Prior to the Closing Date, Respondent shall secure all consents and waivers from all Third Parties that are necessary for the divestiture of GD’s interest in AO to the Commission-approved Acquirer, including, but not limited to, all consents and waivers from DZI pursuant to the AO Agreement.

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- D. The purpose of the divestiture of GD's interest in AO is to ensure the continuing, viable, and competitive operation of AO in the same business and in the same manner in which AO was engaged at the time of the announcement of the proposed Acquisition and to remedy the lessening of competition alleged in the Commission's complaint.

III.**IT IS FURTHER ORDERED** that:

- A. If Respondent has not fully complied with the obligation to divest its interest in AO as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to divest Respondent's interest in AO pursuant to Paragraph II of this Order in a manner that satisfies the requirements of such Paragraph. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a Divestiture Trustee in such action to divest the interest in AO. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent to comply with this Order.
- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise

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in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
 - 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the interest in AO.
 - 2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court;

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provided, however, the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to Respondent's and AO's personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an acquirer as required by this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent from among those approved by the

Decision and Order

Commission; *provided further, however*, that Respondent shall select such entity within five (5) Days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.
6. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the

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preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be granted, licensed, transferred, delivered or otherwise conveyed by this Order.
 8. The Divestiture Trustee shall report in writing to Respondent and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 9. Respondent may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

Decision and Order

- G. The Divestiture Trustee appointed pursuant to this Paragraph may be the same person appointed as Interim Monitor pursuant to the relevant provisions of the Order to Hold Separate.

IV.

IT IS FURTHER ORDERED that GD shall notify the Commission no later than five (5) days after GD submits any proposal to obtain the facilities use contract for either the Iowa Facility and/or the Milan Facility. Such notification shall include a copy of GD's proposal, and any other explanation of the terms of the proposal that GD determines to submit.

V.

IT IS FURTHER ORDERED that:

- A. Within five (5) days of the Acquisition, Respondent shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
- B. Within thirty (30) days after the date this Order becomes final, and every sixty (60) Days thereafter until Respondent has fully complied with Paragraphs II and III, and all its responsibilities to render transitional services, if any, to the Commission-approved Acquirer as provided in the Remedial Agreement(s), Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent shall submit at the same time a copy of its report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed. Respondent shall include in its reports, among other things that are required from time to time:

Decision and Order

1. a full description of the efforts being made to comply with the relevant Paragraphs of this Order; and
2. a description of all technical assistance, if any, provided to the Commission-approved Acquirer during the reporting period.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to:

- A. any proposed dissolution of such Respondent;
- B. any proposed acquisition, merger or consolidation of Respondent;
- C. any proposed dissolution of AO prior to the divestiture of GD's interest in AO; or
- D. any other change in the Respondents, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent made to its principal United States offices, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondent and in the presence of counsel, to all facilities and access to

Analysis to Aid Public Comment

inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent related to compliance with this Order; and

- B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on February 7, 2017.

By the Commission.

**ANALYSIS OF AGREEMENT CONTAINING CONSENT
ORDERS TO AID PUBLIC COMMENT****I. Introduction**

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from General Dynamics Corporation ("GD"). The purpose of the proposed Consent Agreement is to remedy the competitive harm that would otherwise result from GD's acquisition of SNC Technologies, Inc. and SNC Technologies, Corp. (collectively "SNC"). Under the terms of the proposed Consent Agreement, GD is required to divest its interest in American Ordnance LLC to a buyer approved by the Commission in a manner approved by the Commission within four months of acquiring SNC.

Analysis to Aid Public Comment

The proposed Consent Agreement has been placed on the public record for thirty days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw the proposed Consent Agreement or make it final.

On February 23, 2006, GD entered into a Share Purchase Agreement to acquire SNC from SNC-Lavalin Group for approximately \$275 million (CAN\$315 million). The Commission's complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by bringing together two of only three competitors in the market for melt-pour load, assemble and pack services ("LAP services") for mortar rounds and artillery shells in the United States and Canada. The proposed Consent Agreement would remedy the alleged violations by requiring a divestiture that will replace the competition that otherwise would be lost in this market as a result of the acquisition.

II. The Parties

GD is a diversified defense company with leading market positions in aviation, information systems, shipbuilding and marine systems, and land and amphibious combat systems. General Dynamics Ordnance and Tactical Systems ("GD-OTS") is a business unit within GD that manufactures large and medium caliber ammunition and precision metal components, produces spherical propellant for small caliber ammunition used in various military applications, provides explosive LAP services for a variety of tactical missile and rocket programs, and designs and produces shaped charge warheads and control actuator systems. GD-OTS also maintains a fifty percent interest in American Ordnance, a joint venture with Day & Zimmerman, Inc. ("DZI")

Analysis to Aid Public Comment

formed to operate the Middletown, Iowa Army ammunition plant (“Iowa AAP”) and Milan, Tennessee Army ammunition plant (“Milan AAP”) under a single entity to gain certain economic efficiencies. In 2005, GD had revenues of over \$21.2 billion, and GD-OTS sold approximately \$615 million in munitions and propellant.

SNC develops and manufactures ammunition and ammunition systems for Canadian and United States military divisions and law enforcement agencies. The company’s products include large, medium, and small caliber ammunition, propellants, propelling charges and explosives, pyrotechnics, and simulated ammunition products for training applications. It also provides a wide variety of LAP services, including melt-pour. In 2005, SNC garnered approximately \$286 million in sales, including \$136 million from sales within the United States.

III. The Relevant Product Market

The relevant product market in which to evaluate the proposed acquisition is the market for melt-pour LAP services for mortar rounds and artillery shells. Mortar rounds and artillery shells are relatively inexpensive, mass-produced projectiles employed by infantry troops. Melt-pour LAP services are the critical final step in producing and delivering mortar rounds and artillery shells to the U.S. military. LAP services consist of filling (or loading) the mortar with an explosive, trinitrotoluene (“TNT”), assembling the various components to complete the munition and packing the rounds for safe shipment to various military installations around the world. LAP services other than melt-pour or using different explosives than TNT are either too expensive or cumbersome for use with mass-produced weapons such as mortar rounds and artillery shells. As a result, a five to ten percent increase in the cost of melt-pour LAP services for mortar rounds and artillery shells would not cause the U.S. military to switch to any other type of LAP services.

Analysis to Aid Public Comment

The U.S. military contracts with suppliers for its requirements of melt-pour LAP services for mortar rounds and artillery shells. Contracts for melt-pour LAP services for mortar rounds and artillery shells typically are bid out every five years — one-year firm contract with four one-year renewal options. The Army is currently in the process of awarding two contracts for LAP services — a combined 60 mm and 81 mm mortar contract and a 120 mm mortar contract. The next melt-pour LAP services contracts for mortar rounds and artillery shells will not likely be completed until 2011.

IV. Market Structure & Participants

The market for melt-pour LAP services for mortar rounds and artillery shells is highly concentrated. At present, only three companies have the ability to effectively supply these services to the United States Army: SNC, American Ordnance, and DZI. Each of these companies currently contracts with the Army to provide at least one type mortar round or artillery shell melt-pour LAP service. SNC's melt-pour operations are located in its privately-owned facility in Le Gardeur, Canada. American Ordnance and DZI both operate melt-pour facilities that are parts of Army ammunition plants ("AAPs") owned by the U.S. government and run by private companies. American Ordnance operates two such plants, the Milan AAP and the Iowa AAP. DZI currently operates the AAP located in Parsons, Kansas ("Kansas AAP").

Through its plant in Le Gardeur, Canada, SNC produces large, medium, and small caliber ammunition ranging from 155 mm artillery shells to small caliber bullets. The company currently provides various caliber mortar rounds and artillery shells for the Canadian government, as well as 120 mm mortar rounds for the U.S. military. In 2005, SNC's Le Gardeur plant produced sales revenues of approximately \$45 million in propellant, explosives and ammunition.

Analysis to Aid Public Comment

American Ordnance is a joint venture owned equally by GD and DZI. The companies share equally in the profits of the joint venture, and both have representatives on American Ordnance's board of directors. American Ordnance, however, has its own management structure, and neither GD nor DZI is involved in the day-to-day operations of the joint venture. American Ordnance has contracts with the U.S. government to operate the Iowa and Milan AAPs through December 31, 2008. The Army has recently begun the process of seeking proposals for contracts to operate those plants after that date and anticipates awarding the contracts by September of 2008, at the latest, to provide sufficient transition time if a company other than American Ordnance wins the contracts.

In addition to its fifty percent ownership interest in American Ordnance, DZI also operates the Kansas AAP. Future operations of the Kansas AAP are doubtful, however, as the plant was designated for closure as part of the 2005 Base Realignment and Closure ("BRAC") legislation. The BRAC recommendations call for operations located at the Kansas AAP to be moved to other plants beginning in 2008, with full closure of the Kansas AAP scheduled to take place by 2011. Therefore, although three market participants existed in the most recent round of contracting for the provision of melt-pour LAP services for mortar rounds and artillery shells, it appears unlikely that the Kansas facility will remain a viable alternative for the next round of contracting, leaving only SNC and American Ordnance to bid.

V. Competitive Effects

The proposed transaction raises competitive concerns in the market for melt-pour LAP services for mortar rounds and artillery shells because, post-transaction, GD would own 100% of SNC, while at the same time retaining fifty percent ownership in American Ordnance. The competitive concerns arising from GD having some level of ownership interest in two of the three companies currently in the market for melt-pour LAP services for

Analysis to Aid Public Comment

mortar rounds and artillery shells are compounded by the fact that DZI appears likely to lose access to the Kansas AAP and, thus, may be unable to compete for the next round of contracts. This raises the likelihood that GD could act unilaterally to raise prices or otherwise engage in anticompetitive behavior in the market for melt-pour LAP services for mortar rounds and artillery shells. The proposed transaction also raises competitive concerns relating to the current round of competition for melt-pour LAP services for 120 mm and 60 mm and 81 mm mortar rounds.

Absent Commission action, it appears likely that the only two potential bidders for current and future melt-pour LAP service contracts for mortar rounds or artillery shells are SNC and American Ordnance. With the proposed acquisition, GD has an incentive to act unilaterally to raise prices in the relevant product market because it will own all of SNC and receive half of the profits from American Ordnance. GD would have an incentive to submit bids with higher pricing, or other less competitive terms, than SNC would have submitted as an independent company because even if GD/SNC loses the bid, it would lose to American Ordnance, in which GD shares fifty percent of the profits. Therefore, GD would have less incentive to compete vigorously for these contracts, because it would benefit financially regardless of which company wins the contract.

The proposed transaction also increases the likelihood that GD and American Ordnance could coordinate their competing bids for contracts. Through its ownership in American Ordnance, GD would have certain contacts and access to competitively sensitive information that could facilitate reaching terms of coordination, and the detection and punishment of deviations from those terms.

Analysis to Aid Public Comment

VI. Entry Conditions

Entry into the market for the provision of melt-pour LAP services for mortar rounds and artillery shells appears unlikely to occur within the relevant time frame. Establishing a melt-pour operation to effectively enter and compete in this market is expensive and time-consuming, and is unlikely to occur in the next two years, particularly because the Army is not planning any new acquisitions before 2011. Further, even if a firm were to enter the market, it would face the difficult task of winning a bid for a critical product without a demonstrated track record of being able to produce and deliver the product.

VII. The Proposed Consent Agreement

The proposed Consent Agreement effectively remedies the competitive harm that would likely result from the acquisition by requiring GD to divest its interest in American Ordnance, at no minimum price, to a purchaser that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission. The proposed Consent Agreement requires GD to divest its interest in American Ordnance within four months after it completes its acquisition of SNC. By requiring the divestiture of General Dynamic's interest in American Ordnance to a third party, the proposed Consent Agreement ensures that American Ordnance and a combined GD/SNC will remain independent competitors in the market post-acquisition.

Because the Consent Agreement contemplates a divestiture by GD of its interest in American Ordnance after acquiring SNC, an order to hold the American Ordnance business separate ("Hold Separate Order") is included. The Hold Separate Order requires that GD keep the American Ordnance business separate and apart from its other GD businesses, and that the company refrain from involvement in the direction, oversight, or influence of American Ordnance's business. The Hold Separate Order also requires that GD's members of American Ordnance's board of managers be

Analysis to Aid Public Comment

replaced with independent managers who are not affiliated with GD in any way. GD may not permit any of its employees, officers, or directors to be involved in the operations of American Ordnance while the Hold Separate Order remains in effect.

The proposed Consent Agreement also allows the Commission to appoint an interim monitor to oversee GD's compliance with all of its obligations and performance of its responsibilities pursuant to the Commission's Decision and Order. The interim monitor, if appointed, would be required to file periodic reports with the Commission to ensure that the Commission remains informed about the status of the divestiture and the efforts being made to accomplish the divestiture.

The proposed Consent Agreement includes a provision that requires GD to notify the Commission within five days of submitting a proposal to obtain the facilities use contract for either the Iowa AAP or the Milan AAP, and to provide the Commission with copies of all documents submitted as part of the proposal. This notification will allow the Commission to consult with the Department of Defense and the Army regarding possible competitive concerns that may arise in the future should GD be awarded the contracts to operate these melt-pour facilities in addition to owning SNC.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the Consent Agreement or to modify its terms in any way.

Complaint

IN THE MATTER OF
GOEN TECHNOLOGIES CORPORATION, ET
AL.

CONSENT ORDER, ETC. , IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4185; File No. 042 3127
Complaint, February 8, 2007 — Decision, February 8, 2007

This consent order requires respondents Goen Technologies Corporation, et al., to have competent and reliable scientific evidence substantiating any claims that TrimSpa® Completely Ephedra Free Formula X32 or any other covered product or service causes rapid and substantial weight loss or that the Hoodia gordonii, or any other appetite suppressant, in a covered product enables users to lose substantial amounts of weight by suppressing their appetite. The order provides for the payment of \$1,500,000 to the Commission and requires respondents to provide the Commission with a list of all consumers who respondents know purchased TrimSpa X32 from March 1, 2003, through the date of entry of this order. The funds paid by respondents shall be used by the Commission to provide direct redress to purchasers of Trimspa X32 and to pay any attendant costs of administration. Any funds not so used shall be paid to the United States Treasury. In addition, the order requires the respondents, for five years after the last date of dissemination of any representation covered by this order, to make available to the Commission all advertisements and promotional materials containing the representation, all materials that were relied upon in disseminating the representation, and all tests or other evidence that call into question the representation or the basis relied upon for the representation.

Participants

For the *Commission*: *Matthew Daynard, Michael Ostheimer,*
and *Brad Winter.*

For the *Respondents*: *M. Howard Morse, Drinker Biddle &*
Reath, Washington, DC; Donald A. Bashada and James M.
Fischer, Drinker Biddle, Florham Park, NJ; and Edward W.
Correia, Latham & Watkins LLP.

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that Goen Technologies Corporation, NutrAmerica Corporation, and Trimspa, Inc., corporations, and Alexander Szynalski a/k/a Alexander Goen, individually and as an officer of the corporations (“respondents”), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Goen Technologies Corporation (“GTC”) is a New Jersey corporation with its principal office or place of business at 35 Melanie Way, Whippany, New Jersey 07981.
2. Respondent NutrAmerica Corporation (“NutrAmerica”) is a Delaware corporation with its principal office or place of business at 35 Melanie Way, Whippany, New Jersey 07981.
3. Respondent Trimspa, Inc. (“Trimspa”) is a New Jersey corporation with its principal office or place of business at 35 Melanie Way, Whippany, New Jersey 07981.
4. Respondent Alexander Szynalski a/k/a Alexander Goen (“Szynalski”) is an officer of GTC, NutrAmerica, and Trimspa. Individually, or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of GTC, NutrAmerica, and Trimspa, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of the corporations.
5. Respondents have labeled, advertised, offered for sale, sold, and distributed purported weight-loss products to the public, including Trimspa® Completely Ephedra Free Formula X32 (“TrimSpa X32”). TrimSpa X32 is a tablet that, according to its label, contains, among other ingredients, Hoodia gordonii, chromium, vanadium, glucomannan, citrus naringine,

Complaint

glucosamine HCl, cocoa extract, and green tea extract. TrimSpa X32 tablets are “foods” or “drugs,” within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

6. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

7. Respondents have disseminated or have caused to be disseminated advertisements for TrimSpa X32, including but not necessarily limited to the attached Exhibits A through I. These advertisements contain the following statements and depictions:

Television Advertisements

- a. Video: *Cars racing on a track .*
- Video: “HIGH-SPEED” *[vibrating]*
- Video: *Cars racing on a track and close-up of a woman in a racing outfit.*
- Video: “DREAM *[vibrating]* BODY”
- Video: *Cars racing on a track and close-up of a woman in a racing outfit.*
- Video: “DIET PILL” *[vibrating]*
- Video: *Cars racing on a track.*
Super: “TRIMSPA EPHEDRA FREE FORMULA
Use as part of a diet and exercise program.
Results not typical.
Testimonials have lost weight on various
TrimSpa formulas.”
- Woman #1: “You think that’s fast? Try TrimSpa.”

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Woman #2 with: “I’ve lost 57 pounds.”
inset fatter photo
of herself

Woman #3 with: “TrimSpa has driven me to lose 25
inset fatter photo pounds.”
of herself

Man #1: “I’ve lost 8 pounds in 4 weeks.”

Man #2 with: “I lost 18 pounds in 6 weeks on
inset fatter photo ephedra free TrimSpa.”
of himself

Man #3: “TrimSpa works for my team.”

Woman #2: “The results are unbelievable.”

Woman #1: “Get the attention you deserve.”

Video: Super: “1-800-TRIMSPA
TRIMSPA.COM”

Woman #3: “TrimSpa putting you on the fast track to
become all you’ve ever envied.”

Exhibit A (30-second television advertisement)

b.

Video

Audio

John Daly swinging a golf club.

*Red band through center of
screen with white Aticker tape”
text scrolling across for
approximately 21 seconds of the
commercial:*

“BREAKING NEWS
*** BREAKING NEWS ***
BREAKING NEWS”

Woman: “Hey check out John

Complaint

- John Daly riding a motorcycle.* Daly's new golf cart."
- John Daly on a golf course.*
Super: "John Daly
 PGA Tour's Longest
 Driver
Ticker tape text:
 "**BREAKING NEWS ***
 ANNA NICOLE SMITH
 HAS LOST 30 LBS WITH
 TRIMSPA COMPLETELY
 EPHEDRA FREE!..."
*Super in white on a black
 background:* "TRIMSPA®
 EPHEDRA FREE
 FORMULA
Super: Use as part of a diet
 and exercise program.
 Results not typical."
- John Daly: "TrimSpa has
 driven me to lose 32 pounds."
- Woman on a golf course holding
 a flag pole with inset fatter
 photo of herself.* John Daly: "These are my
 new friends."
- Woman on a golf course putting
 with inset fatter photo of herself.* John Daly: "Jerrica down 25
 pounds"
- Man on a golf course driving
 with inset fatter photo of
 himself.* John Daly: "Karla Odell lost
 57 pounds"
- John Daly taking swings on a
 golf course.* John Daly: "And Jon Daniels
 over 100 pounds"
- John Daly: "All with
 TrimSpa. Patented TrimSpa"
- Super:* 1-800-TRIMSPA
 TRIMSPA.COM John Daly: "Your high speed

Complaint

dream body diet pill.”

John Daly: “Completely ephedra free. Call 1-800-TrimSpa or visit trimspa.com”

John Daly: “When it comes to getting your dream body, it’s a gimmee.”

Exhibit — (30-second television advertisement)

c. Video: *Woman with motorcycle posing and moving seductively.*

Super: “Diet and exercise improve results. Results not typical and may vary.”

Audio: “TRIMSPA”

Video: “Before” and “After” photos of woman
Super: “TRIMSPA X32
25 lbs in 2 2 months!”

Audio: “X32”

Video: *Woman continuing to move and pose.*

Audio: “The ultimate comeback — Get the attention you deserve — Go to trimspa.com and order TrimSpa X32 today”

Video: *Super:* “TRIMSPA X32
Be envied.
1-800-TRIMSPA
trimspa.com”

Audio: “also available at fine retailers everywhere.”

Exhibit C (30-second television advertisement)

Complaint

Radio Advertisements

- d. . . . If Anna Nicole Smith with her outrageous appetite lost 40 pounds to recapture her super-model days with TrimSpa Completely Ephedra Free . . . guess what TrimSpa's High Speed Dream Body Diet Pill can do for you!

You and your TrimSpa hot Dream Body will look mighty good next to a cool million dollars at the 2003 Radio Music Awards on Monday, October 27th on NBC.

Exhibit D (60-second radio advertisement)

- e. Howard Stern: Trimspa love it. Big fan. Super model Anna Nicole Smith. You know you forget she used to be a supermodel and then she got fat.

Robin Quivers: Yeah she used to model jeans as a matter of fact.

Howard Stern: Star Magazine did a thing on. — They had a shock-o-meter and the shock was that Anna Nicole Smith had lost 85 pounds.

Robin Quivers: That is shocking . . . that she had 85 to lose.

Howard Stern: TrimSpa formula X32 — boy is that good stuff. 2004 — you want your dream body — well here's your dream body diet pill. They're going to help you lose all that weight, just by taking a little pill. TrimSpa formula X32. It's got a secret ingredient used for centuries by African bushmen to suppress hunger during long hunting trips when food was scarce. That's the truth. That's how TrimSpa came about. It is an amazing formula. You don't see any fat African bushmen, I'll tell you that. Order your dream body now at TrimSpa.com. Call 1-800-TrimSpa.

Man talking in gibberish.

Complaint

Howard Stern: Thank you sir. Here's the inventor of it.
Gibberish continues.

Howard Stern: TrimSpa. Available at Walgreens, RiteAid, and GNC. TrimSpa be all you ever envied. Lose all the weight — shock some people yourself this year — just like Anna Nicole Smith did.

Exhibit E (Radio advertisement)

- f. Announcer: We know you've seen how amazing supermodel and actress Anna Nicole Smith looks since the number one selling diet pill in the country, TrimSpa X32, helped her lose 69 pounds!

What you might not know is that people just like you are also making their “ultimate comebacks” with the help of the Dream Body Diet Pill . . . people like Kipp Cowen, who, at age 37, was at least 100 pounds overweight. Fortunately, when his girlfriend recommended TrimSpa X32, Kipp listened.

Kipp: Hi, my name is Kip[p] Cowen, I'm from Dallas, Texas and in less than four months I have lost 59 pounds taking TrimSpa X32.

Announcer: And then there's the experience of Dichele Lutz, a lucky lady who couldn't be happier about “losing big” in Vegas!

Dichelle: Hello, my name is Dichelle Lutz. I'm from Las Vegas, Nevada and I have lost 78 pounds in seven months using TrimSpa X32.

Announcer: Come on, see what X32 can do for you. Order TrimSpa X32 today! Call 1-800-TrimSpa or go to TrimSpa.com or find it at GNC, Walgreens and Rite Aid! TrimSpa. Be Envied.

Exhibit F (60-second radio advertisement)

Complaint

Print Advertisements

- g. Trim
Spa

...

COMPLETELY EPHEDRA FREE

“Let’s face it, I’m a big guy,” says John Daly. . . . Then I started hearing about TrimSpa® products, went to trimspa.com and was knocked out by the ‘Before’ and ‘After’ pictures of folks whose lives were transformed by its amazing High-Speed **DREAM BODY™** Diet Pill.

. . . one of the owners of Greg Ray Racing — who was so thrilled with his 100 pound weight loss . . . — and even Anna Nicole Smith, who lost over 30 pounds with **TrimSpa™ COMPLETELY EPHEDRA FREE Formula X32!**

[“]Frankly, when I started using TrimSpa products I did think it sounded too good to be true,” admitted Daly. “But not only have I already burned off 32 pounds — the weight loss *continues*

...

**The Secret Ingredients
Behind TrimSpa™ COMPLETELY
EPHEDRA FREE Formula X32**

Hoodia Gordonii Cactus

The perfect solution for unwanted cravings and big appetites, this natural appetite suppressant stops hunger and leaves you feeling satisfied with less food, longer.

...

2003 TrimSpa Results not typical. Not for use by or sale to persons under 18 years of age. Healthy diet accompanied by exercising can only improve results. These statements have not been evaluated by the Food and Drug Administration. Not intended to treat, prevent, mitigate, or cure disease. Call 1-800-TRIMSPA or visit www.trimspa.com for use, guarantee details and requirements. Consult physician before using. Read the label and follow directions. Do not use any of these products if pregnant or nursing. . . .

Complaint

Exhibit G (Product info sheet for events)

h. **“I’M BACK!
THANKS TRIMSPA®!”**

— *Anna Nicole Smith*

ANNA, HOTTER THAN EVER. . .

. . . and she looks *amazing*! When the rumors began to fly that Anna Nicole lost an incredible amount of weight on a patented diet pill, the public was skeptical. We all watched her battle her weight in the past — without long-term success. But when her amazing “Before” and “After” pictures were released, we found ourselves embracing a new THIN Anna Nicole. Looking more beautiful than she ever has. Guess what? She even got back to her modeling days within only 12 weeks — this blond bombshell vows this is the real Anna Nicole. She found something that finally worked when nothing else did.

So what is it?

[*Depictions: Photographs of Anna Nicole Smith labeled “Before” and “After: 8/27/03” with the caption “Anna Nicole Smith’s After Pictures Taken On August 27, 2003, Just 12 Weeks After Taking Trimspa® X32”*]

**TRIMSPA® Worked for
Anna Nicole *because* . . .**

Patented TrimSpa® *COMPLETELY* EPHEDRA FREE Formula X32 contains the super appetite suppressant secret used by African tribesman for thousands of years to destroy hunger during long hunting trips — TrimSpa® *COMPLETELY* EPHEDRA FREE Formula X32 makes the impossible, possible. Its makes losing 30, 50, even 70 pounds (or however many pounds you need to lose) painless - Anna Nicole is proof that you can get your DREAM BODY™ and lose the weight. If it worked for Anna, TrimSpa® *COMPLETELY* EPHEDRA FREE Formula X32 can work for you, too!

Anna’s making the ultimate comeback! When are you going to make yours?

. . .

Complaint

TrimSpa
Be Envied.™

82003 Trimspa® Results not typical. Not for use by or sale to persons under 18 years of age. Healthy diet accompanied by exercising can only improve results. These statements have not been evaluated by the Food and Drug Administration. Not intended to treat, prevent, mitigate, or cure disease. Call 1-800-TRIMSPA or visit www.trimspa.com for use, guarantee details and requirements. Consult physician before using. Read the label and follow directions. Do not use if pregnant or nursing. If you are allergic to shellfish consult your doctor before deciding to take Glucosamine. Models have been compensated for photos. All models have become hotter and sexier (lost weight) using Trimspa® products. . . .

Exhibit H (Magazine advertisement)

Internet Advertising

i. **The Word Is Out . . .**

Anna Nicole Smith

[*Depictions: Photographs of Anna Nicole Smith labeled “Before **TRIMSPA**” and ~~And~~ After **losing 69 lbs!**”]*

Anna Nicole Smith Bares All . . .
. . . About Her Weight Loss!

Have you heard the naked facts? **Anna Nicole Smith** has **FINALLY** bared all on national TV and told the world **exactly** how much weight she lost using **TRIMSPA X32**, the **DREAM BODY Diet Pill!**

And exactly how much **DID** Anna lose in only eight months?

Sixty-nine pounds! Yes, believe it or not, Anna Nicole shed **sixty-nine** pounds with **TRIMSPA X32** to reveal one of the sexiest supermodel **DREAM BODIES** ever to slink down a runway during **Fashion Week** in New York! Now she’s seducing thousands of fans with her incredible new look on talk

Complaint

shows, TV specials, magazine photo spreads and soon, even in a major motion picture!

...

Well, now you not only know her fabulous secret, you're at the perfect place to discover how it can help **you** to lose **all** the weight and get the attention you deserve . . . just like Anna! So don't waste another moment! Click **HERE** to find out more about **TRIMSPA X32** and start making **your** ultimate comeback **right now!**

Buttons "Buy 1 Bottle" or to "Buy 3-Pack"

hyperlinks to "newsletter," "privacy & policies," "store locator," and "order status"

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The statements contained on this site have not been evaluated by the Food and Drug Administration. Not intended to diagnose, treat, prevent, mitigate or cure any disease. Testimonial results not typical. Your actual results may vary. Please read product labels before purchasing product. Please check with your physician before starting any weight loss program. Read the label and follow directions.

Exhibit I (www.trimspa.com — Anna Nicole Smith page
— June 2004)

j. TRIMSPA®
Frequently Asked Questions

* * *

< **How fast will I see results? How many pounds will I lose per week?**

TRIMSPA® products work differently in all people because each person has a different body chemistry. If you don't notice immediate results, please be patient. TRIMSPA's formulas are so unique that we're confident you can achieve significant fat reduction. Generally, weight loss of 2 to 4 pounds per week is considered safe, and such levels of weight loss have

Complaint

been demonstrated with the ingredients in TRIMSPA® products.

CAUTION: Although TRIMSPA® products contain no drugs whatsoever, do not let yourself lose weight too quickly. If you lose more than 10 pounds in the first 5 days, do not take any more pills for 2 or 3 days at the end of the first week.

...

hyperlinks to “newsletter,” “privacy & policies,” “store locator,” and “order status”

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The statements contained on this site have not been evaluated by the Food and Drug Administration. Not intended to diagnose, treat, prevent, mitigate or cure any disease. Testimonial results not typical. Your actual results may vary. Please read product labels before purchasing product. Please check with your physician before starting any weight loss program. Read the label and follow directions.

Exhibit I (www.trimspa.com — Frequently Asked Questions page — June 2004)

k. **TRIMSPA® X32 Testimonials**

Last year I gained 21 pounds! I was miserable and hated the way I looked. I decided to take control of my life and started using TRIMSPA® X32. I am happy to say that in 11 weeks, I was back to my normal weight. I had lost 21 pounds with the help of TRIMSPA® X32. . . . I am sold on TRIMSPA® X32 and now all of my friends are using it to lose weight and feel great! Thank you TRIMSPA®!

Chelsea Zedar
21 lbs more driven

*[Depictions: “before” and
“after” photos of Chelsea]*

TRIMSPA® X32 has changed my life. . . in such a short time I have lost 15 pounds. No other product has ever given me the results that this product has given me. . . .

Complaint

Complaint

[Depictions: “before” and
“after” photos of Dawn]

Dawn Marsico
15 lbs more in control

I found myself very unhappy with the way I looked and felt. I had heard of various weight loss supplements but was skeptical about the outcome. I came across TRIMSPA® X32 and lost 23 pounds in nine weeks. . . .

Sophia Poshni

[Depictions: “before”

and

23 lbs more confident “after” photos of Sophia]

I lost 25 pounds in three months on TRIMSPA® X32 and it also gave me more energy.

[Depictions: “before” and
“after” photos of Sunni]

Sunni Hemme
25 lbs more fierce

. . .

hyperlinks to “newsletter,” “privacy & policies,” “store locator,” and “order status@

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The statements contained on this site have not been evaluated by the Food and Drug Administration. Not intended to diagnose, treat, prevent, mitigate or cure any disease. Testimonial results not typical. Your actual results may vary. Please read product labels before purchasing product. Please check with your physician before starting any weight loss program. Read the label and follow directions.

Exhibit I (www.trimspa.com — TrimSpa X32
Testimonials page — June 2004)

1. **TRIMSPA® X32**

This formula was created to help achieve a sexier you ...

Complaint

Ingredients

Hoodia Gordonii (Hoo-dee-uh Gore-doh-nee) is a natural appetite suppressant, used for generations by South African tribesmen to stave off hunger during long hunting expeditions. . . .

Exhibit I (www.trimspa.com—TrimSpa X32 Ingredients page)

8. Through the means described in Paragraph 7, respondents have represented, expressly or by implication, that:

- A. TrimSpa X32 causes rapid and substantial weight loss; and
- B. Hoodia gordonii — an African appetite suppressant — in TrimSpa X32 enables users to lose substantial amounts of weight by suppressing their appetite.

9. Through the means described in Paragraph 7, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 8, at the time the representations were made.

10. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 8, at the time the representations were made. Therefore, the representation set forth in Paragraph 9 was, and is, false or misleading.

11. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Complaint

THEREFORE, the Federal Trade Commission this eighth day of February, 2007, has issued this complaint against respondents.

By the Commission, Commissioner Rosch recused.

Complaint

Exhibit A

Exhibit A is a computer file containing, *inter alia*, the material depicted in Part 7.a. of the Complaint. A copy of Exhibit A has been placed on the attached CD and, in its entirety, is hereby incorporated by reference into the Complaint.

Complaint

Exhibit B

Exhibit — is a computer file containing, *inter alia*, the material depicted in Part 7.b. of the Complaint. A copy of Exhibit — has been placed on the attached CD and, in its entirety, is hereby incorporated by reference into the Complaint.

Complaint

Exhibit C

Exhibit C is a computer file containing, *inter alia*, the material depicted in Part 7.c. of the Complaint. A copy of Exhibit C has been placed on the attached CD and, in its entirety, is hereby incorporated by reference into the Complaint.

Complaint

Exhibit D

TRIMSPA 2003 RADIO MUSIC AWARDS 60

Want to look and **Be Envied™** like a star—and *win a million bucks*? ~~Well~~, **TrimSpa®** is there to help you go for it at the 2003 Radio Music Awards on NBC live at 9pm Monday, October 27th! Get ready for the music event of the Century with knock out performances by Madonna, J-Lo, John Mayer, Shania Twain and more!

TrimSpa® will pick 5 winners a day, 125 in all, pack your pockets with five grand and fly you and a friend to a blockbuster back stage party at the Radio Music Awards—automatically qualifying you to win a *cool million dollars*!

For details go immediately to trimspa.com. What you also need to lose the weight!

If Anna Nicole Smith with her outrageous appetite lost **40** pounds to recapture her super-model days with **TrimSpa®** **COMPLETELY EPHEDRA FREE...guess what** **TrimSpa's®** High-Speed **DREAM BODY™** Diet Pill can do for you!

You and your **TrimSpa®** hot **DREAM BODY™** will look mighty good next to a *cool million dollars* at the 2003 Radio Music Awards on Monday, October 27th on NBC.

Complaint

Exhibit E

Exhibit E is a computer file containing, *inter alia*, the material depicted in Part 7.e. of the Complaint. A copy of Exhibit E has been placed on the attached CD and, in its entirety, is hereby incorporated by reference into the Complaint.

Complaint

Exhibit F

O4C8GTS

:60 Second Generic
Testimonial Spot

VO: We know you've seen how **amazing** supermodel and actress **Anna Nicole Smith** looks since the **Number One selling diet pill in the country, TRIMSPA X32**, helped her lose **69 pounds!**

What you might *not* know is that people just like you are also making *their* "ultimate comebacks" with the help of the **DREAM BODY Diet Pill**...people like **Kipp Cowen**, who, at age 37, was at least **100 pounds** overweight. Fortunately, when his girlfriend recommended **TRIMSPA X32**, Kipp *listened*....

KIPP: **(SOUND BITE)**
Hi, my name is Kip Cowen, I'm from Dallas, Texas and in less than four months I have lost 59 pounds taking TRIMSPA X32.

VO: And then there's the experience of **Dichele Lutz**, a lucky lady who couldn't be happier about "losing **big**" in Vegas!

DICHELE: **(SOUND BITE)**
Hello, my name is Dichele Lutz. I'm from Las Vegas, Nevada and I have lost 78 pounds in seven months using TRIMSPA ~~Formula~~ (Tim to take out of audio) X32.

VO: Come on, see what X32 can do for you. (Tim needs to have this VO taped) Order **TRIMSPA X32 TODAY!** Call **1-800 TRIMSPA** or go to **TRIMSPA.com**, or find it at **GNC, Walgreens** and **Rite Aid!** **TRIMSPA. Be Envied.**

Complaint

Exhibit G

Product Info Sheet for Events 10.9.03



"Let's face it, I'm a big guy," says John Daly. "I love food and could never pass up any kind of chocolate. So excess pounds became a way of life...besides, there was always the next size in pants and shirts. Then I started hearing about TrimSpa® products, went to trimspa.com and was knocked out by the 'Before' and 'After' pictures of folks whose lives were transformed by its amazing High-Speed DREAM BODY™ Diet Pill.

I was particularly impressed by fellow athletes who are still having tremendous success with TrimSpa® products. Guys like Bubba Paris, the three time Super Bowl® champ for the 49ers*; Tom McMillen, the NBA* star who was also the former Co-Chair for President Clinton's Council on Physical Fitness; Lee Mroszak, one of the owners of Greg Ray Racing—who was so thrilled with his 100 pound weight loss he uniformed the team and plastered the race car with TrimSpa® logos—and even Anna Nicole Smith, who lost over 30 pounds with TrimSpa® COMPLETELY EPHEDRA FREE Formula X32!

Frankly, when I started using TrimSpa® products I did think it sounded too good to be true," admitted Daly. "But not only have I already burned off 32 pounds—the weight loss continues—and, more importantly, I've been able to keep it off. I have more energy than I've ever had in my life and I look great! Heck, I'm getting so ripped I don't know if the ooohs and aaaahs from the gallery are for my long drive, or for my DREAM BODY!

Seriously, though, endorsing TrimSpa® products is a great way for me to show my appreciation of and my total belief in what TrimSpa® can do for just about anybody who tries it."

Tee it up, John...you're no longer a long shot to reach your ideal weight with TrimSpa® products!

TrimSpa® Retail Div: 1-800-TRIMSPA

The Secret Ingredients Behind TrimSpa® COMPLETELY EPHEDRA FREE Formula X32

Hoodia Gordonii Cactus

The perfect solution for unwanted cravings and big appetites, this natural appetite suppressant stops hunger and leaves you feeling satisfied with less food, longer.

Glucosamine

Your ultimate safeguard against gaining weight, this patented ingredient actually assists your metabolism in using the glucose (or blood sugar) in the foods you eat as a source of energy instead of storing it as ugly fat.

Green Tea Extract

Want to turn heads and stop traffic with sexy, defined muscles? This multi-purpose herb helps fight free radicals while it also helps burn fat and reveal the healthy, lean muscles underneath.

Cocoa Extract

Why look heavier than you really are? This natural diuretic helps rid the body of excess water so you look trimmer as you become trimmer.

Citrus Naringinine

Stop obesity before it begins by curbing your appetite and inhibiting the enzymes that can cause you to be overweight in the first place with this soluble source of fiber that keeps your system regular and your body lighter.

Chromium Chelavite™

Don't deprive yourself of the foods you love—while everyone else struggles to resist carbs, this important nutrient can help you achieve the same results low-carb diets offer but without having to sacrifice all breads, pastas and sugar!

Vanadium

The perfect answer to a day of indulgence with your favorite comfort foods, this natural appetite suppressant also assists your metabolism in converting carbohydrates—that might otherwise be stored as fat—into energy.

Glucosaminan

Feel satisfied and full while you actually eat less! This natural dietary fiber increases satiety, resulting in the lower caloric intake that ultimately helps you lose weight.

Sodium Carboxymethylcellulose

Say you can't eat another bite, and mean it! This non-toxic, indigestible solution helps fool your body by creating a sense of fullness while it's in the stomach, reducing the desire to eat...and the numbers on your scale!

OK
John
10/9/03

John Daly
10/9/03

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Complaint

Exhibit H

Anna Cosmo Ad with Coupon 11/11/03 5:19 PM Page 1

**"I'M BACK!
THANKS TRIMSPA!"**
-Anna Nicole Smith

ANNA, HOTTER THAN EVER...

...and she looks amazing! When the rumors began to fly that Anna Nicole lost an incredible amount of weight on a patented diet pill, the public was skeptical. We all watched her battle her weight in the past—without long-term success. But when her amazing "Before" and "After" pictures were released, we found ourselves embracing a new THIN Anna Nicole. Looking more beautiful than she ever has. Guess what? She even got back to her modeling days within only 12 weeks—his blonde bombshell vows this is the real Anna Nicole. She found something that finally worked when nothing else did.

So what is it?
TrimSpa® Worked for Anna Nicole because...

Patented TrimSpa® COMPLETELY EPHEDRA FREE Formula X32 contains the super appetite suppressant secret used by African tribesman for thousands of years to destroy hunger during long hunting trips—TrimSpa® COMPLETELY EPHEDRA FREE Formula X32 makes the impossible, possible. It makes losing 30, 50, even 70 pounds (or however many pounds you need to lose) painless...Anna Nicole is proof that you can get your DREAM BODY™ and lose the weight. If it worked for Anna, TrimSpa® COMPLETELY EPHEDRA FREE Formula X32 can work for you, too!

Anna's making the ultimate comeback! When are you going to make yours?

Call 1-800-634-3617 ext. M620 or visit www.M620.trimspa.com to get your DREAM BODY today. Also available at **GNC®, Walgreens®, Rite Aid® and CVS®.**

Be Envid® with TrimSpa® COMPLETELY EPHEDRA FREE Formula X32.

\$5.00 OFF
TrimSpa® COMPLETELY EPHEDRA FREE Formula X32

Available at these and other fine retailers:
GNC® Walgreens® Rite Aid® CVS®

Expires: 7/1/2004
Offer number: 68121
Coupon code: 5 67463 21274 1 681021 06

TrimSpa
Be Envid.™

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Complaint

Exhibit I


TRIMSPA. Be Envied. Page 1 of 2

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The Word Is Out...



Anna Nicole Smith Bares All...
...About Her Weight Loss!

Have you heard the naked facts? **Anna Nicole Smith** has **FINALLY** bared all on national TV and told the world **exactly** how much weight she lost using **TRIMSPA X32**, the **DREAM BODY Diet Pill!**

And exactly how much **DID** Anna lose in only eight months?

Sixty-nine pounds! Yes, believe it or not, Anna Nicole shed **sixty-nine** pounds with **TRIMSPA X32** to reveal one of the sexiest supermodel **DREAM BODIES** ever to slink down a runway during **Fashion Week** in New York! Now she's seducing thousands of fans with her incredible new look on talk shows, TV specials, magazine photo spreads and soon, even in a major motion picture!

For months, Anna's **ultimate comeback** was the talk of gossip columns,

<http://web.archive.org/web/20040624124528/www.trimspa.com/main/anna.shtml> 2/17/2006

Complaint

TRIMSPA. Be Envid.

Page 2 of 2

entertainment magazines and the popular press, all buzzing with the question, "How much did Anna lose, and how did she **do** it?"

Well, now you not only know her fabulous secret, you're at the perfect place to discover how it can help **you** to lose **all** the weight and get the attention you deserve...just like Anna! So don't waste another moment! Click **HERE** to find out more about **TRIMSPA X32**and start making **your** ultimate comeback **right now!**

Buy 1 Bottle
1 Bottle \$39.95

Buy 3-Pack
~~\$119.85~~ **\$39.95 for 3 bottles**
PLUS Free Gift
Save Over \$14 Off Retail

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The statements contained on this site have not been evaluated by the Food and Drug Administration. Not intended to diagnose, treat, prevent, mitigate or cure any disease. Testimonial results not typical. Your actual results may vary. Please read product labels before purchasing product. Please check with your physician before starting any weight loss program. Read the label and follow directions.

Complaint

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TRIMSPA® Frequently Asked Questions

We've prepared answers to some frequent questions about TRIMSPA® products to help you make an informed decision. We know that the more you learn about TRIMSPA® products, the more you'll see how effective they really are. If you're unsure which TRIMSPA® product is right for you, we invite you to try our [free online weight loss consultation](#). Or, if you're already familiar with our products and you're ready to purchase, [click here](#).

▶ How fast will I see results? How many pounds will I lose per week?
TRIMSPA® products work differently in all people because each person has a different body chemistry. For example, if you're a tall, big-boned person, you will probably lose more weight than someone who is short and small-boned. We've spoken to people who first noticed their results after a full 60 days of using TRIMSPA® products. If you don't notice immediate results, please be patient. TRIMSPA's formulas are so unique that we're confident you can achieve significant fat reduction. Generally, weight loss of 2 to 4 pounds per week is considered safe, and such levels of weight loss have been demonstrated with the ingredients in TRIMSPA® products.

CAUTION: Although TRIMSPA® products contain no drugs whatsoever, do not let yourself lose weight too quickly. If you lose more than 10 pounds in the first 5 days, do not take any more pills for 2 or 3 days at the end of the first week.

▶ How are TRIMSPA® products different from the other weight loss products out there?
TRIMSPA® X32 has an ingredient that prolongs the amount of time that food is available for energy, thus keeping it from being stored as fat. This ingredient is not new to us, but the research on its weight loss capabilities IS fairly new. This makes TRIMSPA® X32 the most technologically advanced body shaping formula ever!

▶ Is it safe to order online?
Absolutely. When you order TRIMSPA® online, your personal information is sent to us via secure servers. All your personal information is encrypted to ensure it doesn't fall into the wrong hands.

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<http://web.archive.org/web/20040706002552/www.trimspa.com/main/questions.shtml> 2/17/2006

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TRIMSPA. Be Envid.

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Complaint

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TRIMSPA. **Be Envied.** **CONSULTATION** **INFORMATION** **QUESTIONS** **TESTIMONIALS** **SHOP**

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next page

TRIMSPA® X32 Testimonials [Next Testimonial Page]

Last year I gained 21 pounds! I was miserable and hated the way I looked. I decided to take control of my life and started using TRIMSPA® X32. I am happy to say that in 11 weeks, I was back to my normal weight. I had lost 21 pounds with the help of TRIMSPA® X32. I felt so great about my new look that I entered the Miss Florida USA pageant. I am sold on TRIMSPA® X32 and now all my friends are using it to lose weight and feel great! Thank you TRIMSPA@!

Chelsea Zedar
21 lbs more driven



TRIMSPA® X32 has changed my life...in such a short time I have lost 15 pounds. No other product has ever given me the results that this product has given me. I feel like a whole new person and I owe it to TRIMSPA® X32. I feel healthy and happy again,

Complaint

TRIMSPA. Be Envid.

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before



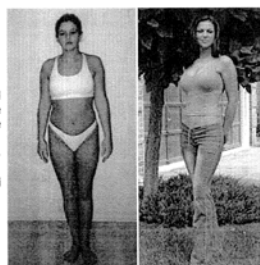
after

and I just want to thank everyone that made this product available to me. Thanks!

Dawn Marsico
15 lbs more *in control*

I found myself very unhappy with the way I looked and felt. I had heard of various weight loss supplements but was skeptical about the outcome. I came across TRIMSPA® X32 and lost 23 pounds in nine weeks. I have never been so happy and satisfied with the way I look. Thank you TRIMSPA®! You have changed my life.

Sophia Poshni
23 lbs more *confident*



before

after

Complaint

TRIMSPA. Be Envid.

Page 3 of 3



before



after

I lost 25 pounds in three months on TRIMSPA® X32 and it also gave me more energy.

Sunni Hemme
25 lbs more fierce

[Next Testimonial Page]

Note: If you have a success story or photos you'd like to share, please let us know. We'll be adding new testimonials constantly, so check back often.

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TRIMSPA. Be Envid.

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TRIMSPA

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[view directions](#)

TRIMSPA® X32

This formula was created to help achieve a sexier you...

Ingredients

- Hoodia Gordonii** (Hoo-dee-uh Gore-doh-nee) is a natural appetite suppressant, used for generations by South African tribesmen to stave off hunger during long hunting expeditions.
- Glucosamine** (Gloo-ko-so-meen) is an ingredient, patented by TRIMSPA for weight loss, that actually prolongs the amount of time glucose (or blood sugar) stays within the bloodstream after eating. This delay means that any extra insulin can be used directly by the muscles for energy, instead of being transferred too quickly to the "warehouse," or fat cells.
- Green Tea Extract** has long been known for its thermogenic-or heat generating-properties that promote burning of fat. The polyphenols in green tea also contain epigallocatechin gallate, which has been known to significantly reduce food intake and, subsequently, body weight in healthy adults. It is rich in potent bioflavonoids that, together with the polyphenols, provide the antioxidants so vital to fighting free radicals.
- Cocoa Extract** contains 3,7 - dimethylxanthine, also known as Theobromine, and is found naturally in cocoa beans.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Goen Technologies Corporation (“GTC”) is a New Jersey corporation with its principal office or place of business at 35 Melanie Way, Whippany, New Jersey 07981.

Decision and Order

Respondent Nutramera Corporation (“Nutramera”) is a Delaware corporation with its principal office or place of business at 35 Melanie Way, Whippany, New Jersey 07981.

Respondent Trimspa, Inc. (“Trimspa”) is a New Jersey corporation with its principal office or place of business at 35 Melanie Way, Whippany, New Jersey 07981.

Respondent Alexander Szynalski a/k/a Alexander Goen (“Szynalski”) is an officer of the corporate respondents. Individually, or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of the corporations. His principal office or place of business is the same as that of the corporations.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER**DEFINITIONS**

For purposes of this Order, the following definitions shall apply:

1. Unless otherwise specified, “Respondents” shall mean:
 - a. Goen Technologies Corporation (“GTC”), a corporation, its successors and assigns and its officers;
 - b. Nutramera Corporation (“Nutramera”), a corporation, its successors and assigns and its officers;
 - c. Trimspa, Inc (“Trimspa”), a corporation, its successors and assigns and its officers; and

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- d. Alexander Szynalski a/k/a/ Alexander Goen (“Szynalski”), individually and as an officer of the corporations;

and each of the above’s employees with managerial authority.

2. “Trimspa X32” shall mean the Trimspa® Completely Ephedra Free Formula X32 dietary supplement.
3. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
4. “Competent and reliable scientific evidence” shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
5. “Covered product or service” shall mean any dietary supplement, food, drug, device, or any health-related service or program.
6. “Endorsement” shall mean as defined in 16 C.F.R. § 255.0(b).
7. “Food,” “drug,” and “device,” shall mean “food,” “drug,” and “device” as defined in Section 15 of the FTC Act, 15 U.S.C. § 55.
8. The term “including” in this Order shall mean “without limitation.”
9. The terms “and” and “or” in this Order shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.

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I.

IT IS ORDERED that Respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, or sale of Trimspa X32 or any other covered product or service, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a product name or endorsement:

- A. That such product or service causes rapid and substantial weight loss;
- B. That the Hoodia gordonii, or any ingredient, in such product, enables users to lose substantial amounts of weight by suppressing their appetite; or
- C. About the health benefits, performance, efficacy, safety or side effects of such product or service, unless the representation is true, not misleading, and, at the time it is made, Respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

IT IS FURTHER ORDERED that:

- A. Nothing in this order shall prohibit Respondents from making any representation for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration; and
- B. Nothing in this order shall prohibit Respondents from making any representation for any product that is

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specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990; and

- C. Nothing in this order shall prohibit Respondents from making any representation for any device that is permitted in labeling for such device under any new medical device application approved by the Food and Drug Administration.

III.

IT IS FURTHER ORDERED that Respondents shall pay to the Federal Trade Commission the sum of one million five hundred thousand dollars (\$1,500,000). This payment shall be made in the following manner:

- A. The payment shall be made by wire transfer or certified or cashier's check made payable to the Federal Trade Commission, the payment to be made no later than fifteen (15) days after the date that this order becomes final.
- B. In the event of any default in payment, which default continues for ten (10) days beyond the due date of payment, the amount due, together with interest, as computed pursuant to 28 U.S.C. § 1961 from the date of default to the date of payment, shall immediately become due and payable to the Commission.
- C. The funds paid by Respondents, together with any accrued interest, shall, in the discretion of the Commission, be used by the Commission to provide direct redress to purchasers of Trimspa X32 in connection with the acts and practices alleged in the complaint, and to pay any attendant costs of administration. If the Commission determines, in its sole discretion, that redress to purchasers of this product is wholly or partially impracticable or is

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otherwise unwarranted, any funds not so used shall be paid to the United States Treasury. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission. No portion of the payment as herein provided shall be deemed a payment of any fine, penalty or punitive assessment.

- D. Respondents relinquish all dominion, control, and title to the funds paid, and all legal and equitable title to the funds vests in the Treasurer of the United States and in the designated consumers. Respondents shall make no claim to or demand for return of funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of any respondent, Respondents acknowledge that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

IV.

IT IS FURTHER ORDERED that Respondents shall, no later than twenty (20) days after the date that this Order becomes final, deliver to the Commission a list, in the form of a sworn affidavit, of all consumers who purchased TrimSpa X32 on or after March 1, 2003 through the date of entry of this Order, to the extent that such purchasers are known to Respondents through a diligent search of their records, including but not limited to computer files, sales records, and inventory lists. Such list shall include each consumer's name and address, the product(s) purchased, the quantity and the amount paid, including shipping and handling charges, and if available, the consumer's telephone number and email address.

V.

IT IS FURTHER ORDERED that Respondents GTC, Nutramerica, and Trimspa, and their successors and assigns, and

Decision and Order

Respondent Szynalski shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon reasonable notice make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

IT IS FURTHER ORDERED that Respondents GTC, Nutramerica, and Trimspa, and their successors and assigns, and Respondent Szynalski shall deliver a copy of this order to all current and future principals, officers, directors, and other employees with managerial authority having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

IT IS FURTHER ORDERED that Respondents GTC, Nutramerica, and Trimspa, and their successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporations that may affect compliance obligations arising

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under this order, including, but not limited to, dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporations about which Respondents learn less than thirty (30) days prior to the date such action is to take place, Respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

VIII.

IT IS FURTHER ORDERED that Respondent Szynalski, for a period of seven (7) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his individual current business or employment, or of his individual affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

IX.

IT IS FURTHER ORDERED that Respondents GTC, Nutramerica, and Trimspa, and their successors and assigns, and Respondent Szynalski shall, within sixty (60) days after service of this order, and, upon reasonable notice, at such other times as the Federal Trade Commission may require, file with the Commission

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a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

X.

IT IS FURTHER ORDERED that this order will terminate on February 8, 2027, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any Respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the Respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Rosch recused.

Analysis to Aid Public Comment

**ANALYSIS OF PROPOSED CONSENT ORDER TO AID
PUBLIC COMMENT**

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Goen Technologies Corp., Nutramerica Corp., TrimSpa, Inc., and Alexander Szynalski a/k/a Alexander Goen (together, “respondents”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

This matter involves the advertising and promotion of Trimspa® Completely Ephedra Free Formula X32 (“TrimSpa X32”), a dietary supplement that, according to its label, contains, among other ingredients, Hoodia gordonii, chromium, vanadium, glucomannan, citrus naringine, glucosamine HCl, cocoa extract, and green tea extract. According to the FTC complaint, respondents represented that TrimSpa X32 causes rapid and substantial weight loss; and that Hoodia gordonii — an African appetite suppressant — in TrimSpa X32 enables users to lose substantial amounts of weight by suppressing their appetite. The complaint alleges that respondents failed to have substantiation for these claims. The proposed consent order contains provisions designed to prevent respondents from engaging in similar acts and practices in the future.

Part I of the proposed order requires respondents to have competent and reliable scientific evidence substantiating any claims that a covered product or service causes rapid and substantial weight loss or that the Hoodia gordonii, or any other appetite suppressant, in a covered product enables users to lose

Analysis to Aid Public Comment

substantial amounts of weight by suppressing their appetite. The provision further requires that any such claim be true. A “covered product or service” is defined as “any dietary supplement, food, drug, or device, or any health-related service or program.” Part I.C. further requires that future claims about the health benefits, performance, efficacy, safety, or side effects of any covered product or service be truthful and supported by competent and reliable scientific evidence.

Part II of the proposed order provides that the order does not prohibit respondents from making representations for any drug that are permitted in labeling for the drug under any tentative final or final Food and Drug Administration (“FDA”) standard or under any new drug application approved by the FDA; representations for any medical device that are permitted in labeling under any new medical device application approved by the FDA; and representations for any product that are specifically permitted in labeling for that product by regulations issued by the FDA under the Nutrition Labeling and Education Act of 1990.

Part III provides for the payment of \$1,500,000 to the Commission.

Part IV of the proposed order requires respondents to provide the Commission with a list of all consumers who respondents know purchased TrimSpa X32 from March 1, 2003 through the date of entry of this Order.

Parts V through IX require respondents to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to certain of their personnel; to notify the Commission of changes in corporate structure (for the corporate respondents) and changes in employment (for the individual respondent) that might affect compliance obligations under the order; and to file compliance reports with the Commission. Part X provides that the order will terminate after twenty (20) years under certain circumstances.

Analysis to Aid Public Comment

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

ZANGO, INC., ET AL.CONSENT ORDER, ETC. , IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-4186; File No. 052 3130
Complaint, March 7, 2007 — Decision, March 7, 2007*

This consent order addresses the developing, marketing, and distributing via Internet downloads of advertising software programs (“adware”) that monitor consumers’ Internet use in order to display targeted pop-up ads. Respondents Zango, Inc., and Keith Smith and Daniel Todd, individually and as officers of Zango, through third-party affiliates, installed their adware on consumers’ computers without adequate notice or consent; and made their adware difficult for consumers to identify, locate, and remove. The order prohibits respondents from contacting any consumer’s computer, to display ads or otherwise, if their adware was installed on that computer before January 1, 2006. The order also prohibits respondents from, or assisting others in, installing software onto any computer by exploiting security vulnerabilities or failing to give adequate notice to consumers, or installing any software program or application without express consent. Respondents must require affiliates to obtain express consent before installing software, and must establish and maintain mechanisms through which consumers can report and respondents can address complaints, and consumers can locate and uninstall respondents’ adware. In addition, the order requires respondents to pay \$3 million to the Commission; these funds may be used to provide such relief as the Commission determines to be reasonably related to respondents’ practices, including the rescission of contracts, payment of damages, and/or public notification respecting such unfair or deceptive practices. Any funds not used shall be paid to the U.S. Treasury.

Participants

For the *Commission: David K. Koehler and Carl H. Settlemyer.*

For the *Respondents: Christine A. Varney and Mary Ellen Callahan, Hogan & Hartson LLP.*

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that Zango, Inc. f/k/a 180solutions, Inc., a corporation, Keith Smith, individually and as an officer of the corporation, and Daniel Todd, individually and as an officer of the corporation (collectively “Respondents”), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Zango, Inc. f/k/a 180solutions, Inc., is a Washington corporation with its principal place of business located at 3600 136th Place SE, Bellevue, Washington 98006. On June 7, 2006, 180solutions merged with New York-based Hotbar, Inc. and changed the combined company’s name to Zango, Inc.
2. Respondent Keith Smith is a founder and officer of the corporate respondent. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of the corporation, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Zango, Inc.
3. Respondent Daniel Todd is a founder and officer of the corporate respondent. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of the corporation, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Zango, Inc.
4. The acts and practices of Respondents alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.
5. Since at least 2002, Respondents have developed advertising software programs (“adware”), including without limitation programs called n-CASE, 180Search Assistant, Zango, and

Complaint

Seekmo, and distributed such programs to consumers' computers via Internet downloads.

6. When installed on a consumer's computer, Respondents' adware monitors Internet use on the computer and displays pop-up advertisements based on that Internet use. Consumers have received over 6.9 billion pop-up advertisements as a result of Respondents' adware.

7. Respondents' adware has been installed on U.S. consumers' computers over 70 million times.

8. One of Respondents' primary methods of distributing their adware is or has been to pay third-party affiliates to install Respondents' adware on consumers' computers.

9. Respondents know or have known that their affiliates retained numerous third-party sub-affiliates to install Respondents' adware on consumers' computers.

10. In numerous instances, Respondents, through affiliates and sub-affiliates acting on behalf and for the benefit of Respondents, bundled Respondents' adware with purportedly free software programs (hereinafter "lureware"), including without limitation Internet browser upgrades, utilities, screen savers, games, peer-to-peer file sharing, and/or entertainment content. Respondents, through affiliates and sub-affiliates, generally represented the lureware as being free.

11. When installing the lureware, consumers often have been unaware that Respondents' adware would also be installed because that fact was not adequately disclosed to them. In some instances, no reference to Respondents' adware was made on the website offering the lureware or in the install windows. In other instances, information regarding Respondents' adware was available only by clicking on inconspicuous hyperlinks contained in the install windows or in lengthy terms and conditions regarding the lureware. Because the lureware often was bundled

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with several different programs, the existence and information about the effects of Respondents' adware could only be ascertained, if at all, by clicking through multiple inconspicuous hyperlinks.

12. In numerous other instances, Respondents, through affiliates and sub-affiliates acting on behalf and for the benefit of Respondents, have installed Respondents' adware on consumers' computers by exploiting security vulnerabilities in Internet web browsers. Installations by this process, also known as "drive-by" downloads or "stealth" installations, provided no notice to consumers that Respondents' adware was being installed on their computers.

13. Respondents knew or should have known that there was widespread failure by their affiliates and sub-affiliates to provide adequate notice of their adware and obtain consumer consent to its installation. Indeed, notwithstanding their own contractual provisions or codes of conduct to the contrary, Respondents continued to allow certain affiliates, who were providing a large volume of installations, to install Respondents' adware for as long as seventeen months after Respondents became aware of the unauthorized installations.

14. Until at least mid-2005, Respondents made identifying, locating, and removing their adware extremely difficult for consumers by, in numerous instances, among other practices:

- a. Failing to identify adequately the name or source of the adware in pop-up ads so as to enable consumers to locate the adware on their computers;
- b. Naming adware files or processes with names resembling core systems software or applications and placing files in a variety of locations;

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- c. Listing the adware in the Windows Add/Remove utility under names, including “Uninstall 180search Assistant,” intended and/or likely to confuse the consumer (*i.e.*, the consumer would not want to remove a program needed to uninstall the adware);
- d. Requiring consumers to follow a multiple-step procedure to uninstall the adware, including having a live connection to the Internet and downloading additional software from Respondents;
- e. Requiring consumers who sought to uninstall the adware to click through multiple warning messages;
- f. Representing to consumers that the adware did not show pop-up ads, that uninstalling the adware would not prevent the consumer from getting pop-up ads, and/or by exaggerating the consequences of uninstalling the adware;
- g. Failing to disclose adequately that, in some versions of the adware, disabling the display of Respondents’ pop-up advertisements would not disable the adware from monitoring and generating logs of the Internet browsing activities of consumers using that machine nor disable Respondents’ collection of such information;
- h. Providing an uninstall tool that failed to uninstall the adware in whole or part;
- i. Installing technology on consumers’ computers to silently reinstall the adware when consumers have attempted to remove it manually or to remove it using third-party anti-spyware or anti-adware programs; and/or
- j. Reinstalling the adware files on the consumer’s computer with randomly generated names to avoid further detection and removal.

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15. Respondents' practices forced consumers to invest significant time and effort, often including the expense of purchasing third party anti-spyware applications, to detect and rid their computers of Respondents' unwanted adware.

VIOLATIONS OF THE FTC ACT**Deceptive Failure Adequately to Disclose Adware**

16. In numerous instances, as described in Paragraphs 8 through 11, Respondents, through affiliates and sub-affiliates acting on behalf and for the benefit of Respondents, represented to consumers, expressly or by implication, that they would receive lureware (including without limitation Internet browser upgrades, utilities, screen savers, games, peer-to-peer file sharing, and/or entertainment content). In numerous instances, Respondents, through affiliates and sub-affiliates acting on behalf and for the benefit of Respondents, failed to disclose, or failed to disclose adequately, that the lureware was bundled with Respondents' adware that would monitor consumers' Internet use and cause consumers to receive numerous pop-up advertisements based on such use. The bundling of adware would be material to consumers in their decision whether to install the lureware. The failure adequately to disclose this fact, in light of the representations made, was, and is, a deceptive act or practice.

Unfair Installation of Adware

17. In numerous instances, as described in Paragraphs 8 through 15, Respondents, through affiliates and sub affiliates acting on behalf of and for the benefit of Respondents, installed on consumers' computers, without their knowledge or authorization, adware that could not be reasonably identified, located, or removed by consumers. Consumers thus have had to spend substantial time and/or money to locate and remove this adware from their computers. Respondents' practice has caused or is likely to cause substantial injury to consumers that cannot

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reasonably be avoided by the consumers themselves and is not outweighed by benefits to consumers or competition. These acts and practices were, and are, unfair.

Unfair Uninstall Practices

18. In numerous instances, as described in Paragraphs 14 through 15, Respondents failed to provide consumers with a reasonable and effective means to identify, locate, and remove Respondents' adware from their computers. Consumers thus have had to spend substantial time and/or money to locate and remove this adware from their computers. Respondents' practices have caused or are likely to cause substantial injury to consumers that cannot reasonably be avoided by consumers themselves and is not outweighed by benefits to consumers or competition. These acts and practices were, and are, unfair.

19. The acts and practices alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission, on this seventh day of March, 2007, issues this complaint against Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Respondents named in the caption hereof, and the Respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the

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Commission for its consideration and which, if issued by the Commission, would charge the Respondents with violation of the Federal Trade Commission Act; and

The Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the Respondents of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the Respondents that the law has been violated as alleged in such complaint, or that any of the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondents have violated the Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to section 2.34 of its Rules, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Zango, Inc. f/k/a 180solutions Inc. is a Washington corporation with its principal place of business located at 3600 136th Place SE, Bellevue, Washington 98006.
2. Respondent Keith Smith is a founder and officer of the corporate Respondent. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of the corporation, including the acts and practices

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alleged in the draft complaint. His principal office or place of business is the same as that of Zango, Inc. f/k/a 180solutions, Inc.

3. Respondent Daniel Todd is a founder and officer of the corporate Respondent. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of the corporation, including the acts and practices alleged in the draft complaint. His principal office or place of business is the same as that of Zango, Inc. f/k/a 180solutions, Inc.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER**DEFINITIONS**

For purposes of this order, the following definitions shall apply:

1. Unless otherwise specified, “Respondents” means Zango, Inc. f/k/a 180solutions, Inc., its successors and assigns, and their officers; Keith Smith, individually and as an officer of the corporation; and Daniel Todd, individually and as an officer of the corporation; and each of the above’s agents, representatives, and employees.

2. “Affiliate program” means any program whereby any person or entity agrees to disseminate, distribute, or download any software program or application onto consumers’ computers, on behalf of Respondents.

3. “Affiliate” means any person or entity who participates in an affiliate program.

4. “Assist others” means knowingly providing any of the following services to any person or entity: (a) developing, supplying, distributing, or publishing any software program,

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product, or service; or (b) formulating, developing, or providing, or arranging for the formulation, development, or provision of, any Internet advertising or marketing content for any person or entity; or (c) performing advertising or marketing services of any kind for any person or entity.

5. “Clear(ly) and prominent(ly)” shall mean that, in an electronic medium, the disclosure shall be: (a) unavoidable; (b) of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it; (c) in understandable language and syntax; and (d) additionally, in connection with each advertisement or promotion for the download or installation of any software program or application, shall be presented on the principal screen or landing page of each advertisement or promotion, and prior to the consumer downloading or installing such software program or application. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotion.

6. “Commerce” means as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

7. “Express consent” shall mean that, prior to downloading or installing any software program or application to consumers’ computers: (a) Respondents clearly and prominently disclose the material terms of such software program or application prior to the display of, and separate from, any final End User License Agreement; and (b) consumers indicate assent to download or install such software program or application by clicking on a button that is labeled to convey that it will activate the download or installation, or by taking a substantially similar action.

8. A “security vulnerability” is a weakness, flaw, or bug in a software program or application that can be used to increase access privileges to a computer system, compromise data stored on it, or control its operation.

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9. “Legacy program” shall mean any software program that: (a) is owned or controlled by Respondents; and (b) was installed on a consumer’s computer prior to January 1, 2006.

10. The “World Wide Web” or the “Web” is a system used on the Internet for cross-referencing and retrieving information. Documents (“webpages” or “websites”) on the World Wide Web are most frequently formatted in a language called HTML or HyperText Markup Language, that supports links to other documents on the World Wide Web.

11. A “website” is a set of electronic files or documents, usually a home page and subordinate pages, readily viewable on a computer by anyone with access to the Web and standard Internet browser software.

12. A “web browser” is a software application used to view, download, upload, surf, or otherwise access documents (“webpage(s)” or “website(s)”) on the World Wide Web. Web browsers read coded documents that reside on servers, and interpret the coding into what users see rendered as a webpage or website. A user may retrieve and view a webpage or website by entering the Uniform Resource Locator (“URL”) or domain name of the webpage in the address bar of the web browser.

I.

IT IS ORDERED that Respondents, directly or through any person, corporation, subsidiary, division, affiliate, or other device, shall not use any legacy program to display any advertisement to, or otherwise communicate with, a consumer’s computer. The provisions of Part I do not apply to any software program or application that was owned or controlled by Hotbar, Inc.

II.

IT IS FURTHER ORDERED that Respondents, directly or through any person, corporation, subsidiary, division, affiliate, or

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other device, shall not publish, disseminate, or distribute or assist others in publishing, disseminating, or distributing, on or through the Internet, the World Wide Web, any bulletin board system, File Transfer Protocol (“FTP”), electronic-mail, instant message, webpage, or website in or affecting commerce, any software script, code, or other content in order to exploit a security vulnerability of any computer operating system, web browser, or other application to download or install onto any computer any software code, program, or content.

III.

IT IS FURTHER ORDERED that Respondents, directly or through any person, corporation, subsidiary, division, affiliate, or other device, in connection with the advertising, promotion, marketing, offering for sale, sale, or provision of any goods or services on or through the Internet, the World Wide Web, or any webpage or website in or affecting commerce, shall not install or download, or assist others in installing or downloading, any software program or application without express consent.

IV.

IT IS FURTHER ORDERED that Respondents, directly or through any person, corporation, subsidiary, division, affiliate, or other device, in connection with the advertising, promotion, marketing, offering for sale, sale, or provision of any goods or services on or through the Internet, the World Wide Web, or any webpage or website in or affecting commerce, shall: (1) establish, implement, and maintain a functioning email address or other Internet-based mechanism for consumers to report complaints regarding Respondents’ practices; (2) conspicuously disclose the existence of such reporting mechanism on Respondents’ websites; (3) use best efforts to associate each such complaint correctly with the software, application, website, or good or service that is the subject of the complaint; and (4) receive and respond to such

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complaints, whether received directly or indirectly, in a timely manner via email or other Internet-based mechanism.

V.

IT IS FURTHER ORDERED that Respondents, directly or through any person, corporation, subsidiary, division, affiliate, or other device, in connection with the advertising, promotion, marketing, offering for sale, sale, or provision of any goods or services on or through the Internet, the World Wide Web, or any webpage or website in or affecting commerce, shall establish, implement, and thereafter maintain, a comprehensive program that is reasonably designed to ensure that affiliates obtain express consent before installing Respondents' software program or application onto consumers' computers. Such measures shall include, at a minimum and without limitation, the following:

- A. Obtain contact information from any prospective participant in any affiliate program. In the case of a natural person, Respondents shall obtain the prospective participant's first and last name, physical address, country, telephone number, email address, and complete bank account information as to where payments are to be made. In the case of corporations, partnerships, proprietorships, limited liability companies, organizations, associations, cooperatives, agencies, or other legal entities, Respondents shall obtain the first and last name, physical address, country, telephone number, and email address for the natural person who owns, manages, or controls the prospective participant, and complete bank account information as to where payments are to be made;
- B. Prior to any such prospective participant's acceptance into any affiliate program, (1) provide each such person a copy of this order; (2) obtain from each such person a signed and dated statement acknowledging receipt of this order and expressly agreeing to comply with this order; and (3) provide written notice that engaging in acts or practices

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prohibited by this order will result in immediate termination of any affiliate program account and forfeiture of all monies earned or owed. Any electronic signature that Respondents obtain pursuant to this Part must comply with the signature requirements of the Electronic Signatures in Global and National Commerce Act (“E-Sign Act”), 15 U.S.C. § 7001 *et seq.*;

- C. Require each affiliate to: (1) provide identifying information to Respondents, including the same types of information as required by Subpart A of this Part, concerning that affiliate’s sub-affiliates, employees, agents, or sub-contractors who download or install any software program or application onto consumers’ computers on Respondents’ behalf; (2) provide each such person with a copy of this order; and (3) obtain from each such person a signed and dated statement acknowledging receipt of this order and expressly agreeing to comply with this order. The identifying information referred to herein shall be required prior to that affiliate’s participation in Respondents’ affiliate program or immediately after any change to that affiliate’s sub-affiliates, employees, agents or sub-contractors;

- D. In accord with Part IV above: (1) establish, implement, and maintain a functioning email address or other Internet-based mechanism for consumers to report complaints to Respondents regarding the practices of any affiliate; (2) clearly and prominently disclose the existence of such reporting mechanism on Respondents’ websites; (3) use best efforts to associate each such complaint correctly with the affiliate that is the subject of the complaint; and (4) receive and respond to such complaints, whether received directly or indirectly, in a timely manner via email or other Internet-based mechanism; and

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- E. Promptly and completely investigate any complaints that the Respondents receive through Subpart D of this Part or any other source to determine whether any such affiliate is engaging in acts or practices prohibited by this order;
- F. Following completion of the investigation required by Part V(E) above: (1) immediately terminate any affiliate that Respondents reasonably conclude has engaged or is engaging, directly or indirectly, in acts or practices prohibited by this order and cease payments to any such affiliate; and thereafter (2) immediately cease the display of any advertisements to, or otherwise using the software program or application to communicate with, any consumer's computer that received Respondents' software program or application through the prohibited acts or practices of such affiliate, except that Respondents may remove or assist consumers in the removal of Respondents' software program or application. Notwithstanding the foregoing, Respondents may send a notice to the affected consumers' computers that clearly and prominently states: (a) that the software program or application may have been installed on their computer without their consent; (b) that they will no longer receive any advertising or communication from Respondents; and (c) how they can remove all vestiges of the software program or application from their computers. The foregoing notice may not be served more than one (1) time to any computer on which a software program or application was installed and must be served within five (5) days after the termination of the affiliate.

Provided, however, that this Part does not authorize or require Respondents to take any action that violates any federal, state, or local law.

Decision and Order

VI.

IT IS FURTHER ORDERED that Respondents, directly or through any person, corporation, subsidiary, division, affiliate, or other device, in connection with the service of any advertisement served or caused by Respondents' software program or application installed on consumers' computers in or affecting commerce, shall in each such advertisement clearly and prominently: (1) identify the program causing the display of such advertisement, together with language specifying that the advertisement is served by such program; (2) provide a hyperlink or other similar technology directly linking to a webpage that provides clear and prominent instructions for (a) uninstalling Respondents' software or other application through which consumers received such advertisement; and (b) accessing Respondents' complaint mechanism as required by Part IV above. Such hyperlink shall be clearly named to indicate these functions.

VII.

IT IS FURTHER ORDERED that Respondents, directly or through any person, corporation, subsidiary, division, affiliate, or other device, shall not install or cause to be installed on consumers' computers any software program or application in connection with the advertising, promotion, marketing, offering for sale, sale, or provision of any goods or services on or through the Internet, the World Wide Web, or any webpage, or website, in or affecting commerce unless Respondents provide a reasonable and effective means for consumers to uninstall the software or application, either through the computers' operating system Add/Remove utility, or other uninstall tool that can be readily located on consumers' computers. Respondents shall not require consumers to: access any website or download or install any additional software program or application; close or deactivate third-party firewalls, operating system firewalls, anti-spyware or anti-adware software, or virus protection software; or provide

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personally identifiable information in order to complete the uninstall.

VIII.

IT IS FURTHER ORDERED that, for a period of five (5) years after the date of issuance of this order, Respondents shall maintain, and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of each document relating to compliance with the terms and provisions of this order, including but not limited to: all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, whether prepared by or on behalf of Respondents, relating to such compliance; and all documents, whether prepared by or on behalf of Respondents, that contradict, qualify, or call into question Respondents' compliance with this order.

IX.

IT IS FURTHER ORDERED that Respondents shall pay to the Federal Trade Commission the sum of three million dollars (\$3,000,000.00). This payment shall be made in the following manner:

- A. The payment shall be made by wire transfer or certified or cashier's check made payable to the Federal Trade Commission in three installments as follows:
1. One million dollars (\$1,000,000.00) no later than ten (10) days after the date of issuance of this order;
 2. One million dollars (\$1,000,000.00) no later than six (6) months after the date of issuance of this order; and
 3. One million dollars (\$1,000,000.00) no later than twelve (12) months after the date of issuance of this order.

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- B. In the event of any default in payment, which default continues for ten (10) days beyond the due date of payment, the amount due, together with interest, as computed pursuant to 28 U.S.C. § 1961 from the date of default to the date of payment, shall immediately become due and payable to the Commission. Respondents agree that, in such event, the facts as alleged in the complaint shall be taken as true in any subsequent litigation filed by the Commission to enforce its rights pursuant to this order, including but not limited to a nondischargeability complaint in any subsequent bankruptcy proceeding.
- C. All funds paid pursuant to this Part, together with any accrued interest, shall be used by the Commission in its sole discretion to provide such relief as it determines to be reasonably related to Respondents' practices alleged in the complaint, and to pay any attendant costs of administration. Such relief may include, but shall not be limited to, the rescission of contracts, payment of damages, and/or public notification respecting such unfair or deceptive practices. If the Commission determines, in its sole discretion, that such relief is wholly or partially impractical, any funds not so used shall be paid to the United States Treasury. Respondents shall be notified as to how the funds are distributed but shall have no right to contest the manner of distribution chosen by the Commission. No portion of the payment as herein provided shall be deemed a payment of any fine, penalty, or punitive assessment.
- D. Respondents shall make no claim to or demand for the return of the funds, directly or indirectly, through counsel or otherwise; and in the event of Respondents' bankruptcy, Respondents acknowledge that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

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X.

IT IS FURTHER ORDERED that Respondents shall, in connection with this action or any subsequent investigations related to or associated with the transactions or occurrences that are the subject of the Complaint, cooperate in good faith with the Commission and appear, or cause their officers, employees, representatives, or agents to appear, at such places and times as the Commission shall reasonably request, after written notice, for interviews, conferences, pretrial discovery, review of documents, and for such other matters as may be reasonably requested by the Commission. If requested in writing by the Commission, Respondents shall appear, or cause their officers, employees, representatives, or agents to appear, and provide truthful testimony in any trial, deposition, or other proceeding related to or associated with the transactions or occurrences that are the subject of the Complaint, without the service of a subpoena.

XI.

IT IS FURTHER ORDERED that Respondent Zango, Inc. f/k/a 180solutions, Inc., its successors and assigns, and Respondents Keith Smith, and Daniel Todd shall delivery a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of the order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

XII.

IT IS FURTHER ORDERED that Respondent Zango, Inc. f/k/a 180solutions, Inc., its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under

Decision and Order

this order, including but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that with respect to any proposed change in the corporation about which Respondent learns less than thirty (30) days prior to the date such action is to take place, Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580.

XIII.

IT IS FURTHER ORDERED that Respondents Keith Smith and Daniel Todd, for a period of ten (10) years after the date of issuance of this order, each shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include Respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580.

Decision and Order

XIV.

IT IS FURTHER ORDERED that Respondent Zango, Inc. f/k/a 180solutions, Inc., its successors and assigns, and Respondents Keith Smith and Daniel Todd shall, within sixty (60) days after service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth the manner and form in which they have complied with this order.

XV.

This order will terminate on March 7, 2027, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any Respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the Respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that this order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Analysis to Aid Public Comment

**ANALYSIS OF PROPOSED CONSENT ORDER TO AID
PUBLIC COMMENT**

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from proposed respondents Zango, Inc., formerly known as 180solutions, Inc. and Keith Smith and Daniel Todd, individually and as officers of Zango, Inc. (together “Respondents”). The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

General Allegations

Respondents develop, market, and distribute via Internet downloads advertising software programs (“adware”) — including programs with the names n-CASE, 180search Assistant, Seekmo, and Zango — that monitor consumers’ Internet use in order to display targeted pop-up ads. This matter concerns allegations that Respondents: (1) via a network of numerous affiliates and sub-affiliates installed their adware on consumers’ computers without adequate notice or consent; and (2) made their adware difficult for consumers to identify, locate, and remove.

The Commission’s complaint alleges that from at least 2002 through 2005, the primary way Respondents distributed their adware was through a network of affiliates. These affiliates often recruited large numbers of third-party sub-affiliates who purported to offer, generally for free, some content to the public, such as Internet browser upgrades, utilities, games, screensavers,

Analysis to Aid Public Comment

peer-to-peer file sharing software and/or entertainment content (hereinafter “lureware”) and bundled the adware with that content.

The Commission’s complaint further alleges that consumers often have been unaware that Respondents’ adware would be installed on their computers because it was not adequately disclosed to them that downloading the lureware would result in installation of Respondents’ adware. In some instances, no reference to the adware was made on websites offering the lureware or in the install windows. In others, information regarding the adware was available only by clicking on inconspicuous hyperlinks contained in the install windows or in lengthy terms and conditions regarding the lureware. Often the existence and information about the effects of Respondents’ adware could only be ascertained, if at all, by clicking through multiple inconspicuous hyperlinks. Other affiliates and sub-affiliates used security exploits and drive-by downloads to bypass consumer notice and consent completely. The complaint alleges that Respondents knew or should have known of their affiliates’ and sub-affiliates’ widespread failure to provide adequate notice of their adware and obtain consumer consent to its installation.

The Commission’s complaint further alleges that Respondents, until at least mid-2005, made identifying, locating, and removing their adware extremely difficult for consumers. Among other things, Respondents: installed code on consumers’ computers that would enable their adware to be reinstalled silently after consumers attempted to uninstall or remove it; failed to identify adequately the name or source of the adware in pop-up ads so as to enable consumers to locate the adware on their computers; named adware files or processes with names resembling core systems software or applications and placing files in a variety of locations; listed the adware in the Windows Add/Remove utility under names intended and/or likely to confuse consumers; required consumers to have a live Internet connection and download additional software from Respondents to uninstall the adware; represented to consumers that the adware did not show pop-up ads and/or exaggerated the consequences of

Analysis to Aid Public Comment

uninstalling the adware; provided uninstall tools that failed to uninstall the adware in whole or part; and/or reinstalled the adware files on consumers' computers with randomly generated names to avoid further detection and removal.

Deception Allegation

The Commission's complaint alleges that by offering content over the Internet such as browser upgrades, utilities, games, screensavers, peer-to-peer file sharing software and/or entertainment content, without disclosing adequately that this content was bundled with Respondents' adware, Respondents committed a deceptive practice. The bundling of Respondents' adware, which monitors their Internet use and causes them to receive pop-up advertisements, would be material to consumers in their decision whether to download the other software programs and/or content.

Unfairness Allegations

The Commission's complaint also alleges that it was an unfair practice for Respondents to install on consumers' computers, without their knowledge or authorization, adware that could not be reasonably identified, located, or removed by consumers. In addition, the complaint alleges that it was an unfair practice, in and of itself, for Respondents not to provide consumers with a reasonable means to identify, locate, and remove Respondents' adware from their computers. The complaint further alleges that these practices have caused or are likely to cause substantial consumer injury by requiring consumers to spend substantial time and/or money to locate and remove this adware from their computers. The injury to consumers was neither reasonably avoided by the consumers themselves, nor outweighed by countervailing benefits to consumers or competition.

Analysis to Aid Public Comment

The Proposed Consent Order

The proposed consent order contains provisions designed to prevent Respondents from engaging in similar acts and practices in the future and to halt continuing harm caused by Respondents' prior unlawful practices. Part I of the proposed order prohibits Respondents from contacting any consumer's computer, to display ads or otherwise, if their adware was installed on that computer before January 1, 2006.

Parts II and III prohibit Respondents from, or assisting others in, installing software onto any computer by exploiting security vulnerabilities or failing to give adequate notice to consumers, or installing any software program or application without express consent. "Express consent" is defined in the proposed order to require clear and prominent disclosure of material terms prior to and separate from any end user license agreement, and consumer activation of the download or installation via clicking a button or a substantially similar action.

Part IV requires Respondents to establish, implement, and maintain a clearly disclosed, user-friendly mechanism through which consumers can report and Respondents can timely address complaints regarding Respondents' practices.

Part V requires Respondents to establish, implement, and maintain a comprehensive program that is reasonably designed to require affiliates to obtain express consent before installing Respondents' software onto consumers' computers. Part V also contains sub-parts mandating certain measures Respondents must take to monitor their distribution network.

Part VI requires Respondents to identify advertisements served via Respondents' adware in order for consumers to easily locate the source of the advertisement, easily access Respondents' complaint mechanism, and access directions on how to uninstall such adware.

Analysis to Aid Public Comment

Part VII requires Respondents to provide reasonable and effective means for consumers to uninstall Respondents' adware.

Part IX requires Respondents to pay \$3 million to the Commission over the course of a year. In the discretion of the Commission, these funds may be used to provide such relief as it determines to be reasonably related to Respondents' practices alleged in the complaint, and to pay any attendant administrative costs. Such relief may include the rescission of contracts, payment of damages, and/or public notification respecting such unfair or deceptive practices. If the Commission determines, in its sole discretion, that such relief is wholly or partially impractical, any funds not used shall be paid to the U.S. Treasury.

Part X requires Respondents to cooperate with the Commission in this action or any subsequent investigations related to or associated with the transactions or the occurrences that are the subject of the Complaint.

The remaining order provisions govern record retention (Part VIII), order distribution (Part XI), ongoing reporting requirements (Parts XII and XIII), and filing a compliance report (Part XIV). Part XV provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

TC GROUP, L.L.C., ET AL.CONSENT ORDER, ETC. , IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT*Docket C-4183; File No. 061 0197**Complaint, January 24, 2007 — Decision, March 14, 2007*

This consent order addresses the acquisition of Kinder Morgan, Inc., by a group of investors. Kinder Morgan is a midstream energy firm whose business includes the terminaling of gasoline and other light petroleum products. Among the investors are TC Group, L.L.C. (The Carlyle Group), and Riverstone Holdings LLC, who together operate several private equity funds that focus on energy-related investments. Two of their funds, Carlyle/Riverstone Global Energy and Power Fund III, L.P. and Carlyle Partners IV, L.P., will each acquire approximately 11.3% of the equity in Kinder Morgan. Another fund, Carlyle/Riverstone Global Energy and Power Fund II, L.P., holds interests in various energy firms, including a 50% interest in the general partner that controls Magellan Midstream Partners, L.P., a midstream terminal and pipeline company that competes with Kinder Morgan. Kinder Morgan and Magellan are two of only three significant “independent” (*i.e.* not owned by a refiner) terminaling companies in the southeastern United States. A reduction in competition, through partial common ownership of the two companies, may result in higher prices of gasoline and other light petroleum products, reduced supply, or other anticompetitive effects in these markets. The order effectively remedies these possible effects by, among other things, prohibiting representatives of Carlyle or Riverstone from serving on any of the Magellan boards, prohibiting Carlyle and Riverstone from exerting control or influence over Magellan as long as they hold an interest in or can influence Kinder Morgan, and requiring respondents to set firewalls to prevent the exchange of competitively sensitive non-public information. The Commission also issued an order to maintain assets, which required the respondents to adhere to the terms of the proposed consent order during the time leading up to their acquisition of equity interests in Kinder Morgan.

Complaint

Participants

For the *Commission*: *Dennis F. Johnson, Eric Rohlck, Brian J. Telpner, Nancy E. Turnblacer, and Amanda L. Wait.*

For the *Respondents*: *Marc Williamson, Latham & Watkins; and Neil Imus and Michael Rosenwasser, Vinson & Elkins.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said acts, the Federal Trade Commission (“FTC” or “Commission”), having reason to believe that Respondent TC Group, L.L.C. (“Carlyle”), a limited liability company, and Respondent Riverstone Holdings LLC (“Riverstone”), a limited liability company, each subject to the jurisdiction of the Commission, have through affiliates entered into an agreement and plan of merger to acquire equity interests in Kinder Morgan, Inc. (“KMI”), in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. THE PARTIES***A. TC Group, L.L.C.***

1. Respondent TC Group, L.L.C. (“Carlyle”) is a limited liability company doing business as The Carlyle Group, and is organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1001 Pennsylvania Avenue, N.W., Suite 220 S, Washington, DC 20004.

Complaint

2. Respondent Carlyle is, and at all times relevant herein has been, engaged in the business of originating, managing and operating private equity funds. As part of its private equity fund business, Respondent Carlyle directly or indirectly acquires interests in a variety of firms, including, as relevant here, midstream energy companies whose businesses include the terminaling of gasoline and other light petroleum products.
3. Respondent Carlyle is, and at all times relevant herein has been, engaged in activities in or affecting commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

B. Riverstone Holdings LLC

4. Respondent Riverstone Holdings LLC (“Riverstone”) is a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 712 Fifth Avenue, 51st Floor, New York, NY 10019.
5. Respondent Riverstone is, and at all times relevant herein has been, engaged in the business of originating, managing and operating private equity funds. As part of its private equity fund business, Respondent Riverstone directly or indirectly acquires interests in a variety of firms, including, as relevant here, midstream energy companies whose businesses include the terminaling of gasoline and other light petroleum products.
6. Respondent Riverstone is, and at all times relevant herein has been, engaged in activities in or affecting commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

Complaint

***C. Carlyle/Riverstone Global Energy
and Power Fund II, L.P.***

7. Respondent Carlyle/Riverstone Global Energy and Power Fund II, L.P. (“CR-II”) is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 712 Fifth Avenue, 51st Floor, New York, NY 10019 (c/o Riverstone Holdings LLC).
8. Respondent CR-II is, and at all times relevant herein has been, a private equity fund that holds interests in a variety of investments.
9. Respondent CR-II is a joint venture between, and is managed and controlled by, Respondents Carlyle and Riverstone.
10. Respondent CR-II holds a fifty percent interest in MGG Midstream Holdings GP, LLC, the general partner of MGG Midstream Holdings, L.P., which in turn holds 100% of Magellan Midstream Holdings GP, LLC, the general partner of Magellan Midstream Holdings, L.P., which in turn holds 100% of Magellan GP, LLC, the general partner of Magellan Midstream Partners, L.P. (“Magellan”). Magellan is a midstream energy firm whose business includes the terminaling of gasoline and other light petroleum products.
11. Respondent CR-II has the right to designate two representatives on a four-member Board of Managers of MGG Midstream Holdings GP, LLC, and has the ability to veto actions by the Board of Managers. The CR-II representatives on the Board of Managers also serve as CR-II’s representatives on the Boards of Directors of Magellan Midstream Holdings GP, LLC, and Magellan GP, LLC.

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12. As a result of the interests and rights set forth above in Paragraphs 9, 10 and 11, Respondents Carlyle, Riverstone and CR-II have the ability to exercise veto power over actions by the Board of Managers of MGG Midstream Holdings GP, LLC and to receive non-public competitively sensitive information from and about Magellan.
13. Through the interests set forth above in Paragraphs 9 and 10, Respondents Carlyle, Riverstone, and CR-II are, and at all times relevant herein have been, engaged in the business of terminaling gasoline and other light petroleum products.
14. Respondent CR-II is, and at all times relevant herein has been, engaged in activities in or affecting commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

***D. Carlyle/Riverstone Global Energy
and Power Fund III, L.P.***

15. Respondent Carlyle/Riverstone Global Energy and Power Fund III, L.P. (“CR-III”), is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 712 Fifth Avenue, 51st Floor, New York, NY 10019 (c/o Riverstone Holdings LLC).
16. Respondent CR-III is, and at all times relevant herein has been, a private equity fund that has been set up to hold interests in a variety of investments.
17. Respondent CR-III is a joint venture between, and is managed and controlled by, Respondents Carlyle and Riverstone.
18. Respondent CR-III is, and at all times relevant herein has been, engaged in activities in or affecting commerce as “commerce” is defined in Section 1 of the Clayton Act, as

Complaint

amended, 15 U.S.C. § 12, and in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

II. THE ACQUISITION

19. On August 28, 2006, Kinder Morgan, Inc. (“KMI”) announced that it had entered into a definitive merger agreement under which a group of investors (collectively the “Investor Group”) would acquire all outstanding shares of KMI for approximately \$14.4 billion plus the assumption of more than \$7 billion in debt (the “Acquisition”).
20. KMI is a midstream energy firm whose business includes, directly or through affiliates, the terminaling of gasoline and other light petroleum products.
21. The Investor Group consists of (1) Members of KMI management, including Chairman and Chief Executive Officer Richard Kinder; (2) Goldman Sachs Capital Partners and affiliates; (3) American International Group and affiliates; (4) Carlyle Partners IV, L.P., a private equity fund managed and controlled by Respondent Carlyle; and (5) Respondent CR-III, a private equity fund jointly managed and controlled by Respondents Carlyle and Riverstone.
22. As a result of the Acquisition, Respondents Carlyle and Riverstone, through their interests in Respondent CR-III, will jointly hold approximately 11.3% of the equity of KMI.
23. As a result of the Acquisition, Respondent Carlyle, through its interest in Carlyle Partners IV, L.P., will also hold approximately 11.3% of the equity of KMI.
24. As a result of their interest in KMI held through CR-III, Respondents Carlyle and Riverstone will have the right to appoint a representative to the Board of Directors of KMI and

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to receive non-public competitively sensitive information from and about KMI.

25. As a result of its interest in KMI held through Carlyle Partners IV, L.P., Respondent Carlyle will have the right to appoint a representative to the Board of Directors of KMI and to receive non-public competitively sensitive information from and about KMI.

III. TRADE AND COMMERCE***A. Relevant Market***

26. Terminals are specialized facilities with large storage tanks used for the receipt and local distribution of large quantities of gasoline and other light petroleum products. Terminals receive deliveries of gasoline and other light petroleum products from pipelines or marine vessels, store the products in large tanks, and redeliver them into tank trucks for ultimate delivery to retail gasoline stations or other buyers. There are no substitutes for terminals for the storage and local distribution of gasoline and other light petroleum products.
27. A relevant line of commerce in which to evaluate the effects of the Acquisition is the terminaling of gasoline and other light petroleum products.
28. Magellan and KMI both own competing terminals in each of the following metropolitan areas in the southeastern United States: (a) Birmingham, Alabama; (b) Albany, Georgia; (c) Atlanta (Doraville), Georgia; (d) Charlotte, North Carolina; (e) Greensboro, North Carolina; (f) Selma, North Carolina; (g) North Augusta, South Carolina; (h) Spartanburg, South Carolina; (i) Knoxville, Tennessee; (j) Richmond, Virginia; and (k) Roanoke, Virginia.

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29. Because of costs and delivery logistics, buyers of gasoline and other light petroleum products in any of the metropolitan areas listed above in Paragraph 28, and shippers of such products into any of such metropolitan areas, would have no effective alternative to terminals located within the area.
30. Each of the metropolitan areas listed above in Paragraph 28 is a relevant section of the country in which to evaluate the effects of this Acquisition on the terminaling of gasoline and other light petroleum products.

B. Market Structure

31. Following the Acquisition, as a result of Respondents' holding of interests in both Magellan and KMI, the market for the terminaling of gasoline and other light petroleum products in each geographic area would be either highly concentrated or moderately concentrated, and would become significantly more concentrated as a result of the Acquisition.

C. Entry Conditions

32. Construction of a terminaling facility and its necessary infrastructure, including tanks, pipeline connections, and truck loading facilities, is subject to significant regulatory and other legal constraints, and requires significant sunk costs and substantial time to accomplish.
33. Entry into the market for the terminaling of gasoline and other light petroleum products in any of the eleven geographic areas listed in Paragraph 28 above would not be timely, likely, or sufficient to prevent the anticompetitive effects that are likely to result from the Acquisition.

Complaint

IV. ANTICOMPETITIVE EFFECTS

34. KMI and Magellan are actual competitors for the terminaling of gasoline and other light petroleum products in each of the relevant sections of the country. By holding significant interests in both KMI and Magellan, by having the right to board representation at both firms, by having the right to exercise veto power over actions by Magellan, and by receiving, using or sharing non-public competitively sensitive information from or about KMI or Magellan, Respondents Carlyle, Riverstone, CR-II and CR-III may substantially lessen competition in the relevant line of commerce in each of the relevant sections of the country.
35. The Acquisition may substantially lessen competition in the following ways, among others:
- a. by eliminating competition between KMI and Magellan in the terminaling of gasoline and other light petroleum products in the relevant sections of the country;
 - b. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between KMI and Magellan, or between KMI, Magellan and other providers of terminaling services, in the relevant sections of the country; and
 - c. by increasing the likelihood that Magellan or KMI, or the combination of Magellan and KMI, will unilaterally exercise market power in the terminaling of gasoline and other light petroleum products;

each of which increases the likelihood that terminal fees and prices for gasoline and other light petroleum products would increase in each of the relevant sections of the country.

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V. VIOLATIONS CHARGED

36. The effect of the Acquisition may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-fourth day of January, 2007, issues its complaint against Respondents.

By the Commission, Commissioner Leibowitz dissenting and Commissioner Rosch recused.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition of equity interests in Kinder Morgan, Inc. by Carlyle Partners IV, L.P., an affiliate of TC Group, L.L.C. d/b/a The Carlyle Group (“Carlyle”), and by Carlyle/Riverstone Global Energy and Power Fund III, L.P., an affiliate of Carlyle and Riverstone Holdings LLC (“Riverstone”) (hereinafter Carlyle, Riverstone, Carlyle / Riverstone Global Energy and Power Fund III, L.P., and Carlyle-Riverstone Global Energy and Power Fund II, L.P. collectively referred to as “Respondents”), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission, having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues the following Order to Maintain Assets:

1. Respondent TC Group, L.L.C., is a limited liability company doing business as The Carlyle Group, and is organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1001 Pennsylvania Avenue, N.W., Suite 220 S, Washington, DC 20004.
2. Respondent Riverstone Holdings LLC is a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 712 Fifth Avenue, 51st Floor, New York, NY 10019.

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3. Respondent Carlyle/Riverstone Global Energy and Power Fund II, L.P., is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 712 Fifth Avenue, 51st Floor, New York, NY 10019 (c/o Riverstone Holdings LLC).
4. Respondent Carlyle/Riverstone Global Energy and Power Fund III, L.P., is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 712 Fifth Avenue, 51st Floor, New York, NY 10019 (c/o Riverstone Holdings LLC).
5. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, all capitalized terms used in this Order to Maintain Assets, but not defined herein, shall have the meanings attributed to such terms in the Decision and Order (“Order”) contained in the Consent Agreement.

II.

IT IS FURTHER ORDERED that:

- A. Respondents shall not consummate the Acquisition unless and until:
 1. Respondents have removed all Magellan CR Directors from all Magellan Boards; and

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2. Respondent CR-II has agreed with MDP-IV that as of the Effective Date:
 - a. all Magellan CR Directors shall be removed from all Magellan Boards;
 - b. Respondent CR-II, Respondent Carlyle, and Respondent Riverstone shall have no rights to elect or appoint a Magellan CR Director; and
 - c. the Amendment will be effective.

The MGG GP Agreement and the Amendment are attached to the Order as Appendix A and Appendix B, respectively, including all amendments, exhibits, attachments, agreements, and schedules thereto. The MGG GP Agreement, currently and as amended in the future, and the Amendment shall not vary or contradict, or be construed to vary or contradict, the terms of the Order, it being understood that nothing in the MGG GP Agreement, currently and as amended in the future, or the Amendment shall be construed to reduce any obligations of the Respondents under the Order. The Amendment shall be deemed incorporated into the Order, and any failure by Respondents to comply with any term of such Amendment shall constitute a failure to comply with the Order. The Amendment shall not be modified, directly or indirectly, without the prior approval of the Commission.

- B. For the time period following the Effective Date that Respondent Carlyle, Respondent Riverstone, or Respondent CR-III holds, directly or indirectly, any interest in KMI; has the ability or right to elect or appoint a KMI CR Director or has a KMI CR Director; has VCOC Exemption Rights with respect to KMI; or has any right to Non-Public Information of or Relating To KMI
 1. Respondents shall:

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- a. not elect or appoint a Magellan CR Director;
 - b. not have a director, officer, partner, employee, agent, or representative on any Magellan Board;
 - c. not influence or attempt to influence, directly or indirectly, by voting or otherwise, the Magellan Operating Entities, or the management or operation of the Magellan Operating Entities;
 - d. not influence or attempt to influence, directly or indirectly, the Magellan Investment Entities, or the management or operation of the Magellan Investment Entities, except and only to the extent as provided in the MGG GP Agreement as amended by the Amendment; and
 - e. not receive or attempt to receive, directly or indirectly, any Non-Public Information of, from or Relating To the Magellan Operating Entities.
2. Respondent Carlyle, Respondent Riverstone and Respondent CR-II shall:
- a. not discuss with, or provide, disclose or otherwise make available to, KMI or any KMI CR Director, directly or indirectly, any Non-Public Information of, from or Relating To Magellan;
 - b. prohibit any Magellan CR Director from discussing with, or providing, disclosing or otherwise making available to, KMI or any KMI CR Director, directly or indirectly, any Non-Public Information of, from or Relating To Magellan; *provided, however*, that the foregoing shall not prevent either David M. Leuschen or Pierre F. Lapeyre, Jr., from serving as a KMI CR Director; and

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- c. institute procedures and requirements throughout the various entities of the Respondents to ensure that Non-Public Information is protected as required by this Paragraph II.B.
- C. Respondent Carlyle, Respondent Riverstone, and Respondent CR-III shall:
1. not discuss with, or provide, disclose or otherwise make available to, Magellan, directly or indirectly, any Non-Public Information of, from or Relating To KMI;
 2. prohibit all KMI CR Directors from discussing with, or providing, disclosing or otherwise making available to, Magellan, directly or indirectly, any Non-Public Information of, from or Relating To KMI; and
 3. institute procedures and requirements throughout the various entities of the Respondents to ensure that Non-Public Information is protected as required pursuant to this Paragraph II.C.
- D. For the time period that Respondent Carlyle or Respondent Riverstone holds, directly or indirectly, any interest in Magellan,
1. Respondent Carlyle and Respondent Riverstone shall not, without providing thirty (30) days advance written notification to the Commission in the manner described in this paragraph, directly or indirectly, acquire any stock, share capital, equity or other interest in KMI other than the interest acquired through the Acquisition.
 2. *Provided, however,* that such prior advance written notice shall not be required if:
 - a. the acquisition is by a CR Passive Investment Fund;

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- b. the acquisition does not change the acquiring Respondent's pro rata interest in KMI received as part of the Acquisition; or
- c. as a result of the acquisition, the acquiring Respondent:
 - (1) does not, and cannot in the future, receive the right or ability to appoint or elect an additional member to any KMI Board; and
 - (2) does not, and cannot in the future, vote any of the stock, share capital, equity or other interest in KMI it receives as a result of such acquisition.

Said advance written notification shall contain: (i) a detailed term sheet for the proposed acquisition, including, among other things, the amount of the acquisition, the type of acquisition, the Person acquiring the interest, the date such acquisition will take effect, and any other information prepared by the Person making the acquisition Related To such acquisition, and (ii) documents that would be responsive to Item 4(c) of the Premerger Notification and Report Form under the Hart-Scott-Rodino Premerger Notification Act, Section 7A of the Clayton Act, 15 U.S.C. § 18a, and Rules, 16 C.F.R. § 801-803, relating to the proposed transaction (hereinafter referred to as *Athe Notification*), *provided, however*, (i) no filing fee will be required for the Notification, (ii) an original and one copy of the Notification shall be filed with the Secretary of the Commission with additional copies to the Assistant Director for Mergers III Division, Bureau of Competition, and the Assistant Director for the Compliance Division, Bureau of Competition. The Notification need not be submitted to the United States Department of Justice; and (iii) the Notification is required from Respondent Carlyle and Respondent Riverstone, and not from any other party to the transaction. Respondent Carlyle and Respondent Riverstone

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shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), no Respondent shall consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

Provided, however, that prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

- E. Within ten (10) days after its occurrence, Respondents shall provide written notification to the Commission (with copies to the Assistant Director for Mergers III Division, Bureau of Competition, and the Assistant Director for the Compliance Division, Bureau of Competition):
1. if Respondents no longer hold any interest in Magellan other than a CR Passive Investment Fund interest in Magellan;
 2. if Respondents no longer hold any interest in Magellan;
 3. if Respondent Carlyle, Respondent Riverstone, and Respondent CR-III no longer hold, directly or indirectly, any interest in KMI; no longer have the ability or right to appoint a KMI CR Director or have a KMI CR Director; no longer retain VCOC Exemption Rights with respect to KMI; and no longer have any right to Non-Public Information of or Relating To KMI;

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4. if Respondents engage in any of the acquisitions listed in Paragraph II.D.2 above, with such notice including, among other things, the amount of the acquisition, the type of acquisition, the Person acquiring the interest, the date of the acquisition, and any other information prepared by the Person making the acquisition Related To such acquisition; or
 5. of any acquisition by any Respondent of stock, share capital, equity or other interest in Magellan, including acquisitions by a CR Passive Investment Fund, with such notice including, among other things, the amount of the acquisition, the type of acquisition, the Person acquiring the interest, the date of the acquisition, and any other information prepared by the Person making the acquisition Related To such acquisition.
- F. The purpose of Paragraph II of this Order to Maintain Assets is to ensure that KMI and Magellan are operated independently of, and in competition with, each other, and to remedy the lessening of competition alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that Respondents shall:

- A. Within twenty (20) days after the Effective Date, send a copy of the Order, the Complaint, and the Analysis to Aid Public Comment, by first class mail, return receipt requested, or by hand delivery (with signed confirmation) to:
 1. All Persons employed by Respondents at the Managing Director level or above;
 2. All Persons who serve on each Magellan Board, including, but not limited to, each Magellan CR Director;

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3. All Persons who serve on each KMI Board, including, but not limited to, each KMI CR Director; and
 4. All investors in Knight Holdco LLC and Knight Acquisition Co.
- B. Send a copy of the Order, the Complaint, and the Analysis to Aid Public Comment, by first class mail, return receipt requested, or hand delivery (with signed confirmation) to:
1. each Person who becomes a KMI CR Director;
 2. each Person known to Respondents who becomes an equity investor in Knight Holdco LLC or Knight Acquisition Co. after the Acquisition unless and until Knight Holdco LLC and Knight Acquisition Co. become publicly traded; and
 3. each Person who serves on each Magellan Board.

Such notice pursuant to this Paragraph III.B. shall occur no later than thirty (30) days after the commencement of such Person's employment or affiliation, except with respect to Persons serving on the Magellan Board, for which such notice shall be given no later than thirty (30) days after Respondents become aware of such person becoming a director or manager. *Provided, however,* that Respondents are not required to send such notices pursuant to this Paragraph III.B. if the Effective Date has not occurred or if and when the Respondents have given the Commission notice pursuant to Paragraph II.E.1., II.E.2., or II.E.3.

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IV.**IT IS FURTHER ORDERED** that:

- A. Kevin Sudy of Navigant Consulting shall be appointed as Implementation Monitor to monitor Respondents' implementation of the firewall procedures under Paragraphs II.B. and II.C. of this Order to Maintain Assets and under Paragraphs II.B. and II.C. of the Order, which Implementation Monitor shall have the rights, duties, and responsibilities as described below.
- B. No later than one (1) day after this Order to Maintain Assets is made final, Respondents shall, pursuant to the Monitor Agreement, which is attached hereto as Appendix A, and pursuant to this Order to Maintain Assets, transfer to the Implementation Monitor all the rights, powers, and authorities necessary to permit the Implementation Monitor to monitor Respondents' implementation of the firewall procedures required under Paragraphs II.B. and II.C. of this Order to Maintain Assets and Paragraphs II.B. and II.C. of the Order, in a manner consistent with the purposes of this Order to Maintain Assets and the Order.
- C. In the event a substitute Implementation Monitor is required, the Commission shall select the Implementation Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Implementation Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Implementation Monitor, Respondents shall be deemed to have consented to the selection of the proposed Implementation Monitor. Not later than ten (10) days after appointment of a substitute Implementation Monitor, Respondents shall execute an agreement that, subject to the prior approval of the

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Commission, confers on the Implementation Monitor all the rights and powers necessary to permit the Implementation Monitor to monitor Respondents' compliance with the terms of this Order to Maintain Assets as stated in this Paragraph IV.

- D. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Implementation Monitor:
1. The Monitor shall have the power and authority to monitor Respondents' implementation of the firewall procedures of Paragraphs II.B. and II.C. of this Order to Maintain Assets and Paragraphs II.B. and II.C. of the Order, in a manner consistent with the purposes of this Order to Maintain Assets and the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Implementation Monitor in a manner consistent with the purposes of this Order to Maintain Assets and the Order and in consultation with the Commission, including, but not limited to:
 - a. Assuring that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities to assure that Non-Public Information is protected as required by this Order to Maintain Assets, the Order, and the Amendment;
 - b. Assuring that Non-Public Information is not received or used by Respondents, except as allowed in this Order to Maintain Assets, the Order, and the Amendment.
 2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 3. The term of the Implementation Monitor shall end when the Implementation Monitor reports to the Commission that Respondents have put in place adequate procedures in

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accordance with Paragraphs II.B. and II.C. of this Order to Maintain Assets, and Paragraphs II.B. and II.C. of the Order, and that those procedures provide the appropriate firewall protections, and the Commission staff notifies Respondents that such procedures are acceptable.

4. Subject to any demonstrated legally recognized privilege, the Implementation Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Implementation Monitor may reasonably request, related to Respondents' compliance with their obligations under Paragraphs II.B. and II.C. of this Order to Maintain Assets, Paragraphs II.B. and II.C. of the Order, and the Amendment. Respondents shall cooperate with any reasonable request of the Implementation Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order to Maintain Assets, the Order, and the Amendment.
5. The Implementation Monitor shall serve, without bond or other security, at the expense of Respondents on such reasonable and customary terms and conditions as the Commission may set. The Implementation Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Implementation Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
6. Respondents shall indemnify the Implementation Monitor and hold the Implementation Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the

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Implementation Monitors' duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Implementation Monitor.

7. Within one (1) month from the date the Implementation Monitor is appointed pursuant to this paragraph, every sixty (60) days thereafter, and otherwise as requested by the Commission, during the term of the Implementation Monitor, the Implementation Monitor shall report in writing to the Commission concerning performance by Respondents of its obligations to protect Non-Public Information under Paragraphs II.B. and II.C. of this Order to Maintain Assets, Paragraphs II.B. and II.C. of the Order, and the Amendment.
 8. Respondents may require the Implementation Monitor and each of the Implementation Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Implementation Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Implementation Monitor and each of the Implementation Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement Relating To Commission materials and information received in connection with the performance of the Implementation Monitor's duties.
- F. If the Commission determines that the Implementation Monitor has ceased to act or failed to act diligently, the

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Commission may appoint a substitute Implementation Monitor in the same manner as provided in this Paragraph IV.

- G. The Commission may on its own initiative, or at the request of the Implementation Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order to Maintain Assets, the Order, and the Amendment including, but not limited to, reinstating the Implementation Monitor to monitor Respondents' compliance with the firewalls as required in this Order to Maintain Assets and the Order.

V.

IT IS FURTHER ORDERED that, beginning fifteen (15) days after the date on which Respondents sign the Consent Agreement and every thirty (30) days thereafter until this Order to Maintain Assets terminates pursuant to Paragraph VIII, each Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the terms of this Order to Maintain Assets. Respondents shall submit at the same time a copy of these reports to the Implementation Monitor.

VI.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to:

- A. any proposed dissolution of Respondents;
- B. any proposed acquisition, merger, or consolidation of Respondents;
- C. any other change in the Respondents, including, but not limited to, assignment and the creation or dissolution of

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subsidiaries, if such change might affect compliance obligations arising out of this Order to Maintain Assets.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents, Respondents shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Respondents related to compliance with this Order to Maintain Assets; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate at the earlier of:

- A. three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. such time as the Decision and Order has been made final.

By the Commission, Commissioner Leibowitz dissenting and Commissioner Rosch recused.

Decision and Order

APPENDIX A**MONITOR AGREEMENT****DECISION AND ORDER**

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition of equity interests in Kinder Morgan, Inc. by Carlyle Partners IV, L.P., an affiliate of TC Group, L.L.C. d/b/a The Carlyle Group (“Carlyle”), and by Carlyle/Riverstone Global Energy and Power Fund III, L.P., an affiliate of Carlyle and Riverstone Holdings LLC (“Riverstone”) (hereinafter Carlyle, Riverstone, Carlyle/Riverstone Global Energy and Power Fund III, L.P., and Carlyle-Riverstone Global Energy and Power Fund II, L.P. collectively referred to as “Respondents”), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as

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alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission, having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and its Order to Maintain Assets and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent TC Group, L.L.C., is a limited liability company doing business as The Carlyle Group, and is organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1001 Pennsylvania Avenue, N.W., Suite 220 S, Washington, DC 20004.
2. Respondent Riverstone Holdings LLC is a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 712 Fifth Avenue, 51st Floor, New York, NY 10019.
3. Respondent Carlyle/Riverstone Global Energy and Power Fund II, L.P., is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 712 Fifth Avenue, 51st Floor, New York, NY 10019 (c/o Riverstone Holdings LLC).

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4. Respondent Carlyle/Riverstone Global Energy and Power Fund III, L.P., is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 712 Fifth Avenue, 51st Floor, New York, NY 10019 (c/o Riverstone Holdings LLC).
5. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Carlyle” means TC Group, L.L.C., doing business as The Carlyle Group, its directors, officers, partners, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, partnerships, divisions, groups, affiliates, investment funds, hedge funds, and alternative investment vehicles controlled or managed by TC Group, L.L.C. (including, but not limited to, TCG Holdings, L.L.C., TC Group-Energy, L.L.C., Carlyle Investment Management L.L.C., and Carlyle Partners IV, L.P. (“CP-IV”)), and the respective directors, officers, partners, employees, agents, representatives, successors, and assigns of each. For purposes of this Order “Carlyle” includes CR-II and CR-III, except where noted in this Order.
- B. “CR-II” means Carlyle/Riverstone Global Energy and Power Fund II, L.P., its directors, officers, partners, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, partnerships, divisions, groups, affiliates, investment funds, hedge funds, and alternative

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investment vehicles controlled or managed by Carlyle/Riverstone Global Energy and Power Fund II, L.P., and the respective directors, officers, partners, employees, agents, representatives, successors, and assigns of each.

- C. “CR-III” means Carlyle/Riverstone Global Energy and Power Fund III, L.P., its directors, officers, partners, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, partnerships, divisions, groups, affiliates, investment funds, hedge funds, and alternative investment vehicles controlled or managed by Carlyle/Riverstone Global Energy and Power Fund III, L.P., and the respective directors, officers, partners, employees, agents, representatives, successors, and assigns of each.
- D. “Riverstone” means Riverstone Holdings LLC, its directors, officers, partners, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, partnerships, divisions, groups, affiliates, investment funds, hedge funds, and alternative investment vehicles controlled or managed by Riverstone Holdings LLC, and the respective directors, officers, partners, employees, agents, representatives, successors, and assigns of each. For purposes of this Order “Riverstone” includes CR-II and CR-III, except where noted in this Order.
- E. “Commission” means the Federal Trade Commission.
- F. “Acquisition” means the transaction contemplated by the Agreement and Plan of Merger among Knight Holdco LLC, Knight Acquisition Co. and Kinder Morgan, Inc., dated August 28, 2006, pursuant to which a group of investors, including, but not limited to, CP-IV and CR-III, plan to acquire KMI.
- G. “Amendment” means Amendment No. 1 dated November 17, 2006 to the MGG GP Agreement.

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- H. “CR Passive Investment Fund” means a current or future investment fund controlled or managed by Respondent Carlyle or Respondent Riverstone that:
1. invests in publicly traded securities or securities convertible into publicly traded securities;
 2. is prohibited from receiving or using, directly or indirectly, Non-Public Information from Respondents or any other source about KMI or Magellan;
 3. does not, directly or indirectly, by its managers or otherwise, exercise any voting rights in KMI or Magellan;
 4. does not have, directly or indirectly, the right or ability to appoint a representative to any KMI Board or Magellan Board; and
 5. does not influence or attempt to influence, directly or indirectly, the management or operations of KMI or Magellan.
- I. “Effective Date” means the date on which the Acquisition is consummated.
- J. “KMI” means Kinder Morgan, Inc., its directors, officers, partners, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, partnerships, divisions, groups and affiliates controlled by Kinder Morgan, Inc. (including, but not limited to, Kinder Morgan Energy Partners L.P. and Kinder Morgan Management LLC), and the respective directors, officers, partners, employees, agents, representatives, successors, and assigns of each. For purposes of this Order, KMI includes Knight Acquisition Co., a Kansas corporation, and Knight Holdco LLC, a Delaware limited liability company.

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- K. “KMI Board” means any board of directors or board of managers of KMI.
- L. “KMI CR Director” means a Person who is elected or appointed by, or who is an agent or representative of, Carlyle, Riverstone, CR-II, or CR-III, on any KMI Board.
- M. “Magellan” means MGG Midstream Holdings GP, LLC, MGG Midstream Holdings, L.P., Magellan Midstream Holdings GP, LLC, Magellan Midstream Holdings, L.P., Magellan GP, LLC, Magellan IDR, L.P., and Magellan Midstream Partners, L.P., and the joint ventures, subsidiaries, partnerships, divisions, groups and affiliates controlled by such entities.
- N. “Magellan Board” means any board of directors or board of managers of Magellan, including, but not limited to, the Board of Managers of MGG Midstream Holdings GP, LLC, the Board of Directors of Magellan Midstream Holdings GP, LLC, and the Board of Directors of Magellan GP, LLC.
- O. “Magellan CR Director” means a Person who is or at any time was elected or appointed by, or who is or at any time was an agent or representative of, Carlyle, Riverstone, CR-II, or CR-III, on any Magellan Board, including, but not limited to, Pierre F. Lapeyre, Jr., David M. Leuschen, N. John Lancaster, Jr., and James Derryberry.
- P. “Magellan Investment Entities” means MGG Midstream Holdings GP, LLC and MGG Midstream Holdings, L.P.
- Q. “Magellan Operating Entities” means Magellan Midstream Holdings GP, LLC, Magellan Midstream Holdings, L.P., Magellan GP, LLC, Magellan IDR, L.P., and Magellan Midstream Partners, L.P. and the joint ventures, subsidiaries, partnerships, divisions, groups and affiliates controlled by such entities.

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- R. “MDP-IV” means Madison Dearborn Capital Partners IV, L.P., a limited partnership, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Three First National Plaza, Suite 3800, Chicago, Illinois 60602, with an ownership interest in Magellan.
- S. “MGG GP Agreement” means the First Amended & Restated Limited Liability Company Agreement of MGG Midstream Holdings GP, LLC, dated December 21, 2005, including all amendments, attachments, exhibits, and schedules thereto.
- T. “Monitor Agreement” means the Monitor Agreement dated December 12, 2006, between Respondents and Kevin Sudy of Navigant Consulting. The Monitor Agreement is attached as Appendix C to this Order.
- U. “Non-Public Information” means all information that is not in the public domain Relating To a Person or a Person’s business, including, but not limited to, customer lists, price lists, plans, contracts, expansion projects, cost information, marketing methods, competitively sensitive data or information, and all other information not available to the public.
- V. “Person” means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.
- W. “Relating To” means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, stating, or in any way pertaining to.
- X. “VCOC Exemption Rights” means any rights necessary for, or that allow, an investor to claim the Venture Capital Operating Company exemption under the plan asset regulation issued by the Department of Labor under 29 C.F.R. § 2520-3-101,

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including, but not limited to, the right to representation on the board of directors, the right to observe the board of directors, the right to inspect books and records, the right to interview officers or employees concerning their business and operations, and any other rights through which the investor can substantially participate in or influence the management of such entity.

II.

IT IS FURTHER ORDERED that:

- A. Respondents shall not consummate the Acquisition unless and until:
 1. Respondents have removed all Magellan CR Directors from all Magellan Boards; and
 2. Respondent CR-II has agreed with MDP-IV that as of the Effective Date:
 - a. all Magellan CR Directors shall be removed from all Magellan Boards;
 - b. Respondent CR-II, Respondent Carlyle, and Respondent Riverstone shall have no rights to elect or appoint a Magellan CR Director; and
 - c. the Amendment will be effective.

The MGG GP Agreement and the Amendment are attached to this Order as Appendix A and Appendix B, respectively, including all amendments, exhibits, attachments, agreements, and schedules thereto. The MGG GP Agreement, currently and as amended in the future, and the Amendment shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in the MGG GP Agreement, currently and as amended in the future,

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or the Amendment shall be construed to reduce any obligations of the Respondents under this Order. The Amendment shall be deemed incorporated into this Order, and any failure by Respondents to comply with any term of such Amendment shall constitute a failure to comply with this Order. The Amendment shall not be modified, directly or indirectly, without the prior approval of the Commission.

B. For the time period following the Effective Date that Respondent Carlyle, Respondent Riverstone, or Respondent CR-III holds, directly or indirectly, any interest in KMI; has the ability or right to elect or appoint a KMI CR Director or has a KMI CR Director; has VCOC Exemption Rights with respect to KMI; or has any right to Non-Public Information of or Relating To KMI,

1. Respondents shall:

- a. not elect or appoint a Magellan CR Director;
- b. not have a director, officer, partner, employee, agent, or representative on any Magellan Board;
- c. not influence or attempt to influence, directly or indirectly, by voting or otherwise, the Magellan Operating Entities, or the management or operation of the Magellan Operating Entities;
- d. not influence or attempt to influence, directly or indirectly, the Magellan Investment Entities, or the management or operation of the Magellan Investment Entities, except and only to the extent as provided in the MGG GP Agreement as amended by the Amendment; and

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- e. not receive or attempt to receive, directly or indirectly, any Non-Public Information of, from or Relating To the Magellan Operating Entities.
2. Respondent Carlyle, Respondent Riverstone and Respondent CR-II shall:
 - a. not discuss with, or provide, disclose or otherwise make available to, KMI or any KMI CR Director, directly or indirectly, any Non-Public Information of, from or Relating To Magellan;
 - b. prohibit any Magellan CR Director from discussing with, or providing, disclosing or otherwise making available to, KMI or any KMI CR Director, directly or indirectly, any Non-Public Information of, from or Relating To Magellan; *provided, however*, that the foregoing shall not prevent either David M. Leuschen or Pierre F. Lapeyre, Jr., from serving as a KMI CR Director; and
 - c. institute procedures and requirements throughout the various entities of the Respondents to ensure that Non-Public Information is protected as required by this Paragraph II.B.
- C. Respondent Carlyle, Respondent Riverstone, and Respondent CR-III shall:
 1. not discuss with, or provide, disclose or otherwise make available to, Magellan, directly or indirectly, any Non-Public Information of, from or Relating To KMI;
 2. prohibit all KMI CR Directors from discussing with, or providing, disclosing or otherwise making available to, Magellan, directly or indirectly, any Non-Public Information of, from or Relating To KMI; and

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3. institute procedures and requirements throughout the various entities of the Respondents to ensure that Non-Public Information is protected as required pursuant to this Paragraph II.C.
- D. For the time period that Respondent Carlyle or Respondent Riverstone holds, directly or indirectly, any interest in Magellan,
1. Respondent Carlyle and Respondent Riverstone shall not, without providing thirty (30) days advance written notification to the Commission in the manner described in this paragraph, directly or indirectly, acquire any stock, share capital, equity or other interest in KMI other than the interest acquired through the Acquisition.
 2. *Provided, however,* that such prior advance written notice shall not be required if:
 - a. the acquisition is by a CR Passive Investment Fund;
 - b. the acquisition does not change the acquiring Respondent's pro rata interest in KMI received as part of the Acquisition; or
 - c. as a result of the acquisition, the acquiring Respondent:
 - (1) does not, and cannot in the future, receive the right or ability to appoint or elect an additional member to any KMI Board; and
 - (2) does not, and cannot in the future, vote any of the stock, share capital, equity or other interest in KMI it receives as a result of such acquisition.

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Said advance written notification shall contain: (i) a detailed term sheet for the proposed acquisition, including, among other things, the amount of the acquisition, the type of acquisition, the Person acquiring the interest, the date such acquisition will take effect, and any other information prepared by the Person making the acquisition Related To such acquisition, and (ii) documents that would be responsive to Item 4(c) of the Premerger Notification and Report Form under the Hart-Scott-Rodino Premerger Notification Act, Section 7A of the Clayton Act, 15 U.S.C. § 18a, and Rules, 16 C.F.R. § 801-803, relating to the proposed transaction (hereinafter referred to as *Athe Notification*), *provided, however*, (i) no filing fee will be required for the Notification, (ii) an original and one copy of the Notification shall be filed with the Secretary of the Commission with additional copies to the Assistant Director for Mergers III Division, Bureau of Competition, and the Assistant Director for the Compliance Division, Bureau of Competition. The Notification need not be submitted to the United States Department of Justice; and (iii) the Notification is required from Respondent Carlyle and Respondent Riverstone, and not from any other party to the transaction. Respondent Carlyle and Respondent Riverstone shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), no Respondent shall consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

Provided, however, that prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

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- E. Within ten (10) days after its occurrence, Respondents shall provide written notification to the Commission (with copies to the Assistant Director for Mergers III Division, Bureau of Competition, and the Assistant Director for the Compliance Division, Bureau of Competition):
1. if Respondents no longer hold any interest in Magellan other than a CR Passive Investment Fund interest in Magellan;
 2. if Respondents no longer hold any interest in Magellan;
 3. if Respondent Carlyle, Respondent Riverstone, and Respondent CR-III no longer hold, directly or indirectly, any interest in KMI; no longer have the ability or right to appoint a KMI CR Director or have a KMI CR Director; no longer retain VCOC Exemption Rights with respect to KMI; and no longer have any right to Non-Public Information of or Relating To KMI;
 4. if Respondents engage in any of the acquisitions listed in Paragraph II.D.2 above, with such notice including, among other things, the amount of the acquisition, the type of acquisition, the Person acquiring the interest, the date of the acquisition, and any other information prepared by the Person making the acquisition Related To such acquisition; or
 5. of any acquisition by any Respondent of stock, share capital, equity or other interest in Magellan, including acquisitions by a CR Passive Investment Fund, with such notice including, among other things, the amount of the acquisition, the type of acquisition, the Person acquiring the interest, the date of the acquisition, and any other information prepared by the Person making the acquisition Related To such acquisition.

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- F. The purpose of Paragraph II of this Order is to ensure that KMI and Magellan are operated independently of, and in competition with, each other, and to remedy the lessening of competition alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that Respondents shall:

- A. Within twenty (20) days after the Effective Date, send a copy of this Order, the Complaint, and the Analysis to Aid Public Comment, by first class mail, return receipt requested, or by hand delivery (with signed confirmation) to:
1. All Persons employed by Respondents at the Managing Director level or above;
 2. All Persons who serve on each Magellan Board, including, but not limited to, each Magellan CR Director;
 3. All Persons who serve on each KMI Board, including, but not limited to, each KMI CR Director; and
 4. All investors in Knight Holdco LLC and Knight Acquisition Co.
- B. Send a copy of this Order, the Complaint, and the Analysis to Aid Public Comment, by first class mail, return receipt requested, or hand delivery (with signed confirmation) to:
1. each Person who becomes a KMI CR Director;
 2. each Person known to Respondents who becomes an equity investor in Knight Holdco LLC or Knight Acquisition Co. after the Acquisition unless and until Knight Holdco LLC and Knight Acquisition Co. become publicly traded; and

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3. each Person who serves on each Magellan Board.

Such notice pursuant to this Paragraph III.B. shall occur no later than thirty (30) days after the commencement of such Person's employment or affiliation, except with respect to Persons serving on the Magellan Board, for which such notice shall be given no later than thirty (30) days after Respondents become aware of such person becoming a director or manager. *Provided, however,* that Respondents are not required to send such notices pursuant to this Paragraph III.B. if the Effective Date has not occurred or if and when the Respondents have given the Commission notice pursuant to Paragraph II.E.1., II.E.2., or II.E.3.

IV.**IT IS FURTHER ORDERED** that:

- A. Kevin Sudy of Navigant Consulting shall be appointed as Implementation Monitor to monitor Respondents' implementation of the firewall procedures under Paragraphs II.B. and II.C. of this Order, which Implementation Monitor shall have the rights, duties, and responsibilities as described below.
- B. Within one (1) day of this Order becoming final, Respondents shall, pursuant to the Monitor Agreement and to this Order, transfer to the Implementation Monitor all the rights, powers, and authorities necessary to permit the Implementation Monitor to monitor Respondents' implementation of the firewall procedures required under Paragraphs II.B. and II.C. of this Order, in a manner consistent with the purposes of this Order.
- C. In the event a substitute Implementation Monitor is required, the Commission shall select the Implementation Monitor,

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subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Implementation Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Implementation Monitor, Respondents shall be deemed to have consented to the selection of the proposed Implementation Monitor. Not later than ten (10) days after appointment of a substitute Implementation Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Implementation Monitor all the rights and powers necessary to permit the Implementation Monitor to monitor Respondents' compliance with the terms of this Order as stated in this Paragraph IV.

- D. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Implementation Monitor:
1. The Monitor shall have the power and authority to monitor Respondents' implementation of the firewall procedures of Paragraphs II.B. and II.C. of this Order, in a manner consistent with the purposes of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Implementation Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission, including, but not limited to:
 - a. Assuring that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities to assure that Non-Public Information is protected as required by the Order and the Amendment;

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- b. Assuring that Non-Public Information is not received or used by Respondents, except as allowed in this Order and the Amendment.
2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. The term of the Implementation Monitor shall end when the Implementation Monitor reports to the Commission that Respondents have put in place adequate procedures in accordance with Paragraphs II.B. and II.C. of this Order, and that those procedures provide the appropriate firewall protections, and the Commission staff notifies Respondents that such procedures are acceptable.
4. Subject to any demonstrated legally recognized privilege, the Implementation Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Implementation Monitor may reasonably request, related to Respondents' compliance with their obligations under Paragraphs II.B. and II.C. of this Order, and the Amendment. Respondents shall cooperate with any reasonable request of the Implementation Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order and the Amendment.
5. The Implementation Monitor shall serve, without bond or other security, at the expense of Respondents on such reasonable and customary terms and conditions as the Commission may set. The Implementation Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary

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to carry out the Monitor's duties and responsibilities. The Implementation Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.

6. Respondents shall indemnify the Implementation Monitor and hold the Implementation Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Implementation Monitors' duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Implementation Monitor.
 7. Within one (1) month from the date the Implementation Monitor is appointed pursuant to this paragraph, every sixty (60) days thereafter, and otherwise as requested by the Commission, during the term of the Implementation Monitor, the Implementation Monitor shall report in writing to the Commission concerning performance by Respondents of its obligations to protect Non-Public Information under Paragraphs II.B. and II.C. of this Order and the Amendment.
 8. Respondents may require the Implementation Monitor and each of the Implementation Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Implementation Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Implementation Monitor and each of the Implementation

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Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement Relating To Commission materials and information received in connection with the performance of the Implementation Monitor's duties.

- F. If the Commission determines that the Implementation Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Implementation Monitor in the same manner as provided in this Paragraph IV.
- G. The Commission may on its own initiative, or at the request of the Implementation Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order and the Amendment including, but not limited to, reinstating the Implementation Monitor to monitor Respondents' compliance with the firewalls as required in this Order.

V.

IT IS FURTHER ORDERED that:

- A. Fifteen (15) days after the date this Order becomes final, and every sixty (60) days thereafter, until Respondents receive the notice from Commission staff pursuant to Paragraph IV.D.3., each Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the terms of this Order and the Amendment. Respondents shall submit at the same time a copy of these reports to the Implementation Monitor, if any Implementation Monitor has been appointed. Respondents shall include in such report, among other things, a detailed description of the procedures put into place to comply with the provisions of the Order prohibiting the dissemination of Non-Public Information as required in Paragraph II, and evidence that notices were

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delivered to required Persons as required pursuant to Paragraph III.

- B. Beginning twelve (12) months after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order becomes final, for the next ten (10) years, each Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it is complying and has complied with this Order and the Amendment. Respondents shall submit at the same time a copy of these reports to the Implementation Monitor, if any Implementation Monitor has been appointed and whose term has not ended.

VI.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to:

- A. any proposed dissolution of Respondents;
- B. any proposed acquisition, merger, or consolidation of Respondents;
- C. any other change in the Respondents, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents, Respondents shall permit any duly authorized representative of the Commission:

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- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Respondents related to compliance with this Order; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on March 14, 2017.

By the Commission, Commissioner Leibowitz dissenting and Commissioner Rosch recused.

CONFIDENTIAL APPENDIX A**FIRST AMENDED & RESTATED LIMITED LIABILITY
COMPANY AGREEMENT OF MGG MIDSTREAM
HOLDINGS GP, LLC**

**[Redacted From the Public Record But Incorporated By
Reference]**

Analysis to Aid Public Comment

CONFIDENTIAL APPENDIX B

**AMENDMENT NO. 1 TO FIRST AMENDED & RESTATED
LIMITED LIABILITY COMPANY AGREEMENT
OF MGG MIDSTREAM HOLDINGS GP, LLC,
DATED NOVEMBER 17, 2006**

**[Redacted From the Public Record But Incorporated By
Reference]**

APPENDIX C

MONITOR AGREEMENT

[Public Record Version]

**ANALYSIS OF PROPOSED AGREEMENT CONTAINING
CONSENT ORDERS TO AID PUBLIC COMMENT**

The Federal Trade Commission, subject to its final approval, has accepted for public comment an Agreement Containing Consent Orders (“Consent Agreement”) with TC Group, L.L.C. (“Carlyle”), Riverstone Holdings LLC (“Riverstone”), Carlyle/Riverstone Global Energy and Power Fund II, L.P. (“CR-II”), and Carlyle/Riverstone Global Energy and Power Fund III, L.P. (“CR-III”). The proposed Consent Agreement remedies the anticompetitive effects that otherwise would be likely to result from the acquisition described herein.

Analysis to Aid Public Comment

On August 28, 2006, Kinder Morgan, Inc. (“KMI”) announced that it had entered into a definitive merger agreement pursuant to which a group of investors, including CR-III, a private equity fund managed and controlled by Carlyle and Riverstone, and Carlyle Partners IV, L.P. (“CP-IV”), an affiliate of Carlyle, would acquire all outstanding shares of KMI for approximately \$22 billion, including the assumption of approximately \$7 billion of debt (the “Acquisition”).

Carlyle and Riverstone have worked together to form, manage, and operate several private equity funds that focus on energy-related investments. One of these funds is CR-III, which, through the Acquisition, will acquire approximately 11.3% of the equity in KMI. In addition, CP-IV will also acquire approximately 11.3% of the equity in KMI. Another fund that is jointly controlled and managed by Carlyle and Riverstone, CR-II, holds interests in various energy firms, including, as relevant here, a 50% interest in the general partner that controls Magellan Midstream Partners, L.P. (“Magellan”), a midstream terminal and pipeline company that competes with KMI in various terminaling and pipeline operations.

Without some form of relief, the proposed Acquisition is likely to result in anticompetitive effects from combining KMI and Magellan under Carlyle and Riverstone. KMI and Magellan compete directly with each other in at least eleven terminal markets in the southeastern United States. These markets include: Birmingham, Alabama; Albany and Atlanta (Doraville), Georgia; North Augusta and Spartanburg, South Carolina; Charlotte, Greensboro, and Selma, North Carolina; Knoxville, Tennessee; and Roanoke and Richmond, Virginia. In addition, KMI and Magellan are two of only three significant “independent” (*i.e.* not owned by a refiner) terminaling companies in the Southeast. A reduction in competition, particularly competition among independent terminaling companies, may result in higher prices of gasoline and other light petroleum products, reduced supply, or other anticompetitive effects in these markets.

Analysis to Aid Public Comment

CR-II has representatives on Magellan's board and has significant veto power over Magellan's activities. Carlyle and CR-III also will have the right to appoint one director each to the eleven-member KMI board. Carlyle and Riverstone therefore may have the ability to reduce competition between the terminals owned by KMI and Magellan through their board representation on both competitors, by exercising veto power at Magellan, by exchanging competitively sensitive non-public information between KMI and Magellan, and by using information learned from one firm in connection with their activities on the other.

The proposed Consent Agreement effectively remedies these possible anticompetitive effects by, among other things, prohibiting CR-II from having representation on any Magellan board, prohibiting the Respondents from influencing or attempting to influence Magellan's business activities, and requiring that Respondents implement firewalls designed to prevent the exchange of competitively sensitive information between Magellan and KMI.

I. The Proposed Respondents and Other Relevant Entities**A. Carlyle and Riverstone**

Founded in 1987, Carlyle is a private equity firm based in Washington, D.C., with more than \$44.3 billion under management. Carlyle invests in buyouts, venture and growth capital, real estate, and leveraged finance in Asia, Australia, Europe, and North America, focusing on aerospace and defense, automotive and transportation, consumer and retail, energy and power, healthcare, industrial, technology and business services, and telecommunications and media. Carlyle's investors include public and private institutional investors and high net worth individuals.

Founded in 2000, Riverstone Holdings LLC is a \$6 billion private investment firm that invests solely in the energy and power sectors. Riverstone has partnered with Carlyle to create a

Analysis to Aid Public Comment

series of energy-focused investment funds, which include CR-II and CR-III.

Carlyle and Riverstone launched CR-II in 2002, and in the last four years the fund has invested more than \$1 billion in transactions in the energy and power sector. Currently, CR-II holds interests in more than a dozen energy firms, including Magellan. In 2005, Carlyle and Riverstone launched CR-III, with more than \$3.8 billion in capital. CR-III, through the Acquisition, proposes to acquire shares that would constitute approximately 11.3% of KMI. CP-IV, another fund controlled and managed by Carlyle, also plans to acquire shares that would constitute approximately 11.3% of KMI, so that Carlyle and Riverstone together would hold approximately 22.6% of the equity of KMI.

B. KMI

KMI is one of the largest energy transportation, storage, and distribution companies in North America. Through various operating affiliates, KMI owns or operates pipelines that transport natural gas, crude oil, petroleum products and carbon dioxide, and terminals that store, transfer, and handle energy products such as gasoline and other light petroleum products, including terminals in the southeastern United States. KMI holds the general partner interest of Kinder Morgan Energy Partners, L.P. (“KMP”), which is one of the largest publicly traded energy limited partnerships in the United States.

C. Magellan

Magellan Midstream Partners, L.P., is a publicly traded limited partnership that is primarily engaged in the storage, transportation, and distribution of refined petroleum products and ammonia. Its assets include an 8,500 mile petroleum products pipeline system, including petroleum product terminals serving the mid-continent region of the United States, and other inland petroleum products terminals located in the southeastern United

Analysis to Aid Public Comment

States, mostly along the Colonial Pipeline. Magellan has a complex organizational structure. CR-II holds a 50% interest in MGG Midstream Holdings GP, LLC — the general partner that ultimately controls Magellan — as well as certain limited partnership interests. Interests affiliated with Madison Dearborn Partners (“MDP”), another investment firm, hold the other 50% interest. CR-II and MDP have the right to designate two representatives each on a four-member Board of Managers, and each has veto power over actions taken by the Board of Managers. CR-II and MDP also have two directors each on the boards of the other general partners that control Magellan.

II. Market Structure and Competitive Effects

Relevant markets in which to analyze the effects of the Acquisition are the terminaling of gasoline and other light petroleum products in eleven metropolitan areas in the southeastern United States, including Birmingham, Alabama; Albany and Atlanta (Doraville), Georgia; North Augusta and Spartanburg, South Carolina; Charlotte, Greensboro, and Selma, North Carolina; Knoxville, Tennessee; and Roanoke and Richmond, Virginia. Terminals are essential to the efficient flow of gasoline and other products from refineries to retail stations and have no effective substitutes. A terminal is the only method of safely and economically receiving, storing, and distributing bulk supplies of gasoline and other refined products in the large quantities needed for delivery to retail stations. Large quantities of gasoline and other light petroleum products can be shipped economically over long distances only by means of pipelines or marine vessels, not by trucks. Local deliveries to retail stations and commercial accounts, however, can be handled effectively only by tank trucks. Terminals serve as the link between pipelines that transport products from refineries and local modes of transportation.

Terminals typically serve limited geographic areas. Although the size of a terminal’s service area may vary from one metropolitan area to another based on the relative proximity of

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terminals, traffic congestion, natural barriers, and other factors impacting tank truck delivery, terminals often are clustered near each other and compete primarily to supply a nearby metropolitan area. The eleven local metropolitan areas in which both KMI and Magellan own terminals are relevant geographic markets in which to assess the possible effects of the Acquisition.

Each of the eleven markets already is either moderately or highly concentrated prior to the Acquisition, and an acquisition that combines KMI and Magellan through partial common ownership or control would significantly increase those levels of concentration. Moreover, KMI and Magellan are two of only three major independent terminaling systems in the Southeast — the third being TransMontaigne. Independent shippers and marketers frequently depend on independent terminals to obtain competitive access to certain markets because proprietary terminals are sometimes either not available to them or only available on a limited basis. In a number of the relevant markets, KMI and Magellan are either the only independent terminals available or two of a small number of independent terminals in service.

As a result, a direct combination of KMI and Magellan would remove a significant supplier of terminal services in markets where customers have few competitive alternatives. The combination would make the exercise of unilateral market power more likely because many customers view KMI's and Magellan's terminals as their first and second choices, and the other suppliers in the market are likely to be either incapable of replacing or unwilling to replace the competition lost as a result of the combination. Indeed, there is evidence that when customers have few independent terminal options, they can have difficulty obtaining storage and terminaling services and pay higher prices for those services that are available. Such a transaction also would increase the likelihood of coordinated interaction because of the small number of competitors remaining in many of the markets at issue and because the transaction would remove one of the few

Analysis to Aid Public Comment

remaining independent participants that may serve as an important competitive influence.

Although the proposed transaction will not directly merge KMI and Magellan, it will have the effect of combining the two companies through partial common ownership. Carlyle and Riverstone, through their funds, will acquire a combined 22.6% interest in KMI, in addition to their existing 50% interest in the general partner controlling Magellan. After the transaction, it is likely that Carlyle and Riverstone would reduce competition between KMI and Magellan through their board representation on both competitors, by exercising veto power at Magellan, by exchanging competitively sensitive non-public information between KMI and Magellan, and by using information learned from one firm in connection with their activities on the other.

III. Entry

Entry into the market for terminaling of gasoline and other light petroleum products in each of the identified markets in the southeastern United States is unlikely to deter or counteract the likely anticompetitive effects. Entry is difficult and time-consuming and potential entrants would face substantial barriers in the form of permit requirements and land use restrictions.

IV. Terms of the Proposed Agreement Containing Consent Orders

The proposed Consent Agreement effectively remedies the Acquisition's alleged anticompetitive effects by, among other things, prohibiting representatives of Carlyle or Riverstone from serving on any of the Magellan boards, prohibiting Carlyle and Riverstone from exerting control or influence over Magellan as long as they hold an interest in or can influence KMI, and requiring Respondents to set firewalls to prevent the exchange of competitively sensitive non-public information. The purpose of the Consent Agreement is to ensure that KMI and Magellan are operated independently of, and in competition with, each other,

Analysis to Aid Public Comment

and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

D. Proposed Respondents' Current and Future Magellan Investments Must Be Passive

In order to achieve the purposes of the Consent Agreement, Paragraph II.A. of the Commission's proposed Decision and Order ("Order") prohibits the proposed Respondents from consummating the Acquisition unless and until (1) they have removed all of their appointed or elected agents from all Magellan boards, and (2) they have agreed with MDP that they will remove such directors and will no longer have the right to have any representation on any Magellan board. Paragraph II.B of the proposed Order provides that as long as either Carlyle, Riverstone, or CR-III holds any interest in KMI, has the ability or right to elect or appoint a KMI director, or has the right to obtain non-public information about KMI, the proposed Respondents shall not: (1) elect or appoint a director to any Magellan board, (2) have a director on any Magellan board, (3) influence or attempt to influence, directly or indirectly, Magellan (with exceptions that would allow Respondents to monitor certain actions of their partner MDP in Magellan entities that are not directly involved in the operation or management of the entities engaged in Magellan's terminaling business), or (4) receive or attempt to receive non-public information about Magellan. CR-II has agreed with MDP to modify their partnership agreement to effectuate the removal of CR-II's representatives on the Magellan boards, to ensure that CR-II does not have the ability through the general partnership agreement to elect or appoint a director to any Magellan board, and to otherwise comply with the terms of the Order.

Paragraph II.B of the Order further provides that as long as either Carlyle, Riverstone, or CR-III holds any interest in KMI, has the ability or right to elect or appoint a KMI director, or has the right to obtain non-public information about KMI, Carlyle,

Analysis to Aid Public Comment

Riverstone, and CR-II shall: (1) not discuss with, or provide, disclose or otherwise make available to KMI or any KMI director any non-public information relating to Magellan, (2) prohibit any Magellan director from discussing with, or providing, disclosing or otherwise making available to KMI or any KMI director, directly or indirectly, any non-public information relating to Magellan; and (3) institute procedures and requirements throughout the various entities of the proposed Respondents to ensure that non-public information is protected as required by the proposed Order. This prohibition, however, would not prevent either David M. Leuschen or Pierre F. Lapeyre, Jr., who are principals with Riverstone, from serving as a director on any KMI board. Although these individuals have served on Magellan boards in the past, they are not currently directors of Magellan and have not been Magellan directors for several years. As a result, any direct non-public information they might have about Magellan from serving on the board in the past is out of date and would be competitively insignificant. In addition, such individuals still are prohibited from divulging such information to KMI or other KMI directors.

E. KMI Information and Investment Limitations

The Order also limits the flow of non-public KMI information to Magellan and places restrictions on the proposed Respondents' additional investments in KMI. Specifically, paragraph II.C. of the proposed Order provides that Carlyle, Riverstone, and CR-III shall: (1) not discuss with, or provide, disclose or otherwise make available to, Magellan, any non-public information relating to KMI; (2) prohibit all KMI directors from discussing with, or providing, disclosing or otherwise making available to Magellan, any non-public information relating to KMI; and (3) institute procedures and requirements throughout the various entities of the proposed respondents to ensure that non-public information is protected as required by the proposed Order.

Paragraph II.D. provides that, for the time period that Carlyle or Riverstone holds, directly or indirectly, any interest in

Analysis to Aid Public Comment

Magellan, Carlyle and Riverstone shall not, without providing thirty days advance written notification, acquire any stock, share capital, equity or other interest in KMI other than the interest acquired through the Acquisition. This prior notice gives the Commission the opportunity to analyze additional purchases of KMI by the proposed Respondents that may change the economic incentives of the proposed Respondents. Advance notice is not required in certain limited situations where investments are effectively passive or where the Respondents' relative ownership interests would not change. In such situations, the Respondents must provide notification under Paragraph II.E. within ten days after such acquisitions.

F. Implementation Monitor

To assure that the firewall provisions of Paragraphs II.B. and II.C. of the Order are properly implemented and enforced, the Order requires an Implementation Monitor to monitor these obligations. Pursuant to Paragraph IV, Mr. Kevin Sudy, an Associate Director at Navigant Consulting, will be appointed as the Implementation Monitor and shall serve until such time as he reports to the Commission that the parties have established adequate procedures under the terms of the proposed Order and the Commission notifies the parties that such procedures are acceptable. The Commission reserves the right subsequently to reinstate the monitor as necessary and appropriate to ensure compliance by Respondents with the terms of the proposed Order. The Implementation Monitor is important to assuring compliance with the firewall provisions of the Order.

G. Notice Provisions

Paragraph II.E. requires the proposed Respondents to provide the Commission with written notice within ten days if they (1) no longer hold any interest in Magellan, other than a wholly passive investment, (2) no longer hold any interest in Magellan, (3) no longer hold any interest in KMI or no longer have the ability to

Analysis to Aid Public Comment

influence or have representation at KMI, (4) acquire interest in interest in KMI through a passive investment fund, or (5) acquire any interest in Magellan.

Paragraph III of the proposed Order requires the proposed Respondents to send notice of the Order, Complaint, and Analysis to Aid Public Comment in this matter to certain persons likely to have competitively sensitive information subject to this Order or likely to be impacted by the firewall provisions of the Order, including persons on the Magellan and KMI Boards of Directors, and other persons involved in the Acquisition of KMI.

Paragraph V.A. requires periodic reports until the Implementation Monitor and the Commission are satisfied that the firewalls are properly established and adequately protect the flow of non-public information as required by the Order. Paragraph V.B. requires annual reports until the Order terminates in ten years.

Paragraph VI requires the proposed Respondents to give the Commission prior notice of certain events that may change their obligations under the Order.

H. Additional Provisions

Paragraph VII allows the Commission to have access to personnel and documents at the offices of the proposed Respondents with proper notice for purposes of determining or securing compliance with this Order.

Paragraph VIII provides that the Order shall terminate after ten years.

V. The Order to Maintain Assets

The Commission has also issued an Order to Maintain Assets in this proceeding, which effectively requires the proposed Respondents to adhere to the terms of the proposed Order during

Analysis to Aid Public Comment

the time period leading up to their proposed Acquisition of equity interests in KMI.

VI. Opportunity for Public Comment

The proposed Consent Agreement has been placed on the public record for thirty (30) days for receipt of comments by interested persons. The Commission has also issued its Complaint in this matter. Comments received during this comment period will become part of the public record. After thirty days, the Commission will again review the proposed Consent Agreement and the comments received and will decide whether it should withdraw from the Agreement or make final the Agreement's proposed Order.

By accepting the proposed Consent Agreement subject to final approval, the Commission anticipates that the competitive problems alleged in the Complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed Order to aid the Commission in its determination of whether it should make final the proposed Order contained in the Agreement. This analysis is not intended to constitute an official interpretation of the proposed Order, nor is it intended to modify the terms of the proposed Order in any way.

Complaint

IN THE MATTER OF

MIREALSOURCE, INC.CONSENT ORDER, ETC. , IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket D-9321; File No. 061 0266**Complaint, October 10, 2006 — Decision, March 20, 2007*

This consent order addresses rules and policies adopted by MiRealSource, a real estate corporation in Southeastern Michigan that operates a Multiple Listing Service, which shares and publicizes information on properties for sale. These rules and policies discriminated against certain kinds of lawful contracts between listing real estate brokers and their customers. The order prohibits MiRealSource from adopting or enforcing any rules or policies that deny or limit the ability of Multiple Listing Service members to enter into Exclusive Agency Listings or any other lawful listing agreements with sellers of properties. The order also prohibits MiRealSource from denying or restricting the services of the Multiple Listing Service to Exclusive Agency Listings or treating Exclusive Agency Listings, or any other lawful listings, in a less advantageous manner than Exclusive Right to Sell Listings. The order also requires that, within forty-five days after it becomes final, MiRealSource shall have conformed its rules to the substantive provisions of the order. In addition, the respondent is required to notify its members of the applicable order through its usual business communications and its website, to notify the Commission of changes in its structure, and to file periodic written reports concerning compliance.

Participants

For the *Commission*: *Peggy Bayer Femenella, Joel Christie, Sean P. Gates, Linda Holleran, and Christopher Renner.*

For the *Respondent*: *Kimberly Allen and Sheldon Klein, Butzel Long, P.C.; and Charles O. Houston III, Ferriby & Houston.*

Complaint

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. § 41, et seq.) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that MiRealSource, Inc. (hereinafter sometimes referred to as “Respondent” or “MiRealSource”), a corporation, has violated and is now violating the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

NATURE OF THE CASE

This matter concerns a corporation, owned by member real estate brokers in Southeastern Michigan, that operates a Multiple Listing Service, which is designed to foster real estate brokerage services by sharing and publicizing information on properties for sale by customers of real estate brokers. MiRealSource has adopted rules and policies that limit the acceptance, publication and marketing of certain properties, based on the terms of the listing contract entered into between a real estate broker and the customer who wishes to sell a property. These rules discriminate against certain kinds of lawful contracts between listing real estate brokers and their customers, and lack any pro-competitive justification. These rules constitute an anticompetitive concerted refusal to deal except on specified terms with respect to key inputs for the provision of residential real estate brokerage services, and violate the antitrust laws.

RESPONDENT AND ITS MEMBERS

PARAGRAPH 1. Respondent MiRealSource, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business at 5700 Crooks Road, Suite 102, Troy, Michigan 48098. The shareholders of Respondent are real estate

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brokers doing business in Southeastern Michigan, and are commonly referred to as Amembers” of the Respondent.

PARAGRAPH 2. Respondent is organized for the purpose of serving its members’ interests, including their economic interests, by promoting, fostering, and advancing the real estate brokerage services industry in Southeastern Michigan. One of the primary functions of Respondent is the operation of the MiRealSource Multiple Listing Service. A multiple listing service (“MLS”) is a clearinghouse through which member real estate brokerage firms regularly and systematically exchange information on listings of real estate properties and share commissions with members who locate purchasers. When a property is listed on the MiRealSource MLS, it is made available to all members of the MLS for the purpose of trying to match a buyer with a seller. Information about the property, including the asking price, address and property details, are made available to members of the MLS so that a suitable buyer can be found.

PARAGRAPH 3. Respondent has more than 7,000 real estate professionals as members. The majority of MiRealSource’s members hold an active real estate license and are active in the real estate profession.

PARAGRAPH 4. The large majority of residential real estate brokerage professionals in Southeastern Michigan are members of MiRealSource. These professionals compete with one another to provide residential real estate brokerage services to consumers.

PARAGRAPH 5. MiRealSource services the territory within Southeastern Michigan, specifically Macomb, Livingston, Oakland, Genesee, Sanilac, Lapeer, Wayne, Huron, Tuscola, and St. Clair Counties. (“MiRealSource Service Area”).

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JURISDICTION

PARAGRAPH 6. The acts and practices of Respondent, including the acts and practices alleged herein, have been or are in or affecting commerce as “commerce” is defined in the Federal Trade Commission Act, as amended, and Respondent is subject to the jurisdiction of the Federal Trade Commission. Among other things, the aforesaid acts and practices:

- (a) Affect the purchase and sale of real estate by persons moving into and out of Southeastern Michigan; and
- (B) Affect the transmission of real estate listing information to public real estate web sites that are intended for a national audience, including *Realtor.com*.

THE CHALLENGED CONDUCT

PARAGRAPH 7. Respondent has restrained competition in the provision of residential real estate brokerage services by combining or conspiring with its members or others, or by acting as a combination of its members or others, to hinder unreasonably the ability of real estate brokers in Southeastern Michigan to offer residential real estate brokerage services on terms other than those contained in the traditional form of listing agreement known as an Exclusive Right to Sell Listing.

PARAGRAPH 8. An Exclusive Right to Sell Listing is a listing agreement under which the property owner or principal appoints a real estate broker as his or her exclusive agent for a designated period of time, to sell the property on the owner’s stated terms, and agrees to pay the broker a commission when the property is sold, whether by the listing broker, the owner or another broker. An Exclusive Right to Sell Listing is the form of listing agreement traditionally used by listing brokers to provide full-service residential real estate brokerage services.

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PARAGRAPH 9. An alternative form of listing agreement to an Exclusive Right to Sell Listing is an Exclusive Agency Listing. An Exclusive Agency Listing is a listing agreement under which the listing broker acts as an exclusive agent of the property owner or principal in the sale of a property, but reserves to the property owner or principal a right to sell the property without further assistance of the listing broker, in which case the listing broker is paid a reduced or no commission when the property is sold.

PARAGRAPH 10. Exclusive Agency Listings are a means by which listing brokers can offer lower-cost, Unbundled Real Estate Brokerage Services to home sellers. Unbundled Real Estate Brokerage Services are lawful arrangements pursuant to which a listing broker will cause the property offered for sale to be listed on the MLS, but the listing broker will not provide some or all of the additional services offered by traditional real estate brokers, or will only offer such additional services as may be chosen from a menu of services for a fee.

PARAGRAPH 11. Brokers offering Unbundled Real Estate Brokerage Services often provide home sellers with exposure of their listing through the MLS for a flat fee or reduced commission that is small compared to the full commission prices commonly charged by traditional brokers, often by entering into Exclusive Agency Listings that reserve to the home seller the right to sell the property without owing more to the listing broker.

PARAGRAPH 12. To be listed in the MLS, a home seller must enter into a listing agreement with a listing real estate broker that is a member of the MLS. The compensation paid by the home seller to the listing broker is determined by negotiation between the home seller and the listing broker. Whatever type of listing agreement is entered into between the home seller and the listing real estate broker, the MLS rules require that the home seller must offer to pay a commission to a cooperating real estate broker, known as a selling broker, who successfully secures a buyer for the property. If the home seller fails to pay a commission to a selling broker who secures a buyer for the property, the selling

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broker may recover the commission due from the listing agent, under rules and procedures established by the MLS.

PARAGRAPH 13. Beginning in 2003, Respondent adopted a series of rules designed to thwart competition by firms using alternative business models for real estate brokerage services in Southeastern Michigan. During this time frame, Respondent was well aware that these alternative business models used Exclusive Agency Listings to offer a menu of services that a home seller could choose from at a significantly lower price. Respondent believed that these alternative business models were gaining ground with home sellers and home buyers during this time period and adopted rules in response to this additional competition.

PARAGRAPH 14. In or about August 2003, Respondent adopted a rule that precludes the acceptance of any listings into the MiRealSource MLS other than Exclusive Right to Sell Listings (the “Exclusion Policy”). The Exclusion Policy became effective on or about August 8, 2003. The Exclusion Policy was aimed at precluding Exclusive Agency Listings from the MiRealSource MLS.

PARAGRAPH 15. In or about the summer of 2003, MiRealSource adopted a “Co-Mingling Policy.” The Co-Mingling Policy precluded MiRealSource members that operated public web sites from permitting MiRealSource listing information on such sites from being searched by users of the sites together with listing information from other sources. The Co-Mingling Policy was adopted by MiRealSource to prevent information concerning Exclusive Agency Listings from being mixed in with MiRealSource listings on public web sites. In or about the summer of 2005, MiRealSource eliminated the Co-Mingling Policy because full service broker members complained about the rule.

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PARAGRAPH 16. In or about early 2004, Respondent adopted a rule specifying the minimum set of real estate brokerage services that a listing broker was required to offer in order to have a listing on the MiRealSource MLS (the “Listing Broker Policy”). MiRealSource adopted the Listing Broker Policy because Unbundled Service Providers were using listing agreements that allow home sellers to choose from a menu of services for a fee. At or about the time that the Listing Broker Policy was adopted, MiRealSource believed that these alternative pricing models were gaining ground with home sellers and home buyers.

PARAGRAPH 17. In or about August 2004, MiRealSource amended its Rules and Regulations to contain the following language: “Each Shareholder requesting MLS service must maintain a physical office.” In 2006, MiRealSource amended this language to the following: “Each Shareholder requesting MLS service must maintain a physical office in the state of Michigan.” MiRealSource adopted these rule changes in order to make sure that listing brokers carried out the minimum set of real estate brokerage services required under the Listing Broker Policy.

PARAGRAPH 18. In or about the summer of 2004, Respondent adopted a rule that prevents certain lawful residential property listings provided to MiRealSource, including Exclusive Agency Listings, from being transmitted to real estate web sites: “Information which can be downloaded and/or otherwise displayed, is limited to properties listed on an exclusive right to sell basis” (the “Web Site Policy”). The Web Site Policy specifically prevents information concerning Exclusive Agency Listings from being published on web sites approved by MiRealSource to receive information concerning properties listed on the MiRealSource MLS, including (1) the NAR-operated “*Realtor.com*” web site; (2) the MiRealSource-owned “*Mirealsource.com*” web site; and (3) MiRealSource-member web sites (collectively, “Approved Web Sites”).

Complaint

PARAGRAPH 19. In or about March 2005, Respondent adopted a rule that restricts how and where home sellers can advertise and market their homes (the “FSBO Policy”). The FSBO Policy states: “A Broker-Owner can not have an Exclusive Right to Sell (ERS) Listing in the MiRealSource system while appearing as an Exclusive Agency (EA) Listing in another MLS service, on any ‘For Sale By Owner’ (FSBO) site, or display a ‘For Sale By Owner’ sign on the property - effective May 1, 2005.” The FSBO Policy was also aimed at keeping Exclusive Agency Listings out of the MiRealSource MLS.

PARAGRAPH 20. MiRealSource actively enforces the Exclusion Policy, Listing Broker Policy, Web Site Policy, and FSBO Policy through violation letters and fines. As of September 2006, the fine for submitting an Exclusive Agency Listing as an Exclusive Right to Sell Listing is: 1st offense - \$1,000; 2nd offense - \$2,000; 3rd offense - \$5,000; 4th offense - Office Member removed from MLS.

MIREALSOURCE HAS MARKET POWER

PARAGRAPH 21. The provision of residential real estate brokerage services to sellers and buyers of real property in Southeastern Michigan and/or the MiRealSource Service Area is a relevant market.

PARAGRAPH 22. The publication and sharing of information relating to residential real estate listings for the purpose of brokering residential real estate transactions is a key input to the provision of real estate brokerage services, and represents a relevant input market. Publication of listings through the MiRealSource MLS is generally considered by sellers, buyers and their brokers to be the fastest and most effective means of obtaining the broadest market exposure for property in the MiRealSource Service Area.

Complaint

PARAGRAPH 23. Participation in MiRealSource is a service that is necessary for the provision of effective residential real estate brokerage services to sellers and buyers of real property in the MiRealSource Service Area. Participation significantly increases the opportunities of brokerage firms to enter into listing agreements with residential property owners and to assist prospective buyers in obtaining properties that fit their needs, and significantly reduces the costs of obtaining up-to-date and comprehensive information on listings and sales. The realization of these opportunities and efficiencies is important for brokers to compete effectively in the provision of residential real estate brokerage services in the MiRealSource Service Area.

PARAGRAPH 24. Access to the Approved Web Sites is a service that is necessary for the provision of effective residential real estate brokerage services in the MiRealSource Service Area. Home buyers regularly use the Approved Web Sites to assist in their search for homes. The Approved Web Sites are the web sites most commonly used by home buyers in their home search. Many home buyers find the home that they ultimately purchase by searching on one or more Approved Web Sites.

PARAGRAPH 25. The most efficient and, at least in some cases, the only means for MiRealSource members to have their listed properties visible to the public on the Approved Web Sites is by having MiRealSource transmit those listings.

PARAGRAPH 26. By virtue of industry-wide participation and control over the ability of real estate brokers to participate in the MiRealSource MLS and the ability of home sellers to publicize their homes for sale on Approved Web Sites, MiRealSource has market power in the MiRealSource Service Area.

Complaint

**THE MIREALSOURCE POLICIES HAVE NO
EFFICIENCY BENEFIT**

PARAGRAPH 27. There are no cognizable and plausible efficiency justifications for the conduct that constitutes the violation alleged in this Complaint. Such conduct is not reasonably ancillary to the legitimate and beneficial objectives of the MLS.

VIOLATION

PARAGRAPH 28. In adopting the policies and engaging in the acts and practices described herein, MiRealSource has combined or conspired with its members or others, or acted as a combination or conspiracy of its members or others, to restrain trade in the provision of residential real estate brokerage services within Southeastern Michigan and/or the MiRealSource Service Area.

PARAGRAPH 29. The acts and practices of MiRealSource described herein constitute an agreement that only listings based exclusively on traditional contract terms as dictated by MiRealSource will be placed in the MiRealSource MLS, and thereby eliminate certain forms of competition. The acts and practices have no cognizable and plausible efficiency justifications and are inherently suspect restraints of trade.

PARAGRAPH 30. The acts and practices of MiRealSource described herein constitute a concerted refusal to deal by competitors, except on specified terms, with respect to services that are necessary for the provision of effective residential real estate brokerage services. As such, the acts and practices are inherently suspect restraints of trade that have no cognizable and plausible efficiency justifications.

Complaint

PARAGRAPH 31. The purposes, capacities, tendencies, or effects of the policies, acts, or practices of MiRealSource and its members as described herein have been and are unreasonably to restrain competition among brokers, and to injure consumers, in the market for provision of residential real estate brokerage services within Southeastern Michigan and/or the MiRealSource Service Area.

PARAGRAPH 32. The policies, acts, practices, and combinations or conspiracies described herein constitute unfair methods of competition in or affecting interstate commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondent that the eighth day of January, 2007, at 10:00a.m., or such later date as determined by an Administrative Law Judge of the Federal Trade Commission, is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the FTC Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded to you to file with the Commission an answer to this complaint on or before the twentieth (20th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

Complaint

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings and the right to appeal the initial decision to the Commission under Rule 3.52.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

The ALJ will schedule an initial prehearing scheduling conference to be held not later than 14 days after the last answer is filed by any party named as a Respondent in the complaint. Unless otherwise directed by the ALJ, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a Respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

Complaint

NOTICE OF CONTEMPLATED RELIEF

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions might be inadequate to fully remedy the violation of the FTC Act, the Commission may order such other or further relief as it finds necessary or appropriate.

DEFINITIONS

For the purposes of this Order, the following definitions shall apply:

- A. "Respondent" or "MiRealSource" means MiRealSource, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business as of September 2006 at 5700 Crooks Road, Suite 102, Troy, Michigan 48098. The term also means the MiRealSource Board of Directors, its predecessors, divisions and wholly or partially owned subsidiaries, affiliates, licensees of affiliates, partnerships, and joint ventures; and all the directors, officers, Shareholders, participants, employees, consultants, agents, and representatives of the foregoing. The terms "subsidiary," "affiliate" and "joint venture" refer to any person in which there is partial or total ownership or control by MiRealSource, and is specifically meant to include MiRealSource MLS and/or each of the MiRealSource Websites.
- B. "MiRealSource Shareholder" means a member of MiRealSource, including licensees of the shareholder, affiliates, and licensees of the affiliates.

Complaint

- C. “Multiple Listing Service” or “MLS” means a cooperative venture by which real estate brokers serving a common market area submit their listings to a central service which, in turn, distributes the information for the purpose of fostering cooperation in and facilitating real estate transactions.
- D. “MiRealSource MLS” means any MLS owned, operated or controlled, in whole or in part, directly or indirectly, by MiRealSource, and any of its predecessors, divisions and wholly or partially owned subsidiaries, affiliates, licensees of the affiliates, partnerships, and joint ventures, and all the directors, officers, Shareholders, participants, employees, consultants, agents, and representatives of the foregoing.
- E. “IDX” means the internet data exchange process that provides a means or mechanism for MLS listings to be integrated within a Website.
- F. “IDX Website” means a Website that is capable of integrating the IDX listing information within the Website.
- G. “*Mirealsource.com*” means the Website operated by MiRealSource that allows the general public to search information concerning real estate listings from MiRealSource.
- H. “*Realtor.com*” means the Website operated by the National Association of Realtors that allows the general public to search information concerning real estate listings downloaded from a variety of MLSs representing different geographic areas of the country, including but not limited to real estate listings from MiRealSource.

Complaint

- I. “Approved Website” means a Website to which MiRealSource or MiRealSource MLS provides information concerning listings for publication including, but not limited to, MiRealSource Shareholder IDX Websites, *Mirealsource.com*, and *Realtor.com*.
- J. “Exclusive Right to Sell Listing” means a listing agreement under which the property owner or principal appoints a real estate broker as his or her exclusive agent for a designated period of time, to sell the property on the owner’s stated terms, and agrees to pay the broker a commission when the property is sold, whether by the broker, the owner or another broker, or any other definition that MiRealSource ascribes to the term “Exclusive Right to Sell Listing.”
- K. “Exclusive Agency Listing” means a listing agreement that authorizes the listing broker, as an exclusive agent, to offer cooperation and compensation on a blanket unilateral basis, but also reserves to the seller a general right to sell the property on an unlimited or restrictive basis, or any other definition that MiRealSource ascribes to the term “Exclusive Agency Listing.”
- L. “Services of the MLS” means the benefits and services provided by the MLS to assist MiRealSource Shareholders in selling, leasing and valuing property and/or brokering real estate transactions. With respect to real estate brokers or agents representing home sellers, Services of the MLS shall include, but are not limited to:
 - 1. having the property included among the listings in the MLS in a manner so that information concerning the listing is easily accessible by cooperating brokers; and
 - 2. having the property publicized through means available to the MLS, including, but not limited to, information concerning the listing being made

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available on *Mirealsource.com*, *Realtor.com* and IDX Websites.

II.

IT IS ORDERED that Respondent MiRealSource, its successors and assigns, and its Board of Directors, officers, committees, agents, representatives, and employees, directly or indirectly, or through any corporation, subsidiary, division, or other device, in connection with the operation of a Multiple Listing Service or Approved Websites in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall forthwith cease and desist from adopting or enforcing any policy, rule, practice or agreement of MiRealSource to deny, restrict or interfere with the ability of MiRealSource Shareholders to enter into Exclusive Agency Listings or other lawful listing agreements with the sellers of properties, including but not limited to any policy, rule, practice or agreement to:

1. prevent MiRealSource Shareholders from offering or accepting Exclusive Agency Listings;
2. prevent MiRealSource Shareholders from cooperating with listing brokers or agents that offer or accept Exclusive Agency Listings;
3. prevent MiRealSource Shareholders, or the sellers of properties who have entered into lawful listing agreements with MiRealSource Shareholders, from publishing information concerning listings offered pursuant to Exclusive Agency Listings on the MiRealSource MLS and Approved Websites;
4. prevent MiRealSource Shareholders, or the sellers of properties who have entered into lawful listing agreements with MiRealSource Shareholders, from publishing

Complaint

information concerning listings on public real estate web sites, including but not limited to *www.FSBO.com*;

5. prevent MiRealSource Shareholders from using the MiRealSource MLS unless they maintain a physical office;
6. prevent MiRealSource Shareholders from offering un-bundled real estate brokerage services, including but not limited to requiring MiRealSource Shareholders to provide a minimum set of real estate brokerage services;
7. deny or restrict the Services of the MLS to Exclusive Agency Listings or other lawful listings in any way that such Services of the MLS are not denied or restricted to Exclusive Right to Sell Listings; and
8. treat Exclusive Agency Listings, or any other lawful listings, in a less advantageous manner than Exclusive Right to Sell Listings, including but not limited to, any policy, rule or practice pertaining to the searching, sorting, ordering, transmission, downloading, or displaying of information pertaining to such listings.

Provided, however, that nothing herein shall prohibit the Respondent from adopting or enforcing any policy, rule, practice or agreement regarding subscription or participation requirements, payment of dues, administrative matters, or any other policy, rule, practice or agreement, that it can show is reasonably ancillary to the legitimate and beneficial objectives of the MLS.

III.

IT IS FURTHER ORDERED that Respondent shall, no later than thirty (30) days after the date this Order becomes final, amend its rules and regulations to conform to the provisions of this Order.

Complaint

IV.

IT IS FURTHER ORDERED that, within ninety (90) days after the date this Order becomes final, Respondent shall (1) inform each MiRealSource Shareholder of the amendments to its rules and regulations to conform to the provisions of this Order; and (2) provide each MiRealSource Shareholder with a copy of this Order. Respondent shall transmit the rule change and Order by the means it uses to communicate with its members in the ordinary course of MiRealSource's business, which shall include, but not be limited to: (a) sending one or more emails with one or more statements that there has been a change to the rule and an Order, along with a link to the amended rule and the Order, to each MiRealSource Shareholder; and (B) placing on the publicly accessible MiRealSource Website (*www.MiRealSource.com*) a statement that there has been a change to the rule and an Order, along with a link to the amended rule and the Order. Respondent shall modify its Website as described above no later than five (5) business days after the date the Order becomes final, and shall display such modifications for no less than ninety (90) days from the date this Order becomes final. The Order shall remain accessible through common search terms and archives on the Website for five (5) years from the date it becomes final.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in Respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation or any other proposed changes in the corporation which may affect compliance obligations arising out of the Order.

Decision and Order

VI.

IT IS FURTHER ORDERED that Respondent shall file a written report within six (6) months of the date this Order becomes final, and annually on the anniversary date of the original report for each of the five (5) years thereafter, and at such other times as the Commission may require by written notice to Respondent, setting forth in detail the manner and form in which it has complied with this Order.

VII.

IT IS FURTHER ORDERED that this Order shall terminate ten (10) years from the date the Order is issued.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this tenth day of October, 2006, issues its Complaint against Respondent MiRealSource, Inc.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having heretofore issued its complaint charging Respondent MiRealSource, Inc. with violations of Section 5 of the Federal Trade Commission Act, as amended, and Respondent MiRealSource, Inc. having been served a copy of that complaint, together with a notice of contemplated relief, and Respondent MiRealSource, Inc. having answered the complaint denying said charges and asserting affirmative defenses but admitting the jurisdictional allegations set forth herein; and

Decision and Order

The Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order, an admission by the Respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only, is entered into by Respondent and does not constitute an admission by Respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules, 16 C.F.R. § 3.25(c) (2006); and

The Commission having thereafter considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comments received from interested parties pursuant to Sections 2.34 and 3.25(f) of its Rules, 16 C.F.R. §§ 2.34, 3.25(f) (2006), now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following Order:

1. Respondent MiRealSource, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business at 5700 Crooks Road, Suite 102, Troy, Michigan 48098.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

Decision and Order

ORDER**I.**

IT IS ORDERED that for the purposes of this Order, the following definitions shall apply:

- A. “Respondent” or “MiRealSource” means MiRealSource, Inc., the MiRealSource Board of Directors, their predecessors, their successors and assigns of MiRealSource, Inc., its divisions and wholly or partially owned subsidiaries, affiliates, licensees of affiliates, partnerships, and joint ventures; and all the directors, officers, committees, employees, consultants, agents, and representatives of the foregoing, when acting in such capacity. The terms “subsidiary,” “affiliate” and “joint venture” refer to any person in which there is partial or total ownership or control by MiRealSource, and is specifically meant to include MiRealSource MLS and/or each of the MiRealSource Websites.
- B. “MiRealSource Shareholder” means a member of MiRealSource, including licensees of the shareholder, affiliates, and licensees of the affiliates.
- C. “Multiple Listing Service” or “MLS” means a cooperative venture by which real estate brokers serving a common market area submit their listings to a central service which, in turn, distributes the information for the purpose of fostering cooperation in and facilitating real estate transactions.
- D. “MiRealSource MLS” means any MLS owned, operated or controlled, in whole or in part, directly or indirectly, by MiRealSource.

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- E. “IDX” means an internet data exchange process that provides a means or mechanism for MLS listings to be integrated within a Website.
- F. “IDX Website” means a Website that is capable of integrating the IDX listing information within the Website.
- G. “MiRealSource Websites” means any public Website operated (not merely hosted) by MiRealSource, including but not limited to, *Mirealsource.com*.
- H. “*Realtor.com*” means the Website operated by the National Association of Realtors that allows the general public to search information concerning real estate listings downloaded from a variety of MLSs representing different geographic areas of the country, including but not limited to real estate listings from MiRealSource.
- I. “Approved Website” means a Website to which MiRealSource or MiRealSource MLS provides information concerning listings for publication including, but not limited to, MiRealSource Shareholder IDX Websites, MiRealSource Websites, and *Realtor.com*.
- J. “Exclusive Right to Sell Listing” means a listing agreement under which the property owner or principal appoints a real estate broker as his or her exclusive agent for a designated period of time, to sell the property on the owner’s stated terms, and agrees to pay the broker a commission when the property is sold, whether by the broker, the owner or another broker.
- K. “Exclusive Agency Listing” means a listing agreement under which the property owner or principal appoints a real estate broker, as his or her exclusive agent for a designated period of time, to sell the property on the owner’s stated terms, but also reserves to the seller a

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general right to sell the property without assistance from a broker, in which case the listing broker is paid a reduced or no commission when the property is sold.

- L. “Services of the MLS” means the benefits and services provided by the MLS to assist MiRealSource Shareholders in selling, leasing and valuing property and/or brokering real estate transactions. With respect to real estate brokers or agents representing home sellers, Services of the MLS shall include, but are not limited to:
1. having the property included among the listings in the MLS in a manner so that information concerning the listing is easily accessible by cooperating brokers; and
 2. having the property publicized through means available to the MLS, including, but not limited to, information concerning the listing being made available on MiRealSource Websites, *Realtor.com* and *IDX* Websites.
- M. The term “Unbundled Real Estate Brokerage Services” means a lawful arrangement pursuant to which a real estate broker or its agent provides that a property offered for sale shall be listed on an MLS, but the listing broker or its agent will not provide some or all of the additional services offered by other real estate brokers or will only offer such additional services as may be chosen from a menu of services for a fee.

II.

IT IS FURTHER ORDERED that Respondent MiRealSource, directly or indirectly, or through any corporation, subsidiary, division, or other device, in connection with the operation of a the MiRealSource MLS or MiRealSource Websites in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall

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forthwith cease and desist from adopting or enforcing any policy, rule, practice or agreement of MiRealSource to deny, restrict or interfere with the ability of MiRealSource Shareholders to enter into Exclusive Agency Listings or other lawful listing agreements with the sellers of properties, including but not limited to any policy, rule, practice or agreement to:

1. prevent MiRealSource Shareholders from offering or accepting Exclusive Agency Listings;
2. prevent MiRealSource Shareholders from cooperating with listing brokers or their agents that offer or accept Exclusive Agency Listings;
3. prevent MiRealSource Shareholders from publishing information concerning listings offered pursuant to Exclusive Agency Listings on the MiRealSource MLS and Approved Websites;
4. prevent MiRealSource Shareholders, or the sellers of properties who have entered into lawful listing agreements with MiRealSource Shareholders, from publishing information concerning listings (or, in the case of a seller, the seller's listing) on public real estate web sites, including but not limited to *www.FSBO.com*;
5. prevent MiRealSource Shareholders from using the MiRealSource MLS unless they maintain a physical office;
6. prevent MiRealSource Shareholders from offering Unbundled Real Estate Brokerage Services, including but not limited to requiring MiRealSource Shareholders to provide a minimum set of real estate brokerage services;

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7. deny or restrict the Services of the MLS to Exclusive Agency Listings or other lawful listings in any way that such Services of the MLS are not denied or restricted to Exclusive Right to Sell Listings; and
8. treat Exclusive Agency Listings, or any other lawful listings, in a less advantageous manner than Exclusive Right to Sell Listings, including but not limited to, any policy, rule or practice pertaining to the searching, sorting, ordering, transmission, downloading, or displaying of information pertaining to such listings.

Provided, however, that nothing herein shall prohibit the Respondent from adopting or enforcing any policy, rule, practice or agreement regarding subscription or participation requirements, payment of dues, administrative matters, or any other policy, rule, practice or agreement, including but not limited to, rules allowing a participant to make independent decisions regarding the display of listing information on that participant's web site or the display of listing information provided by that participant on the MiRealSource MLS on the web sites of others, so long as Respondent can show that the policy, rule, practice or agreement is reasonably ancillary to the legitimate and beneficial objectives of the MLS.

III.

IT IS FURTHER ORDERED that Respondent shall, no later than forty five (45) days after the date this Order becomes final, amend its rules and regulations to conform to the provisions of this Order.

IV.

IT IS FURTHER ORDERED that, within ninety (90) days after the date this Order becomes final, Respondent shall (1) inform each MiRealSource Shareholder of the amendments to its rules and regulations to conform to the provisions of this Order;

Decision and Order

and (2) provide each MiRealSource Shareholder with a copy of this Order. Respondent shall transmit the rule change and Order by the means it uses to communicate with its members in the ordinary course of MiRealSource's business, which shall include, but not be limited to: (a) sending one or more emails with one or more statements that there has been a change to the rule and an Order, along with a link to the amended rule and the Order, to each MiRealSource Shareholder; and (B) placing on the publicly accessible MiRealSource Website (*www.MiRealSource.com*) a statement that there has been an Order and related rule changes, along with a link to the Order, for a period of no less than ninety (90) days. The Order shall remain accessible through common search terms and archives on the Website for five (5) years from the date it becomes final.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in Respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation or any other proposed changes in the corporation which may affect compliance obligations arising out of the Order.

VI.

IT IS FURTHER ORDERED that Respondent shall file a written report within six (6) months of the date this Order becomes final, and annually on the anniversary date of the original report for each of the five (5) years thereafter, and at such other times as the Commission may require by written notice to Respondent, setting forth in detail the manner and form in which it has complied with this Order.

Analysis to Aid Public Comment

VII.

IT IS FURTHER ORDERED that this Order shall terminate on March 20, 2017.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted for public comment an agreement containing consent order with MiRealSource, Inc. (“MiRealSource” or “Respondent”). Respondent is a corporation owned by real estate brokers in Southeastern Michigan that operates a multiple listing service (“MLS”) designed to facilitate real estate transactions. The agreement settles charges that Respondent violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, through particular acts and practices of the MLS. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate comment on the proposed consent order. This analysis does not constitute an official interpretation of the agreement and proposed order, and does not modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only, and does not constitute an admission by Respondent that it

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violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

I. The Respondent

MiRealSource is a Michigan corporation. Its shareholders are real estate brokers doing business in Southeastern Michigan, and they are generally referred to as “members” of the Respondent. MiRealSource has approximately 7,000 members, and these members supply real estate brokerage services to home sellers in Southeastern Michigan and to prospective purchasers seeking homes in that area. One of the primary tools utilized by members to carry out their business efficiently is the MiRealSource MLS. This service facilitates the process of matching sellers and buyers for a large number of individual properties. It functions as a clearinghouse through which members regularly and systematically exchange information on property listings.

II. Industry Background

A Multiple Listing Service, or “MLS,” is a cooperative venture by which real estate brokers serving a common local market area submit their listings to a central service, which in turn distributes the information, for the purpose of fostering cooperation among brokers in real estate transactions. The MLS facilitates transactions by putting together a home seller, who contracts with a broker who is a member of the MLS, with prospective buyers, who may be working with other brokers who are also members of the MLS. Typically, the MLS rules establish criteria for membership, including the requirement that brokers and agents must be licensed by the applicable state regulatory agency to engage in real estate brokerage services.

Prior to the late 1990s, the listings on an MLS generally were directly accessible only to real estate brokers who were members of a local MLS. At that time, the MLS listings typically were made available through books or dedicated computer terminals,

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and generally could only be accessed by the public by physically visiting a broker's office or by receiving a fax or hand delivery of selected listings from a broker.

Information from an MLS is now typically available to the general public not only through the offices of real estate brokers who are MLS members, but also through three principal categories of internet web sites. First, information concerning many MLS listings is available through *Realtor.com*, a national web site run by the National Association of Realtors ("NAR"). *Realtor.com* contains listing information from many local MLS systems around the country and is the largest and most-used internet real estate web site. Second, information concerning MLS listings is often made available through a local MLS-affiliated web site. Third, information concerning MLS listings is often made available on the internet sites of various real estate brokers, who choose to provide these web sites as a way of promoting their brokerage services to potential clients (home buyers and sellers). Most of these various web sites receive information from an MLS pursuant to a procedure known as Internet Data Exchange ("IDX"), which is typically governed by MLS policies. The IDX policies allow operators of approved web sites to display MLS active listing information to the public.

Today the internet plays a crucial role in real estate sales. According to a 2006 survey by the National Association of Realtors ("NAR"), 80 percent of home buyers used the internet to assist in their home search, with 59 percent reporting frequent internet searches. Twenty-four percent of respondents first learned about the home they selected from the internet, the second most common means behind learning about a home from a real estate agent (36 percent).¹ In all, 73 percent of home buyers found the internet to be a "very useful" source of information, and a total of

¹ *E.g.*, PAUL C. BISHOP, HARIKA BICKICIOGLU, AND SHONDA D. HIGHTOWER, THE 2006 NATIONAL ASSOCIATION OF REALTORS PROFILE OF HOME BUYERS AND SELLERS (hereinafter, "ANAR Study") at 3-3, 3-4, 3-6.

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98 percent found the internet to be either “very useful” or “somewhat useful.”² Moreover, the NAR Survey makes clear that the overwhelming majority of web sites used nationally in searching for homes contain listing information that is provided by local MLS systems.³

A. Types of Real Estate Brokerage Professionals

A typical real estate transaction involves two real estate brokers. These are commonly referred to as a “listing broker” and a “selling broker.” The listing broker is hired by the seller of the property to locate an appropriate buyer. The seller and the listing broker agree upon compensation, which is determined by written agreement negotiated between the seller and the listing broker. In a common traditional listing agreement, the listing broker receives compensation in the form of a commission, which is typically a percentage of the sales price of the property, payable if and when the property is sold. In such a traditional listing agreement, the listing broker agrees to provide a package of real estate brokerage services, including promoting the listing through the MLS and on the internet, providing advice to the seller regarding pricing and presentation, fielding all calls and requests to show the property, supplying a lock-box so that potential buyers can see the house with their agents, running open houses to show the house to potential buyers, reviewing offers, negotiating with buyers or their agents on offers, assisting with home inspections and other arrangements once a contract for sale is executed, and attending the closing of the transaction.

The other broker involved in a typical transaction is commonly referred to as the selling broker. This selling broker will identify and discuss the properties that may be of interest to

² *Id.* at 3-5.

³ NAR Study at 3-19.

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the buyer, accompany the buyer to see various properties, try to arrange a transaction between buyer and seller, assist the buyer in negotiating the contract, and help in further steps necessary to close the transaction. In a traditional transaction, the listing broker offers the selling broker a fixed commission, to be paid from the listing broker's commission when and if the property is sold. Real estate brokers typically do not specialize as only listing brokers or selling brokers, but often function in either role depending on the particular transaction.

B. Types of Real Estate Listings

The relationship between the listing broker and the seller of the property is established by agreement. The two most common types of agreements governing listings are Exclusive Right to Sell Listings and Exclusive Agency Listings. An Exclusive Right to Sell Listing is the traditional listing agreement, pursuant to which the property owner appoints a real estate broker as his or her exclusive agent for a designated period of time, to sell the property on the owner's stated terms, and agrees to pay the listing broker a commission if and when the property is sold, whether the buyer of the property is secured by the listing broker, the owner or another broker.

An Exclusive Agency Listing is a listing agreement pursuant to which the listing broker acts as an exclusive agent of the property owner or principal in the sale of a property, but under which the property owner or principal reserves a right to sell the property without assistance of the listing broker, in which case the listing broker is paid a reduced or no commission when the property is sold.

Some real estate brokers have attempted to offer services to home sellers on something other than the traditional full-service basis. Many of these brokers, often for a flat fee paid at the inception of the listing contract and not contingent on whether the home sells during the term of that contract, will offer sellers access to the MLS's information-sharing function as well as a

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promise that their listing will appear on the most popular real estate web sites. Under such arrangements, the listing broker does not offer additional real estate brokerage services as part of the flat fee package, but allows sellers to purchase additional services if sellers so desire. These non-traditional arrangements often are structured using Exclusive Agency Listing contracts.

There is a third type of real estate transaction that does not involve a real estate broker or the services of the MLS, and it is known as a “For Sale By Owner” or “FSBO” transaction. With a FSBO transaction, a home owner will attempt to sell a house without the involvement of any real estate broker and without paying any compensation to such a broker, by advertising the availability of the home through traditional advertising mechanisms (such as a newspaper) or FSBO-specific web sites.

There are two critical distinctions between an Exclusive Agency Listing and a FSBO for the purpose of this analysis. First, the Exclusive Agency Listing employs a listing broker for access to the MLS and popular web sites providing MLS listing information open to the public; a FSBO transaction does not. Second, an Exclusive Agency Listing sets terms of compensation to be paid to a selling broker, while a FSBO transaction often does not.

III. The Conduct Addressed by the Proposed Consent Order

The complaint in this matter, issued on October 10, 2006,⁴ alleges that MiRealSource has violated the FTC Act by adopting rules or policies that limit the publication and marketing of certain sellers’ properties, but not others, based solely on the terms of their respective listing contracts. The complaint alleges that Respondent favored Exclusive Right to Sell Listings and disfavored Exclusive Agency Listings through, among other

⁴ See <http://www.ftc.gov/os/adjpro/d9321/061012admincomplaint.pdf>.

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things, the adoption of a rule excluding the latter listings entirely from the MLS.

The allegations explain that Respondent also adopted a series of further rules to stifle competition from real estate brokers using alternative business models to provide brokerage services in Southeastern Michigan. These rules include: (1) the “Web Site Policy,” which limits the publication of certain residential real estate listings on popular real estate web sites; (2) the “Listing Broker Policy,” which requires a Listing Broker to perform a minimum set of services; (3) the “Physical Office Policy,” which requires each member to have an office in the state of Michigan; (4) the “FSBO Policy,” which restricts how and where home sellers can advertise and market their homes; and (5) the “Co-Mingling Policy,” which (for a time) restricted MiRealSource listing information from being searched on public web sites along side listing information from other sources.

Such rules limit the acceptance, publication, and marketing of certain residential real estate listing contracts, thereby limiting home sellers’ ability to choose a listing type that best serves their specific needs. The complaint alleges that the conduct was collusive and exclusionary, because in agreeing to keep non-traditional listings off the MLS and from public web sites, the brokers enacting the rules were, in effect, agreeing among themselves to limit the manner in which they compete with one another, and withholding valuable benefits of the MLS from real estate brokers who did not go along. In addition, the complaint alleges that MiRealSource actively enforced the anticompetitive rules and policies through violation letters to members and substantial fines.

Some of the conduct at issue in this matter also is similar to the conduct addressed by the Commission in its recent consent orders involving real estate boards and associations operating MLSs in Texas, New Hampshire, New Jersey, Virginia,

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Wisconsin and Colorado.⁵ As in those matters, certain rules or policies of Respondent challenged in the complaint preclude information about properties from being made available on popular real estate web sites because the listing contracts do not follow the traditional format approved by the MLS. These rules or policies prevent properties with non-traditional listing contracts from being displayed on a broad range of public web sites, including the national “*Realtor.com*” web site operated by the National Association of Realtors, the local web site operated by MiRealSource, and individual members’ web sites.

A. The Respondent Has Market Power

MiRealSource serves residential real estate brokers in Southeastern Michigan. These professionals compete with one another to provide residential real estate brokerage services to consumers. Membership in the MiRealSource MLS is necessary for a broker to provide effective residential real estate brokerage services to sellers and buyers of real property in this area.⁶ By

⁵ *In the Matter of Austin Bd. of Realtors*, Docket No. C-4167 (Final Approval, Aug. 29, 2006); *In the Matter of Northern New England Real Estate Network, Inc.*, Docket No. C-4175 (Final Approval, Nov. 22, 2006); *In the Matter of Monmouth County Association of Realtors, Inc.*, Docket No. C-4176 (Final Approval, Nov. 22, 2006); *In the Matter of Williamsburg Area Association of Realtors, Inc.*, Docket No. C-4177 (Final Approval, Nov. 22, 2006); *In the Matter of Realtors Association of Northeast Wisconsin, Inc.*, Docket No. C-4178 (Final Approval, Nov. 22, 2006); *In the Matter of Information and Real Estate Services, LLC*, Docket No. C-4179 (Final Approval, Nov. 22, 2006). The ABOR consent order was published with an accompanying Analysis To Aid Public Comment at 71 Fed. Reg. 41023 (July 19, 2006). The other five consent orders were published at 71 Fed. Reg. 61474 (October 12, 2006).

⁶ As noted, the MLS provides valuable services for a broker assisting a seller as a listing broker, by offering a means of publicizing the property to other brokers and the public. For a broker assisting a buyer, it also offers unique and valuable services, including detailed information that is not shown on public web sites, which can help with house showings and otherwise facilitate home selections.

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virtue of broad industry participation and control over a key input, MiRealSource has market power in the provision of residential real estate brokerage services to sellers and buyers of real property in the MiRealSource Service Area.

B. Respondent's Conduct

Non-traditional forms of listing contracts, including Exclusive Agency Listings, are used by listing brokers to offer lower-cost real estate services to consumers. The series of rules and policies adopted by Respondent were joint action by a group of competitors to withhold distribution of listing information from rivals who did not contract with their brokerage service customers in a way that the group wished. This type of conduct was condemned by the Commission 20 years ago. In the 1980s and 1990s, several local MLS boards banned Exclusive Agency Listings from the MLS entirely. The Commission investigated and issued complaints against these exclusionary practices, obtaining several consent orders.⁷ The complaint alleges that, in addition to following these past practices, MiRealSource also extended its exclusionary rules to the more modern method of distributing listing information publicly via the internet.

⁷ See, e.g., *In the Matter of Port Washington Real Estate Bd., Inc.*, 120 F.T.C. 882 (1995); *In the Matter of United Real Estate Brokers of Rockland, Ltd.*, 116 F.T.C. 972 (1993); *In the Matter of Am. Indus. Real Estate Assoc.*, Docket No. C-3449, 1993 WL 13009648 (F.T.C. Jul. 6, 1993); *In the Matter of Puget Sound Multiple Listing Serv.*, Docket No. C-3390 (F.T.C. Aug. 2, 1990); *In the Matter of Bellingham-Whatcom County Multiple Listing Bureau*, Docket No. C-3299 (F.T.C. Aug. 2, 1990); *In the Matter of Metro MLS, Inc.*, Docket No. C-3286, 1990 WL 10012611 (F.T.C. Apr. 18, 1990); *In the Matter of Multiple Listing Serv. of the Greater Michigan City Area, Inc.*, 106 F.T.C. 95 (1985); *In the Matter of Orange County Bd. of Realtors, Inc.*, 106 F.T.C. 88 (1985).

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C. Competitive Effects of the Respondent's Rules and Policies

The MiRealSource rules and policies have prevented its members from offering or accepting Exclusive Agency Listings. Thus, the rules impede the provision of unbundled brokerage services, and may make it more difficult and costly for home sellers to market their homes. The Respondent's rules and policies have caused some brokers to exit from the real estate business in Southeastern Michigan, or to refrain from offering non-traditional brokerage services in that market or to not enter at all. Furthermore, the rules have caused home sellers to switch away from Exclusive Agency Listings to other forms of listing agreements.

By preventing Exclusive Agency Listings from being included in the MLS and transmitted to public-access real estate web sites, the MiRealSource rules and policies have adverse effects on home sellers and home buyers. When home sellers switch to full service listing agreements from Exclusive Agency Listings that often offer lower-cost real estate services to consumers, the sellers may purchase services that they would not otherwise buy. This, in turn, may increase the commission costs to consumers of real estate brokerage services. In particular, the rules deny home sellers choices for marketing their homes and deny home buyers the chance to use the internet easily to see all of the houses listed by real estate brokers in the area, making their search less efficient.

D. There is No Competitive Efficiency Associated with the Web Site Policy

The Respondent's rules at issue here advance no legitimate pro-competitive purpose. As a theoretical matter, if buyers and sellers could avail themselves of an MLS system and carry out real estate transactions without compensating any of its broker members, an MLS might be concerned that those buyers and

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sellers were free-riding on the investment that brokers have made in the MLS and adopt rules to address that free-riding. But this theoretical concern does not justify the rules or policies adopted by MiRealSource. Exclusive Agency Listings are not a credible means for home buyers or sellers to bypass the use of the brokerage services that the MLS was created to promote, because a listing broker is always involved in an Exclusive Agency Listing, and other provisions in the MiRealSource rules ensure that a selling broker — a broker who finds a buyer for the property — is compensated for the brokerage service he or she provides.

Under existing MLS rules that apply to any form of listing agreement, the listing broker must ensure that the home seller pays compensation to the cooperating selling broker (if there is one), and the listing broker may be liable himself for a lost commission if the home seller fails to pay a selling broker who was the procuring cause of a completed property sale. The possibility of sellers or buyers using the MLS but bypassing brokerage services is already addressed effectively by the Respondent's existing rules that do not distinguish between forms of listing contracts, and does not justify the series of exclusionary rules and policies adopted by MiRealSource. It is possible, of course, that a buyer of an Exclusive Agency Listing may make the purchase without using a selling broker, but this is true for traditional Exclusive Right to Sell Listings as well.

IV. The Proposed Consent Order

The proposed order is designed to ensure that the Respondent does not misuse its market power, while preserving the pro-competitive incentives of members to contribute to the MLS.

The proposed order prohibits MiRealSource from adopting or enforcing any rules or policies that deny or limit the ability of MLS members to enter into Exclusive Agency Listings, or any other lawful listing agreements, with sellers of properties. More specifically, the proposed order prohibits MiRealSource from

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preventing its members from offering or accepting Exclusive Agency Listings or other lawful listing agreements; cooperating with Listing Brokers or agents that offer or accept Exclusive Agency Listings or other lawful listing agreements; publishing Exclusive Agency Listings or other lawful listing agreements on the MLS and Approved Web Sites; publishing their information concerning listings on public real estate web sites, including but not limited to www.FSBO.com; requiring members to have a physical office; and offering unbundled real estate brokerage services, including but not limited to requiring MiRealSource Shareholders to provide a minimum set of real estate brokerage services. The proposed order also prohibits MiRealSource from denying or restricting the services of the MLS to Exclusive Agency Listings or other lawful listings in any way that such services of the MLS are not denied or restricted to Exclusive Right to Sell Listings; or treating Exclusive Agency Listings, or any other lawful listings, in a less advantageous manner than Exclusive Right to Sell Listings, including but not limited to, any policy, rule or practice pertaining to the transmission, downloading, or displaying of information pertaining to such listings.

In addition to these substantive provisions, the proposed order states that, within forty-five days after it becomes final, Respondent shall have conformed its rules to the substantive provisions of the order. Respondent is further required to notify its members of the applicable order through its usual business communications and its web site. The proposed order requires notification to the Commission of changes in the respondent's structure, and periodic filings of written reports concerning compliance. The relief in the proposed consent order ensures that the Respondent cannot revert to the old rules or policies, or engage in future variations of the challenged conduct.

The proposed order applies to MiRealSource and entities it owns or controls, including its respective MLS and any affiliated web site it operates. The order does not prohibit members, or

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other independent persons or entities that receive listing information from Respondent, from making independent decisions concerning the use or display of such listing information on member or third-party web sites, consistent with any contractual obligations to Respondent.

The proposed order will expire in 10 years.

Complaint

IN THE MATTER OF

HOSPIRA, INC., AND MAYNE PHARMA LIMITED

CONSENT ORDER, ETC. , IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT

Docket C-4182; File No. 071 0002

Complaint, January 18, 2007 — Decision, March 21, 2007

This consent order address the acquisition by respondent Hospira, Inc., of respondent Mayne Pharma Limited. Both respondents are engaged in the development, manufacture, marketing, sale, and distribution of generic injectable pharmaceutical products. The acquisition would eliminate competition between Hospira and Mayne, and reduce the number of competitors in the market for the manufacture and sale of generic injectable hydromorphone hydrochloride, and would eliminate potential competition between Hospira and Mayne in the markets for the manufacture and sale of generic injectable morphine sulfate, preservative-free morphine sulfate, nalbuphine hydrochloride, and deferoxamine mesylate. The order requires the companies to assign and divest to Barr Pharmaceuticals, Inc., or another Commission-approved acquirer the Mayne rights and assets necessary to manufacture and market certain generic injectable pharmaceuticals. The order requires Hospira and Mayne to provide transitional services to enable the Commission-approved acquirers to obtain all of the necessary approvals from the FDA. The order also requires Hospira and Mayne to file reports with the Commission periodically until the divestitures and transfers are accomplished.

Participants

For the *Commission*: Michele Cerullo, Andrew J. Forman,
David L. Inglefield, Christine Naglieri, and David von Nirschl.

For the *Respondents*: David A. Clanton and David J. Laing,
Baker & McKenzie LLP; and William Kolasky and Jeffrey D.
Ayer, Wilmer Cutler Pickering Hale and Dorr LLP.

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COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Hospira, Inc. (“Hospira”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Mayne Pharma Limited (“Mayne”), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act (“FTC Act”), as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. DEFINITIONS

1. “Commission” means the Federal Trade Commission.
2. “FDA” means the United States Food and Drug Administration.
3. “Respondents” means Hospira and Mayne individually and collectively.
4. “DEA” means the United States Drug Enforcement Administration.

II. RESPONDENTS

5. Respondent Hospira is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 275 North Field Drive, Lake Forest, Illinois 60045. Hospira is engaged in the development, manufacture, marketing, sale, and distribution of generic injectable pharmaceutical products and drug delivery devices.

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6. Respondent Mayne is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Australia, with its headquarters address at Level 3, 390 St. Kilda Road, Melbourne, Victoria 3004, Australia, and with the address of the principal place of business of Mayne Pharma (USA) Inc., its United States subsidiary, at 650 From Road, 2nd Floor, Mack-Cali Centre II, Paramus, New Jersey 07652. Mayne is engaged in the development, manufacture, marketing, sale, and distribution of generic injectable pharmaceutical products.

7. Respondents are, and at all times relevant herein have been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and are corporations whose business is in or affects commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED ACQUISITION

8. Pursuant to a Scheme Implementation Agreement (the “Agreement”), Hospira proposes to acquire all of the outstanding shares of Mayne (the “Acquisition”). The transaction is valued at approximately \$2 billion.

IV. THE RELEVANT MARKETS

9. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are the development, manufacture, and sale of the following generic injectable pharmaceutical products:

- a. hydromorphone hydrochloride;
- b. morphine sulfate (with preservatives);
- c. preservative-free morphine sulfate;

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- d. nalbuphine hydrochloride; and
- e. deferoxamine mesylate.

10. For the purposes of this Complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant lines of commerce.

V. THE STRUCTURE OF THE RELEVANT MARKETS

11. Hydromorphone hydrochloride is an opioid analgesic agent used to relieve moderate to severe acute and chronic pain. Hydromorphone hydrochloride is classified by the DEA as a Schedule II narcotic. Currently, Hospira, Baxter Healthcare Corp. (“Baxter”), and Mayne are the only suppliers of generic hydromorphone hydrochloride in the United States. The Acquisition would leave only Hospira and Baxter in this market, and increase Hospira’s market share to over 85 percent. The Herfindahl-Hirschman Index (“HHI”) would increase by 3,000 points, resulting in a post-acquisition HHI of 7,450 points.

12. Morphine sulfate is an opioid analgesic agent used in the treatment of moderate to severe acute and chronic pain. Morphine sulfate also is classified by the DEA as a Schedule II narcotic. Hospira is the leading supplier of generic morphine sulfate with a full-line of product presentations and strengths. Baxter and Amphastar Pharmaceuticals, Inc. are the only other suppliers of morphine sulfate in the United States. Mayne is in the process of entering this market and is one of a limited number of suppliers capable of entering this market in a timely manner. The Acquisition would eliminate Mayne’s entry into the morphine sulfate market.

13. Preservative-free morphine sulfate, unlike morphine sulfate, is used when the drug is delivered to the intrathecal or epidural space next to the nerves in a patient’s spine. Currently, only Hospira and Baxter sell preservative-free morphine sulfate like generic suppliers. Mayne is in the process of entering this

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market and is one of a limited number of suppliers capable of entering this market in a timely manner. The Acquisition would eliminate Mayne's entry into the preservative-free morphine sulfate market.

14. Nalbuphine hydrochloride is an opioid analgesic agent used to relieve moderate to severe pain in patients. Hospira currently is the only supplier of nalbuphine hydrochloride in the United States. Mayne is in the process of entering this market and is one of a limited number of firms capable of entering this market in a timely manner. The Acquisition would eliminate Mayne's entry into the nalbuphine hydrochloride market.

15. Deferoxamine mesylate is an iron chelator used to treat acute iron poisoning or chronic iron overload. Hospira and Teva Pharmaceutical Industries Ltd. are the only suppliers of generic deferoxamine mesylate in the United States. Mayne is in the process of entering this market and is well-positioned to enter this market in a timely manner. The Acquisition would eliminate Mayne's entry into the deferoxamine mesylate market.

VI. ENTRY CONDITIONS

16. Entry into each of the relevant product markets described in Paragraph 9 would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. Developing and obtaining FDA approval for the manufacture and sale of each of these products takes at least two years due to substantial regulatory, technological, and intellectual property barriers.

VII. EFFECTS OF THE ACQUISITION

17. The effects of the Acquisition, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton

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Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. by eliminating actual, direct, and substantial competition between Hospira and Mayne, and reducing the number of competitors in the market for the manufacture and sale of generic injectable hydromorphone hydrochloride thereby: (1) increasing the likelihood that Hospira will be able to unilaterally exercise market power in this market, (2) increasing the likelihood and degree of coordinated interaction between or among the remaining competitors, and (3) increasing the likelihood that customers would be forced to pay higher prices; and
- b. by eliminating potential competition between Hospira and Mayne in the markets for the manufacture and sale of generic injectable morphine sulfate, preservative-free morphine sulfate, nalbuphine hydrochloride, and deferoxamine mesylate, thereby: (1) increasing the likelihood that the combined entity would forego or delay the launch of Mayne's products in these markets, and (2) increasing the likelihood that the combined entity would delay or eliminate the substantial additional price competition that would have resulted from Mayne's independent entry into the markets.

VIII. VIOLATIONS CHARGED

18. The Agreement described in Paragraph 8 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

19. The Acquisition described in Paragraph 8, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

Order to Maintain Assets

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighteenth day of January, 2007, issues its Complaint against said Respondents.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Hospira, Inc. (“Hospira”) of Respondent Mayne Pharma Limited (“Mayne”), hereinafter referred to as “Respondents,” and Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. §18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

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The Commission having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Respondent Hospira, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 275 North Field Drive, Lake Forest, Illinois 60045.
2. Respondent Mayne Pharma Limited is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Australia, with its headquarters address at Level 3, 390 St. Kilda Road, Melbourne, Victoria 3004, Australia, and the address of the principal place of business of Mayne Pharma (USA) Inc, its United States subsidiary, at 650 From Road, 2nd Floor, Mack-Cali Centre II, Paramus, New Jersey 07652.
3. The Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final, the Decision and Order), shall apply:

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- A. “Hospira” means Hospira, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Hospira (including, but not limited to, Hospira Holdings (S.A.) Pty Ltd and Hospira Worldwide, Inc.) and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each. After the Acquisition, Hospira shall include Mayne.
- B. “Mayne” means Mayne Pharma Limited, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Mayne (including, but not limited to, Mayne Pharma (USA) Inc), and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- C. “Respondents” means Hospira and Mayne, individually and collectively.
- D. “Commission” means the Federal Trade Commission.
- E. “Divestiture Product Business(es)” means the Respondents’ business within the Geographic Territory specified in the Decision and Order related to each of the Divestiture Products, including the research, Development, manufacture, distribution, marketing, and sale of each Divestiture Product and the assets related to such business, including, but not limited to, the Divestiture Assets.
- F. “Divestiture Product Core Employees” means the Product Research and Development Employees and the Product Manufacturing Employees related to each Divestiture Product(s), individually and collectively.

Order to Maintain Assets

- G. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph III of the Decision and Order.
- H. “Orders” means the Decision and Order and this Order to Maintain Assets.
- I. “Pre-Acquisition Marketing Plan” means any marketing or sales plan that was planned or implemented within the period immediately prior to the Acquisition and without consideration of the influence of the pending Acquisition for the Divestiture Product Businesses.

II.

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final:

- A. Respondents shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the Divestiture Product Businesses, to minimize any risk of loss of competitive potential for the Divestiture Product Businesses, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Divestiture Product Businesses except for ordinary wear and tear. Respondents shall not sell, transfer, encumber or otherwise impair the Divestiture Assets (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the Divestiture Product Businesses.
- B. Respondents shall maintain the operations of the Divestiture Product Businesses in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such businesses) and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Divestiture Product Businesses and shall use their best efforts to preserve

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the existing relationships with the following: suppliers; vendors and distributors, including, but not limited to, the High Volume Accounts; customers; Agencies; employees; and others having business relations with the Divestiture Product Businesses. Respondents' responsibilities shall include, but are not limited to, the following:

1. providing the Divestiture Product Businesses with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such businesses and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the Divestiture Product Businesses;
2. continuing, at least at their scheduled pace, any additional expenditures for the Divestiture Product Businesses authorized prior to the date the Consent Agreement was signed by Respondents including, but not limited to, all research, Development, manufacture, distribution, marketing and sales expenditures;
3. provide such resources as may be necessary to respond to competition against the Divestiture Products and/or to prevent any diminution in sales of the Divestiture Products during and after the Acquisition process and prior to divestiture of the related Divestiture Assets;
4. provide such resources as may be necessary to maintain the competitive strength and positioning of the Divestiture Products at the High Volume Accounts;
5. making available for use by the Divestiture Product Businesses funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets related to such business, including the Divestiture Assets;

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6. providing the Divestiture Product Businesses with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the Divestiture Product Businesses; and
 7. providing such support services to the Divestiture Product Businesses as were being provided to these businesses by Respondents (whichever Respondent is relevant to such Divestiture Product(s)) as of the date the Consent Agreement was signed by Respondents.
- C. Respondents shall maintain a work force at least equivalent in size, training, and expertise to what has been associated with the Divestiture Products for the relevant Divestiture Product's most recent Pre-Acquisition Marketing Plan.
- D. Until the Closing Date for each respective set of Divestiture Assets, Respondents shall provide all the related Divestiture Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, and manufacture the relevant Divestiture Products consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of such Divestiture Products pending divestiture and to ensure successful execution of the Pre-Acquisition Marketing Plans related to the relevant Divestiture Products. Such incentives shall include a continuation of all employee benefits offered by Respondents (whichever Respondent is relevant to such Divestiture Product(s)) until the Closing Date for the divestiture of the respective Divestiture Assets has occurred, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by Law), and additional incentives as may be necessary to prevent any diminution of the relevant Divestiture Product's competitiveness.

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E. Respondents shall:

1. for each Divestiture Product, for a period of at least twelve (12) months from the relevant Closing Date or upon the hiring of ten (10) Divestiture Product Core Employees by the relevant Acquirer, whichever occurs earlier, provide the relevant Acquirer with the opportunity to enter into employment contracts with the Divestiture Product Core Employees related to such Divestiture Products and assets acquired by such Acquirer. Each of these periods is hereinafter referred to as the Divestiture Product Employee Access Period(s); and
2. not later than the earlier of the following dates: (1) ten (10) days after notice by staff of the Commission to Respondents to provide the Product Employee Information; or (2) ten (10) days after the relevant Closing Date, provide the relevant Acquirer or the relevant Proposed Acquirer with the Product Employee Information related to the relevant Divestiture Product Core Employees. Failure by Respondents to provide the Product Employee Information for any Divestiture Product Core Employee within the time provided herein shall extend the Divestiture Product Employee Access Period(s) with respect to that employee in an amount equal to the delay.
3. during the Divestiture Product Employee Access Period, not interfere with the hiring or employing by the relevant Acquirer of Divestiture Product Core Employees, and shall remove any impediments within the control of Respondents that may deter these employees from accepting employment with such Acquirer, including, but not limited to, any noncompete provisions of employment or other contracts with Respondents (whichever Respondent is relevant to such Divestiture Product(s)) that

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would affect the ability or incentive of those individuals to be employed by such Acquirer. In addition, Respondents shall not make any counteroffer to a Divestiture Product Core Employee who receives a written offer of employment from the relevant Acquirer;

provided, however, that this Paragraph II.E.3. shall not prohibit Respondents from continuing to employ any Divestiture Product Core Employee (subject to the conditions of continued employment prescribed in the Decision and Order).

- F. Pending divestiture of the relevant Divestiture Assets, Respondents shall:
1. not use, directly or indirectly, any such Confidential Business Information related to the research, Development, manufacturing, marketing, or sale of the relevant Divestiture Product(s) other than as necessary to comply with the following: (1) the requirements of the Orders; (2) Respondents' obligations to the Acquirer under the terms of any Remedial Agreement related to relevant Divestiture Product(s); or (3) applicable Law;
 2. not disclose or convey any such Confidential Business Information, directly or indirectly, to any person except the relevant Acquirer;
 3. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the relevant Divestiture Products to the employees associated with business related to those Retained Products that are approved by the FDA for the same or similar indications as the relevant Divestiture Products; and
 4. institute procedures and requirements to ensure that the above-described employees:

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- a. do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Order to Maintain Assets; and
 - b. do not solicit, access or use any Confidential Business Information that they are prohibited under this Order to Maintain Assets from receiving for any reason or purpose.
- G. Not later than thirty (30) days following the Effective Date, Respondents shall provide to all of Respondents' employees and other personnel who may have access to Confidential Business Information related to each of the respective Divestiture Products written or electronic notification of the restrictions on the use of such information by Respondents' personnel. At the same time, if not provided earlier, Respondents shall provide a copy of such notification by e-mail with return receipt requested or similar transmission, and keep an electronic file of such receipts for one (1) year after the Closing Date. Respondents shall provide a copy of the form of such notification to the Acquirer, the Interim Monitor(s), and the Commission. Respondents shall also obtain from each employee covered by this Paragraph II.G. an agreement to abide by the applicable restrictions. Respondents shall maintain complete records of all such agreements at Respondents' corporate headquarters and shall provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied with. Respondents shall monitor the implementation by their employees and other personnel of all applicable restrictions, and take corrective actions for the failure of such employees and personnel to comply with such restrictions or to furnish the written agreements and acknowledgments required by this Order to Maintain Assets. Respondents shall provide the Acquirer with copies of all certifications,

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notifications and reminders sent to Respondents' employees and other personnel.

- H. Respondents shall adhere to and abide by the Remedial Agreements (which agreements shall not vary or contradict, or be construed to vary or contradict, the terms of the Orders, it being understood that nothing in the Orders shall be construed to reduce any obligations of Respondents under such agreement(s)), which are incorporated by reference into this Order to Maintain Assets and made a part hereof.
- I. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Divestiture Product Businesses through their respective transfer to the Acquirer(s), to minimize any risk of loss of competitive potential for the Divestiture Product Businesses, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divestiture Assets except for ordinary wear and tear.

III.

IT IS FURTHER ORDERED that:

- A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint an Interim Monitor to assure that Respondents expeditiously comply with all of their obligations and performs all of their responsibilities as required by the Orders and the Remedial Agreements. The Commission may appoint one or more Interim Monitors to assure Respondents' compliance with the requirements of the Orders, and the related Remedial Agreements.
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondent Hospira which consent shall not be unreasonably withheld. If Respondent Hospira has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days

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after notice by the staff of the Commission to Respondent Hospira of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.

- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.
- D. If one or more Interim Monitors are appointed pursuant to this Paragraph or pursuant to the relevant provisions of the Decision and Order in this matter, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of each Interim Monitor:
1. The Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission;
 2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission;
 3. The Interim Monitor shall serve until the later of:
 - a. the completion by Respondents of the divestiture of all Divestiture Assets in a manner that fully satisfies the requirements of the Orders;

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- b. notification by each of the relevant Acquirer(s) that the relevant Acquirer (or the Designee(s) of such Acquirer) is approved by the FDA to manufacture each of the relevant Divestiture Products and able to manufacture such Divestiture Products in commercial quantities, in a manner consistent with cGMP, independently of Respondents;
- c. with respect to the monitoring of Respondents' obligations related to a particular Divestiture Product, notification by the relevant Acquirer(s) that such Acquirer has abandoned its efforts to obtain approval by the FDA manufacture such Divestiture Product; and
- d. the completion by Respondents of the last obligation under the Orders pertaining to the Interim Monitor's service;

provided, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders;

provided, further, that, with respect to each Divestiture Product, the Interim Monitor's service shall not exceed five (5) years from the Closing Date on the Remedial Agreement to Contract Manufacture such Divestiture Product.

- E. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with their obligations under the Orders, including, but not limited to, their obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no

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action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.

- F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.
- G. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
- H. Respondents shall report to the Interim Monitor in accordance with the requirements of this Order to Maintain Assets and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by the Acquirer with respect to the performance of Respondents' obligations under the Orders or the Remedial Agreement. Within one (1) month from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders.

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- I. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement;
- provided, however,* that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- J. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph or the relevant provisions of the Decision and Order in this matter.
- L. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
- M. The Interim Monitor appointed pursuant to this Order to Maintain Assets or the relevant provisions of the Decision and Order in this matter may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets becomes final, and every thirty (30) days thereafter until Respondents have fully

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complied with their obligations to assign, grant, license, divest, transfer, deliver or otherwise convey relevant assets as required by Paragraph II.A. of the related Decision and Order in this matter, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order to Maintain Assets and the related Decision and Order; *provided, however*, that, after the Decision and Order in this matter becomes final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondents pursuant to Paragraph VI of the Decision and Order.

V.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to:

- A. any proposed dissolution of Respondents;
- B. any proposed acquisition, merger or consolidation of Respondents; or
- C. any other change in Respondents including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

VI.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondents made to their principal United States offices or their headquarters

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address, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during business office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondents related to compliance with this Order, which copying services shall be provided by Respondents at the request of the authorized representative(s) of the Commission; and
- B. to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the earlier of:

- A. Three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The latter of:
 - 1. The day after the divestiture of all of the Divestiture Assets, as required by and described in the Decision and Order, has been completed and each Interim Monitor, in consultation with Commission staff and the Acquirer(s), notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions related to such divestitures

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are complete, or the Commission otherwise directs that this Order to Maintain Assets is terminated; or

2. the day the related Decision and Order becomes final.

By the Commission.

**PUBLIC
APPENDIX A
TO THE ORDER TO MAINTAIN ASSETS
AGREEMENT CONTAINING CONSENT ORDER
AND
PROPOSED DECISION AND ORDER**

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Hospira, Inc. (“Hospira”) of Respondent Mayne Pharma Limited (“Mayne”), hereinafter referred to as “Respondents,” and Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Maintain Assets (“ttached to this Order as Appendix I), and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having modified the Decision and Order in one respect, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Hospira, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 275 North Field Drive, Lake Forest, Illinois 60045.
2. Respondent Mayne Pharma Limited is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Australia, with its headquarters address at Level 3, 390 St. Kilda Road, Melbourne, Victoria 3004, Australia, and the address of the principal place of business of Mayne Pharma (USA)

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Inc, its United States subsidiary, at 650 From Road, 2nd Floor, Mack-Cali Centre II, Paramus, New Jersey 07652.

3. The Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in the Order, the following definitions shall apply:

- A. “Hospira” means Hospira, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Hospira (including, but not limited to, Hospira Holdings (S.A.) Pty Ltd and Hospira Worldwide, Inc.) and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each. After the Acquisition, Hospira shall include Mayne.
- B. “Mayne” means Mayne Pharma Limited, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Mayne (including, but not limited to, Mayne Pharma (USA) Inc), and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- C. “Respondents” means Hospira and Mayne, individually and collectively.
- D. “Commission” means the Federal Trade Commission.

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- E. “Acquirer” means the following:
1. an entity specified by name in this Order to acquire particular assets or rights that Respondents are required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission’s determination to make this Order final; or
 2. an entity approved by the Commission to acquire particular assets or rights that Respondents are required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.
- F. “Acquisition” means the Respondent Hospira’s acquisition of fifty percent (50%) or more of the voting securities of Respondent Mayne pursuant to the executed Scheme Implementation Agreement, dated September 20, 2006, by and among Hospira, Hospira Holdings (S.A.) Pty Ltd. And Mayne Pharma Limited.
- G. “Aguadilla Manufacturing Facility” means Respondent Mayne’s manufacturing facility located at 170 Parallel Road, Aguadilla, Puerto Rico 00604.
- H. “Agency(ies)” means any government regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Product. The term “Agency” includes, but is not limited to, the United States Food and Drug Administration (“FDA”) and the United States Drug Enforcement Agency (“DEA”).
- I. “Application(s)” means all of the following: “New Drug Application” (“NDA”), “Abbreviated New Drug Application” (“ANDA”), “Supplemental New Drug Application”

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(“SNDA”), or “Marketing Authorization Application” (“MAA”) means the applications for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part 314, and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, and all correspondence between Respondents and the FDA related thereto. The term “Application” also includes an “Investigational New Drug Application” (“IND”) for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part 312, and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, and all correspondence between Respondents and the FDA related thereto. The term “Application” also includes a “Biologics License Application” filed with the FDA pursuant to Section 351 of the Public Health Service Act, 42 U.S.C. 262., and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, and all correspondence between Respondents and the FDA related thereto.

- J. “Barr” means Barr Pharmaceuticals, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 400 Chestnut Ridge Road, Woodcliff Lake, New Jersey 07677.
- K. “Categorized Assets” means the following assets related to the specified Divestiture Product(s):
1. all Product Intellectual Property related to such Divestiture Product(s);
 2. perpetual, fully paid-up and royalty-free license(s) with rights to sublicense to all Product Licensed Intellectual Property to use, make, distribute, offer for sale, promote, advertise, sell, import, export, or have used, made,

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distributed, offered for sale, promoted, advertised, sold, imported, or exported the Divestiture Product(s) within the specified Geographic Territory;

3. all Product Registrations related to such Divestiture Product(s);
4. all Product Manufacturing Technology related to such Divestiture Product(s);
5. all Product Marketing Materials related to such Divestiture Product(s);
6. a list of all of the NDC Numbers related to such Divestiture Product(s), and rights, to the extent permitted by Law:
 - a. to require Respondents to discontinue the use of those NDC Numbers in the sale or marketing of Products other than with respect to returns, rebates, allowances, and adjustments for Divestiture Products sold prior to the Closing Date, or as specified in any agreement that is specifically referenced and attached to this Order where such agreement becomes a Remedial Agreement for such Divestiture Product;
 - b. to prohibit Respondents from seeking from any customer any type of cross- referencing of those NDC Numbers with any Retained Product(s);
 - c. to seek to change any cross-referencing by a customer of those NDC Numbers with the Retained Product(s) (including the right to receive notification from Respondents of any such cross-referencing that is discovered by Respondents);

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- d. to seek cross-referencing from a customer of those NDC Numbers with the relevant Acquirer's NDC Numbers related to the Divestiture Product(s);
 - e. to approve the timing of Respondents' discontinued use of those NDC Numbers in the sale or marketing of Products other than with respect to returns, rebates, allowances, and adjustments for Divestiture Products sold prior to the Closing Date, or as specified in any agreement that is specifically referenced and attached to this Order where such agreement becomes a Remedial Agreement for such Divestiture Product;
 - f. to approve any notification(s) from Respondents to any customer(s) regarding the use or discontinued use of such numbers by Respondents prior to such notification(s) being disseminated to the customer(s);
7. all rights to all of Respondents' Applications related to such Divestiture Product(s);
 8. Right of Reference or Use to the Drug Master Files related to the above-described Applications including, but not limited to, the pharmacology and toxicology data contained in all Application(s);
 9. all Product Development Reports related to such Divestiture Product(s);
 10. at the relevant Acquirer's option, all Product Assumed Contracts related to such Divestiture Product(s) (copies to be provided to the relevant Acquirer on or before the Closing Date);
 11. a perpetual, fully paid-up and royalty-free license(s) with rights to sublicense to all Product Risk Management Program(s) related to: (1) such Divestiture Products;

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and/or (2) any Retained Product that is approved for the same indications and has the same active pharmaceutical ingredient as the relevant Divestiture Product, that:

- a. have been approved by the FDA;
 - b. Respondents are in the process of formulating or planning (including, but not limited to, any potential changes in any Product Risk Management Program already approved by, or submitted to, the FDA); and/or
 - c. Respondents have submitted to the FDA for FDA approval.
12. all patient registries related to such Divestiture Product(s), and any other systematic active post-marketing surveillance program to collect patient data, laboratory data and identification information required to be maintained by the FDA to facilitate the investigation of adverse effects related to such Divestiture Product(s);
13. a list of all customers and/or targeted customers for such Divestiture Product(s) and the net sales (in either units or dollars) of such Divestiture Products to such customers on either an annual, quarterly, or monthly basis including, but not limited to, a separate list specifying the above-described information for the High Volume Accounts and including the name of the employee(s) for each High Volume Account that is or has been responsible for the purchase of such Divestiture Products on behalf of the High Volume Account and his or her business contact information;
14. at the relevant Acquirer's option and to the extent approved by the Commission in the relevant Remedial Agreement, all inventory in existence as of the Closing Date including, but not limited to, raw materials,

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packaging materials, work-in-process and finished goods related to such Divestiture Product(s);

15. copies of all unfilled customer purchase orders for such Divestiture Product(s) as of the Closing Date, to be provided to the relevant Acquirer not later than two (2) days after the Closing Date;
16. at the relevant Acquirer's option, subject to any rights of the customer, all unfilled customer purchase orders for such Divestiture Products;
17. at the relevant Acquirer's option, all manufacturing and other equipment located at the Aguadilla Manufacturing Facility that was used in, or suitable for use in, the research, Development, or manufacture of such Divestiture Products; and
18. all of the Respondents' books, records, and files directly related to the foregoing or to such Divestiture Product(s);

provided, however, that "Categorized Assets" shall not include documents relating to Respondents' general business strategies or practices relating to research, development, manufacture, marketing or sales of generic pharmaceutical Products, where such documents do not discuss with particularity the Divestiture Products;

provided further, the "Categorized Assets" shall not include administrative, financial, and accounting records;

provided further, Respondents may exclude from the "Categorized Assets" quality control records that are determined by the Interim Monitor or the Acquirer not to be material to the manufacture of the Divestiture Product(s);

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provided further, the “Categorized Assets” shall not include any real estate and the buildings and other structures located thereon;

provided further, that in cases in which documents or other materials included in the relevant assets to be divested contain information: (1) that relates both to such Divestiture Product(s) and to other Products or businesses of the Respondents and cannot be segregated in a manner that preserves the usefulness of the information as it relates to such Divestiture Product(s); or (2) for which the relevant party has a legal obligation to retain the original copies, the relevant party shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the relevant Acquirer, the relevant party shall provide such Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Respondents provide the relevant Acquirer with the above-described information without requiring Respondents completely to divest itself of information that, in content, also relates to Retained Product(s).

- L. “cGMP” means current Good Manufacturing Practice as set forth in the United States Food, Drug, and Cosmetic Act, as amended, and includes all rules and regulations promulgated thereunder.
- M. “Closing Date” means, as to each Divestiture Product, the date on which Respondents (or a Divestiture Trustee) consummate a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey assets related to such Divestiture Product to an Acquirer pursuant to this Order.
- N. “Confidential Business Information” means all information owned by, or in the possession or control of, Respondents that

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is not in the public domain and that is directly related to the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support or use of the Divestiture Product(s); *provided, however*, that the restrictions contained in this Order regarding the use, conveyance, provision or disclosure of AConfidential Business Information” shall not apply to the following:

1. information that subsequently falls within the public domain through no violation of this Order or breach of confidentiality or non-disclosure agreement with respect to such information by Respondents;
 2. information related to the Divestiture Products that Respondent Hospira can demonstrate it obtained without the assistance of Respondent Mayne prior to the Acquisition;
 3. information that is required by Law to be publicly disclosed;
 4. information that does not directly relate to the Divestiture Product(s);
 5. information relating to Respondents’ general business strategies or practices relating to research, development, manufacture, marketing or sales of generic pharmaceutical Products that does not discuss with particularity the Divestiture Product(s); or
 6. information specifically excluded from the Categorized Assets.
- O. “Contract Manufacture” means the manufacture of a Divestiture Product to be supplied by Respondents or a Designee to an Acquirer.

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P. “Deferoxamine Products” means all of the following: all Products in Development, manufactured, marketed or sold at any time by Respondent Mayne pursuant to the following of Respondent Mayne’s ANDAs (pending FDA approval):

1. ANDA 77-970; and
2. any supplements, amendments, or revisions thereto;

provided, however, that for the purposes of the Contract Manufacture provisions of this Order, the term “Deferoxamine Products” shall include all presentations of any Retained Product that, as of the Effective Date, are being manufactured, marketed or sold by Respondent Hospira for sale within the United States that contain the active pharmaceutical ingredient deferoxamine.

Q. “Designee” means any entity other than Respondents that will manufacture a Divestiture Product for an Acquirer.

R. “Development” means all preclinical and clinical drug development activities (including formulation), including test method development and stability testing, toxicology, formulation, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing, conducting clinical trials for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing, and sale of a Product (including any government price or reimbursement approvals), Product approval and registration, and regulatory affairs related to the foregoing. “Develop” means to engage in Development.

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- S. “Direct Cost” means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. A Direct Cost” to the Acquirer for its use of any of Respondents’ employee’s labor shall not exceed the average hourly wage rate for such employee.
- T. “Divestiture Product(s)” means the following Products: Deferoxamine Products, Hydromorphone Hydrochloride Products, Nalbuphine Hydrochloride Products, and the Morphine Products, individually and collectively.
- U. “Divestiture Product Assets” means all of Respondent Mayne’s rights, title and interest in and to all assets (wherever located in the world) related to Respondent Mayne’s business within the United States of America (including all of the territories within its jurisdiction or control) related to the Divestiture Products to the extent legally transferable, including the research, Development, manufacture, distribution, marketing, and sale of the Divestiture Products, including, without limitation, the Categorized Assets related to the Divestiture Products.
- V. “Divestiture Product Core Employees” means the Product Research and Development Employees and the Product Manufacturing Employees related to each Divestiture Product.
- W. “Divestiture Product Divestiture Agreements” means the following agreements:
1. “Asset Purchase Agreement” by and between Hospira, Inc. and Barr Laboratories, Inc. dated as of December 18, 2006; and
 2. “First Amendment to Manufacture and Supply Agreement for Hydromorphone” by and between Hospira, Inc. and Barr Laboratories, Inc. dated as of December 18, 2006

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(related to the Contract Manufacture of the Hydromorphone Hydrochloride Products);

3. “Development and Supply Agreement” by and between Barr Laboratories, Inc., and Hospira Worldwide, Inc. dated as of December 18, 2006;
4. “Supply Agreement” by and between Barr Laboratories, Inc., and Hospira Worldwide, Inc. dated as of December 18, 2006 (related to the Contract Manufacture of the Deferoxamine Products, Morphine Products, and the Nalbuphine Products); and
5. all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Divestiture Products that have been approved by the Commission to accomplish the requirements of this Order.

The Divestiture Product Divestiture Agreements are attached to this Order and contained in non-public Appendix II.A.

- X. “Divestiture Product Releasee(s)” means the Acquirer for the assets related to a particular Divestiture Product or any entity controlled by or under common control with such Acquirer, or any licensees, sublicensees, manufacturers, suppliers, distributors, and customers of such Acquirer, or of such Acquirer-affiliated entities.
- Y. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to the relevant provisions of this Order.
- Z. “Domain Name” means the domain name(s) (universal resource locators), and registration(s) thereof, issued by any entity or authority that issues and maintains the domain name registration. “Domain Name” shall not include any trademark or service mark rights to such domain names other than the rights to the Product Trademarks required to be divested.

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- AA. “Drug Master Files” means the information submitted to the FDA as described in 21 C.F.R. Part 314.420 related to a Product.
- BB. “Effective Date” means the date on which the Acquisition occurs.
- CC. “Geographic Territory” shall mean the United States of America (including all of the territories within its jurisdiction or control) unless otherwise specified.
- DD. “Government Entity” means any Federal, state, local or non-U.S. government, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.
- EE. “High Volume Account(s)” means any retailer, wholesaler or distributor whose annual and/or projected annual aggregate purchase amounts (on a company-wide level), in units or in dollars, of a Divestiture Product in the United States from the Respondent Hospira or Respondent Mayne (whichever party is relevant to such Divestiture Product) was, is, or is projected to be among the top twenty highest of such purchase amounts by Respondent Hospira or Respondent Mayne (whichever party is relevant to such Divestiture Product) U.S. customers on any of the following dates: (1) the end of the last quarter that immediately preceded the date of the public announcement of the proposed Acquisition; (2) the end of the last quarter that immediately preceded the Effective Date; (3) the end of the last quarter that immediately preceded the Closing Date for the relevant assets; or 4) the end of the last quarter following the Acquisition and/or the Closing Date.
- FF. “Hydromorphone Hydrochloride Products” means all of the following:

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1. all Products in Development, manufactured, marketed or sold at any time by Respondent Mayne pursuant to the following of Respondent Mayne's ANDAs:
 - a. ANDA 076-444 (includes the following Products: Hydromorphone Hydrochloride Injection, 10 mg/mL in the following presentations: 10mg/mL in 1 mL (2mL vials); 10mg/mL in 5 mL (5mL vials); 10 mg/mL in 50 mL (50 mL vials); and 2 mg/mL in 2 mL vials;
 - b. any supplements, amendments, or revisions thereto; and
2. all Products used or sold commercially in the United States on the day before the 1962 Amendments to the United States Food, Drug, and Cosmetic Act became effective that contain Hydromorphone Hydrochloride and that were manufactured, marketed or sold at any time by Respondent Mayne;

provided, however, for the purposes of the Contract Manufacture provisions of this Order, the term "Hydromorphone Hydrochloride Products" shall include all presentations of any Product that contains the active pharmaceutical ingredient hydromorphone hydrochloride that are to be manufactured by Respondent Hospira on behalf of the Acquirer pursuant to an agreement to Contract Manufacture in each instance where: (1) such agreement to Contract Manufacture is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Divestiture Product.

GG. "Interim Monitor" means any monitor appointed pursuant to Paragraph III of this Order or Paragraph III of the related Order to Maintain Assets.

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HH. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.

II. “Manufacture and Supply Agreement for Hydromorphone” means the Manufacture and Supply Agreement for Hydromorphone between Hospira, Inc., and Mayne Pharma (USA), Inc., dated October 13, 2005. The Manufacture and Supply Agreement for Hydromorphone is attached to this Order and contained in non-public Appendix II.A.

JJ. “Morphine Products” means all Products in Development, manufactured, marketed or sold at any time by Respondent Mayne in the Geographic Territory that contain the active pharmaceutical ingredient morphine sulphate;

provided, however, for the purposes of the Contract Manufacture provisions of this Order, the term “Morphine Products” shall include all presentations of any Product that contains the active pharmaceutical ingredient morphine sulphate that are to be manufactured by Respondent Hospira on behalf of the Acquirer pursuant to an agreement to Contract Manufacture in each instance where: (1) such agreement to Contract Manufacture is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Divestiture Product.

KK. “Nalbuphine Hydrochloride Products” means all of the following: all Products in Development, manufactured, marketed or sold at any time by Respondent Mayne pursuant to the following of Respondent Mayne’s ANDAs:

1. ANDA 74-471; and
2. any supplements, amendments, or revisions thereto;

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provided, however, that for the purposes of the Contract Manufacture provisions of this Order, the term “Nalbuphine Hydrochloride Products” shall include all presentations of any Retained Product that, as of the Effective Date, are being manufactured, marketed or sold by Respondent Hospira for sale within the United States that contain the active pharmaceutical ingredient nalbuphine hydrochloride.

- LL. “NDC Numbers” means the National Drug Code number(s), including both the labeler code assigned by the FDA and the additional numbers assigned by the Application holder as a product code for a specific Product.
- MM. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders. The Order to Maintain Assets is attached to this Order and contained in Appendix I.
- NN. “Patents” means all patents, patent applications, including provisional patent applications, and statutory invention registrations, in each case existing as of the Closing Date (*except* where this Order specifies a different time), and includes all reissues, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions, related to any Product of or owned by Respondents as of the Closing Date (*except* where this Order specifies a different time).
- OO. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or Government Entity, and any subsidiaries, divisions, groups or affiliates thereof.
- PP. “Product” means any pharmaceutical, biological, or genetic composition containing any formulation or dosage of a

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compound referenced as its pharmaceutically, biologically, or genetically active ingredient.

QQ. “Product Assumed Contracts” means all of the following contracts or agreements (copies of each such contract to be provided to the Acquirer on or before the relevant Closing Date and segregated in a manner that clearly identifies the purpose(s) of each such contract):

1. that make specific reference to the Divestiture Product(s) and pursuant to which any Third Party is obligated to purchase, or has the option to purchase without further negotiation of terms, the Divestiture Product(s) from Respondent Hospira or Respondent Mayne (whichever party is relevant to such Divestiture Product) unless such contract applies generally to the divesting entity’s sales of Products to that Third Party;
2. pursuant to which Respondent Hospira or Respondent Mayne (whichever party is relevant to such Divestiture Product) purchases the active pharmaceutical ingredient(s) or other necessary ingredient(s) or had planned to purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) from any Third Party for use in connection with the manufacture of the Divestiture Product(s);
3. relating to any clinical trials involving the Divestiture Product(s);
4. with universities or other research institutions for the use of the Divestiture Product(s) in scientific research;
5. relating to the particularized marketing of the Divestiture Product(s) or educational matters relating solely to the Divestiture Product(s);

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6. pursuant to which a Third Party manufactures the Divestiture Product(s) on behalf of Respondent Hospira or Respondent Mayne (whichever party is relevant to such Divestiture Product);
7. pursuant to which a Third Party provides the Product Manufacturing Technology or related equipment related to the Divestiture Product(s) to Respondent Hospira or Respondent Mayne (whichever party is relevant to such Divestiture Product);
8. constituting confidentiality agreements involving the Divestiture Product(s);
9. involving any royalty, licensing, or similar arrangement involving the Divestiture Product(s);
10. pursuant to which a Third Party provides any specialized services necessary to the research, Development, manufacture or distribution of the Divestiture Products to Respondent Hospira or Respondent Mayne (whichever party is relevant to such Divestiture Product) including, but not limited to, consultation arrangements; and/or
11. pursuant to which any Third Party collaborates with Respondent Hospira or Respondent Mayne (whichever party is relevant to such Divestiture Product) in the performance of research, Development, marketing, distribution or selling of the Divestiture Product(s) or the Divestiture Product(s) business;

provided, however, that where any such contract or agreement also relates to a Retained Product(s), Respondents shall assign the Acquirer all such rights under the contract or agreement as are related to the Divestiture Product(s), but concurrently may retain similar rights for the purposes of the Retained Product(s).

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RR. "Product Copyrights" means rights to all original works of authorship of any kind directly related to the Divestiture Product(s) and any registrations and applications for registrations thereof within the Geographic Territory, including, but not limited to, the following: all such rights with respect to all promotional materials for healthcare providers; all promotional materials for patients; educational materials for the sales force; copyrights in all preclinical, clinical and process development data and reports relating to the research and Development of the Divestiture Product(s) or of any materials used in the research, Development, manufacture, marketing or sale of the Divestiture Product(s), including all raw data relating to clinical trials of the Divestiture Product(s), all case report forms relating thereto and all statistical programs developed (or modified in a manner material to the use or function thereof (other than through user references)) to analyze clinical data, all market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; customer information, promotional and marketing materials, the Divestiture Product(s) sales forecasting models, medical education materials, sales training materials, and advertising and display materials; all records relating to employees who accept employment with the Acquirer (excluding any personnel records the transfer of which is prohibited by applicable Law); all records, including customer lists, sales force call activity reports, vendor lists, sales data, reimbursement data, speaker lists, manufacturing records, manufacturing processes, and supplier lists; all data contained in laboratory notebooks relating to the Divestiture Product(s) or relating to its biology; all adverse experience reports and files related thereto (including source documentation) and all periodic adverse experience reports and all data contained in electronic databases relating to adverse experience reports and periodic adverse experience reports; all analytical and quality control data; and all correspondence with the FDA.

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SS. “Product Development Reports” means:

1. Pharmacokinetic study reports related to the specified Divestiture Product(s);
2. Bioavailability study reports (including reference listed drug information) related to the specified Divestiture Product(s);
3. Bioequivalence study reports (including reference listed drug information) related to the specified Divestiture Product(s);
4. all correspondence to the Respondent Hospira or Respondent Mayne (whichever party is relevant to such Divestiture Product) from the FDA and from Respondent Hospira or Respondent Mayne (whichever party is relevant to such Divestiture Product) to the FDA relating to the Application(s) submitted by, on behalf of, or acquired by, Respondent Hospira or Respondent Mayne (whichever party is relevant to such Divestiture Product) related to the specified Divestiture Product;
5. annual and periodic reports related to the above-described Application(s), including any safety update reports;
6. FDA approved Product labeling related to the specified Divestiture Product(s);
7. currently used product package inserts (including historical change of controls summaries) related to the specified Divestiture Product(s);
8. FDA approved patient circulars and information related to the specified Divestiture Product(s);
9. adverse event/serious adverse event summaries related to the specified Divestiture Product(s);

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10. summary of Product complaints from physicians related to the specified Divestiture Product(s);
11. summary of Product complaints from customers related to the specified Divestiture Product(s); and
12. Product recall reports filed with the FDA related to the specified Divestiture Product(s).

TT. "Product Employee Information" means the following, for each Divestiture Product Core Employee, as and to the extent permitted by the Law:

1. a complete and accurate list containing the name of each relevant employee (including former employees who were employed by Respondents within ninety (90) days of the execution date of any Remedial Agreement);
2. with respect to each such employee, the following information:
 - a. the date of hire and effective service date;
 - b. job title or position held;
 - c. a specific description of the employee's responsibilities related to the relevant Divestiture Product; *provided, however*, in lieu of this description, Respondents may provide the employee's most recent performance appraisal;
 - d. the base salary or current wages;
 - e. the most recent bonus paid, aggregate annual compensation for Respondents' last fiscal year and current target or guaranteed bonus, if any;

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- f. employment status (*i.e.*, active or on leave or disability; full-time or part-time); and
 - g. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and
3. at the Acquirer's option or the Proposed Acquirer's option (as applicable), copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.
- UU. "Product Intellectual Property" means all of the following related to a Divestiture Product (other than Product Licensed Intellectual Property):
1. Patents;
 2. Product Copyrights;
 3. Product Trademarks, Product Trade Dress, trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information; and
 4. rights to obtain and file for patents and copyrights and registrations thereof;

provided, however, "Product Intellectual Property" does not include the names or trade dress of "Hospira," "Mayne," or the names or trade dress of any other corporations, companies, or brands owned or sold at any time by Respondents or the related logos to the extent used on Respondents' Retained Products.

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VV. “Product Licensed Intellectual Property” means the following:

1. Patents that are related to a Divestiture Product that Respondents can demonstrate have been routinely used, prior to the Effective Date, by either Respondent Hospira or Respondent Mayne (whichever party is relevant to such Divestiture Product) for a Retained Product(s) that:
 - a. has been marketed or sold on an extensive basis by Respondent Hospira or Respondent Mayne (whichever party is relevant to such Divestiture Product) within the two-year period immediately preceding the Acquisition; or
 - b. for which, prior to the announcement of the Acquisition, there was an approved marketing plan to market or sell such a Retained Product on an extensive basis by Respondent Hospira or Respondent Mayne; and
2. trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development, and other information, and all rights in any jurisdiction to limit the use or disclosure thereof, that are related to a Divestiture Product and that Respondent Hospira or Respondent Mayne can demonstrate have been routinely used, prior to the Effective Date, by either Respondent Hospira or Respondent Mayne (whichever party is relevant to such Divestiture Product) for a Retained Product(s) that:
 - a. has been marketed or sold on an extensive basis by either Respondent Hospira or Respondent Mayne (whichever party is relevant to such Divestiture Product) within the two-year period immediately preceding the Acquisition; or

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- b. for which, prior to the announcement of the Acquisition, there was an approved marketing plan to market or sell such a Retained Product on an extensive basis by Respondent Hospira or Respondent Mayne;

provided however, that, in cases where the aggregate retail sales in dollars within the two-year period immediately preceding the Acquisition of the Retained Product(s) collectively are less than the aggregate retail sales in dollars within the same period of the Divestiture Product(s) collectively, the above-described intellectual property shall be considered, at the Acquirer's option, to be Product Intellectual Property and, thereby, subject to assignment to the Acquirer; *provided further, however*, that in such cases, Respondents may take a license back from the Acquirer for such intellectual property for use in connection with the Retained Products.

WW. "Product Manufacturing Employees" means all salaried employees of Respondents who have directly participated in the planning, design, implementation or use of the Product Manufacturing Technology of the specified Divestiture Product(s) (irrespective of the portion of working time involved unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the eighteen (18) month period immediately prior to the Closing Date.

XX. "Product Manufacturing Technology" means:

1. all technology, trade secrets, know-how, and proprietary information (whether patented, patentable or otherwise) related to the manufacture of the Divestiture Product(s) including, but not limited to, the following: all product specifications, processes, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating

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procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with the FDA Application(s) conformance and cGMP compliance, and labeling and all other information related to the manufacturing process, and supplier lists; and,

2. for those instances in which the manufacturing equipment is not readily available from a Third Party, at the Acquirer's option, all such equipment used to manufacture the Divestiture Product(s).

YY. "Product Marketing Materials" means all marketing materials used specifically in the marketing or sale of a Divestiture Product(s) in the Geographic Territory as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (e.g., detailing reports, vendor lists, sales data), marketing information (e.g., competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), customer information (including customer net purchases information to be provided on the basis of either dollars and/or units for each month, quarter or year), sales forecasting models, educational materials, and advertising and display materials, speaker lists, promotional and marketing materials, Website content and advertising and display materials, artwork for the production of packaging components, television masters and other similar materials related to the Divestiture Product(s).

ZZ. "Product Registrations" means all registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, required by applicable Agencies related to the research, Development, manufacture, distribution, finishing, packaging, marketing, or

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sale of the Product within the Geographic Territory, including all Applications in existence for the Product as of the Closing Date.

- AAA. “Product Research and Development Employees” means all salaried employees of Respondents who directly have participated in the research, Development, or regulatory approval process, or clinical studies of the specified Divestiture Product(s) (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the eighteen (18) month period immediately prior to the Closing Date.
- BBB. “Product Risk Management Program” means a strategic safety program designed to decrease product risk by using one or more interventions or tools beyond the package insert, which program may be modified or amended from time to time and may be a condition of FDA approval.
- CCC. “Product Trade Dress” means the current trade dress of the Divestiture Product, including but not limited to, Product packaging, and the lettering of the Product trade name or brand name.
- DDD. “Product Trademark(s)” means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for the Product(s).
- EEE. “Proposed Acquirer” means an entity proposed by Respondents (or a Divestiture Trustee) to the Commission and submitted for the approval of the Commission as the acquirer for particular assets required to be assigned, granted, licensed,

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divested, transferred, delivered or otherwise conveyed by Respondents pursuant to this Order.

FFF. “Remedial Agreement(s)” means the following:

1. any agreement between Respondents and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission’s determination to make this Order final;
2. any agreement between Respondents and a Third Party to effect the assignment of assets or rights of Respondents related to a Divestiture Product to the benefit of an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission’s determination to make this Order final;
3. any agreement between Respondents and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of this Order; and/or

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4. any agreement between Respondents and a Third Party to effect the assignment of assets or rights of Respondents related to a Divestiture Product to the benefit of an Acquirer that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto.

GGG. “Retained Product” means any Product(s) other than a Divestiture Product.

HHH. “Right of Reference or Use” means the authority to rely upon, and otherwise use, an investigation for the purpose of obtaining approval of an Application, including the ability to make available the underlying raw data from the investigation for FDA audit.

III. “Supply Cost” means a cost not to exceed the manufacturer’s average direct per unit cost of manufacturing the Divestiture Product for the twelve (12) month period immediately preceding the Effective Date. “Supply Cost” shall expressly exclude any intracompany business transfer profit.

JJJ. “Third Party(ies)” means any private entity other than the following: (1) Respondents; or (2) the relevant Acquirer for the affected assets, rights and Divestiture Product(s).

KKK. “Website” means the content of the Website(s) located at the Domain Names, the Domain Names, and all copyrights in such Website(s), to the extent owned by Respondents; *provided, however*, “Website” shall not include the following: (1) content owned by Third Parties and other Product Intellectual Property not owned by Respondents that are incorporated in such Website(s), such as stock photographs used in the Website(s), *except* to the extent that Respondents can convey their rights, if any, therein; or (2) content unrelated to the Product(s).

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II.**IT IS FURTHER ORDERED** that:

- A. Not later than ten (10) days after the Effective Date, Respondents shall divest the Divestiture Product Assets, absolutely and in good faith, to Barr pursuant to, and in accordance with, the Divestiture Product Divestiture Agreements (which agreements shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of Barr or to reduce any obligations of Respondents under such agreements), and each such agreement, if it becomes the Remedial Agreement related to the Divestiture Product Assets, is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondents have divested the Divestiture Product Assets to Barr prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Barr is not an acceptable purchaser of the Divestiture Product Assets, then Respondents shall immediately rescind the transaction with Barr, in whole or in part, as directed by the Commission, and shall divest the Divestiture Product Assets within one hundred eighty (180) days from the date the Order becomes final, absolutely and in good faith, at no minimum price, to an Acquirer(s) and only in a manner that receives the prior approval of the Commission;

provided further that if Respondents have divested the Divestiture Product Assets to Barr prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such

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modifications to the manner of divestiture of the Divestiture Product Assets to Barr (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- B. Any Remedial Agreement shall be deemed incorporated into this Order, and any failure by Respondents to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order. Respondents shall include in each Remedial Agreement related to each of the Divestiture Products a specific reference to this Order, and the remedial purpose thereof.
- C. Respondents shall do the following and, in addition, include the following among the provisions in the Remedial Agreement(s) related to each of the Divestiture Products:
 - 1. upon reasonable notice and request from the Acquirer to Respondents, Respondents shall provide in a timely manner at no greater than Direct Cost the following:
 - a. assistance and advice to enable the Acquirer (or the Designee of the Acquirer) to obtain all necessary permits and approvals from any Agency or Government Entity to manufacture and sell the relevant Divestiture Products in commercial quantities (including, but not limited to, those Divestiture Products for which Respondent Mayne has, at any time, ceased production);
 - b. assistance to the Acquirer (or the Designee of the Acquirer) to manufacture the relevant Divestiture Product(s) (including, but not limited to, those Divestiture Products for which Respondent Mayne has, at any time, ceased production) in substantially the same manner, quality, and quantity(ies) employed or achieved by Respondent Mayne for the relevant

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Divestiture Product(s) or Respondent Hospira for those Retained Products that are generic equivalents of the Divestiture Product(s); and

- c. consultation with knowledgeable employees of Respondents and training, at the request of the Acquirer and at a facility chosen by the Acquirer, until the Acquirer (or the Designee of the Acquirer) obtains all FDA approvals necessary to manufacture in commercial quantities, and in a manner consistent with cGMP, the relevant Divestiture Product(s) (including, but not limited to, those Divestiture Products for which Respondent Mayne has, at any time, ceased production) independently of Respondents and sufficient to satisfy management of the Acquirer that its personnel (or the Designee's personnel) are adequately trained in the manufacture of the relevant Divestiture Product(s);
 - d. personnel, assistance and training as the Acquirer might reasonably need to transfer the assets related to the Divestiture Products;
2. provide an organized, comprehensive, complete, useful, timely, and meaningful transfer of information related to the Product Manufacturing Technology, and, as a part of such transfer, shall designate employees of Respondents knowledgeable with respect to such Product Manufacturing Technology and experienced in such transfers to a committee for the purposes of communicating directly with the Acquirer and the Interim Monitor (if applicable) for the purposes of effecting such transfer;
 3. include in the Remedial Agreement a representation from the relevant Acquirer that such Acquirer shall use commercially reasonable efforts to secure the FDA

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approval(s) necessary to manufacture, or to have manufactured by a Third Party, in commercial quantities, each such Divestiture Product and to have any such manufacture to be independent of Respondents, all as soon as reasonably practicable;

4. upon reasonable notice and request from the Acquirer to Respondents, Respondents shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondents to assist the Acquirer to defend against, respond to, or otherwise participate in any litigation related to the Product Intellectual Property related to the relevant Divestiture Product(s);
5. for any patent infringement suit in which either Respondent is a party prior to the Closing Date or for such Respondent has prepared or is preparing as of the Closing Date to be a party, and where such a suit would have the potential to interfere with the Acquirer's freedom to practice in the research, Development, manufacture, use, import, export, distribution or sale of the relevant Divestiture Product(s), Respondents shall:
 - a. cooperate with the Acquirer and provide any and all necessary technical and legal assistance, documentation and witnesses from Respondents in connection with obtaining resolution of any pending patent litigation involving a Divestiture Product;
 - b. waive conflicts of interest, if any, to allow either Respondents' outside legal counsel to represent the Acquirer in any ongoing patent litigation involving a Divestiture Product; and

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- c. permit the transfer to the Acquirer of all of the litigation files and any related attorney work-product in the possession of Respondents' outside counsel relating to such Divestiture;
6. Respondents shall not seek pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement a decision the result of which would be inconsistent with the terms of this Order and/or the remedial purposes thereof;
7. upon reasonable notice and request from the Acquirer to Respondents, Respondents shall Contract Manufacture and deliver to the Acquirer, in a timely manner and under reasonable terms and conditions a supply of each of the relevant Divestiture Products or, in substitute for this, a supply of the relevant Retained Product that is the generic equivalent to the Divestiture Product, at Respondents' Supply Cost, for a period of time sufficient to allow the Acquirer (or the Designee of the Acquirer) to obtain all of the relevant Agency approvals necessary to manufacture in commercial quantities, and in a manner consistent with cGMP, the relevant finished drug product independently of Respondents and to secure sources of supply of the relevant active pharmaceutical ingredients, excipients, other ingredients, and/or necessary components specified in the Respondents' Application(s) for the Product from entities other than Respondents;

provided, however, that in each instance where: (1) an agreement to Contract Manufacture is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Divestiture Product, Supply Cost shall be determined as specified in such Remedial Agreement;

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8. provide a right on behalf of the Acquirer to utilize a Third Party to conduct an independent audit at least once per year in order to verify whether the Respondents' determination of the cost charged to the Acquirer for any Products supplied under a Contract Manufacture is consistent with United States Generally Accepted Accounting Principles and the calculation of cost agreed to under the Remedial Agreement to Contract Manufacture the Product;
9. make representations and warranties to the Acquirer that the Product(s) supplied through Contract Manufacture pursuant to the Remedial Agreement meet the relevant Agency-approved specifications. For the Product(s) to be marketed or sold in the Geographic Territory, Respondents shall agree to indemnify, defend and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Product(s) supplied to the Acquirer pursuant to the Remedial Agreement by Respondents to meet cGMP. This obligation may be made contingent upon the Acquirer giving Respondents prompt, adequate notice of such claim and cooperating fully in the defense of such claim. The Remedial Agreement shall be consistent with the obligations assumed by Respondents under this Order; *provided, however*, that Respondents may reserve the right to control the defense of any such litigation, including the right to settle the litigation, so long as such settlement is consistent with Respondents' responsibilities to supply the ingredients and/or components in the manner required by this Order; *provided further* that this obligation shall not require Respondents to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by Respondents to the Acquirer; *provided further* that in each instance where: (1) an agreement to divest relevant assets is specifically referenced and attached to this Order, and

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(2) such agreement becomes a Remedial Agreement for a Divestiture Product, each such agreement may contain limits on Respondents' aggregate liability resulting from the failure of the Products supplied to the Acquirer pursuant to such Remedial Agreement by Respondents to meet cGMP;

10. make representations and warranties to the Acquirer that Respondents shall hold harmless and indemnify the Acquirer for any liabilities or loss of profits resulting from the failure by Respondents to deliver the Products in a timely manner as required by the Remedial Agreement unless Respondents can demonstrate that their failure was entirely beyond the control of Respondents and in no part the result of negligence or willful misconduct by Respondents; *provided, however*, that in each instance where: (1) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Divestiture Product, each such agreement may contain limits on Respondents' aggregate liability for such a breach; and
11. for any Product that has been classified by the FDA or the DEA as a Schedule II controlled substance, Respondents shall use commercially reasonable efforts to:
 - a. apply for, obtain, and/or amend a DEA quota for the active pharmaceutical ingredient(s) in the Product in order to meet the Acquirer's forecast of the quantity of the Product the Acquirer will order during the calendar year;
 - b. to have the DEA issue separate quotas for the active pharmaceutical ingredient needed to manufacture the Product for the Respondents and the active

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pharmaceutical ingredient(s) needed to Contract Manufacture the Product for the Acquirer;

- c. to have such DEA quotas increased (as is necessary) to meet the Acquirer's forecast for any calendar year;
 - d. once the DEA issues such a quota to the Respondents, whether or not in the aggregate amount of the forecasted needs of the Respondents, any Third Party (with a pre-existing agreement from Respondents to supply the relevant Product and only for such agreements executed prior to the date Respondent Hospira announced its intention to acquire Respondent Mayne), and the Acquirer, then Respondents shall, after consultation with any consultant hired pursuant to Paragraph II.C.12., prorate the quota among the Respondents, such Third Party (if applicable) and the Acquirer based on the original forecasted amounts requested by each of the parties for such calendar year; and
 - e. if the Acquirer requests additional quota during a calendar year, to obtain additional quota from the DEA, and to cooperate with the Acquirer in obtaining such additional quota;
12. for any Product that has been classified by the FDA or the DEA as a Schedule II substance and for the purposes of securing DEA quota and in order to prevent the exchange of commercially sensitive information between the Respondents and the Acquirer, at the Acquirer's option and the Respondents' expense, Respondents shall hire an independent consultant with expertise in securing quota from the DEA to:
- (1) advise, assist, or prepare all necessary documentation to apply, obtain, and/or amend a DEA quota on behalf of the Acquirer; and

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- (2) advise and assist in making an equitable determination of the allocation of the DEA quota among the Respondents, such Third Party (as referenced in Paragraph II.C.11.d, if applicable) and the Acquirer; and
13. during the term of the Contract Manufacture between Respondents and the Acquirer, upon request of the Acquirer or Interim Monitor (if any has been appointed), Respondents shall make available to the Acquirer and the Interim Monitor (if any has been appointed) all records that relate to the manufacture of the relevant Divestiture Products that are generated or created after the Closing Date.

The foregoing provisions, II.C.1. - 13., shall remain in effect with respect to each Divestiture Product until the earliest of: (1) the date the relevant Acquirer (or the Designee(s) of such Acquirer) is approved by the FDA to manufacture such Divestiture Product and able to manufacture such Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents; (2) the date the relevant Acquirer notifies the Commission and the Respondents of its intention to abandon its efforts to obtain approval by the FDA to manufacture such Divestiture Product; or (3) five (5) years from the Closing Date on the Remedial Agreement to Contract Manufacture such Divestiture Product.

D. Respondents shall:

1. submit to the Acquirer, at Respondents' expense, all Confidential Business Information related to the relevant Divestiture Product(s);

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2. deliver such Confidential Business Information as follows:
 - a. in good faith;
 - b. as soon as practicable, avoiding any delays in transmission of the respective information; and
 - c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;
3. pending complete delivery of all such Confidential Business Information to the Acquirer, provide the Acquirer and the Interim Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the relevant Divestiture Product(s) that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;
4. not use, directly or indirectly, any such Confidential Business Information related to the research, Development, manufacturing, marketing, or sale of the relevant Divestiture Product(s) other than as necessary to comply with the following:
 - a. the requirements of this Order;
 - b. Respondents' obligations to the Acquirer under the terms of any Remedial Agreement related to relevant Divestiture Product(s); or
 - c. applicable Law;
5. not disclose or convey any such Confidential Business Information, directly or indirectly, to any person except the Acquirer; and

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6. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the relevant Divestiture Products to the employees associated with business related to those Retained Products that are approved by the FDA for the same or similar indications or purposes as the relevant Divestiture Products.
- E. Respondents shall not enforce any agreement against a Third Party or the Acquirer to the extent that such agreement may limit or otherwise impair the ability of the Acquirer to acquire the Product Manufacturing Technology related to the relevant Divestiture Product(s) or related equipment from the Third Party. Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information related to such Product Manufacturing Technology.
 - F. Not later than ten (10) days after the Closing Date, Respondents shall grant a release to each Third Party that is subject to an agreement as described in Paragraph II.E. that allows the Third Party to provide the relevant Product Manufacturing Technology or related equipment to the Acquirer. Within five (5) days of the execution of each such release, Respondents shall provide a copy of the release to the Acquirer for the relevant assets.
 - G. Respondents shall not enter into or enforce any agreement against a Third Party or the Acquirer to the extent that such agreement would prevent the Acquirer from obtaining the active pharmaceutical ingredient related to the relevant Divestiture Product(s) from the Third Party. For each Divestiture Product for which the active pharmaceutical ingredient is manufactured by a Third Party, Respondents shall facilitate the Acquirer to secure a source of supply of such active pharmaceutical ingredient from a Third Party.

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H. Respondents shall:

1. for each Divestiture Product, for a period of at least twelve (12) months from the relevant Closing Date or upon the hiring of ten (10) Divestiture Product Core Employees by the relevant Acquirer, whichever occurs earlier, provide the relevant Acquirer with the opportunity to enter into employment contracts with the Divestiture Product Core Employees related to the Divestiture Products and assets acquired by such Acquirer. Each of these periods is hereinafter referred to as the Divestiture Product Employee Access Period(s); and
2. not later than the earlier of the following dates: (1) ten (10) days after notice by staff of the Commission to Respondent Hospira to provide the Product Employee Information; or (2) ten (10) days after the relevant Closing Date, provide the relevant Acquirer or the relevant Proposed Acquirer with the Product Employee Information related to the relevant Divestiture Product Core Employees. Failure by Respondents to provide the Product Employee Information for any Divestiture Product Core Employee within the time provided herein shall extend the Divestiture Product Employee Access Period(s) with respect to that employee in an amount equal to the delay.

I. Respondents shall:

1. during the Divestiture Product Employee Access Period(s), not interfere with the hiring or employing by the relevant Acquirer of the Divestiture Product Core Employees related to the particular Divestiture Products and assets acquired by such Acquirer, and remove any impediments within the control of Respondents that may deter these employees from accepting employment with

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the relevant Acquirer, including, but not limited to, any noncompete or nondisclosure provision of employment with respect to a Divestiture Product or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by the relevant Acquirer. In addition, Respondents shall not make any counteroffer to such a Divestiture Product Core Employee who has received a written offer of employment from the relevant Acquirer;

provided, however, that this Paragraph II.I.1 shall not prohibit Respondents from continuing to employ any Divestiture Product Core Employee during the Divestiture Product Employee Access Period (subject to the conditions of continued employment prescribed in this Order);

2. until the Closing Date, provide all Divestiture Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, and manufacture the Divestiture Product(s) consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Divestiture Product(s) and to ensure successful execution of the pre-Acquisition plans for such Divestiture Product(s). Such incentives shall include a continuation of all employee compensation and benefits offered by Respondents until the Closing Date(s) for the divestiture of the assets related to the Divestiture Product(s) has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

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provided, however, that nothing in this Order requires or shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing to employ the Divestiture Product Core Employees (other than those conditions of continued employment prescribed in this Order) in connection with the Acquisition; and

3. for a period of one (1) year from the relevant Closing Date, not:
 - a. directly or indirectly, solicit or otherwise attempt to induce any employee of the Acquirer with any amount of responsibility related to a Divestiture Product (“Divestiture Product Employee”) to terminate his or her employment relationship with the relevant Acquirer; or
 - b. hire any Divestiture Product Employee; *provided, however,* Respondents may hire any former Divestiture Product Employee whose employment has been terminated by the relevant Acquirer or who independently applies for employment with Respondents, as long as such employee was not solicited in violation of the nonsolicitation requirements contained herein;

provided, however, Respondents may do the following: (1) advertise for employees in newspapers, trade publications or other media not targeted specifically at the Divestiture Product Employees; or (2) hire a Divestiture Product Employee who contacts Respondents on his or her own initiative without any direct or indirect solicitation or encouragement from Respondents.

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- J. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary to permit Respondents to divest the assets required to be divested pursuant to this Order to the relevant Acquirer(s), and/or to permit such Acquirer to continue the research, Development, manufacture, sale, marketing or distribution of the Divestiture Products;

provided, however, Respondents may satisfy this requirement by certifying that the relevant Acquirer has executed all such agreements directly with each of the relevant Third Parties.

- K. Respondents shall require, as a condition of continued employment post-divestiture of the assets required to be divested pursuant to this Order, that each Divestiture Product Core Employee retained by Respondent, the direct supervisor(s) of any such employee, and any other employee retained by Respondents and designated by the Interim Monitor (if applicable) sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Confidential Business Information related to the Divestiture Products as strictly confidential, including the nondisclosure of such information to all other employees, executives or other personnel of Respondents (other than as necessary to comply with the requirements of this Order).
- L. Not later than thirty (30) days after the Effective Date, Respondents shall provide written notification of the restrictions on the use of the Confidential Business Information related to the Divestiture Products by Respondents' personnel to all of Respondents' employees who:
1. are or were directly involved in the research, Development, manufacturing, distribution, sale or marketing of each of the relevant Divestiture Products;

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2. are directly involved in the research, Development, manufacturing, distribution, sale or marketing of Retained Products that are approved by the FDA for the same or similar indications as each of the relevant Divestiture Products prior to the Acquisition; and/or
3. may have Confidential Business Information related to the Divestiture Products.

Respondents shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the relevant Closing Date. Respondents shall provide a copy of such notification to the Acquirer. Respondents shall maintain complete records of all such agreements at Respondents' corporate headquarters and shall provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied with. Respondents shall provide the Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel.

- M. Upon reasonable notice and request by the Acquirer(s), Respondents shall make available to the Acquirer(s), at no greater than Direct Cost (or, in each instance where: (1) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Divestiture Product, then at such cost as may be provided therein) such personnel, assistance and training as the Acquirer(s) might reasonably need to transfer the assets related to the Divestiture Product(s) and shall continue providing such personnel, assistance and training, at the request of the Acquirer(s), until either: (1) the relevant Acquirer (or the Designee(s) of such Acquirer) is approved by the FDA to manufacture each of the relevant Divestiture Products and able to manufacture such Divestiture Products in commercial quantities, in a manner consistent with cGMP, independently of Respondents, or (2) the relevant Acquirer notifies the Commission and the Respondents of its

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intention to abandon its efforts to obtain approval by the FDA to manufacture a particular Divestiture Product, in which instance, the Respondents' obligations related to such Divestiture Product under the foregoing provision shall end.

- N. Pending divestiture of the assets required to be divested pursuant to this Order, Respondents shall take such actions as are necessary to maintain the full economic viability and marketability of the business associated with such assets, to minimize any risk of loss of competitive potential for such business, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of these assets until after their respective transfer to the relevant Acquirer in a manner that ensures that there is no disruption, delay, or impairment of the regulatory approval processes related to such assets. Respondents shall not sell, transfer, encumber or otherwise impair such assets (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the above-described businesses.
- O. Respondents shall maintain manufacturing facilities necessary to manufacture each Divestiture Product that is subject to the Contract Manufacture provisions of this Order in finished form (suitable for sale to the ultimate consumer/patient by the Acquirer) until the earliest of: (1) the date the relevant Acquirer (or the Designee(s) of such Acquirer) is approved by the FDA to manufacture such Divestiture Product and able to manufacture such Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents; (2) the date relevant Acquirer notifies the Commission and the Respondents of its intention to abandon its efforts to obtain approval by the FDA to manufacture a particular Divestiture Product; or (3) five (5) years from the Closing Date on the Remedial Agreement to Contract Manufacture such Divestiture Product;

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provided, however, the Commission may eliminate, or limit the duration of, Respondents' obligation under this provision if the Commission determines that the relevant Acquirer is not using commercially reasonable efforts to secure the FDA approvals necessary to manufacture in commercial quantities each such Divestiture Product in finished form in a facility that is independent of Respondents and to enable itself to manufacture such quantities of each such Divestiture Product independently of Respondents.

- P. Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against the relevant Acquirer(s) or the Divestiture Product Releasee(s) for the research, Development, manufacture, use, import, export, distribution, or sale of the relevant Divestiture Product(s) under the following:
1. any Patent owned or licensed by Respondents as of the Effective Date that claims a method of making, using, or administering, or a composition of matter, relating to the respective Divestiture Product, or that claims a device relating to the use thereof;
 2. any Patent owned or licensed at any time after the Effective Date by Respondents that claim any aspect of the research, Development, manufacture, use, import, export, distribution, or sale of the respective Divestiture Products, other than such Patents that claim inventions conceived by and reduced to practice after the Effective Date;

if such suit would have the potential to interfere with the relevant Acquirer's freedom to practice the research, Development, manufacture, use, import, export, distribution, or sale of the relevant Divestiture Products. Respondents shall also covenant to the relevant Acquirer that as a condition of any assignment, transfer, or license to a Third Party of the above-described Patents, the Third Party shall agree to provide a covenant whereby the Third Party covenants not to sue the

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relevant Acquirer or the related Divestiture Product Releasee(s) under such Patents, if the suit would have the potential to interfere with the relevant Acquirer's freedom to practice in the research, Development, manufacture, use, import, export, distribution, or sale of the relevant Divestiture Products.

Respondents shall include the above-described covenants in the Remedial Agreement(s) with the relevant Acquirer.

- Q. Respondents shall not, in the Geographic Territory:
1. use the Product Trademarks related to the Divestiture Products or any mark confusingly similar to such Product Trademarks, as a trademark, trade name, or service mark;
 2. attempt to register such Product Trademarks;
 3. attempt to register any mark confusingly similar to such Product Trademarks;
 4. challenge or interfere with the Acquirer(s)'s use and registration of such Product Trademarks; or
 5. challenge or interfere with the Acquirer(s)'s efforts to enforce its trademark registrations for and trademark rights in such Product Trademarks against Third Parties;

provided however, that nothing in this Order shall preclude Respondents from continuing to use those trademarks, trade-names, or service marks related to the Retained Products as of the Effective Date.

- R. The purpose of the divestiture of the Divestiture Product Assets and the related obligations imposed on the Respondents by this Order is:

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1. to ensure the continued use of such assets in the research, Development, manufacture, distribution, sale and marketing of the each of the Divestiture Products, respectively;
2. to create a viable and effective competitor in the relevant markets alleged in the Commission's Complaint who is independent of the Respondents; and,
3. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

III.**IT IS FURTHER ORDERED** that:

- A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that Respondents expeditiously comply with all of their obligations and performs all of their responsibilities as required by this Order, the Order to Maintain Assets and the Remedial Agreements.
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondent Hospira, which consent shall not be unreasonably withheld. If Respondent Hospira has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent Hospira of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.
- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to

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permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.

- D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
1. The Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission.
 2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 3. The Interim Monitor shall serve until the later of:
 - a. the completion by Respondents of the divestiture of all Divestiture Assets in a manner that fully satisfies the requirements of the Orders;
 - b. notification by each of the relevant Acquirer(s) that the relevant Acquirer (or the Designee(s) of such Acquirer) is approved by the FDA to manufacture each of the relevant Divestiture Products and able to manufacture such Divestiture Products in commercial quantities, in a manner consistent with cGMP, independently of Respondents;
 - c. with respect to the monitoring of Respondents' obligations related to a particular Divestiture Product, notification by the relevant Acquirer(s) that such

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Acquirer has abandoned its efforts to obtain approval by the FDA manufacture such Divestiture Product; and

- d. the completion by Respondents of the last obligation under the Orders pertaining to the Interim Monitor's service;

provided, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders;

provided, further, that, with respect to each Divestiture Product, the Interim Monitor's service shall not exceed five (5) years from the Closing Date on the Remedial Agreement to Contract Manufacture such Divestiture Product.

4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with their obligations under the Order, including, but not limited to, their obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Order.
5. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary

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to carry out the Interim Monitor's duties and responsibilities.

6. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
7. Respondents shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by the Acquirer with respect to the performance of Respondents' obligations under the Order or the Remedial Agreement. Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Order.
8. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

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- E. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- F. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.
- G. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.
- H. The Interim Monitor appointed pursuant to this Order may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

IV.**IT IS FURTHER ORDERED** that:

- A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey relevant assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver or otherwise convey the assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed pursuant to each of the relevant Paragraphs in a manner that satisfies the requirements of each such Paragraph. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of

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a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

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1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.
2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.
3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

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4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; and, *provided further, however*, that Respondents shall select such entity within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

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6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
 7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; *provided, however*, that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Interim Monitor pursuant to the relevant provisions of the Order to Maintain Assets in this matter.
 8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.

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- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

V.

IT IS FURTHER ORDERED that:

Respondents shall assure that, in any instance wherein their counsel (including in-house counsel under appropriate confidentiality arrangements) either retains unredacted copies of documents or other materials provided to the Acquirer(s) or accesses original documents (under circumstances where copies of documents are insufficient or otherwise unavailable) provided to the Acquirer(s), that Respondents' counsel does so only in order to do the following:

- A. comply with any Remedial Agreement, this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals), any data retention requirement of any applicable Government Entity, or any taxation requirements; or
- B. defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena or other proceeding relating to the divestiture or any other aspect of the Divestiture Products or assets and businesses associated with those Products; *provided, however*, that Respondents may disclose such information as necessary for the purposes set forth in this Paragraph pursuant to an appropriate confidentiality order, agreement or arrangement;

provided, however, that pursuant to this Paragraph V, Respondents shall: (1) require those who view such unredacted documents or other materials to enter into

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confidentiality agreements with the relevant Acquirer (but shall not be deemed to have violated this requirement if the relevant Acquirer withholds such agreement unreasonably); and (2) use their best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

VI.

IT IS FURTHER ORDERED that:

- A. Within five (5) days of the Acquisition, Respondents shall submit to the Commission a letter certifying the date on which the Acquisitions occurred.
- B. Within five (5) days of the completion of the divestiture described in Paragraph II.A., Respondents shall submit to the Commission a letter certifying the date on which Respondents completed such divestiture and describing the manner in which Respondents completed such divestiture.
- C. Within thirty (30) days after the date this Order becomes final, and every sixty (60) days thereafter until Respondents have fully complied with the following:
 1. Paragraphs II.A., (*i.e.*, has assigned, licensed, divested, transferred, delivered or otherwise conveyed all relevant assets to the relevant Acquirer in a manner that fully satisfies the requirements of the Order);
 2. Paragraphs II.D., II.F., II.H., II.I., II.J., and II.L.; and
 3. all of their responsibilities to render transitional services to the relevant Acquirer as provided by this Order and the Remedial Agreement(s),

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Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondents shall submit at the same time a copy of their report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant Paragraphs of the Order, including a full description of all substantive contacts or negotiations related to the divestiture of the relevant assets and the identity of all Persons contacted, including copies of all written communications to and from such Persons, all internal memoranda, and all reports and recommendations concerning completing the obligations.

- D. One (1) year after the date this Order becomes final, annually for the next nine years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with the Order.

VII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to:

- A. any proposed dissolution of Respondents;
- B. any proposed acquisition, merger or consolidation of Respondents; or
- C. any other change in Respondents including, but not limited to, assignment and the creation or dissolution of subsidiaries, if

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such change might affect compliance obligations arising out of the Order.

VIII.

IT IS FURTHER ORDERED that Respondents shall not modify or amend any of the terms of any Remedial Agreement that are related to the Divestiture Products without the prior approval of the Commission.

IX.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondents made to their principal United States offices or their headquarters address, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during business office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondents related to compliance with this Order, which copying services shall be provided by Respondents at the request of the authorized representative(s) of the Commission; and
- B. to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

X.

IT IS FURTHER ORDERED that this Order shall terminate on March 21, 2017.

By the Commission.

Analysis to Aid Public Comment

**PUBLIC
APPENDIX I
ORDER TO MAINTAIN ASSETS**

**NON-PUBLIC APPENDIX II.A.
DIVESTITURE PRODUCT DIVESTITURE AGREEMENTS**

**[Redacted From the Public Record But Incorporated by
Reference]**

**ANALYSIS OF PROPOSED CONSENT ORDER TO AID
PUBLIC COMMENT**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Hospira Inc. (“Hospira”) and Mayne Pharma Ltd. (“Mayne”), which is designed to remedy the anticompetitive effects of Hospira’s acquisition of Mayne. Under the terms of the Consent Agreement, the companies would be required to assign and divest to Barr Pharmaceuticals, Inc. (“Barr”) the Mayne rights and assets necessary to manufacture and market the following generic injectable pharmaceuticals: (1) hydromorphone hydrochloride (“hydromorphone”); (2) nalbuphine hydrochloride (“nalbuphine”); (3) morphine sulfate (“morphine”); (4) preservative-free morphine; and (5) deferoxamine mesylate (“deferoxamine”).

The proposed Consent Agreement has been placed on the public record for thirty (30) days for receipt of comments by

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interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement, modify it, or make final the Decision and Order (“Order”).

Pursuant to a Scheme Implementation Agreement dated September 20, 2006, Hospira intends to acquire all of the outstanding shares of Mayne for approximately \$2 billion. Both parties manufacture and sell generic pharmaceuticals in the United States. The Commission’s Complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the markets for the manufacture and sale of the following generic injectables: (1) hydromorphone; (2) nalbuphine; (3) morphine; (4) preservative-free morphine; and (5) deferoxamine (“the Products”). The proposed Consent Agreement remedies the alleged violations by replacing in each of these markets the lost competition that would result from the acquisition.

The Products and Structure of the Markets

Hospira’s proposed acquisition of Mayne would strengthen Hospira’s position in generic injectable pharmaceuticals and provide it with a stronger pipeline of generic products. Injectable pharmaceuticals are not close substitutes for oral drugs because they are used when a patient is unable to ingest pills or capsules or when an immediate onset of action is required and the patient cannot wait for the treatment to pass through the gastrointestinal system. The companies overlap in a number of generic injectable pharmaceutical markets, and if consummated, the transaction likely would lead to anticompetitive effects in five of the overlap markets.

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The transaction would reduce the number of competing generic suppliers in five already concentrated markets. When the number of suppliers of a generic is small, the number of suppliers has a direct and substantial effect on generic pricing, as each additional supplier can have a competitive impact on the market. Because there are (or would be) multiple generic equivalents for each of the Products absent the proposed acquisition, the branded versions would not significantly constrain the generics' pricing.

For one of the generic injectable products at issue, hydromorphone, Hospira and Mayne currently are two of only three suppliers offering the product. In the remaining four markets, Mayne is one of a limited number of suppliers capable of, and in the process of, entering these markets. As a result, the proposed acquisition would eliminate important future competition in these markets.

Injectable hydromorphone is a narcotic opioid analgesic used to relieve moderate to severe pain, both acute and chronic, and is classified by the U.S. Drug Enforcement Administration ("DEA") as a Schedule II narcotic. The branded product, Dilaudid-HP, is manufactured and sold by Abbott Laboratories Inc. In 2006, sales of generic injectable hydromorphone exceeded \$39 million. Only three companies compete in the generic injectable hydromorphone market: Hospira, Baxter Healthcare Corp. ("Baxter"), and Mayne. Hospira is the market leader with a market share of approximately 60 percent. Mayne and Baxter are the only other suppliers, with market shares of 25 percent and 15 percent, respectively. After Hospira's acquisition of Mayne, Hospira's market share would increase from 60 percent to approximately 85 percent, and Baxter would be the only other competitor.

Nalbuphine is an injectable opioid analgesic used to relieve moderate to severe pain in patients. Hospira currently is the only supplier of generic injectable nalbuphine in the United States. Mayne is in the process of entering this market and is one of a limited number of firms capable of entering this market in a

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timely manner. The proposed acquisition would eliminate Mayne's entry into the injectable nalbuphine market.

Injectable morphine is a widely-used opioid analgesic for the treatment of moderate to severe, acute and chronic pain, and is classified by the DEA as a Schedule II narcotic. Hospira is the leading supplier of injectable morphine, and provides a full-line of preservative and preservative-free morphine products in various strengths, sizes, and delivery mechanisms. Baxter and Amphastar Pharmaceuticals, Inc. are the only other suppliers of injectable morphine in the United States. Mayne is in the process of entering this market and is one of a limited number of suppliers capable of entering this market in a timely manner. The proposed acquisition would eliminate Mayne's entry into the injectable morphine market. Absent the proposed transaction, Mayne would have been the only competitor to Hospira for the 50 mg/ml strength presentations of injectable morphine.

Injectable preservative-free morphine, unlike injectable morphine, is used when the drug is delivered to the intrathecal or epidural space next to the nerves in a patient's spine. Currently, only Hospira and Baxter sell preservative-free morphine in the United States in the manner of generic suppliers. Mayne is in the process of entering this market and is one of a limited number of suppliers capable of entering this market in a timely manner. The proposed transaction would eliminate Mayne's entry into the injectable preservative-free morphine market.

Injectable deferoxamine is an iron chelator used to treat acute iron poisoning or chronic iron overload. Hospira and Teva Pharmaceutical Industries Ltd. are the only suppliers of generic injectable deferoxamine in the United States. Mayne is in the process of entering this market and is well-positioned to enter this market in a timely manner. The proposed acquisition would eliminate Mayne's entry into the injectable deferoxamine market.

Analysis to Aid Public Comment

Entry

Entry into the markets for the manufacture and sale of the Products would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract the anticompetitive effects of the acquisition. Developing and obtaining U.S. Food and Drug Administration (“FDA”) approval for the manufacture and sale of each of the Products takes at least two (2) years due to substantial regulatory, technological, and intellectual property barriers.

Effects of the Acquisition

The proposed acquisition would cause significant anticompetitive harm to consumers in the U.S. markets for the manufacture and sale of generic injectable hydromorphone, generic injectable nalbuphine, generic injectable morphine, generic injectable preservative-free morphine, and generic injectable deferoxamine. In generic pharmaceutical markets, pricing is heavily influenced by the number of competitors that participate in a given market. Here, the evidence shows that, given the small number of suppliers, the prices of the generic pharmaceutical product at issue decrease with the entry of each additional competitor. Evidence gathered during our investigation indicates that anticompetitive effects — whether unilateral or coordinated — are likely to result from the decrease in the number of independent competitors in the markets at issue that would be a consequence of the proposed acquisition.

In the market for generic injectable hydromorphone, the proposed acquisition would leave only two current competitors: the combined firm and one other company. The evidence indicates that the presence of three independent competitors in these markets allows customers to negotiate lower prices, and that a reduction in the number of competitors would allow the merged entity and the other market participant(s) to raise prices.

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The competitive concerns in the market for generic injectable hydromorphone can be characterized as both unilateral and coordinated in nature. Certain conditions in the relevant market may reduce the ability of suppliers to reach and maintain an agreement on price. For example, bids to GPOs typically specify prices and rebates for an array of drugs and presentations, and there are long term contracts. Nevertheless, the weight of the evidence leads to the conclusion that the transaction will increase the likelihood of coordination. The transparency of awards by GPOs makes coordination among the suppliers, especially customer allocation, more likely to occur, because deviation from an agreement would be relatively easy to detect. Also, the fact that there will be only two suppliers after the proposed acquisition is an important consideration in evaluating the likelihood of coordination.

The impact that a reduction in the number of firms would have on pricing can also be explained in terms of unilateral effects. With fewer bidders, the probability of winning a given bid is higher and the incentives to bid aggressively are lower. With transactions that lead to a significant decrease in the number of bidders for a given drug, such as the instant one, a significant increase in the price charged to customers is likely to result. Such effects are likely to be particularly large in the market for generic injectable hydromorphone, where there would be only two competitors after Hospira's acquisition of Mayne.

The proposed acquisition also would cause significant anticompetitive harm to consumers by eliminating potential competition between Hospira and Mayne in the markets for the manufacture and sale of generic injectable nalbuphine, generic injectable morphine, generic injectable preservative-free morphine, and generic injectable deferoxamine. In each of these markets, there are no more than three current suppliers, and Mayne is poised to enter in the near future. Mayne's independent entry into these markets would likely result in lower prices. The proposed transaction would eliminate that independent entry, and

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hence would leave prices at levels that are higher than would prevail absent the acquisition.

The Consent Agreement

The proposed Consent Agreement effectively remedies the proposed acquisition's anticompetitive effects in the relevant product markets. Pursuant to the Consent Agreement, Hospira and Mayne are required to divest certain rights and assets related to the relevant products to a Commission-approved acquirer no later than ten (10) days after the acquisition. Specifically, the proposed Consent Agreement requires that the parties assign and divest all of the Mayne rights and assets for the Products to Barr.

The acquirers of the divested assets must receive the prior approval of the Commission. The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. A proposed acquirer of divested assets must not itself present competitive problems.

Barr is a reputable generic injectable pharmaceutical manufacturer and is well-positioned to compete effectively in each of the relevant product markets. Following its recent acquisition of Pliva d.d., Barr markets several injectable pharmaceutical products in the United States and has multiple manufacturing facilities, an established sales organization, FDA and DEA regulatory expertise, and a robust injectable product pipeline. Moreover, Barr will not present competitive problems in any of the markets in which it will acquire a divested asset because it currently does not compete in those markets. With its resources, capabilities, and good reputation, Barr is well-positioned to replicate the competition that would be lost with the proposed acquisition.

If the Commission determines that Barr is not an acceptable acquirer of the assets to be divested, or that the manner of the

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divestitures to Barr is not acceptable, the parties must unwind the sale and divest the Products within six (6) months of the date the Order becomes final to another Commission-approved acquirer. If the parties fail to divest within six (6) months, the Commission may appoint a trustee to divest the Product assets.

The proposed remedy contains several provisions to ensure that the divestitures are successful. The Order requires Hospira and Mayne to provide transitional services to enable the Commission-approved acquirers to obtain all of the necessary approvals from the FDA. These transitional services include technology transfer assistance to manufacture the Products in substantially the same manner and quality employed or achieved by Hospira and Mayne.

The Commission has appointed R. Owen Richards of Quantic Regulatory Services, LLC (“Quantic”) to oversee the asset transfer and to ensure Hospira and Mayne’s compliance with all of the provisions of the proposed Consent Agreement. Mr. Richards is President of Quantic and has several years of experience in the pharmaceutical industry. He is a highly-qualified expert on FDA regulatory matters and currently advises Quantic clients on achieving satisfactory regulatory compliance and interfacing with the FDA. In order to ensure that the Commission remains informed about the status of the proposed divestitures and the transfers of assets, the proposed Consent Agreement requires Hospira and Mayne to file reports with the Commission periodically until the divestitures and transfers are accomplished.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

Complaint

IN THE MATTER OF

GUIDANCE SOFTWARE, INC.CONSENT ORDER, ETC. , IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4187; File No. 062 3057**Complaint, March 30, 2007 — Decision, March 30, 2007*

This consent order addresses representations that respondent Guidance Software, Inc., made as to the security of the sensitive personal information it collected from customers and its failure to actually safeguard the information. Guidance failed to provide reasonable and appropriate security for sensitive personal information stored on its computer network, and in 2005, a hacker exploited vulnerabilities in the respondent's website to obtain unauthorized access to information for thousands of credit cards. The order prohibits Guidance from misrepresenting the extent to which it maintains and protects the privacy, confidentiality, or security of any personal information collected from or about consumers. The order requires Guidance to establish and maintain a comprehensive information security program to protect the security, confidentiality, and integrity of such information. In addition, the respondent is required to obtain biennial assessments of its security program from a qualified, objective, independent third-party professional. The order also includes certain reporting and compliance provisions.

Participants

For the *Commission*: *Katrina A. Blodgett, Kathryn D. Ratté,*
and *Alain Sheer.*

For the *Respondents*: *Elaine Kolish and Marc Zwillinger,*
Sonnenschein Nath & Rosenthal, LLP.

COMPLAINT

The Federal Trade Commission, having reason to believe that Guidance Software, Inc. ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing

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to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Guidance Software, Inc. is a California corporation with its principal office or place of business at 215 N. Marengo Ave., Pasadena, California, 91101.

2. The acts and practices of respondent as alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

3. Respondent sells software and related training, materials, and services that customers use to, among other things, investigate and respond to computer breaches and other security incidents. Through its Professional Services Division, respondent also performs forensic examinations of customer computer systems.

4. Respondent operates a computer network that it uses for routine corporate activities and that customers use, in conjunction with respondent’s website (www.guidancesoftware.com) and web application program (“web application”), to obtain information and to buy respondent’s products and services (hereinafter, “Acorporate network”). Respondent also operates a separate computer network that does not connect to the corporate network or the internet and is used only by its Professional Services Division.

5. In selling its products and services, respondent routinely collected sensitive personal information from customers, including name, address, email address, telephone number, and, for customers paying with a credit card, the card number, expiration date, and security code number. It collected this information through its website, sales representatives, and telephone and fax orders.

Complaint

6. Respondent stored sensitive personal information obtained from customers on the corporate network on a computer accessible through its website.

7. Since at least 2002, respondent has disseminated or caused to be disseminated privacy policies and statements, including, but not necessarily limited to the following statements regarding the privacy and confidentiality of sensitive information collected from customers:

Security

This website takes every precaution to protect our users' information. When users submit sensitive information via the website, your information is protected both online and off-line. When our registration/order form asks users to enter sensitive information (such as credit card number and/or social security number), that information is encrypted and is protected with the best encryption software in the industry - SSL. While on a secure page, such as our order form, the lock icon on the bottom of Web browsers such as Netscape Navigator and Microsoft Internet Explorer becomes locked, as opposed to unlocked, or open, when you are just 'surfing'. . . . While we use SSL encryption to protect sensitive information online, we also do everything in our power to protect user-information off-line. . . . (Exhibit A, Guidance Software Privacy Statement accessible through respondent's corporate website, January 1, 2004 (emphasis in original)).

Guidance Software is committed to keeping the data you provide us secure and will take reasonable precautions to protect your information from loss, misuse or alteration. (Exhibit B, Guidance Software Privacy Policy accessible through respondent's online store, July 19, 2003).

8. Until December 7, 2005, respondent engaged in a number of practices that, taken together, failed to provide

Complaint

reasonable and appropriate security for sensitive personal information stored on its corporate network. In particular, although it employed SSL encryption, respondent: (1) stored the information in clear readable text; (2) did not adequately assess the vulnerability of its web application and network to certain commonly known or reasonably foreseeable attacks, such as “Structured Query Language” (or “SQL”) injection attacks; (3) did not implement simple, low-cost, and readily available defenses to such attacks; (4) stored in clear readable text network user credentials that facilitate access to sensitive personal information on the network; (5) did not use readily available security measures to monitor and control connections from the network to the internet; and (6) failed to employ sufficient measures to detect unauthorized access to sensitive personal information.

9. Beginning in September 2005 and continuing through December 7, 2005, a hacker exploited the failures set forth in Paragraph 8 by using SQL injection attacks on respondent’s website and web application to install common hacking programs on respondent’s corporate network. The hacking programs were used to find sensitive personal information, including credit card numbers, expiration dates, and security code numbers, stored on the corporate network and to transmit the information over the internet to computers outside the network. As a result, the hacker obtained unauthorized access to information for thousands of credit cards.

10. Respondent became aware of the breach in December 2005, at which time it took steps to prevent further unauthorized access, sent breach notification letters to customers for whom it had or could obtain addresses, and notified law enforcement.

11. Through the means described in Paragraph 7, respondent represented, expressly or by implication, that it implemented reasonable and appropriate measures to protect

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sensitive personal information it obtained from customers against unauthorized access.

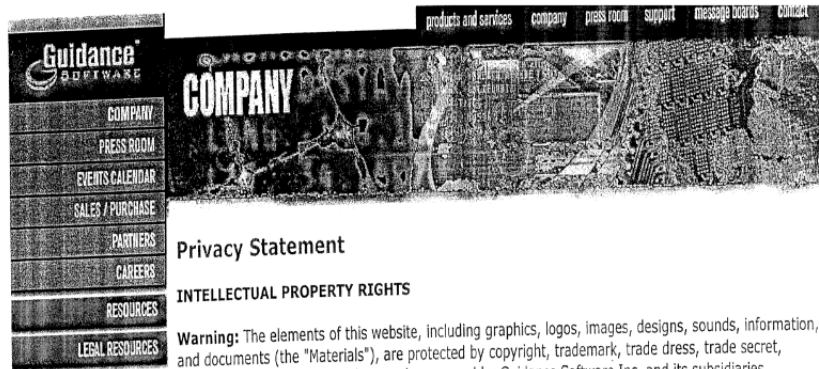
12. In truth and in fact, respondent did not implement reasonable and appropriate measures to protect sensitive personal information it obtained from customers against unauthorized access. In particular, respondent failed to implement procedures that were reasonable and appropriate to: (1) detect reasonably foreseeable web application vulnerabilities, and (2) prevent attackers from exploiting such vulnerabilities and obtaining unauthorized access to sensitive personal information. Therefore, the representation set forth in Paragraph 7 was, and is, false or misleading.

13. The acts and practices of respondent as alleged in this complaint constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this thirtieth day of March, 2007, has issued this complaint against Respondent.

By the Commission.

Complaint Exhibits

Exhibit A**Privacy Statement****INTELLECTUAL PROPERTY RIGHTS**

Warning: The elements of this website, including graphics, logos, images, designs, sounds, information, and documents (the "Materials"), are protected by copyright, trademark, trade dress, trade secret, unfair competition and other laws and are owned by Guidance Software Inc. and its subsidiaries, divisions and affiliates ("Guidance Software"); or its suppliers, vendors or other third parties who have contributed Materials to the website (each a "Supplier"). In no event shall any of the Materials be copied, reproduced, distributed, displayed, downloaded, stored in a retrieval system, or transmitted in any form without the prior express written permission of Guidance Software and/or its Supplier. EnCase®, the EnCase logo, EnScript™ and other Guidance Software products and brands mentioned in this website are registered trademarks or trademarks of Guidance Software in the United States and/or other countries. The names of actual products and companies mentioned in this website may be registered trademarks or trademarks of their respective owners. Any rights not expressly granted herein are reserved.

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THE MATERIALS ON THIS WEBSITE COULD INCLUDE INACCURACIES OR TYPOGRAPHICAL ERRORS AND ARE SUBJECT TO CHANGE AT ANY TIME. THE MATERIALS ARE PROVIDED "AS IS" WITHOUT WARRANTY OF ANY KIND. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, GUIDANCE SOFTWARE AND ITS SUPPLIERS HEREBY DISCLAIM ALL WARRANTIES, EITHER EXPRESSED OR IMPLIED, AND CONDITIONS WITH RESPECT TO THE MATERIALS, THEIR QUALITY, PERFORMANCE, SUITABILITY, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT.

Links to Other Websites

As a convenience to you, this website may contain links to websites controlled by parties other than Guidance Software. Guidance Software is not responsible for and does not endorse the privacy practices or content of these third party websites.

Limitation of Liability

IN NO EVENT WILL GUIDANCE SOFTWARE AND ITS SUPPLIERS BE LIABLE FOR INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES, WHETHER IN AN ACTION OF CONTRACT OR TORT, ARISING OUT OF THE USE OR INABILITY TO USE THE MATERIALS AVAILABLE ON THIS WEBSITE, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN PARTICULAR, AND WITHOUT LIMITATION, GUIDANCE SOFTWARE SHALL HAVE NO LIABILITY FOR ANY LOSS OF USE, DATA, INCLUDING THE COSTS OF RECOVERING SUCH DATA, OR PROFITS.

Complaint Exhibits

Privacy Statement

Guidance Software has created this privacy statement in order to demonstrate our firm commitment to your privacy. We intend to give you as much control as possible over your personal information (individually identifiable information about an individual collected online) and strive to help you protect your privacy while using our services. The purpose of our policy is to inform you about the types of information we gather about you when you visit our site, how we may use that information, whether we disclose it to anyone. Please read this notice. By using this site, you signify your assent to our privacy policy. If you do not agree to this policy, please do not use our sites. The following discloses our information gathering and dissemination practices for this website: www.guidancesoftware.com

Information Collection and Use

Guidance Software is the sole owner of the information collected on this site. We will not sell, share, or rent this information to others. Guidance Software collects information from our users at several different points on our website.

Registration

In order to use some portions of this website, a user must first complete the registration form. During registration a user is required to give their contact information (such as name and email address). This information is used to contact the user about the products and services offered by Guidance Software.

Order Information

We request information from the user on our order form. Here a user must provide contact information (like name and shipping address) and financial information (like credit card number, expiration date). This information is used for billing purposes and to fill customer's orders. If we have trouble processing an order, this information is used to contact the user.

Cookies

A cookie is a piece of data stored on the user's hard drive containing information about the user. Usage of a cookie is in no way linked to any personally identifiable information while on our site. Once the user closes their browser, the cookie simply terminates. For instance, by setting a cookie on our site, the user would not have to log in a password more than once, thereby saving time while on our site. If a user rejects the cookie, they may still use our site. Cookies can also enable us to track and target the interests of our users to enhance the experience on our site.

Public Forums

This site makes chat rooms, forums, mailing lists, message boards, and/or news newsgroups available to its users. Please remember that any information that is disclosed in these areas becomes public information and you should exercise caution when deciding to disclose your personal information.

Log Files

We use IP addresses to analyze trends, administer the site, track user's movement, and gather broad demographic information for aggregate use. IP addresses are not linked to personally identifiable information.

Links

This web site contains links to other sites. Please be aware that we are not responsible for the privacy practices of such other sites. We encourage our users to be aware when they leave our site and to read

Complaint Exhibits

the privacy statements of each and every web site that collects personally identifiable information. This privacy statement applies solely to information collected by this Web site.

Newsletter

If a user wishes to subscribe to our legal newsletter, we ask for contact information such as name and email address.

Surveys & Contests

From time-to-time our site requests information from users via surveys or contests. Participation in these surveys or contests is completely voluntary and the user therefore has a choice whether or not to disclose this information. Information requested may include contact information (such as name and shipping address), and demographic information (such as zip code, age level). Contact information will be used to notify the winners and award prizes. Survey information will be used for purposes of monitoring or improving the use and satisfaction of this site.

Security

This website takes every precaution to protect our users' information. When users submit sensitive information via the website, your information is protected both online and off-line. When our registration/order form asks users to enter sensitive information (such as credit card number and/or social security number), that information is encrypted and is protected with the best encryption software in the industry - SSL. While on a secure page, such as our order form, the lock icon on the bottom of Web browsers such as Netscape Navigator and Microsoft Internet Explorer becomes locked, as opposed to un-locked, or open, when you are just 'surfing'. To learn more about SSL, follow this link. While we use SSL encryption to protect sensitive information online, we also do everything in our power to protect user-information off-line. All of our users' information, not just the sensitive information mentioned above, is restricted in our offices. Only employees who need the information to perform a specific job (for example, our billing clerk or a customer service representative) are granted access to personally identifiable information. Furthermore, ALL employees are kept up-to-date on our security and privacy practices. Any time new policies are added, our employees are notified and/or reminded about the importance we place on privacy, and what they can do to ensure our customers' information is protected. Finally, the servers that we store personally identifiable information on are kept in a secure environment, behind a locked cage. If you have any questions about the security at our website, you can send an email to our [webmaster](#).

Software and Training Updates

We also send the user product and service announcement updates. We communicate with the user to provide requested services and information via email.

Notification of Changes

If we decide to change our privacy policy, we will post those changes on our Homepage so our users are always aware of what information we collect, how we use it, and under circumstances, if any, we disclose it. If at any point we decide to use personally identifiable information in a manner different from that stated at the time it was collected, we will notify users by way of an email. Users will have a choice as to whether or not we use their information in this different manner. We will use information in accordance with the privacy policy under which the information was collected.

Complaint Exhibits

Exhibit B

GUIDANCE SOFTWARE PRIVACY POLICY

Guidance Software respects your privacy. We use your information to support and enhance our relationship with you; for example, to process your purchase, provide service and support, and share product, service and company news and offerings with you. We do not sell your personal information. We only share your personal data for marketing purposes outside Guidance Software with your consent, as required by law or to protect Guidance Software, its customers, or the public, or with companies that help Guidance Software fulfill its obligations with you (such as shipping companies). At any time you may contact Guidance Software with any privacy questions or concerns you may have. You also may ask at any time to see the data you have given us and request correction or deletion. We strive to ensure a high level of security and confidentiality.

We've developed our privacy policy from industry guidelines and standards, and local, national, and international laws and requirements. All privacy practices and methods described in this policy apply only insofar as permitted by the applicable standards, laws and requirements.

Thanks again for placing your trust in Guidance Software.

INFORMATION COLLECTED

During the sales process, or through trade shows, marketing events, and other activities, Guidance Software may collect information from you. For example, we request information from you when you:

1. Register on www.guidancesoftware.com
2. Request a demo disk
3. Request a quotation or information
4. Register for a webinar, seminar, or other informational event
5. Place an order
6. Participate in a sweepstakes or other promotional offer
7. Subscribe to a newsletter or a mailing list
8. Request assistance from Guidance Software

We may ask you for your name, address, e-mail address, type of business, and credit card information, as well as other similar personal information.

HOW WE USE YOUR INFORMATION

The information you provide will be used to support your relationship with Guidance Software. Among other things, your information may be used to alert you to product upgrades or special offers, and to market or sell Guidance Software products or services to you. Your information may be combined with information collected about you by Guidance Software or third parties, with information that is collected about you from public records, or with information that Guidance Software may acquire from third parties.

DATA SHARING AND TRANSFER

Information regarding you (such as name, address and phone number) or your order and the products you purchase will not be given or sold to any outside organization for its use in marketing or solicitation without your consent. In addition, occasionally Guidance Software will share contact information, such as name and address, with third parties with whom we have partnered to provide specific services to Guidance Software, or services on behalf of Guidance Software.

In addition, Guidance Software may be required to disclose your information in connection with law enforcement, fraud prevention, regulation, and other legal action or if Guidance Software reasonably believes it is necessary to do so to protect Guidance Software, its customers, or the public.

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Guidance Software is an expanding business, and like other companies, we sometimes acquire or divest business units. As part of such transfers, we may convey the business assets of the particular business unit, including information that you have supplied.

DATA SECURITY AND RESPONSIBILITY

Guidance Software is committed to keeping the data you provide us secure and will take reasonable precautions to protect your information from loss, misuse or alteration. Vendors, contractors, or partners of Guidance Software who have access to your information in connection with providing services for Guidance Software are required to keep the information confidential and are not permitted to use this information for any other purpose than to carry out the services they are performing for Guidance Software.

Your information will generally be stored in our Guidance Software databases, which are located in the United States. For easier processing of e-mail communications, or other marketing purposes, however, your information may be sent, usually on a temporary basis, to countries outside the United States. Guidance Software data protection standards are the same, regardless of where your information is stored.

YOU CAN OPT-OUT OF RECEIVING FURTHER MARKETING FROM GUIDANCE SOFTWARE

Periodically, we may send you information about our various products and services, or other products and services we feel may be of interest to you. If you do not want to receive such information, simply contact us at the address set forth below.

OTHER SITES

Guidance Software is not responsible for the privacy practices or the content of other Websites. We recommend that you carefully read the privacy policies of each site you visit.

CONTACT US

Please send us your questions or comments regarding our Privacy Policy or your information to:

Privacy Compliance Coordinator
Guidance Software, Inc.
P.O. Box _____
Pasadena, CA 91101
USA
privacy@guidancesoftware.com

Guidance Software will be happy to respond to your questions and comments.

YOUR ACCEPTANCE OF OUR PRIVACY PRACTICES

By using the Guidance Software website, purchasing from Guidance Software, or participating in a Guidance Software service or program, you signify your acceptance of the terms and conditions of this Privacy Policy. Guidance Software may make changes to this Privacy Policy from time to time. We will post changes to our Privacy Policy on the Guidance Software website, so from time to time please check the Privacy Policy posted there.

Last updated: 7/19/03

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft Complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the Respondent with violation of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq*;

The Respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), an admission by the Respondent of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that the Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its Complaint, makes the following jurisdictional findings and enters the following Order:

1. Proposed respondent Guidance Software, Inc. is a California corporation with its principal office or place of business at 215 N. Marengo Avenue, Pasadena, California, 91101.

Decision and Order

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER**DEFINITIONS**

For purposes of this order, the following definitions shall apply:

1. “Personal information” shall mean individually identifiable information from or about a consumer including, but not limited to: (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name that reveals a consumer’s email address; (d) a telephone number; (e) a Social Security number; (f) credit or debit card information, including card number, expiration date, and numerical security code; (g) a persistent identifier, such as a customer number held in a “cookie” or processor serial number, that is combined with other available data that identifies a consumer; or (h) any other information from or about a consumer that is combined with (a) through (g) above.

2. Unless otherwise specified, “respondent” shall mean Guidance Software, Inc. and its successors and assigns, officers, agents, representatives, and employees.

3. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the online advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce,

Decision and Order

shall not misrepresent in any manner, expressly or by implication, the extent to which respondent maintains and protects the privacy, confidentiality, security, or integrity of any personal information collected from or about consumers.

II.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall, no later than the date of service of this order, establish and implement, and thereafter maintain, a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. Such program, the content and implementation of which must be fully documented in writing, shall contain administrative, technical, and physical safeguards appropriate to respondent's size and complexity, the nature and scope of respondent's activities, and the sensitivity of the personal information collected from or about consumers, including:

- A. the designation of an employee or employees to coordinate and be accountable for the information security program.
- B. the identification of material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assessment of the sufficiency of any safeguards in place to control these risks. At a minimum, this risk assessment should include consideration of risks in each area of relevant operation, including, but not limited to: (1) employee training and management; (2) information systems, including network and software design, information processing, storage, transmission, and disposal; and (3)

Decision and Order

prevention, detection, and response to attacks, intrusions, or other systems failures.

C. the design and implementation of reasonable safeguards to control the risks identified through risk assessment, and regular testing or monitoring of the effectiveness of the safeguards' key controls, systems, and procedures.

D. the development and use of reasonable steps to retain service providers capable of appropriately safeguarding personal information they receive from respondent, requiring service providers by contract to implement and maintain appropriate safeguards, and monitoring their safeguarding of personal information.

E. the evaluation and adjustment of respondent's information security program in light of the results of the testing and monitoring required by subparagraph C, any material changes to respondent's operations or business arrangements, or any other circumstances that respondent knows or has reason to know may have a material impact on the effectiveness of its information security program.

III.

IT IS FURTHER ORDERED that, in connection with its compliance with Paragraph II of this order, respondent shall obtain initial and biennial assessments and reports ("Assessments") from a qualified, objective, independent third-party professional, using procedures and standards generally accepted in the profession. The reporting period for the Assessments shall cover: (1) the first one hundred and eighty (180) days after service of the order for the initial Assessment, and (2) each two (2) year period thereafter for ten (10) years after service of the order for the biennial Assessments. Each Assessment shall:

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- A. set forth the specific administrative, technical, and physical safeguards that respondent has implemented and maintained during the reporting period;
- B. explain how such safeguards are appropriate to respondent's size and complexity, the nature and scope of respondent's activities, and the sensitivity of the personal information collected from or about consumers;
- C. explain how the safeguards that have been implemented meet or exceed the protections required by Paragraph II of this order; and
- D. certify that respondent's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of personal information is protected and has so operated throughout the reporting period.

Each Assessment shall be prepared and completed within sixty (60) days after the end of the reporting period to which the Assessment applies by a person qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); a person holding Global Information Assurance Certification (GIAC) from the SysAdmin, Audit, Network, Security (SANS) Institute; or a similarly qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

Respondent shall provide the initial Assessment, as well as all: plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, whether prepared by or on behalf of respondent, relied upon to prepare such Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, within ten (10) days after the Assessment has been prepared. All

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subsequent biennial Assessments shall be retained by respondent until the order is terminated and provided to the Associate Director of Enforcement within ten (10) days of request.

IV.

IT IS FURTHER ORDERED that respondent shall maintain, and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of each document relating to compliance, including but not limited to:

A. for a period of five (5) years: any documents, whether prepared by or on behalf of respondent, that contradict, qualify, or call into question respondent's compliance with this order; and

B. for a period of three (3) years after the date of preparation of each biennial Assessment required under Paragraph III of this order: all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, whether prepared by or on behalf of respondent, relating to respondent's compliance with Paragraphs II and III of this order for the compliance period covered by such biennial Assessment.

V.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having managerial responsibilities relating to the subject matter of this order. Respondent shall deliver this order to such current personnel within thirty (30) days after service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

Decision and Order

VI.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in either corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Paragraph shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VII.

IT IS FURTHER ORDERED that respondent shall, within one hundred and eighty (180) days after service of this order, and at such other times as the Commission may require, file with the Commission an initial report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VIII.

This order will terminate on March 30, 2027, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

Analysis to Aid Public Comment

- A. any Paragraph in this order that terminates in less than twenty (20) years;
- B. this order's application to any respondent that is not named as a defendant in such complaint; and
- C. this order if such complaint is filed after the order has terminated pursuant to this Paragraph.

Provided, further, that if such complaint is dismissed or a federal court rules that respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Paragraph as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

**ANALYSIS OF PROPOSED CONSENT ORDER
TO AID PUBLIC COMMENT**

The Federal Trade Commission has accepted, subject to final approval, a consent agreement from Guidance Software Inc. ("Guidance").

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

Analysis to Aid Public Comment

Guidance sells software and related training, materials, and services that customers use to, among other things, investigate and respond to computer breaches and other security incidents. In selling its products and services, Guidance routinely collected sensitive personal information from customers, including name, address, email address, telephone number, and, for customers paying with a credit card, the card number, expiration date, and security code number. It collected this information through its website, sales representatives, and telephone and fax orders and stored the information on its computer network. This matter concerns alleged false or misleading representations Guidance made about the security it provided for this information.

The Commission's proposed complaint alleges that Guidance represented that it implemented reasonable and appropriate security measures to protect the privacy and confidentiality of personal information. The complaint alleges this representation was false because Guidance engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for sensitive personal information stored on its computer network. In particular, although it employed SSL encryption, Guidance: (1) stored the information in clear readable text; (2) did not adequately assess the vulnerability of its web application and network to certain commonly known or reasonably foreseeable attacks, such as "Structured Query Language" (or "SQL") injection attacks; (3) did not implement simple, low-cost, and readily available defenses to such attacks; (4) stored in clear readable text network user credentials that facilitate access to sensitive personal information on the network; (5) did not use readily available security measures to monitor and control connections from the network to the internet; and (6) failed to employ sufficient measures to detect unauthorized access to sensitive personal information.

The complaint further alleges that beginning in September 2005 and continuing through December 7, 2005, a hacker

Analysis to Aid Public Comment

exploited these vulnerabilities by using SQL injection attacks on Guidance's website and web application to install common hacking programs on Guidance's computer network. The hacking programs were used to find sensitive personal information, including credit card numbers, expiration dates, and security code numbers, stored on the network and to transmit the information over the internet to computers outside the network. As a result, the hacker obtained unauthorized access to information for thousands of credit cards.

The proposed order applies to personal information Guidance obtains from consumers. It contains provisions designed to prevent Guidance from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order prohibits Guidance, in connection with the online advertising, marketing, promotion, offering for sale, or sale of any product or service, from misrepresenting the extent to which it maintains and protects the privacy, confidentiality, or security of any personal information collected from or about consumers.

Part II of the proposed order requires Guidance to establish and maintain a comprehensive information security program in writing that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. The security program must contain administrative, technical, and physical safeguards appropriate to Guidance's size and complexity, the nature and scope of its activities, and the sensitivity of the personal information collected from or about consumers. Specifically, the order requires Guidance to:

- Designate an employee or employees to coordinate and be accountable for the information security program.

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- Identify material internal and external risks to the security, confidentiality, and integrity of customer information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assess the sufficiency of any safeguards in place to control these risks.
- Design and implement reasonable safeguards to control the risks identified through risk assessment, and regularly test or monitor the effectiveness of the safeguards' key controls, systems, and procedures.
- Develop and use reasonable steps to retain service providers capable of appropriately safeguarding personal information they receive from Guidance, require service providers by contract to implement and maintain appropriate safeguards, and monitor their safeguarding of personal information.
- Evaluate and adjust its information security program in light of the results of testing and monitoring, any material changes to its operations or business arrangements, or any other circumstances that it knows or has reason to know may have material impact on its information security program.

Part III of the proposed order requires that Guidance obtain within 180 days, and on a biennial basis thereafter for a period of ten (10) years, an assessment and report from a qualified, objective, independent third-party professional, certifying, among other things, that: (1) it has in place a security program that provides protections that meet or exceed the protections required by Part II of the proposed order; and (2) its security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of consumers' personal information has been protected.

Analysis to Aid Public Comment

Parts IV through VIII of the proposed order are reporting and compliance provisions. Part IV requires Guidance to retain documents relating to their compliance with the order. For most records, the order requires that the documents be retained for a five-year period. For the third-party assessments and supporting documents, Guidance must retain the documents for a period of three years after the date that each assessment is prepared. Part V requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part VI ensures notification to the FTC of changes in corporate status. Part VII mandates that Guidance submit compliance reports to the FTC. Part VIII is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify their terms in any way.

Complaint

IN THE MATTER OF

**THE BOEING COMPANY AND LOCKHEED
MARTIN CORPORATION**CONSENT ORDER, ETC. , IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT*Docket C-4188; File No. 051 0165
Complaint, May 1, 2007 — Decision, May 1, 2007*

The purpose of this consent order is to remedy the anticompetitive effects resulting from the formation of United Launch Alliance L.L.C., a joint venture of the Boeing Company and Lockheed Martin Corporation that will provide space launch services to the Department of Defense and other U.S. government customers. The U.S. Department of Defense informed the Commission that the creation of United Launch Alliance will advance U.S. national security interests by improving the United States' ability to access space reliably, with the increase in reliability as an efficiency flowing from the joint venture. However, the Department had concerns about effects not related to national security benefits, anticompetitive effects of substantially lessening competition in the U.S. government markets for medium-to-heavy launch services and space vehicles. The order requires that United Launch Alliance cooperate on equivalent terms with all providers of government space vehicles; that the space vehicle businesses of Boeing and Lockheed provide equal consideration and support to all launch services providers when seeking any U.S. government delivery-in-orbit contract; and that Boeing, Lockheed, and United Launch Alliance safeguard competitively sensitive information obtained from other providers of space vehicles and launch services. To ensure compliance, Boeing and Lockheed must create selection criteria and have those criteria approved by the compliance officer, who will be appointed by the Secretary of Defense. Further, the order prohibits Boeing and Lockheed from selecting United Launch Alliance as a launch services supplier without the prior approval of the compliance officer. In addition, United Launch Alliance facilities must be physically separate from those of Boeing and Lockheed, and employees must be able to access only the facilities of their respective employer.

Complaint

Participants

For the *Commission*: *Richard H. Cunningham, Daniel P. Ducore, and Randall A. Long.*

For the *Respondents*: *Raymond A. Jacobsen, McDermott Will & Emery; and Benjamin S. Sharp, Perkins Coie.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent The Boeing Company (“Boeing”), a corporation subject to the jurisdiction of the Commission, has agreed with Respondent Lockheed Martin Corporation (“Lockheed”), a corporation subject to the jurisdiction of the Commission, to form a joint venture to be named United Launch Alliance L.L.C. (“ULA”) in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. DEFINITIONS

1. “Commission” means the Federal Trade Commission.
2. “Boeing” means The Boeing Company, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by The Boeing Company, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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3. “Lockheed” means Lockheed Martin Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Lockheed Martin Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

4. “ULA” means United Launch Alliance, L.L.C., its general partners, directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by ULA, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each. ULA shall not include Boeing or LM.

5. “DOD” means the United States Department of Defense.

6. “Launch Services” means the service of using a Launch Vehicle to place a Space Vehicle into earth orbit or beyond for the United States.

7. “Launch Vehicle” means an expendable launch-system or other system to launch a Space Vehicle from the earth’s surface to earth orbit or beyond. Launch Vehicle shall not include the space shuttle system.

8. “Space Vehicle” means a spacecraft or multiple spacecrafts weighing not less than 4,150 pounds, in total, to be launched to low earth orbit at a ninety degrees inclination reference orbit, or a lighter spacecraft or multiple spacecrafts to higher orbital parameters requiring equivalent lift capacity, procured or proposed to be procured pursuant to a Program with the capability of performing various scientific, military, exploration, observation, intelligence, reconnaissance, communication or other space missions.

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9. “Respondents” means Boeing and Lockheed, individually and collectively.

II. RESPONDENTS

10. Respondent Boeing is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 100 North Riverside, Chicago, Illinois 60606.

11. Respondent Lockheed is a corporation organized, existing, and doing business under and by virtue of the laws of Maryland, with its office and principal place of business located at 6801 Rockledge Drive, Bethesda, Maryland 20817.

12. Respondents, among other things, are engaged in the manufacturing, research, and development of Launch Vehicles and the sale of Launch Services to the United States. Respondents are also engaged in the manufacturing, research, development, and sale of Space Vehicles to the United States.

13. Respondents are, and at all times relevant herein have been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. §12, and are corporations whose business is in or affects commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED JOINT VENTURE

14. Pursuant to a Joint Venture Master Agreement dated May 2, 2005, Boeing and Lockheed agreed to combine their respective Launch Services businesses to form a joint venture called ULA (“Transaction”).

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IV. THE RELEVANT MARKETS

15. For the purposes of this Complaint, there are two distinct relevant lines of commerce in which to analyze the effects of the Transaction:

- a. the research, development, and sale of Medium to Heavy (“MTH”) Launch Services; and
- b. the research, development, and sale of Space Vehicles.

16. The United States government purchases MTH Launch Services to launch its Space Vehicles. There is no alternative technology to deliver Space Vehicles to their necessary orbit or flight trajectory, nor is there any alternative technology to execute the multitude of unique functions the United States government purchases Space Vehicles to perform.

17. For the purposes of this Complaint, the relevant geographic market is the United States. Federal law and national security imperatives require that the U.S. government purchase MTH Launch Services and Space Vehicles from domestic companies.

V. THE STRUCTURE OF THE MARKET

18. The U.S. markets for MTH Launch Services and Space Vehicles are highly concentrated. In the MTH Launch Services market, Boeing and Lockheed are the only competitors, and their consolidation will result in a monopoly. In the U.S. market for Space Vehicles, three firms, Boeing, Lockheed, and Northrop Grumman, account for the large majority of sales.

VI. ENTRY CONDITIONS

19. ULA’s monopoly in the U.S. MTH Launch Services market is likely to be durable, due to the extremely high barriers

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to entry that are present in the market. The U.S. Space Vehicle market is also characterized by extremely high barriers to entry. In these markets, design and development alone requires many years and costs in excess of a billion dollars. Even if a firm does attempt to enter these markets, significant market impact is likely to be many years away. Due to the expense involved and the vital national security and scientific services provided by Space Vehicles, the United States government only purchases proven, reliable MTH Launch Services and Space Vehicles. As a result, successful new entry into the relevant markets is unlikely to occur in the foreseeable future.

VII. EFFECTS OF THE ACQUISITION

20. The effects of the Transaction, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. Respondents, through their joint ownership of ULA, may gain access to competitively sensitive non-public information concerning other Space Vehicle suppliers, whereby:
 - i. actual competition between Respondents and other Space Vehicle suppliers would be reduced; and
 - ii. the research, development, innovation, and quality of Space Vehicles may be reduced;
- b. ULA, through its joint ownership by Respondents, may gain access to competitively sensitive non-public information concerning other potential MTH Launch Services competitors, whereby:
 - i. actual competition between ULA and potential MTH Launch Service suppliers would be reduced; and

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- ii. the research, development, innovation, and quality of Launch Services may be reduced;
- c. ULA, as a supplier of MTH Launch Services, may be in a position to disadvantage or raise the costs of Space Vehicle suppliers that compete against Respondents' Space Vehicle businesses by withholding support and information relating to a Launch Vehicle necessary to make a Space Vehicle compatible with a Launch Vehicle; and
- d. Respondents, as suppliers of Space Vehicles, may be in a position to disadvantage or raise the costs of entry to potential MTH Launch Services suppliers by withholding support and information relating to a Space Vehicle necessary to make a Space Vehicle compatible with a Launch Vehicle.

VIII. VIOLATIONS CHARGED

21. The Transaction described in Paragraph 14 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

22. The Transaction described in Paragraph 14, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this first day of May, 2007, issues its Complaint against said Respondents.

By the Commission.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed formation of United Launch Alliance, L.L.C. (“ULA”) by The Boeing Company (“Boeing”) and Lockheed Martin Corporation (“LM”) (hereinafter all of which may be referred to as “Respondents”), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission, having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having considered the comments filed by interested persons, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

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1. Respondent Boeing is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 100 N. Riverside, Chicago, IL 60606.
2. Respondent LM is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 6801 Rockledge Drive, Bethesda, MD 20817.
3. Respondent ULA is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 12257 South Wadsworth Boulevard, Mailstop T6000, Littleton, CO 80125.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, for purposes of this Order, the following definitions shall apply:

- A. “Boeing” means The Boeing Company, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures (excluding ULA), subsidiaries, divisions, groups and affiliates controlled by Boeing, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- B. “LM” means Lockheed Martin Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures (excluding ULA),

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subsidiaries, divisions, groups and affiliates controlled by LM, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.

- C. “ULA” means United Launch Alliance, L.L.C., its general partners, directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by ULA, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each. ULA shall not include Boeing or LM.
- D. “Collaborative Agreement” means any agreement involving collaboration on a proposal or other competitive efforts.
- E. “Commission” means the Federal Trade Commission.
- F. “Compliance Officer” means the person appointed pursuant to Paragraph IX. of this Order, as well as his or her designees.
- G. “Customer Support Proposal Team” means a unique group of people dedicated to developing ULA’s offering in support of a specific Space Vehicle Prime Contractor’s proposal, each such team to comprise employees responsible for performing contracting, mission management, and business development functions, who shall receive contract, estimating, financial, administrative, and technical proposal information provided by ULA in connection with that offering and tailor the information to the specific Space Vehicle Prime Contractor’s proposal.
- H. “Discriminate” or “Discriminating” means
 1. in the context of behavior by ULA, to advantage Boeing or LM or disadvantage a competitor of Boeing or LM in connection with a Program for any reason; and

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2. in the context of behavior by Space Vehicle Business, to advantage ULA or disadvantage a competitor of ULA in connection with a Program for any reason;

provided, however, that the determination of compliance or non-compliance with the non-discrimination provisions of this Order shall take into account that different firms will take different competitive approaches that may result in differences, individually and collectively, in price, schedule, quality, data, personnel, investment (including, but not limited to, independent research and development), technology, innovations, design, and risk.

- I. “DoD” means the United States Department of Defense.
- J. “General Counsel of DoD” means the General Counsel of the Department of Defense or the General Counsel’s designee.
- K. “Government Customer” means a United States government agency procuring Space Vehicles, Launch Vehicles, or Launch Services.
- L. “Launch Services” means the service of placing a Space Vehicle into earth orbit or beyond using a Launch Vehicle.
- M. “Launch Services Information” means all information that is needed by a Space Vehicle Prime Contractor from a Launch Services Prime Contractor to enable the Space Vehicle to perform its intended function in interfacing with a Launch Vehicle. Launch Services Information includes all related technical data and information provided by a Launch Services Prime Contractor to a Space Vehicle Prime Contractor prior to entering into, or in the course of working pursuant to, a Collaborative Agreement between the Launch Services Prime Contractor and the Space Vehicle Prime Contractor or otherwise supporting the Space Vehicle Prime Contractor’s efforts in connection with a Program. Data and information

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provided include, but are not limited to, the types of data and information provided by a Launch Service Prime Contractor to the Space Vehicle Business in connection with a Program.

- N. "Launch Services Prime Contractor" means an entity performing, proposing to perform, or with responsibility to perform, Launch Services for a Government Customer. ULA is a Launch Services Prime Contractor. For purposes of this Order, Launch Services Prime Contractor does not include a Space Vehicle Prime Contractor performing pursuant to a delivery-in-orbit contract.
- O. "Launch Vehicle" means an expendable launch system or other system to launch a Space Vehicle from the earth's surface to earth orbit or beyond. For purposes of this Order, Launch Vehicle does not include the space shuttle system.
- P. "Master Agreement" means the Joint Venture Master Agreement, dated May 2, 2005, and all exhibits, schedules, attachments, and amendments thereto, pursuant to which Boeing and LM formed ULA.
- Q. "Non-Public Launch Services Information" means any information not in the public domain furnished by any Launch Services Prime Contractor other than ULA to Boeing and LM (including Space Vehicle Business),
1. and, if written information, designated by the supplier of the information as proprietary information on the face thereof, or, if oral, visual, or other information, identified as proprietary information in writing by the supplier of the information at any time up to thirty (30) days after such disclosure.
 2. Non-Public Launch Services Information shall not include information:

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- a. that falls within the public domain through no violation of this Order or any other existing agreement intended to protect confidentiality;
 - b. that becomes known from a third party not in breach of a confidentiality or non-disclosure agreement with respect to such information;
 - c. independently known or developed by the recipient without reference to Non-Public Launch Services Information; or
 - d. after seven (7) years from the date of disclosure to Boeing and LM.
- R. “Non-Public Space Vehicle Information” means any information not in the public domain furnished by a Space Vehicle Prime Contractor to ULA,
1. and, if written information, designated in writing by the Space Vehicle Prime Contractor as proprietary information on the face thereof, or, if oral, visual, or other information, identified as proprietary information in writing by the Space Vehicle Prime Contractor at any time up to thirty (30) days after such disclosure.
 2. Non-Public Space Vehicle Information shall not include information:
 - a. that falls within the public domain through no violation of this Order or any other existing agreement intended to protect confidentiality;
 - b. that becomes known from a third party not in breach of a confidentiality or non-disclosure agreement with respect to such information;

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- c. independently known or developed by the recipient without reference to Non-Public Space Vehicle Information; or
 - d. after seven (7) years from the date of disclosure to ULA.
- S. “Personnel” means directors, officers, employees, or consultants hired or retained by or representing Respondents.
- T. “Program” means — for a particular mission, future mission, proposal for a potential future mission, or any other project for which ULA is a supplier or potential supplier of Launch Services to a Government Customer or to a Space Vehicle Prime Contractor — the entire process through the award of the applicable contract or, if a determination is made by the Government Customer not to award the applicable contract, through the time such a determination is made, including, but not limited to, any and all activities related to formulating, finalizing, and submitting proposals, whether accepted by the Government Customer or not, and negotiations with the Government Customer, whether procured under one solicitation or multiple solicitations, and whether procured by one agency or by multiple agencies.
- U. “Respondents” means, collectively or individually as the context requires, Boeing, LM, or ULA.
- V. “Secretary of Defense” means the United States Secretary of Defense, the Deputy Secretary of Defense, or the designee of either.
- W. “Secretary of the Air Force” means the United States Secretary of the Air Force or the Secretary of the Air Force’s designee.
- X. “Space Vehicle” means a spacecraft or multiple spacecrafts weighing not less than 4,150 pounds, in total, to be launched

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to low earth orbit at a ninety degrees inclination reference orbit, or a lighter spacecraft or multiple spacecrafts to higher orbital parameters requiring equivalent lift capacity, procured or proposed to be procured pursuant to a Program with the capability of performing various scientific, military, exploration, observation, intelligence, reconnaissance, communication or other space missions.

- Y. “Space Vehicle Business” means those portions of LM or Boeing, other than ULA, that are engaged in the manufacture and sale of Space Vehicles, and that perform or seek to perform contracts for a Government Customer.
- Z. “Space Vehicle Information” means all information that is needed by a Launch Services Prime Contractor from a Space Vehicle Prime Contractor in order to engage in and successfully complete a Launch Service. Space Vehicle Information includes all related technical data and information provided by a Space Vehicle Prime Contractor to a Launch Services Prime Contractor prior to entering into, or in the course of working pursuant to, a Collaborative Agreement, or otherwise supporting the Launch Services Prime Contractor’s efforts in connection with a Program. Data and information provided include, but are not limited to, the types of data and information provided by a Space Vehicle Prime Contractor to the Launch Vehicle Prime Contractor in connection with a Program.
- AA. “Space Vehicle Prime Contractor” means an entity proposing to deliver, or with responsibility to deliver, a Space Vehicle to a Government Customer. Boeing and LM are Space Vehicle Prime Contractors.
- BB. “Technical Support” means access to the laboratories and engineering staffs of LM and Boeing by ULA if needed to address the ability of ULA to provide Launch Services.

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CC. "Transaction" means the proposed formation of ULA by Boeing and LM pursuant to the Master Agreement.

II.

IT IS FURTHER ORDERED that:

A. In connection with each and every Program:

1. ULA shall provide Launch Services on a non-discriminatory basis, which shall include, without limitation, the following:
 - a. not entering into any exclusive Collaborative Agreement with any Space Vehicle Prime Contractor for Launch Services;
 - b. not Discriminating in supporting the proposal of any Space Vehicle Prime Contractor;
 - c. not Discriminating in providing Launch Services Information to all Space Vehicle Prime Contractors;
 - d. not Discriminating regarding staffing decisions, resource allocation, or design decisions in connection with Launch Services to be offered or provided to any Space Vehicle Prime Contractor;
 - e. not Discriminating in entering into Collaborative Agreements or other arrangements and not Discriminating as to any Space Vehicle Prime Contractors in the negotiations of such agreements and other arrangements. Such Collaborative Agreements shall not Discriminate in favor of Space Vehicle Business against any other Space Vehicle Prime Contractor on any basis, including, but not limited to, price, schedule, quality, data, personnel, investment (including, but not limited to, independent research

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and development), technology, innovations, design, and risk;

- f. not Discriminating among Space Vehicle Prime Contractors in making available for use in Launch Services any technologies developed by ULA under independent research and development funding, government-funded prime contract research and development activities or other funds expended by ULA but not provided by third parties, including LM and Boeing, or resulting from joint investment with a third party;
 - g. establishing and maintaining separate Customer Support Proposal Teams to support each Space Vehicle Prime Contractor's efforts; and
 - h. as to each separate Customer Support Proposal Team established, ensuring that Non-Public Space Vehicle Information is not shared between the Customer Support Proposal Teams. For purposes of Paragraph II. of this Order only, Non-Public Space Vehicle Information shall also include the unique information on the ULA technical offering being made by each separate Customer Support Proposal Team.
2. ULA shall not enter into a Collaborative Agreement with a Space Vehicle Prime Contractor for ULA's supply of Launch Services for a Program until the Compliance Officer has approved a draft of the final Collaborative Agreement.
 - a. ULA shall provide to the Compliance Officer copies of the draft of the final Collaborative Agreement for the approval of the Compliance Officer, prior to execution of the Collaborative Agreement.

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- b. The Compliance Officer shall act within ten (10) business days of receipt of the draft of the final Collaborative Agreement from ULA, and shall not unreasonably withhold approval of such Collaborative Agreement or its terms.
- c. The Compliance Officer may approve or reject the Collaborative Agreement in its entirety or may reject specific terms of the Collaborative Agreement.
 - (1) If the Compliance Officer approves the Collaborative Agreement in its entirety, then the Compliance Officer shall so notify ULA.
 - (2) If the Compliance Officer disapproves a Collaborative Agreement in its entirety, or rejects specific terms of a Collaborative Agreement:
 - (a) the Compliance Officer shall, no later than ten (10) business days after receipt of the Collaborative Agreement from ULA, refer the matter to the Secretary of the Air Force, including the Compliance Officer's recommendations relating to the Collaborative Agreement;
 - (b) the Secretary of the Air Force, in his or her sole discretion, shall, within ten (10) business days of the referral by the Compliance Officer to the Secretary of the Air Force, make the final determination as to whether to approve the Collaborative Agreement and what terms should be included in such Collaborative Agreement;
 - (c) if a Collaborative Agreement is referred to the Secretary of the Air Force and the Secretary of the Air Force makes his or her final

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determination, ULA shall enter into such Collaborative Agreement only on the terms determined by the Secretary of the Air Force.

- d. ULA shall not change, modify, or alter the terms of a Collaborative Agreement that has been entered into pursuant to the procedure described in Paragraph II. of this Order without the prior approval of the Compliance Officer.
 - (1) If the Compliance Officer approves the proposed change, then the Compliance Officer shall so notify ULA.
 - (2) If the Compliance Officer disapproves the change, either in part or in its entirety:
 - (a) the Compliance Officer shall, no later than ten (10) business days after receipt of the proposed change from ULA, refer the matter to the Secretary of the Air Force, including the Compliance Officer's recommendations relating to the proposed change;
 - (b) the Secretary of the Air Force, in his or her sole discretion, shall, within ten (10) business days of the referral by the Compliance Officer to the Secretary of the Air Force, make the final determination as to whether to approve the proposed change;
 - (c) if an agreement or arrangement is referred to the Secretary of the Air Force and the Secretary of the Air Force makes his or her final determination, ULA shall change the agreement or arrangement only as approved by the Secretary of the Air Force.

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3. If the Compliance Officer concludes that ULA has Discriminated in violation of this Order, or otherwise failed to comply with the requirements of Paragraph II. of this Order:
 - a. The Compliance Officer shall notify ULA immediately, describing the conduct that may violate the Order;
 - b. ULA shall commence action to correct the conduct no later than ten (10) business days after such notification and shall, no later than the end of the ten (10) day period:
 - (1) notify the Compliance Officer that it has commenced corrective action; and
 - (2) describe in detail the action it is taking and will take and the amount of time it will take to complete the action to correct the conduct; and
 - c. if ULA fails to commence action to correct the conduct within ten (10) business days of such notification, fails to complete the action to correct the conduct within the amount of time described in its notification to the Compliance Officer, or if the Compliance Officer determines that the corrective action that ULA proposes to take will not adequately remedy the violation or will take too long to correct the conduct,
 - (1) the Compliance Officer shall refer the matter to the Secretary of the Air Force who shall, in consultation with the General Counsel of DoD, decide what, if any, corrective action shall be required by ULA; and

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- (2) the Secretary shall notify ULA and the Compliance Officer of his or her decision in writing within ten (10) business days of the referral by the Compliance Officer to the Secretary of the Air Force.
- B. Notwithstanding any other provisions of Paragraph II. of this Order, ULA may decline to provide Launch Services or a Customer Support Proposal Team to a particular Space Vehicle Prime Contractor in connection with a Program if:
1. ULA has determined that supplying Launch Services or a Customer Support Proposal Team to that particular Space Vehicle Prime Contractor is commercially unreasonable because either:
 - a. the particular Space Vehicle Prime Contractor lacks the technical or financial capability to supply a Space Vehicle; or
 - b. ULA does not have the capacity to provide Launch Services or a Customer Support Proposal Team to one or more Space Vehicle Prime Contractors that have requested such services or team because the number or burden of Space Vehicle Prime Contractors seeking the benefit of Paragraph II. of this Order becomes unreasonably large; and
 2. ULA has obtained, pursuant to the following procedure, the prior approval of the Compliance Officer to decline to provide such services or team to that particular Space Vehicle Prime Contractor:
 - a. ULA shall notify the Compliance Officer in writing of ULA's determination, including a detailed explanation of the basis for ULA's determination, no later than ten (10) business days after receipt of the request by the

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Space Vehicle Prime Contractor for provision of such services or team;

- b. if the Compliance Officer concurs in ULA's determination, the Compliance Officer shall notify ULA no later than ten (10) business days after the Compliance Officer's receipt of ULA's determination; and
 - c. if the Compliance Officer does not concur in ULA's determination, then the Compliance Officer shall refer ULA's determination to the Secretary of the Air Force no later than ten (10) business days after the Compliance Officer's receipt of ULA's determination, with the recommendation of the Compliance Officer; the Secretary of the Air Force shall have the sole discretion to decide whether ULA shall supply Launch Services or a Customer Support Proposal Team to that Space Vehicle Prime Contractor, such decision to be made within ten (10) business days after the referral by the Compliance Officer.
- C. If ULA enters into a Collaborative Agreement with any Space Vehicle Prime Contractor for any Program, and the team engages in joint investment or development activity for that Program, then notwithstanding any other provision in this Order, ULA shall be under no obligation to disclose the products or other results of such joint investments or developments of one team to any other team for the Program.
- D. The provision of any information, technology, or product to any party pursuant to this Order shall be subject to appropriate confidentiality agreements on the treatment of competition-sensitive, national security-sensitive, ITAR-controlled, and/or proprietary information. Notwithstanding any other provision of this Order, Respondents shall not be required to provide any information to the Compliance Officer or a Space Vehicle

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Prime Contractor if they do not have the security clearance required to be eligible to receive such information.

- E. No provision of this Order shall require ULA to provide products, services, or technology to any party without commercially reasonable terms.

III.

IT IS FURTHER ORDERED that:

- A. When LM or Boeing has the responsibility to select a provider of Launch Services for a particular Space Vehicle as a Space Vehicle Prime Contractor and has the opportunity to select ULA as the provider of Launch Services for that Space Vehicle:
 - 1. LM and Boeing shall:
 - a. not Discriminate in the selection of the provider of Launch Services;
 - b. not Discriminate in providing Space Vehicle Information to providers of Launch Services who are capable of providing Launch Services in connection with the particular Space Vehicle; and
 - c. not Discriminate regarding staffing decisions, resource allocation, or design decisions in connection with the Launch Services;
 - 2. In connection with the criteria for selecting Launch Services for a particular Space Vehicle:
 - a. LM or Boeing, as appropriate, shall propose Launch Services selection criteria that do not Discriminate.

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- b. LM or Boeing, as appropriate, shall submit the proposed Launch Services selection criteria to the Compliance Officer for his or her approval before soliciting Launch Services.
- c. The Compliance Officer shall act within ten (10) business days after receipt of the criteria and shall not unreasonably withhold approval of the criteria.
 - (1) If the Compliance Officer approves the criteria, then the Compliance Officer shall so notify LM or Boeing, as appropriate.
 - (2) If the Compliance Officer rejects the criteria:
 - (a) the Compliance Officer shall, no later than ten (10) business days after receipt of the criteria, refer the matter to the Secretary of the Air Force, including the Compliance Officer's recommendations relating to the criteria;
 - (b) the Secretary of the Air Force, in his or her sole discretion, shall, within ten (10) business days after the referral by the Compliance Officer to the Secretary of the Air Force, make the final determination as to whether to approve the criteria and what terms should be included; the Secretary of the Air Force shall approve or alter the source selection criteria within five (5) business days of the decision of the Compliance Officer.
3. LM or Boeing, as appropriate, shall not change, modify, or alter the selection criteria without the prior approval of the Compliance Officer, and the Compliance Officer shall not unreasonably withhold approval of the changes.

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- a. If LM or Boeing, as appropriate, determines to change, modify, or alter the selection criteria, they shall notify the Compliance Officer in writing, including the proposed changes and the reasons for the changes.
 - b. If the Compliance Officer approves the proposed change, then the Compliance Officer shall so notify LM or Boeing, as appropriate, no later than ten (10) business days after receiving the written notification.
 - c. If the Compliance Officer disapproves the change, either in part or in its entirety:
 - (1) the Compliance Officer shall, no later than ten (10) business days after receipt of the proposed change, refer the matter to the Secretary of the Air Force, including the Compliance Officer's recommendations relating to the proposed changes;
 - (2) the Secretary of the Air Force, in his or her sole discretion, shall, within ten (10) business days after the referral by the Compliance Officer to the Secretary of the Air Force, make the final determination as to whether to approve the proposed changes and notify LM or Boeing, as appropriate;
 - (3) if changes are referred to the Secretary of the Air Force, and the Secretary of the Air Force makes his or her final determination, LM or Boeing, as appropriate, shall change the criteria only as approved by the Secretary of the Air Force.
- B. When LM or Boeing, as appropriate, determines to select ULA as the Launch Services provider for a particular Space Vehicle, it shall seek the prior approval of the Compliance Officer.

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1. LM or Boeing, as appropriate, shall notify the Compliance Officer of its determination and fully explain the reasons for the proposed selection.
 2. The Compliance Officer shall act within ten (10) business days after receipt of the written notification and shall not unreasonably withhold approval of the selection.
 3. If the Compliance Officer approves the selection, then the Compliance Officer shall so notify LM or Boeing, as appropriate.
 4. If the Compliance Officer disapproves the selection:
 - a. the Compliance Officer shall, no later than ten (10) business days after receipt of the notification, refer the matter to the Secretary of the Air Force, including the Compliance Officer's recommendations relating to the selection;
 - b. the Secretary of the Air Force, in his or her sole discretion, shall, within ten (10) business days after the referral by the Compliance Officer to the Secretary of the Air Force, make the final determination as to whether to approve the selection and notify LM or Boeing, as appropriate;
 - c. if a selection is referred to the Secretary of the Air Force, and the Secretary of the Air Force makes his or her final determination, the selection shall be made only as determined by the Secretary of the Air Force.
- C. If the Compliance Officer concludes that LM or Boeing has Discriminated in violation of this Order, or otherwise failed to comply with the requirements of Paragraph III. of this Order:

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1. The Compliance Officer shall notify LM or Boeing, as appropriate, immediately, describing the conduct that may violate the Order;
2. LM or Boeing, as appropriate, shall commence action to correct the conduct no later than ten (10) business days after such notification and shall, no later than the end of the ten (10) day period:
 - a. notify the Compliance Officer that it has commenced corrective action, and
 - b. describe in detail the action it is taking and will take and the amount of time it will take to complete the action to correct the conduct; and
3. If LM or Boeing, as appropriate, fails to commence action to correct the conduct within ten (10) business days of such notification, fails to complete the action to correct the conduct within the amount of time described in its notification to the Compliance Officer, or if the Compliance Officer determines that the corrective action that LM or Boeing, as appropriate, proposes to take will not adequately remedy the violation or will take too long to correct the conduct,
 - a. the Compliance Officer shall refer the matter to the Secretary of the Air Force who shall, in consultation with the General Counsel of DoD, decide what, if any, corrective action shall be required by LM or Boeing; and
 - b. the Secretary shall notify LM or Boeing, as appropriate, and the Compliance Officer of his or her decision in writing within ten (10) business days after the referral by the Compliance Officer to the Secretary of the Air Force.

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- D. When LM or Boeing, as a Space Vehicle Prime Contractor, has the responsibility to select a provider of Launch Services for a particular Space Vehicle and has the opportunity to select ULA as the provider of Launch Services for that Space Vehicle, it shall not be required to comply with the requirements of Paragraph III. of this Order if LM or Boeing, as appropriate, notifies the Compliance Officer in writing that, in connection with the selection of a provider of Launch Services relating to a particular Space Vehicle:
1. it has determined not to select ULA to provide Launch Services in connection with the particular Space Vehicle; or
 2. ULA has determined not to provide Launch Services in connection with that particular Space Vehicle.

IV.

IT IS FURTHER ORDERED that

- A. No later than ten (10) business days after the closing of the Transaction, Respondents shall deliver a copy of the final Master Agreement to the Compliance Officer.
- B. Boeing and LM shall comply with Exhibit F of the Master Agreement.
- C. After the closing of the Transaction and after Respondents have delivered a copy of the final Master Agreement to the Compliance Officer, Boeing and LM shall not change the Master Agreement or any provision of the Master Agreement unless:
 1. Boeing and LM have notified the Compliance Officer of the proposed change, and

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2. the Compliance Officer has not, within five (5) business days of receiving notice of the proposed change:
 - a. notified Boeing and LM that the proposed change would or could reasonably be expected to adversely affect:
 - (1) Respondents' ability to comply with this Order;
 - (2) Boeing's and LM's ability and responsibility to provide technical and financial support to ULA; or
 - (3) ULA's ability to successfully perform contracts for Government Customers; and
 - b. requested additional time in which to review and evaluate the proposed change.
- D. If the Compliance Officer raises specific concerns and requests additional time, Boeing and LM shall effectuate the proposed change only if:
 1. the Compliance Officer approves the change as proposed; or
 2. the Compliance Officer has not notified Boeing or LM, within ten (10) business days of requesting additional time, that he or she has disapproved the proposed change in whole or in part.
- E. In the Compliance Officer's notification to Boeing or LM of his or her disapproval, the Compliance Officer shall explain the basis of the disapproval and afford Boeing and LM an opportunity to address the concerns by modifying the proposed change.

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- F. If the Compliance Officer notifies Boeing or LM of his or her disapproval and Boeing and LM are unable to modify the proposed change in a manner satisfactory to the Compliance Officer:
1. the Compliance Officer shall, at the request of Boeing or LM, immediately refer the matter to the Secretary of the Air Force and the General Counsel of DoD, including the Compliance Officer's recommendations relating to the proposed changes and Boeing's and LM's explanations in support of the proposed changes; and
 2. the Secretary of the Air Force, in consultation with the General Counsel of DoD, shall, within ten (10) business days after the referral by the Compliance Officer, make the final determination as to whether to approve the proposed changes and notify LM or Boeing accordingly.

V.

IT IS FURTHER ORDERED that:

- A. Boeing and LM, including Space Vehicle Business, shall not, absent the prior written consent of the proprietor of Non-Public Launch Services Information, provide, disclose or otherwise make available to ULA any Non-Public Launch Services Information, other than Non-Public Launch Services Information relating to Delta and Atlas launch vehicles.
- B. Boeing and LM, including Space Vehicle Business, shall use any Non-Public Launch Services Information only in their capacity as a Space Vehicle manufacturer, absent the prior written consent of the proprietor of Non-Public Launch Services Information; for avoidance of doubt, Boeing is not restricted from using information relating to Delta launch vehicles, and LM is not restricted from using information relating to Atlas launch vehicles.

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- C. ULA shall not, absent the prior written consent of the proprietor of Non-Public Space Vehicle Information, provide, disclose, or otherwise make available to Boeing or LM, including Space Vehicle Business, any Non-Public Space Vehicle Information.
- D. ULA shall use Non-Public Space Vehicle Information only in ULA's capacity as a Launch Services supplier absent the prior written consent of the proprietor of the Non-Public Space Vehicle Information.
- E. Notwithstanding the provisions of Paragraphs V.C. and V.D. of this Order:
 - 1. ULA may disclose Non-Public Space Vehicle Information to LM Personnel and Boeing Personnel who are serving as members of the Board of Directors of ULA only under the following conditions:
 - a. the LM Personnel and Boeing Personnel to whom such information would be disclosed have no management responsibilities relating to Space Vehicle Business;
 - b. the information that would be disclosed is provided only while such Personnel are serving as members of the Board of Directors;
 - c. the information that would be disclosed is provided for the sole purpose of providing oversight;
 - d. the information that would be disclosed is used solely for the purpose of providing oversight; and
 - e. ULA and such Personnel comply with the procedures described in Paragraphs V.E.4. and V.F. of this Order.

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2. ULA may disclose Non-Public Space Vehicle Information to LM Personnel and Boeing Personnel who prepare LM's and Boeing's financial statements and tax returns only under the following conditions:
 - a. the LM Personnel and Boeing Personnel to whom such information would be disclosed have no management responsibilities relating to Space Vehicle Business;
 - b. the information that would be disclosed is necessary for the preparation of LM's and Boeing's financial statements and tax returns and cannot be obtained any other way;
 - c. the information that would be disclosed is provided only while such Personnel have responsibilities in connection with the preparation of LM's and Boeing's financial statements and tax returns;
 - d. the information is provided for the sole purpose of preparing LM's and Boeing's financial statements and tax returns;
 - e. the information is used solely for the purpose of preparing LM's and Boeing's financial statements and tax returns; and
 - f. ULA and such Personnel comply with the procedures described in Paragraphs V.E.4. and V.F. of this Order.
3. ULA may disclose Non-Public Space Vehicle Information to LM Personnel and Boeing Personnel who are providing Technical Support to ULA only under the following conditions:
 - a. the information is necessary for the provision of Technical Support;

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- b. the information is provided only during such time as the Personnel are providing Technical Support to ULA;
 - c. the information is provided for the sole purpose of providing Technical Support to ULA;
 - d. the information shall be used solely for the purpose of providing Technical Support to ULA; and
 - e. ULA and such Personnel comply with the procedures described in Paragraphs V.E.4. and V.F. of this Order.
4. Respondents shall assure that LM Personnel and Boeing Personnel who receive Non-Public Space Vehicle Information pursuant to Paragraphs V.E.1, V.E.2, or V.E.3 of this Order, each:
- a. use Non-Public Space Vehicle Information solely for the purposes described in Paragraph V. of this Order;
 - b. not disclose such information to any other Personnel at LM or Boeing;
 - c. maintain the confidentiality of such information;
 - d. return any documents obtained pursuant to Paragraph V. of this Order to the Compliance Officer when such documents are no longer being used;
 - e. agree in writing to comply with the obligations set forth in this Order in a form approved by the Compliance Officer, and
 - f. submit that written agreement to the Compliance Officer at the time required by the Compliance Officer.

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5. ULA may disclose Non-Public Space Vehicle Information to LM Personnel and Boeing Personnel as necessary to provide services consistent with Respondents' obligations pursuant to the Transition Services Agreement (Lockheed Martin to ULA); Transition Services Agreement (ULA to Lockheed Martin); and Transition Services Agreement (Boeing and ULA) (hereinafter referred to collectively as "Transition Services Agreements") only under the following conditions:
 - a. ULA, LM and Boeing shall comply with the confidentiality provisions of the Transition Services Agreements;
 - b. those provisions shall be incorporated by reference into this Order and made a part hereof as Confidential Appendix A;
 - c. any failure by ULA, LM, or Boeing to comply with the confidentiality provisions of the Transition Services Agreements shall constitute a failure to comply with this Order; and
 - d. the Compliance Officer shall have the authority to monitor ULA's, LM's, and Boeing's compliance with the confidentiality provisions of the Transition Services Agreements.
6. ULA may disclose Non-Public Space Vehicle Information to LM Personnel and Boeing Personnel to the extent necessary to enable LM or Boeing to continue to provide, after the expiration of the Transition Services Agreements, similar administrative services to those that had been provided by LM or Boeing to ULA pursuant to the Transition Services Agreements if:
 - a. ULA has notified the Compliance Officer that it intends to obtain such services from LM or Boeing, as

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appropriate; LM or Boeing, as appropriate, has notified the Compliance Officer that it intends to provide such services; and the Compliance Officer has notified ULA, LM, or Boeing, as appropriate, that he or she approves the arrangement;

- b. standard industry-wide confidentiality provisions have been executed by the appropriate parties and have been submitted to the Compliance Officer;
- c. the parties comply with those provisions;
- d. any failure by ULA, LM , or Boeing to comply with those provisions shall constitute a failure to comply with this Order; and
- e. the Compliance Officer shall have the authority to monitor ULA's, LM's, and Boeing's compliance with these provisions.

F. Respondents shall:

- 1. develop and implement procedures to ensure that their Personnel comply with the obligations contained in Paragraph V. of this Order, including, but not limited to, procedures for monitoring and enforcing these obligations;
- 2. convey these procedures to their Personnel;
- 3. require LM Personnel and Boeing Personnel who receive Non-Public Space Vehicle Information to comply with the requirements of Paragraph V. of this Order; and
- 4. conduct annual training sessions with their Personnel who have or may expect to have duties in connection with these obligations.

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- G. LM or Boeing, as applicable, shall ensure that its Personnel receiving Non-Public Space Vehicle Information from ULA are not involved in any LM or Boeing proposal team pursuing those Program(s) and will not assist any such LM or Boeing proposal team during the Program and for a period to continue at least one year following the date of his or her last access to or use of the Non-Public Space Vehicle Information.
- H. If any Non-Public Space Vehicle Information or Non-Public Launch Services Information is transferred, obtained, or used in violation of Paragraph V. of this Order, the Compliance Officer shall have the authority to implement procedures in his or her sole discretion to remedy the violation immediately and shall notify the General Counsel of the DoD and the Federal Trade Commission.
- I. Respondents shall deliver a copy of this Order to any Space Vehicle Prime Contractor prior to obtaining from the Space Vehicle Prime Contractor any Non-Public Space Vehicle Information and to any Launch Services Prime Contractor prior to obtaining from the Launch Services Prime Contractor any Non-Public Launch Services Information.

VI.

IT IS FURTHER ORDERED that:

- A. By no later than twenty-four (24) months after the closing of the Transaction, ULA shall have separate communication networks and management information systems from the networks and systems of Boeing and LM (including Space Vehicle Business), with appropriate firewalls and confidentiality protections in place.
- B. By no later than three (3) months after the closing of the Transaction:

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1. ULA shall have separate physical locations segregated from Boeing and LM (including Space Vehicle Business), although the respective businesses may be located on the same campus with clearly demarcated separate facilities; ULA's physical locations, facilities, and business shall be secured separately from LM and Boeing (including Space Vehicle Business) so that ULA's physical locations and facilities cannot be accessed by LM or Boeing (including Space Vehicle Business) Personnel, other than for facility repair, support, and maintenance, pursuant to ULA's lease agreements with LM or Boeing; notwithstanding the foregoing, LM's and Boeing's Personnel may access ULA facilities for meetings and similar events in the ordinary course of business, but each shall be treated as a third-party contractor for purposes of compliance with Respondents' obligations pursuant to this Order;
 2. pending implementation of the separate communication networks and management information systems required by Paragraph VI.A. of this Order, ULA shall implement procedures to ensure that the information systems it employs protect Non-Public Space Vehicle Information within those systems from being accessed by LM or Boeing Personnel other than those permitted to use that information pursuant to the provisions of Paragraph V.E. of this Order; and
 3. ULA Personnel shall have and shall wear different badges from LM Personnel and Boeing Personnel.
- C. No later than fifteen (15) business days after the closing of the Transaction, ULA, LM, and Boeing shall jointly submit to the Compliance Officer, the General Counsel of the DoD, and the Commission's Compliance Division a proposal outlining the policies and procedures to be implemented to satisfy the obligations of Paragraph VI. of this Order. Formal policies and procedures implementing Paragraph VI. of this Order

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shall be submitted to the Compliance Officer, the General Counsel of the DoD, and the Commission's Compliance Division for review within ninety (90) calendar days after closing of the Transaction. After consultation with ULA, LM, and Boeing, the General Counsel of DoD, shall in his or her sole discretion make changes to such plan to assure compliance with the terms of this Order. Such changes shall be reflected in the next compliance reports submitted by the Compliance Officer and Respondents.

- D. LM or Boeing, as appropriate (including Space Vehicle Business), shall not hire or re-hire ULA Personnel (other than consultants) without first requiring such Personnel to acknowledge and agree in writing to comply with the obligations of Paragraph V. of this Order. Any ULA Personnel (including consultants) who have had access to Non-Public Space Vehicle Information in connection with a Program and who are hired, or re-hired, by LM or Boeing shall not, for a period of at least one year from their last day at ULA, have any responsibilities relating to such Programs in which the former ULA Personnel were personally and substantially involved while at ULA.
1. This provision will not restrict any ULA employee who has had access only to Non-Public Space Vehicle Information of one parent company from being hired by that parent company; and
 2. Records of such transfers, and copies of any such acknowledgments, shall be maintained during the term of this Order, and shall be available for inspection by the Compliance Officer. LM or Boeing, as applicable, shall notify the Compliance Officer of any such hiring or rehiring.

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VII.

IT IS FURTHER ORDERED that, when this Order places time limits on certain actions by the Compliance Officer, Secretary of DoD, Secretary of the Air Force, or General Counsel of DoD, such limits may be modified by their agreement with Respondents. When this Order places time limits on certain actions by any Respondent, such limits may be modified by agreement between the Compliance Officer and that Respondent.

VIII.

IT IS FURTHER ORDERED that:

- A. No later than thirty (30) days after the closing of the Transaction:
 1. Respondents shall distribute this Order to the Personnel of ULA and Space Vehicle Business.
 2. In a separate communication:
 - a. ULA shall inform all of its Personnel of the terms and requirements of this Order and require all ULA Personnel to adhere to such provisions.
 - b. Boeing and LM shall inform all of its Space Vehicle Business Personnel of the terms and requirements of this Order and require all Space Vehicle Business Personnel to adhere to such provisions.
- B. No later than three (3) months after the closing of the Transaction, Respondents shall:
 1. develop procedures, policies, and practices relating to the receipt, identification, custody, use, and disposal of any Non-Public Space Vehicle Information or Non-Public Launch Services Information and incorporate such

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procedures, policies, and practices into Respondents' operations manuals or other systems used for disseminating such procedures, policies, and practices;

2. complete the development of new procedures or the incorporation into existing procedures measures to be used in the event any Personnel of Respondents fails to comply with such procedures, policies, and practices; and
 3. complete the provision of in-person or computer-based training of ULA and Space Vehicle Business Personnel who have or who can expect to have duties related to the requirements of this Order.
- C. After the initial training required by Paragraph VIII.B.3. of this Order, Respondents shall conduct annual in-person or computer-based training of ULA and Space Vehicle Business Personnel who have or can expect to have duties related to the requirements of this Order.
- D. In connection with the training required by Paragraphs V.F.4., VIII.B.3., and VIII.C. of this Order, no later than one month prior to conducting the required training, Respondents shall notify the Compliance Officer of the categories of Personnel that they plan to include in the training. If the Compliance Officer determines that additional categories of Personnel must be included in the training, he or she will notify Respondents no later than ten (10) days after receiving Respondents' notification, and Respondents shall include those categories of Personnel in the required training.

IX.

IT IS FURTHER ORDERED that:

- A. The Secretary of Defense shall appoint a Compliance Officer, who shall be an employee of the United States government. The Compliance Officer shall oversee compliance by the

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Respondents with the terms of this Order, and shall have the power and authority to oversee such compliance.

- B. Respondents shall not object to the Compliance Officer chosen by the Secretary of Defense
- C. To perform his or her duties and responsibilities pursuant to this Order, and subject to any legally recognized privilege, the Compliance Officer shall be authorized to and may:
 - 1. interview any of Respondents' Personnel, upon three (3) days' notice to that Respondent and without restraint or interference by Respondents, relating to any matters contained in this Order as determined by the Compliance Officer;
 - 2. during normal business hours, inspect and copy any document in the possession, custody, or control of Respondents relating to any matters contained in this Order as determined by the Compliance Officer;
 - 3. during normal business hours, obtain access to and inspect any systems or equipment to which Respondents' Personnel have access;
 - 4. during normal business hours, obtain access to and inspect any physical facility, building, or other premises to which Respondents' Personnel have access; and
 - 5. require Respondents to provide documents, data, and other information to the Compliance Officer in such form as the Compliance Officer may direct and within such time periods as the Compliance Officer may require.
- D. The Compliance Officer may require Respondents to comply with his or her requests relating to Respondents' compliance

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with their obligations pursuant to this Order within reasonable time limits established by the Compliance Officer.

1. The Compliance Officer shall convey to Respondents the time limits applicable to the request at the time he or she makes the request.
2. Failure to comply with the Compliance Officer's requests within the time limits established by the Compliance Officer shall be a violation of this Order; provided, however, that the Compliance Officer shall, within the initial time limits established, afford Respondents the opportunity to request additional time if needed and the Compliance Officer shall not unreasonably withhold approval of such a request for an extension.

E. The Compliance Officer shall:

1. investigate any complaint or representation made to him or her, or made available to him or her with respect to any matter arising in relation to or connected with compliance by Respondents with this Order;
2. solicit and accept comments from third parties regarding Respondents' compliance with this Order as the Compliance Officer deems necessary and appropriate;
3. use DoD or other United States government staff as appropriate; and
4. hire, at the cost and expense of Respondents, a third party (or third parties) who shall be solely accountable to the Compliance Officer, shall have such duties and responsibilities as determined by the Compliance Officer and that do not exceed the Compliance Officer's duties and responsibilities as set forth in this Order and shall have the same access as the Compliance Officer pursuant to Paragraph IX.C. of this Order; provided, however, that

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the professional staff (including third party consultants) reporting to the Compliance Officer shall be no larger than ten (10) persons (measured by full-time equivalents), with such maximum to be expanded solely with the permission of the Secretary of the Air Force as necessary pursuant to this Order; and provided that such professional staff (including third party consultants) shall maintain the confidentiality of business sensitive or proprietary information and documents of Respondents or any other person.

- F. Respondents shall use their best efforts to assist the Compliance Officer and the Compliance Officer's staff in satisfaction of their responsibilities pursuant to this Order.
- G. Respondents shall cooperate with the Compliance Officer and his or her staff and shall take no action to interfere with or to impede the performance of the Compliance Officer and his or her staff in satisfaction of these responsibilities.
- H. Each of Respondents shall furnish to the Compliance Officer a compliance report, to be submitted as directed by the Compliance Officer, but in any event no less frequently than on an annual basis or more frequently than quarterly.
 - 1. The compliance report of each Respondent shall contain an affidavit that describes the actions that that Respondent has taken and the steps that that Respondent has implemented to comply with the terms of this Order and shall be verified as true and correct by an officer of that Respondent.
 - 2. The Compliance Officer may direct Respondents to include in their reports any other information the Compliance Officer deems useful or necessary.

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- I. The Compliance Officer shall report in writing on an annual basis to the Secretary of the Air Force, the General Counsel of the DoD, and the Compliance Division of the Commission, summarizing the actions the Compliance Officer has undertaken in performing his or her duties pursuant to this Order. Such report shall include any compliance reports submitted by Respondents to the Compliance Officer pursuant to Paragraph IX.H. of this Order.
- J. If the Compliance Officer is unable to perform his or duties for whatever reason, the Compliance Officer shall promptly notify the individuals listed in Paragraph IX.I. of this Order. The Secretary of Defense shall then appoint another Compliance Officer. The Secretary of Defense shall have the sole discretion to replace the Compliance Officer at any time when the Secretary of Defense considers such action appropriate.
- K. If the Compliance Officer determines to investigate any assertions or allegations of noncompliance, the Compliance Officer shall advise Respondents as soon as practical of the assertions or allegations of noncompliance that the Compliance Officer intends to investigate, the Compliance Officer shall afford Respondents reasonable time limits, to be determined by the Compliance Officer in his or her sole discretion, to attempt to resolve any deficiencies in Respondents' performance of its obligations under this Order.
- L. If the Compliance Officer has reason to believe that there has been a failure of the Respondents to comply with any term of this Order, he or she shall notify the Secretary of the Air Force, the General Counsel of the DoD, and the Compliance Division of the Commission. As soon as practical, the Compliance Officer shall inform Respondents that he or she has notified the Secretary of the Air Force, the General Counsel of the DoD, and the Compliance Division of the Commission of the failure and the material nature of the assertion or allegation of noncompliance.

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M. Respondents:

1. shall bear all of their costs of monitoring, complying with, or enforcing this Order, and all such reasonable costs of the DoD arising solely from monitoring, complying with, or enforcing this Order, excluding the salaries and benefits of United States government employees, and including, but not limited to, the costs of the Compliance Officer and the costs associated with the retention of third parties to assist the Compliance Officer.
2. shall not charge to the DoD, either directly or indirectly, any costs of DoD referred to in Paragraph IX.M.1. of this Order; Respondents shall not charge to DoD, either directly or indirectly, any of Respondents' costs, referred to in Paragraph IX.M.1. of this Order, including any remedial costs, as defined by Paragraph IX.M.3. of this Order; provided, however, that costs referred to in Paragraph IX.M.1. of this Order, incurred by Respondents, other than remedial costs, associated with normal business activities that could reasonably have been undertaken by Respondents in the absence of this Order are not subject to the charging restrictions of Paragraph IX.M.2. of this Order, whether or not such activities are affected by this Order; and further provided that, in the event that the Commission determines to seek civil penalties based on non-compliance with provisions of this Order, and the conduct at issue is held to be compliant with the Order, the remedial costs disallowed pursuant to Paragraph IX.M. of this Order may be charged to DoD.
3. Remedial costs are those costs, incurred by Respondents, relating directly to the administration of measures to remedy conduct of Respondents in violation of this Order, where the following conditions are met:

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- a. the conduct of Respondents was not undertaken pursuant to prior written direction or approval of the Compliance Officer;
- b. the Secretary of the Air Force has taken action in accordance with this Order indicating concurrence with the Compliance Officer's conclusion that Respondents have engaged in conduct in violation of this Order with respect to a Program; and
- c. said costs are incurred after the date of the Secretary of the Air Force's action.

IX.

IT IS FURTHER ORDERED that each Respondent shall notify the General Counsel of DoD and the Commission at least thirty (30) days prior to any proposed change in that Respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order.

X.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, subject to any legally recognized privilege and any security requirements imposed by a United States Government Agency, and upon written request, each Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during business hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control

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of that Respondent relating to any matters contained in this Order; and

- B. Upon five (5) days' notice to that Respondent and without restraint or interference from it, to interview officers, directors, employees, independent contractors, or agents of that Respondent, who may have counsel present, relating to any matters contained in this Order.

XI.

IT IS FURTHER ORDERED that within sixty (60) days after the date this Order becomes final and annually for the next nine (9) years on the anniversary of the date this Order becomes final, and at such additional times as the Commission or the General Counsel of DoD may require, each Respondent shall submit to the Commission and the General Counsel of DoD a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the requirements of this Order, including, but not limited to, a separate, specific statement by the General Counsel of each Respondent as to whether that Respondent has complied with the requirements of Paragraph IV. of this Order.

XII.

IT IS FURTHER ORDERED that this Order shall terminate on May 1, 2017.

By the Commission.

Concurring Statement

Confidential Appendix A

**[Redacted From Public Record But Incorporated By
Reference]**

**CONCURRING STATEMENT OF
COMMISSIONER PAMELA JONES HARBOUR**

I concur in the Commission's decision to accept a proposed consent agreement and allow the formation of United Launch Alliance (ULA), a joint venture of The Boeing Company (Boeing) and Lockheed Martin Corporation (Lockheed). I write separately to elaborate on the reasoning behind my vote.

The Analysis to Aid Public Comment ("APC) states, and I agree, that Asignificant anticompetitive effects, including the loss of non-price competition and the loss of potential future price competition, are likely to occur if the proposed transaction is consummated." If the proposed ULA joint venture could be scrutinized solely through a competition lens, I would have no choice but to vote for a Commission challenge.

It is impossible, however, to ignore the views of the U.S. Department of Defense (DoD). DoD unequivocally has communicated its position to the Commission: the creation of ULA is critical to protect national security interests, and enabling these unique national security benefits to flow is more important to the public interest than preventing the loss of direct competition between Boeing and Lockheed.

Concurring Statement

It is my understanding that the Commission and DoD share a long history of cooperation in their review of defense industry transactions, with each agency contributing its specialized expertise and insights. In this case, pursuant to established protocol, staff from the two agencies have worked together for many months to analyze the proposed joint venture.

Moreover, DoD is the primary purchaser of government medium to heavy launch services and government space vehicles. In merger cases outside of the defense context, the Commission and its staff typically rely on customer testimony (“among other sources of information) to learn about markets, define the scope of potential competitive harm, and evaluate whether the Commission should take enforcement action.¹ As a matter of legal principle and sound enforcement policy, the views of DoD as a major customer are entitled to no less respect in this case.

From a purely practical perspective, I must consider the potential role of DoD testimony if the Commission were to seek a preliminary injunction over DoD’s objections. As a Commissioner, I am responsible for evaluating litigation risk before sending Commission staff into court. Customer testimony, standing alone, certainly would not (and should not) be

¹ See, e.g., Interview with Commissioner Pamela Jones Harbour, ANTITRUST SOURCE (March 2006), at 9, available at <http://www.abanet.org/antitrust/at-source/06/03/Mar06-HarbourIntrvw3=22f.pdf> (discussing role of customer testimony) (citing, *inter alia*, Deborah Platt Majoras, *Recent Actions at the Federal Trade Commission*, Remarks Before the Dallas Bar Association’s Antitrust and Trade Regulation Section (Jan. 18, 2005), available at <http://www.ftc.gov/speeches/majoras/050126recentactions.pdf>); Chicago Bridge & Iron Co. N.V., *et al.*, FTC Dkt. No. 9300, Opinion of the Commission (2004), available at <http://www.ftc.gov/os/adjpro/d9300/050106opionpublicrecordversion9300.pdf>); Arch Coal, FTC Dkt. No. 9316, Statement of the Commission (June 13, 2005), available at <http://www.ftc.gov/os/adjpro/d9316/050613commstatement.pdf>; *id.*, Dissenting Statement of Commissioner Pamela Jones Harbour, available at <http://www.ftc.gov/os/adjpro/d9316/050613harbourstatement.pdf>).

Concurring Statement

dispositive, in this or any other merger case. I expect, however, that DoD's conclusions would influence a judge's decision whether to grant a preliminary injunction — especially in light of the national security overlay and DoD's expertise.

The proposed consent order addresses three competitive concerns that, in DoD's view, are not “intrinsically linked” to ULA's putative national security advantages. The AAPC acknowledges that the proposed consent agreement “does not attempt to remedy the loss of direct competition” and is, instead, intended to “address ancillary competitive harms that DoD has identified as not inextricably tied to the national security benefits associated with the creation of ULA.”

While I have voted in favor of accepting the proposed consent agreement, I note a few troublesome aspects. The proposed consent agreement departs radically from traditional Commission consent orders in merger cases. Structural remedies are, by far, the preferred way to resolve competitive problems in the horizontal merger context. Conduct restrictions, standing alone, generally are viewed as insufficient to address the underlying market mechanisms from which competitive harm may arise. Here, in lieu of market-based competition, the monopolist ULA will be subjected to an elaborate and highly regulatory system of oversight by a “compliance officer” appointed by the Secretary of Defense. Ordinarily, such a system would not be considered an effective remedy for the anticompetitive effects alleged in the Commission's complaint.

I continue to believe that preserving a competitive market structure is the preferred “fix” for an anticompetitive horizontal merger. Also, I am somewhat unsettled by the notion that the Commission — an independent, bipartisan federal agency — is, in effect, delegating away too much of its oversight authority to an executive branch agency. I recognize, however, that staff from the Commission and DoD have attempted to craft a workable remedy that will strike an appropriate balance between competition and broader national security interests.

Analysis to Aid Public Comment

In the end, I am faced with a Hobson's choice: accept a complex and regulatory consent that will prevent some competitive harm; or do nothing, and allow the joint venture to proceed unrestricted. I lack the technical expertise to second-guess DoD's conclusion that allowing the formation of ULA is the best way to preserve national security and protect the public interest. In light of our agencies' established protocol for concurrent review of defense industry transactions, I reluctantly agree that the Commission must give DoD the benefit of the doubt. I therefore vote to accept the proposed consent agreement.

**ANALYSIS OF AGREEMENT CONTAINING CONSENT
ORDER TO AID PUBLIC COMMENT****I. Introduction**

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from The Boeing Company ("Boeing"), Lockheed Martin Corporation ("Lockheed"), and United Launch Alliance L.L.C. ("ULA"). The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects resulting from the formation of ULA, a joint venture of Boeing and Lockheed that will provide launch services to the Department of Defense ("DoD") and other U.S. government customers, that are not necessary to achieve the national security benefits that DoD believes will flow from the creation of ULA. The proposed Consent Agreement requires that: (1) ULA cooperate on equivalent terms with all providers of government space vehicles; (2) the space vehicle businesses of Boeing and Lockheed provide equal consideration and support to all launch services providers when seeking any U.S. government delivery in orbit contract; and

Analysis to Aid Public Comment

(3) Boeing, Lockheed, and ULA safeguard competitively sensitive information obtained from other providers of space vehicles and launch services.

The Consent Agreement has been placed on the public record for 30 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement or make it final.

Pursuant to a Joint Venture Master Agreement, dated May 2, 2005, Boeing and Lockheed agreed to form a joint venture to be called ULA (“Proposed Joint Venture”). The Proposed Joint Venture would consolidate manufacturing and development of Boeing and Lockheed’s Expendable Launch Vehicles (“ELV”). Sales of launch services to the U.S. government will also be merged into ULA. Boeing and Lockheed will not exchange any cash in the transaction, but each party’s contributed businesses are valued in excess of \$530.7 million. The Commission's complaint alleges that the Proposed Joint Venture would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in the U.S. markets for government medium to heavy (“MTH”) launch services and government space vehicles.

II. The Parties

Boeing maintains its headquarters in Chicago, Illinois. It is the world’s largest aerospace company and the second largest supplier to the Department of Defense. Boeing manufactures and sells MTH launch services to the U.S. government on its two ELVs, the Delta II and Delta IV. Delta II provides medium lift capability; Delta IV provides heavy lift capability. Boeing is the third largest supplier of government space vehicles.

Analysis to Aid Public Comment

Lockheed, based in Bethesda, Maryland, is the largest defense contractor in the United States. Lockheed provides MTH launch services to the U.S. government with its Atlas V ELV. Lockheed is the largest supplier of government space vehicles.

III. Government MTH Launch Services and Space Vehicles

Government MTH launch services are a relevant product market for the purposes of assessing the likely competitive effects of the Proposed Joint Venture. Launch service providers deliver space vehicles (i.e., satellites, interplanetary spacecraft, and other payloads) into earth orbit or beyond into outer space. Payloads in excess of 4,150 pounds require, at minimum, a medium lift launch vehicle to attain low earth orbit, the lowest sustainable orbit. MTH launch vehicles are generally based on a common vehicle configuration, i.e., the Delta IV and Atlas V, and are customized to adjust lift capability by adding “strap-on” motors or additional booster engines. There is no alternative technology currently available to deliver satellites and other payloads to space in the medium and heavy weight classes. Light launch vehicles cannot be “scaled-up” with strap-on motors or booster engines to increase lift capability. Further, with the U.S. government’s demand for communication and reconnaissance capabilities increasing, space vehicles are not expected to become lighter in the future. Accordingly, the U.S. government has no alternatives for the functions performed by space vehicles and no alternative technology to deliver MTH payloads to space.

Government space vehicles are a second relevant product market for the purposes of analyzing the competitive effects of the Proposed Joint Venture. The United States government purchases space vehicles for a multitude of unique (and often classified) applications, including military communications and navigation, reconnaissance, atmospheric observation, and scientific exploratory missions, among other things. Other forms of communication, navigation, reconnaissance, and scientific

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observation are not substitutes for the unique capabilities of government space vehicles.

The relevant geographic market is the United States. Federal law and national security imperatives require that the U.S. government purchase MTH launch services and space vehicles from domestic companies.

The U.S. markets for government MTH launch services and government space vehicles are highly concentrated. In the U.S. government MTH launch services market, Boeing and Lockheed are the only competitors, and their consolidation will result in a monopoly. Space Exploration Technologies Corp. (“SpaceX”) is attempting to enter the MTH launch services market, but the timing of its possible entry and the reliability of its MTH launch vehicles is uncertain. Additionally, DoD and other government customers would require several validation launches before purchasing MTH launch services from SpaceX, further postponing the market impact of SpaceX’s potential entry. In the U.S. market for government space vehicles, three firms, Boeing, Lockheed, and Northrop Grumman (“Northrop”), account for the large majority of sales.

IV. Entry

Entry into the government MTH launch services market and the government space vehicle market is extremely difficult. For MTH launch vehicles and government space vehicles alike, design and development alone require many years and cost in excess of a billion dollars. Government space vehicles cost approximately \$1 billion and take approximately five years to produce. Moreover, because the costs of a launch failure or a space vehicle malfunction are extremely high in terms of dollars and delays in vital national security or scientific services, the U.S. government only procures MTH launch services and space vehicles from firms with an established track record for success. As a result, new entry is unlikely to reverse the anticompetitive effects of the Proposed Joint Venture.

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V. Competitive Effects

DoD has contracted with both Boeing and Lockheed to provide MTH launch services through 2011. Under the current procurement program — known as “Buy III” — Boeing’s and Lockheed’s fixed costs are covered by DoD, and launch services are purchased at variable cost. The rationale for this program is grounded in a Presidential Decision Directive requiring the U.S. Government to maintain “assured access to space,” which is interpreted to require maintaining at least two independent MTH launch vehicle providers.

Despite the absence of current price competition under Buy III, significant anticompetitive effects, including the loss of non-price competition and the loss of potential future price competition, are likely to occur if the proposed transaction is consummated. Under Buy III, launches that are more than two years away may be awarded to either Boeing or Lockheed. As a result, each has an incentive to improve the capability and reliability of its launch services to increase the likelihood that DoD will award it future launches. In addition, Buy III expires in 2011, after which full price and non-price competition pursuant to DoD’s usual procurement process may be reinstated. Finally, the creation of the Proposed Joint Venture would deny the government the benefits of a competitive “down select” to either the Delta or Atlas ELV if assured access to space is later determined not to require two separate families of launch vehicles.

National security issues, however, are also a vital element of an analysis of the Proposed Joint Venture. To understand the unique national security implications of the Proposed Joint Venture, the Commission has consulted closely with the DoD and

Analysis to Aid Public Comment

other federal agencies.¹ Indeed, as the primary customer of government MTH launch services and space vehicles and the government agency ultimately responsible for the security of the United States, DoD's views on ULA were particularly significant. Under these unique circumstances, the Commission placed a great deal of weight on DoD's position as to whether ULA would benefit national security and whether the Commission should challenge the Proposed Joint Venture.

DoD has informed the Commission that the creation of ULA will advance U.S. national security interests by improving the United States' ability to access space reliably. DoD considers access to space "essential" given the military's increasing dependence on space-based reconnaissance, communication, and munitions-guidance systems. Maximizing the reliability of launch vehicles that provide access to space is of paramount importance to DoD. A single launch failure can result in the loss of a mission-critical payload and threaten military programs by delaying future launches until the cause of the failure is discovered and remedied.

ULA will improve launch vehicle reliability in several ways. First, the single ULA workforce will benefit from a launch tempo (the number of vehicles assembled and launched per year) greater than could be expected from the two separate Lockheed and Boeing workforces. A single workforce with more launch experience will be critical in minimizing mistakes and malfunctions that jeopardize mission success. In addition, integrating the two firms' complementary technologies will infuse each firm's launch vehicles with the technical improvements and innovations of its competitor, further enhancing the reliability of Atlas V and Delta IV. Under these unique circumstances, the

¹ See Letter from Michael R. Moiseyev, Assistant Director, Bureau of Competition, Federal Trade Commission, to Douglas P. Larsen, Deputy General Counsel ("Acquisition & Logistics), Department of Defense, dated July 6, 2006, and Letter from Honorable Kenneth J. Krieg, Under Secretary of Defense for Acquisition, Technology & Logistics, Department of Defense, to Honorable Deborah P. Majoras, Chairman of the Federal Trade Commission, dated August 15, 2006.

Analysis to Aid Public Comment

increase in reliability can be recognized as an efficiency flowing from the joint venture.

After thorough review, DoD has determined that the national security benefits flowing from ULA would exceed any anticompetitive harm caused by the proposed transaction. DoD has expressed three competitive concerns, however, that are not intrinsically linked to ULA's national security benefits. These vertical issues are competitively significant because ULA's pricing will be regulated, rather than competitive, giving ULA the incentive to exert its monopoly power in related, but unregulated, markets. The first of DoD's concerns is that ULA will favor its parents' space vehicle businesses to the detriment of other space vehicle manufacturers, such as Northrop. Today, competition between Boeing and Lockheed for launch services induces the companies to cooperate with other space vehicle suppliers, notwithstanding the fact that each has incentives to favor its own space vehicle business, out of fear that the other would cooperate and win the launch. The proposed transaction eliminates that threat, and, as a result, reduces the incentives for ULA to optimize its launch vehicles for use with Northrop space vehicles, to the detriment of Northrop and the government.

Second, DoD believes that Boeing and Lockheed may utilize their positions in the space vehicle market to raise barriers to entry in the government MTH launch services market. In this regard, one type of space vehicle procurement presents a problem. Occasionally, DoD requires a space vehicle supplier to select a launch service and provide one price for the space vehicle as well as the launch. In these so-called "delivery in orbit" procurements, DoD is concerned that Boeing and Lockheed will have an incentive to defend ULA's monopoly by refusing to consider on equal terms any other launch service competitors that may emerge, such as SpaceX.

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Third, the creation of ULA increases the likelihood that competitively sensitive information from third parties will be disclosed among ULA, Boeing, and Lockheed in a manner that harms competition. For example, as vertically integrated suppliers, Boeing and Lockheed may have incentives to share confidential Northrop information obtained as a launch vehicle services supplier with their respective space vehicle businesses. Similarly, Boeing and Lockheed may have an incentive to share with ULA confidential information that their space vehicle businesses may learn from any future launch vehicle service competitors. This concern arises because third parties, such as Northrop, will no longer be able to utilize competition between Boeing and Lockheed in the MTH launch services market to negotiate the creation of firewalls and other protections for their confidential information.

VI. The Proposed Consent Agreement

To allow the United States to obtain the national security enhancements offered by ULA, the proposed Consent Agreement does not attempt to remedy the loss of direct competition between Boeing and Lockheed Martin under these unique circumstances. Instead, the purpose of the proposed Consent Agreement is to address ancillary competitive harms that DoD has identified as not inextricably tied to the national security benefits associated with the creation of ULA. To ensure that the provisions of the proposed Consent Agreement are followed, it provides for a compliance officer who will be appointed by the Secretary of Defense. The compliance officer will have broad investigative and remedial powers and may interview respondents' personnel, inspect respondents' facilities, and require respondents to provide documents, data, and other information.

To alleviate DoD's concerns in the government space vehicle market, the proposed Consent Agreement requires ULA to cooperate on equivalent terms with all government space vehicle providers seeking to win U.S. government procurement contracts. Because a space vehicle and launch vehicle require significant

Analysis to Aid Public Comment

integration to achieve successful placement of a space vehicle into orbit, space vehicle and launch services providers work closely together pursuant to teaming arrangements when seeking to win government contracts. Pursuant to the proposed agreement, ULA must provide all space vehicle suppliers with equal access to engineering resources, personnel, and technical information. These provisions ensure that ULA cannot give an unfair advantage to the space vehicle businesses of its parents during DoD's space vehicle procurement process.

The proposed Consent Agreement addresses DoD's concern that Boeing and Lockheed will refuse to support or deal with future competitors to ULA by requiring Boeing and Lockheed to provide equal consideration, information, and resources to any launch services competitors of ULA when bidding on a delivery in orbit contract. These provisions prevent Boeing and Lockheed from slowing or deterring entry into the MTH launch services businesses in order to protect ULA's monopoly status. To ensure the parties' compliance with this requirement, Boeing and Lockheed must create selection criteria and have those criteria approved by the compliance officer. Further, the proposed Consent Agreement prohibits Boeing and Lockheed from selecting ULA as a launch services supplier without the prior approval of the compliance officer.

To address DoD's concern that competitive harm may occur as the result of the exchange of confidential information, the proposed agreement forbids ULA, Boeing, and Lockheed from sharing third parties' competitively sensitive information. ULA must establish separate teams to support each space vehicle supplier's efforts to win government contracts and implement procedures, pursuant to the compliance officer's oversight, that will ensure that confidential information is not exchanged among the teams. Additionally, the order requires a number of prophylactic measures designed to ensure that confidential information is not exchanged between ULA and its parents. Pursuant to these provisions, ULA's facilities must be physically

Analysis to Aid Public Comment

separate from those of Boeing and Lockheed, and employees must be able to access only the facilities of their respective employer. If ULA requires technical support from Boeing or Lockheed employees, these employees must sign confidentiality agreements, which must be provided to the compliance officer, agreeing not to disclose the confidential information of any space vehicle supplier teaming with ULA. In addition, for a one-year period, any such employee may not join or assist a Boeing or Lockheed project that is competing with a space vehicle supplier whose confidential information was obtained by the employee during work at ULA.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

Complaint

IN THE MATTER OF

**DARDEN RESTAURANTS, INC., GMRI, INC. AND
DARDEN GC CORPORATION**CONSENT ORDER, ETC. , IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4189; File No. 062 3112
Complaint, May 7, 2007 — Decision, May 7, 2007*

This consent order addresses the respondents' failure to disclose adequately the material terms and conditions of Darden Gift Cards, which can be used at several restaurant chains. The order prohibits respondents from advertising or selling Darden Gift Cards without disclosing, clearly and prominently, the existence and all terms and conditions of any expiration date or automatic fees. The disclosure must also appear on the front of the card. The order also prohibits respondents from making any misrepresentation about any material term or condition associated with the Darden Gift Card, and it prohibits them from collecting or attempting to collect any dormancy fee on any card activated prior to the date of the order. Respondents are required to restore to a card the amount of any fees assessed prior to the date of the order and to provide notice to consumers on respondents' websites of the automatic restoration of fees. The order also requires respondents to maintain certain records relating to Darden Gift Cards and to distribute copies of the order to various respondent personnel as well as to others who engage in conduct related to the order. The respondents must also notify the Commission of any changes in corporate structure that might affect compliance with the order and must file reports with the Commission detailing compliance with the order.

Participants

For the *Commission*: *Jonathan M. Kraden, Lucy Morris, and Bevin T. Murphy.*

For the *Respondents*: *Christine Varney and Sharis Pozen, Hogan & Hartson LLP; and Richard Leighton, Keller & Heckman LLP.*

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that Darden Restaurants, Inc., GMRI, Inc., and Darden GC Corp. (collectively, “respondents”) have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Darden Restaurants, Inc. (“Darden”), is a Florida corporation that, through its subsidiaries, owns and operates several restaurant chains, including Olive Garden Restaurant, Red Lobster Restaurant, Smokey Bones Restaurant, and Bahama Breeze Restaurant. Darden’s principal office or place of business is located at 5900 Lake Ellenor Drive, Orlando, Florida 32809.

2. Respondent GMRI, Inc., is a Florida corporation with its principal office or place of business located at 5900 Lake Ellenor Drive, Orlando, Florida 32809.

3. Respondent Darden GC Corp. is a Colorado corporation with its principal office or place of business located at 5900 Lake Ellenor Drive, Orlando, Florida 32809.

4. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

5. Since at least 2001, respondents have advertised, offered for sale, sold, and distributed gift cards through Darden’s restaurants and Web sites, and third parties. Respondents have also advertised their gift cards in television and radio advertisements.

6. Respondents’ gift cards are plastic, stored-value cards, similar in size and shape to credit or debit cards, often branded with one or more of Darden’s restaurant logos. Respondents’ gift

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cards typically can be used to purchase goods or services at any of Darden's restaurant locations.

7. Respondents have represented that consumers can redeem respondents' gift cards for goods or services of an equal value to the monetary amount placed on the cards. Respondents have promoted their gift cards as "perfect for any budget — in amounts from \$5 to \$250." Respondents have sold their gift cards in specific denominations for exact amounts (*e.g.*, a \$25 Olive Garden Gift Card costs \$25, etc.), and respondents' gift cards are often branded with monetary amounts on the front of the cards. Additionally, respondents have claimed that their gift cards can be used like gift certificates, which typically are redeemable for the monetary amount specified on the certificates.

8. In numerous instances, respondents have applied a fee that depletes the value of their gift cards over time and, in some instances, renders the cards worthless. For gift cards sold prior to February 2004, after 15 consecutive months of non-use, respondents deducted a monthly fee of \$1.50 (hereinafter, "dormancy fee" or "fee") until the consumer used the card again. For gift cards sold after February 2004, respondents deducted the fee after 24 consecutive months of non-use.

9. In numerous instances, respondents have failed to disclose or failed to disclose adequately the dormancy fee by, among other practices:

- a. Disclosing the dormancy fee in small print (approximately five point font) on the back of the gift card, obscured by miscellaneous other information (*see Attachment A*);
- b. Marketing a transparent (or clear-colored) Red Lobster Gift Card with a red lobster design on the front of the card that further obscures the dormancy fee disclosure on the back (*see Attachment B*);

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- c. Marketing their gift cards in Darden's restaurants and failing to direct consumers' attention to the dormancy fee disclosure on the back of their gift cards or otherwise notifying consumers of the dormancy fee. For example, respondents provide restaurant patrons with drink coasters and table tents that operate as gift card order forms. Consumers fill in the forms with the quantity and dollar amount of the gift cards they wish to purchase, and the server then adds the charge to the consumer's restaurant bill. In numerous instances, these materials do not contain any disclosure about the card's dormancy fees (*see Attachment C*); and
- d. Marketing their gift cards on Darden's Web sites, i.e., Darden.com, Olivegarden.com, Redlobster.com, Smokeybones.com, and Bahamabreeze.com, without disclosing to consumers before purchase that a dormancy fee may apply to the card.

10. In numerous instances, consumers have not learned of the fee until they attempted to use respondents' gift cards and discovered that the cards held little or no remaining value. Some consumers have contacted respondents to request reimbursement of the amounts lost as a result of the fee, and respondents have provided some amount or form of reimbursement.

11. In the advertising and sale of Darden's gift cards, respondents have represented, expressly or by implication, that consumers have the right to redeem their gift cards for goods or services of an equal value to the monetary amount placed on the cards. Respondents have failed to disclose, or have failed to disclose adequately, that, after a specified number of consecutive months of non-use (*i.e.*, 15 or 24 consecutive months), respondents deduct a \$1.50 fee per month from the value of their gift cards until they are used again. This fact would be material to consumers in their purchase or use of respondents' gift cards. The

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failure to disclose this fact, in light of the representation made, was, and is, a deceptive practice.

12. The acts and practices of respondents as alleged in this complaint constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this seventh day of May, 2007, has issued this complaint against respondents.

By the Commission.

Complaint

Complaint Exhibits

Attachment A



189 364

This gift card is issued by and represents an obligation of Darden OC Corp. (DOC). Each time you use it, we'll deduct that amount from the balance until you've used the full balance of the card. (1) Except where required by law, the card is not redeemable for cash in our restaurants. (2) We can't replace it if it's lost or stolen. (3) Except in California and where prohibited by law, if you don't use your card for a 24-month period, a \$1.50 monthly maintenance fee will be deducted from the balance until you use it again. (4) It may be used at any Red Lobster, Bahama Breeze or Sotokey Breeze restaurant. (U.S. only) (5) DOC approval required to activate this card.

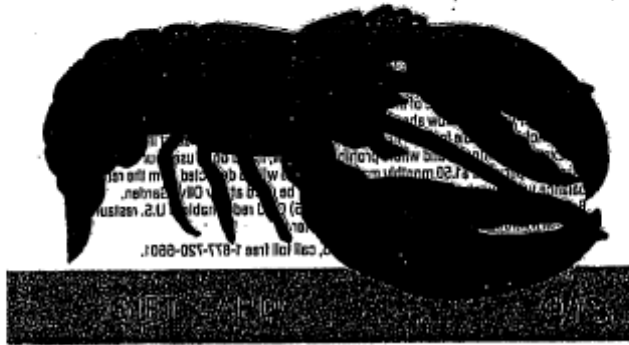
To find out the balance of your Gift Card, call toll free 1-877-230-4120.

www.thegarden.com

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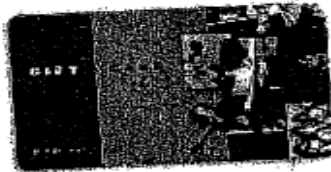
Attachment B



Complaint

Attachment C

**The Perfect Gift for
Moms, Dads & Grads**



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For the special people in your life.

See reverse to order today

**Give the gift
of great seafood!**

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to your server or bartender. We're happy to add
the charge to your check... It's that easy.

Gift Cards:

Available in amounts from \$5 to \$250

| Quantity | \$ Amount |
|----------------------|----------------------|
| <input type="text"/> | <input type="text"/> |
| <input type="text"/> | <input type="text"/> |

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Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Federal Trade Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in the complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter by interested persons, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1.a. Respondent **DARDEN RESTAURANTS, INC.** is a Florida corporation with its principal office or place of business at 5900 Lake Ellenor Drive, Orlando, FL 32809.

Decision and Order

1.b. Respondent GMRI, INC. is a Florida corporation with its principal office or place of business at 5900 Lake Ellenor Drive, Orlando, FL 32809.

1.c. Respondent DARDEN GC CORP is a Colorado corporation with its principal office or place of business at 5900 Lake Ellenor Drive, Orlando, FL 32809.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER**DEFINITIONS**

For purposes of this order, the following definitions shall apply:

1. "Clearly and prominently" shall mean as follows:
 - (a) In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. *Provided, however,* that in any advertisement presented solely through video or audio means, the disclosure may be made through the same means in which the advertisement is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media the disclosure shall also be unavoidable and shall be

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presented prior to the consumer incurring any financial obligation.

- (B) In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears. In multi-page documents, the disclosure shall appear on each page where a gift card is advertised, promoted, mentioned, or depicted.
- (C) On a product label or gift card, the disclosure shall be in a type size and location on the principal display panel sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.
- (D) The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

2. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

3. "Document" is synonymous in meaning and equal in scope to the usage of the term in Federal Rule of Civil Procedure 34(a), and includes writings, drawings, graphs, charts, photographs, audio and video recordings, computer records, and other data compilations from which information can be obtained and translated, if necessary, into reasonably usable form through detection devices. A draft or non-identical copy is a separate document within the meaning of the term.

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4. Unless otherwise specified, “respondents” shall mean Darden Restaurants, Inc., GMRI, Inc., and Darden GC Corp., corporations, their successors and assigns, and their officers, agents, representatives, and employees.

5. “Darden Gift Card” shall mean any payment device: (a) issued by, or on behalf of, respondents or their successors and assigns; (b) that can be used to purchase goods or services at a Darden restaurant location or any other restaurant, store, or Web site operated by respondents or their successors and assigns; (c) issued in a specified monetary amount; (d) that may, or may not, be increased in value or reloaded; and (e) for which cash or other value or consideration was given to respondents.

6. “Covered Fee” shall mean any fee or surcharge that is assessed automatically by respondents or their successors and assigns, following activation of any Darden Gift Card, and that decreases the value of the gift card, including but not limited to any dormancy, maintenance, inactivity, monthly, balance inquiry, or other fees assessed automatically by respondents, their successors or assigns. *Provided, however*, that this definition shall not apply to any replacement fee for any lost or stolen Darden Gift Card.

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution, in or affecting commerce, of any Darden Gift Card, shall not fail to disclose clearly and prominently:

- A. the existence of any expiration date or Covered Fee associated with the Darden Gift Card; *provided, however*, that, at the point of sale, prior to purchase, respondents shall not fail to disclose clearly and prominently all of the material terms and conditions of any expiration date or Covered Fee associated with the Darden Gift Card; and

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- B. on the front of each Darden Gift Card, the existence of any expiration date or Covered Fee associated with the Darden Gift Card.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution, in or affecting commerce, of any Darden Gift Card, shall not misrepresent, in any manner, expressly or by implication, any material term or condition of the Darden Gift Card.

III.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, shall:

- A. Not collect or attempt to collect any Covered Fee on any Darden Gift Card activated prior to the date of issuance of this order;
- B. Upon issuance of this order, cause the amount of any Covered Fee that was assessed on a Darden Gift Card prior to the date of issuance of this order to be restored to such Darden Gift Card; and
- C. For a period of two (2) years after the date of issuance of this order, provide notice to consumers of the restoration of fees required by Section III.B. of this order. Such notice shall be clearly and prominently disclosed on respondents' websites, including www.darden.com, www.darden-restaurants.com, www.redlobster.com, www.olivegarden.com, www.smokeybones.com, and www.bahamabreeze.com.

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IV.

IT IS FURTHER ORDERED that respondents Darden Restaurants, Inc., GMRI, Inc., and Darden GC Corp., and their successors and assigns, shall, for five (5) years after the date of issuance of this order, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution, in or affecting commerce, of any Darden Gift Card, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. Accounting records that reflect the cost of Darden Gift Cards sold, revenues generated, and the disbursement of such revenues;
- B. Records documenting the sales figures and unit sales figures for the Darden Gift Card; the total amount of any and all Covered Fees that have been deducted from Darden Gift Cards; and the total number of Darden Gift Cards from which a fee was deducted;
- C. Records maintained in the ordinary course of business reflecting during their employment: the name, physical address, and telephone number of each person employed by respondents, and their successors and assigns, including as an independent contractor, with responsibilities relating to compliance with this order; that person's job title or position; the date upon which the person commenced work; and the date and reason for the person's termination; if applicable;
- D. Complaints and refund requests relating to the Darden Gift Card (whether received directly, indirectly, or through any third party) and any responses to those complaints or requests;

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- E. Copies of all advertisements or other marketing materials relating to the Darden Gift Card;
- F. Representative copies of all versions of the Darden Gift Card; and
- G. All other records and documents reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to all documents obtained, created, generated or which in any way relate to the requirements, provisions or terms of this order, and all reports submitted to the FTC pursuant to this order.

V.

IT IS FURTHER ORDERED that respondents Darden Restaurants, Inc., GMRI, Inc., and Darden GC Corp., and their successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers who engage in conduct related to the subject matter of the order, and to the officers, directors, and managers of any third-party vendor who engages in conduct related to the subject matter of the order, and shall secure from each such person, within thirty (30) days of delivery, a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within five (5) days after the date of service of this order, and to future personnel within ten (10) days after their assuming their responsibilities.

VI.

IT IS FURTHER ORDERED that respondents Darden Restaurants, Inc., GMRI, Inc., and Darden GC Corp., and their successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in any of the corporations that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other

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action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

VII.

IT IS FURTHER ORDERED that respondents Darden Restaurants, Inc., GMRI, Inc., and Darden GC Corp., and their successors and assigns, shall, within sixty (60) days after service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VIII.

This order will terminate on May 7, 2027, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and

Analysis to Aid Public Comment

- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

**ANALYSIS OF PROPOSED CONSENT ORDER TO AID
PUBLIC COMMENT**

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Darden Restaurants, Inc., GMRI, Inc., and Darden GC Corp. (collectively, “respondents” or “Darden”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

Respondents, through subsidiaries, own and operate several restaurant chains, including Olive Garden Restaurant, Red Lobster Restaurant, Smokey Bones Restaurant, and Bahama Breeze

Analysis to Aid Public Comment

Restaurant. Respondents advertise, sell, and distribute Darden Gift Cards through their restaurants and Web sites, and third parties. Darden Gift Cards are plastic, stored-value cards, similar in size and shape to credit or debit cards, often branded with one or more of Darden's restaurant logos. Darden Gift Cards typically can be used to purchase goods or services at any of Darden's restaurant locations. This matter concerns the respondents' alleged failure to disclose, or failure to disclose adequately, material terms and conditions of Darden Gift Cards.

The Commission's complaint alleges that, in the advertising and sale of Darden Gift Cards, respondents have represented, expressly or by implication, that a consumer can redeem a Darden Gift Card for goods or services of an equal value to the monetary amount placed on the card. Respondents have failed to disclose, or failed to disclose adequately, that, after a specified number of consecutive months of non-use (*i.e.*, 15 or 24 months), respondents deduct a \$1.50 fee per month from the value of the Darden Gift Card until it is used again. The proposed complaint alleges that the failure to disclose adequately this material fact is a deceptive practice.

The proposed consent order contains provisions designed to prevent respondents from engaging in similar acts and practices in the future.

Part I.A. of the proposed order prohibits respondents from advertising or selling Darden Gift Cards without disclosing, clearly and prominently: (a) the *existence* of any expiration date or automatic fees, *in all advertising*, and (b) *all material terms and conditions* of any expiration date or automatic fee, *at the point of sale and prior to purchase*. The effect of this provision is to require respondents to alert consumers to potential fees and expiration dates during advertising, and to fully disclose all relevant details at the point of sale, before consumers purchase the gift cards.

Analysis to Aid Public Comment

Part I.B. of the proposed order prohibits respondents from advertising or selling Darden Gift Cards without disclosing, clearly and prominently the *existence* of any automatic fee or expiration date *on the front* of the gift card.

Part II of the proposed order prohibits respondents from making any misrepresentation about any material term or condition associated with the Darden Gift Card.

Part III.A. of the proposed order prohibits respondents from collecting or attempting to collect any dormancy fee on any Darden Gift Card activated prior to the date of issuance of the proposed order.

Part III.B. of the proposed order requires respondents, upon issuance of the order, to cause the amount of any fees assessed on a Darden Gift Card prior to the date of issuance of the order to be restored to the card.

Part III.C. of the proposed order requires respondents to provide notice to consumers of the automatic restoration of fees required by Section III.B. This notice must be clearly and prominently disclosed on respondents' websites, including www.darden.com, www.dardenrestaurants.com, www.redlobster.com, www.olivegarden.com, www.smokeybones.com, and www.bahamabreeze.com.

Part IV of the proposed order contains a document retention requirement, the purpose of which is to ensure compliance with the proposed order. It requires that respondents maintain accounting and sales records for Darden Gift Cards, copies of ads and promotional material that contain representations covered by the proposed order, complaints and refund requests relating to the Darden Gift Cards, and other materials that were relied upon by respondents in complying with the proposed order.

Analysis to Aid Public Comment

Part V of the proposed order requires respondents to distribute copies of the order to various principals, officers, directors, and managers of respondents as well as to the officers, directors, and managers of any third-party vendor who engages in conduct related to the proposed order.

Part VI of the proposed order requires respondents to notify the Commission of any changes in corporate structure that might affect compliance with the order.

Part VII of the proposed order requires respondents to file with the Commission one or more reports detailing compliance with the order.

Part VIII of the proposed order is a “sunset” provision, dictating the conditions under which the order will terminate twenty years from the date it is issued or twenty years after a complaint is filed in federal court, by either the United States or the FTC, alleging any violation of the order.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify in any way its terms.

Complaint

IN THE MATTER OF

**ACTAVIS GROUP, HF. AND ABRIKA
PHARMACEUTICALS, INC.**CONSENT ORDER, ETC. , IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT*Docket C-4190; File No. 071 0063
Complaint, May 18, 2007 — Decision, May 18, 2007*

This consent order seeks to remedy the anticompetitive effects of the acquisition of Abrika Pharmaceuticals, Inc., by Actavis Group, hf. Both respondents are engaged in the research, development, manufacture, and sale of generic pharmaceutical products, and they are the only two companies selling generic isradipine capsules in the United States. The order requires the respondents to assign and divest the Abrika rights and assets necessary to manufacture and market generic isradipine capsules to Cobalt Laboratories, Inc., the U.S. subsidiary of Arrow Group, or to another Commission-approved acquirer. As part of the divestiture, Abrika will transfer its supply arrangement to Cobalt. Actavis and Abrika will transfer all confidential business information related to Abrika's isradipine product to Cobalt. Finally, Actavis and Abrika will provide technical assistance to Cobalt to allow it to manufacture isradipine in substantially the same manner and quality employed or achieved by Abrika. The order also requires Actavis and Abrika to file reports with the Commission periodically until the divestitures and transfers are accomplished.

Participants

For the *Commission*: Amy S. Posner and Kari A. Wallace.

For the *Respondents*: John F. Collins, Dewey Ballantine LLP;
and Cecil S. Chung and Shirley Z. Johnson, Greenberg Traurig
LLP.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade

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Commission (“Commission”), having reason to believe that Respondent Actavis Group, hf. (“Actavis”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Abrika Pharmaceuticals, Inc., including the voting securities of Abrika Pharmaceuticals, Inc. owned by Alan P. Cohen (known collectively as “Abrika”), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act (“FTC Act”), as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. DEFINITIONS

1. “Commission” means the Federal Trade Commission.
2. “FDA” means the United States Food and Drug Administration.
3. “Respondents” means Actavis and Abrika, individually and collectively.

II. RESPONDENTS

4. Respondent Actavis is a corporation organized, existing, and doing business under and by virtue of the laws of Iceland, with its headquarters address at Dalshraun 1, 220 Hafnarfjordur, Iceland. Actavis’s principal subsidiary in the United States, Actavis U.S., is located at 14 Commerce Drive, Suite 301, Cranford, New Jersey 07016. Actavis is engaged in the research, development, manufacture, and sale of generic pharmaceutical products.

5. Respondent Abrika is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 13800 N.W. 2nd Street, Suite 190, Sunrise, Florida 33325. Abrika is engaged in the

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research, development, manufacture, and sale of generic pharmaceutical products.

6. Respondents are, and at all times relevant herein have been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and are corporations whose business is in or affects commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED ACQUISITION

7. On November 20, 2006, Actavis and Abrika entered into an Agreement and Plan of Merger (the “Merger Agreement”) whereby Actavis proposes to acquire 100 percent of the issued and outstanding voting securities of Abrika in a transaction valued at approximately \$235 million (the “Acquisition”).

IV. THE RELEVANT MARKET

8. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the manufacture and sale of generic isradipine capsules.

9. For the purposes of this Complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant line of commerce.

V. THE STRUCTURE OF THE MARKET

10. The market for the manufacture and sale of generic isradipine capsules is highly concentrated with a pre-acquisition Herfindahl-Hirschman Index (“HHI”) of 8,872 points. Isradipine capsules are calcium channel blockers that relax blood vessels and reduce the workload on the heart. Currently, Actavis and Abrika are the only suppliers of generic isradipine in the United States with market shares of 6 percent and 94 percent, respectively. The

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Acquisition would create a monopoly in this market and increase the HHI concentration by 1,128 points, resulting in a post-acquisition HHI of 10,000 points.

VI. ENTRY CONDITIONS

11. Entry into the relevant product market described in Paragraph 8 would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. Entry would not take place in a timely manner because the combination of generic drug development times and FDA drug approval requirements takes at least two years. Entry would not be likely because the relevant market is relatively small and in decline, limiting sales opportunities for any potential new entrant.

VII. EFFECTS OF THE ACQUISITION

12. The effects of the Acquisition, if consummated, may be to substantially lessen competition and to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by eliminating actual, direct, and substantial competition between Actavis and Abrika. The merger of Actavis and Abrika eliminates price competition between these two generic drug companies, thereby: (1) increasing the likelihood that Actavis will be able to unilaterally exercise market power in this market and (2) increasing the likelihood that customers would be forced to pay higher prices.

VIII. VIOLATIONS CHARGED

13. The Merger Agreement described in Paragraph 7 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

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14. The Acquisition described in Paragraph 7, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighteenth day of May, 2007, issues its Complaint against said Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Actavis Group hf. (“Actavis”) of Respondent Abrika Pharmaceuticals, Inc. (“Abrika”), hereinafter referred to as “Respondents,” and Respondents having been furnished thereafter with a copy of a draft of Complaint (“Complaint”) that the Bureau of Competition proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such

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Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Actavis is a corporation, organized, existing and doing business under and by virtue of the laws of Iceland, with its headquarters address at Dalshraun 1, 220 Hafnarfjordur, Iceland.
2. Respondent Abrika is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 13800 N.W. 2nd Street, Suite 190, Sunrise, Florida 33325.
3. The Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in the Order, the following definitions shall apply:

- A. "Actavis" means Actavis Group hf., its directors, officers, employees, agents, representatives, successors, and

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assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Actavis (including, but not limited to, Actavis Inc. and Panthers Acquisition Corp.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Actavis shall include Abrika.

- B. “Abrika” means Abrika Pharmaceuticals, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Abrika, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” means Actavis and Abrika, individually and collectively.
- D. “Commission” means the Federal Trade Commission.
- E. “Abrika-Cobalt Agreement” means the Asset Purchase Agreement by and among Abrika Pharmaceuticals, Inc., Actavis Inc., and Cobalt Laboratories Inc., dated April 2, 2007, and all amendments, exhibits, attachments, agreements, and schedules related thereto. The Abrika-Cobalt Agreement is attached to this Order and contained in non-public Appendix I.
- F. “Abrika-PMRS Supply Agreement” means the Commercial Supply Agreement by and between Pharmaceutical Manufacturing Research Services, Inc., and Abrika Pharmaceuticals, dated December 31, 2005, and all amendments, exhibits, attachments, agreements, and schedules related thereto. The Abrika-PMRS Supply Agreement is attached to this Order and contained in non-public Appendix II.

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- G. “Acquirer” means:
1. Cobalt; or
 2. An entity that receives the prior approval of the Commission to acquire the Isradipine Assets that Respondents are required to assign, grant, license, divest, transfer, deliver, terminate, or otherwise convey pursuant to this Order.
- H. “Acquirer Employees” means any of an Acquirer’s employees with any amount of responsibility related to the Isradipine Product.
- I. “Acquisition” means the acquisition contemplated by The Agreement and Plan of Merger dated November 20, 2006, by and among Actavis Inc., Panthers Acquisition Corp., Abrika Pharmaceuticals, Inc., and Alan P. Cohen, and all amendments, exhibits, attachments, agreements, and schedules thereto.
- J. “Acquisition Date” means the earlier of the following dates:
1. The date Respondents close on the Acquisition; or
 2. The date the merger contemplated by the Acquisition is consummated by filing the certificate of merger related to the Acquisition with the Secretary of State of the State of Delaware.
- K. “Agency(ies)” means any government regulatory authority or authorities in the world responsible for granting approvals, clearances, qualifications, licenses, or permits for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Product. This term includes, but is not limited to, the United States Food and Drug Administration (“FDA”).

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- L. “Applications” means the applications for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Parts 312 and 314, and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, and all related correspondence between Respondents and the FDA. This term includes, but is not limited to, Investigational New Drug Application (“IND”), New Drug Application (“NDA”), Abbreviated New Drug Application (“ANDA”), Supplemental New Drug Application (“SNDA”), and Marketing Authorization Application (“MAA”) for a Product filed or to be filed with the FDA and all supplements, amendments, and revisions thereto, any preparatory work, drafts, and data necessary for the preparation thereof, and all related correspondence between Respondents and the FDA.
- M. “Assumed Contracts” means any and all of the following contracts or agreements:
1. That make specific reference to the Isradipine Product and pursuant to which any Third Party is obligated to purchase, or has the option to purchase with no further negotiation on price, the Isradipine Product from Respondents unless such contracts apply generally to the divesting Respondents’ sales of generic Products to that Third Party;
 2. Pursuant to which Respondents purchase the active pharmaceutical ingredients or had planned to purchase the active pharmaceutical ingredients from any Third Party for use in connection with the manufacture of the Isradipine Product;
 3. Relating to any clinical trial involving the Isradipine Product;

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4. With universities or other research institutions for the use of the Isradipine Product in scientific research;
5. Relating to the particularized marketing of the Isradipine Product or educational matters relating solely to the Isradipine Product;
6. Pursuant to which a Third Party manufactures the Isradipine Product on behalf of the Respondents;
7. Pursuant to which a Third Party provides the Manufacturing Technology or related equipment to the Respondents;
8. Constituting confidentiality agreements involving the Isradipine Product;
9. Involving any royalty, licensing, or similar arrangement involving the Isradipine Product to which Respondents are party;
10. Pursuant to which a Third Party provides any specialized services necessary to the research, Development, or manufacture of the Isradipine Product to Respondents, including consultation arrangements; and
11. Pursuant to which any Third Party collaborates with the Respondents in the performance of research, Development, marketing, distribution or selling of the Isradipine Product or the Isradipine Product business;

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Provided, however, that where any such contract or agreement also relates to Retained Products, Respondents shall assign to an Acquirer all such rights under the contract or agreement as are related to the Isradipine Product, but concurrently may retain similar rights for the purposes of the Retained Products;

Provided further, however, that Respondents shall provide copies of each contract or agreement to an Acquirer on or before the related Closing Date and segregated in a manner that clearly identifies the purpose of each contract or agreement.

- N. “Categorized Assets” means the following assets related to the Isradipine Product:
1. All Intellectual Property;
 2. A perpetual, fully paid-up and royalty-free license with rights to sublicense to all Licensed Intellectual Property solely within the field of use to use, make, distribute, offer for sale, promote, advertise, sell, import, export, or have used, made, distributed, offered for sale, promoted, advertised, sold, imported, or exported the Isradipine Product within the specified Geographic Territory;
 3. All Product Registrations;
 4. All Manufacturing Technology;
 5. All Marketing Materials;
 6. A list of all NDC Numbers and rights, to the extent permitted by Law, related to the Isradipine Product:

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- a. To require Respondents to discontinue the use of those NDC Numbers in the sale or marketing of Products other than with respect to returns, rebates, allowances, and adjustment for Isradipine Product sold prior to the Acquisition Date;
- b. To prohibit Respondents from seeking from any customer any type of cross-referencing of those NDC Numbers with any Retained Products;
- c. To seek to change any cross-referencing by a customer of those NDC Numbers with the Retained Products (including the right to receive notification from Respondents of any such cross-referencing that is discovered by Respondents);
- d. To seek cross-referencing from a customer of those NDC Numbers with the relevant Acquirer's NDC Numbers related to the Isradipine Product;
- e. To approve the timing of Respondents' discontinued use of those NDC Numbers in the sale or marketing of Products other than with respect to returns, rebates, allowances, and adjustments for Isradipine Product sold prior to the Acquisition Date, provided that Respondents may provide the minimum notice required by contract or law;
- f. To approve any notification from Respondents to any customer regarding the use or discontinued use of such numbers by Respondents prior to such notification being disseminated to the customer, provided that Respondents may provide the minimum notice required by contract or law;

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7. All rights to all of Respondents' relevant Applications;
8. Rights of Reference or Use to the Drug Master Files related to the Applications including, but not limited to, the pharmacology and toxicology data contained in all Applications;
9. All Development Reports;
10. At an Acquirer's option, all Assumed Contracts;
11. All strategic safety programs submitted to the FDA that are designed to decrease product risk by using one or more interventions or tools beyond the package insert;
12. All patient registries, and any other systematic active post-marketing surveillance program to collect patient data, laboratory data and identification information required to be maintained by the FDA to facilitate the investigation of adverse effects;
13. Lists of all customers and/or targeted customers, net sales (in either units or dollars) to such customers on either an annual, quarterly, or monthly basis including, but not limited to, a separate list specifying the above-described information for the High Volume Accounts and including the names of employees for the High Volume Accounts that are or have been responsible for the purchase of the Isradipine Product on behalf of the High Volume Accounts and their business contact information;
14. At an Acquirer's option, all inventory in existence as of the Closing Date including, but not limited to, raw materials, packaging materials, work-in-process and finished goods;

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15. Copies of all unfulfilled customer purchase orders as of the Closing Date, to be provided to the relevant Acquirer not later than two (2) days after the Closing Date;
16. At an Acquirer's option, subject to any rights of the customer, all unfulfilled customer purchase orders; and
17. All of the Respondents' books, records, and files directly related to the foregoing or to the Isradipine Product;

Provided, however, that this term shall not include (1) documents relating to Respondents' general business strategies or practices relating to research, development, manufacture, marketing or sale of generic pharmaceutical Products, where such documents do not discuss with particularity the Isradipine Product, and (2) administrative, financial and accounting records;

Provided further, however, Respondents may exclude from this term quality control records that are determined by the Interim Monitor or the Acquirer not to be material to the manufacture of the Isradipine Product;

Provided further, however, that in cases in which documents or other materials included in the relevant assets to be divested contain information: (1) that relate to both the Isradipine Product and other Products or businesses of Respondents and cannot be segregated in a manner that preserves the usefulness of the information related to the Isradipine Product; or (2) for which the Respondents have a legal obligation to retain the original copies, the Respondents shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to an Acquirer, the Respondents shall

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provide such Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that the Respondents provide an Acquirer with the above-described information without requiring the Respondents to completely divest themselves of information that, in content, also relates to Products and businesses other than the Isradipine Product.

- O. “cGMP” means current Good Manufacturing Practice as set forth in the United States Federal, Food, Drug, and Cosmetic Act, as amended, and includes all rules and regulations promulgated by the FDA thereunder.
- P. “Closing Date” means the date on which the Respondents (or a Divestiture Trustee) consummate a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey assets or rights related to the Isradipine Product to an Acquirer pursuant to this Order.
- Q. “Cobalt” means Cobalt Laboratories Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 24840 S. Tamiami Trail, Suite 1, Bonita Springs, Florida 34134.
- R. “Confidential Business Information” means all information owned by, or in the possession or control of, Respondents that is not in the public domain and that is directly related to the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support or use of the Isradipine Product; *provided, however*, that the restrictions contained in this Order regarding the use, conveyance, provision or disclosure of “Confidential Business Information” shall not apply to the following:

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1. Information that subsequently falls within the public domain through no violation of this Order or breach of confidentiality or non-disclosure agreement with respect to such information by Respondents;
 2. Information related to the Isradipine Product that Respondent Actavis can demonstrate it obtained without the assistance of Respondent Abrika prior to the Acquisition;
 3. Information that is required by law to be publicly disclosed;
 4. Information that does not directly relate to the Isradipine Product;
 5. Information relating to Respondents' general business strategies or practices relating to research, Development, manufacture, marketing or sale of generic pharmaceutical Products that does not discuss with particularity the Isradipine Product; and
 6. Information specifically excluded from the Categorized Assets.
- S. "Copyrights" means rights to all original works of authorship of any kind directly related to the Isradipine Product and any registrations and applications for registrations thereof within the Geographic Territory, including, but not limited to, all the following:
1. Promotional materials for healthcare providers;
 2. Promotional materials for patients;
 3. Educational materials for the sales force;

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4. Copyrights in all preclinical, clinical and process development data and reports relating to research and Development, including raw data relating to clinical trials, case report forms relating thereto, statistical programs developed (or modified in a manner material to use or function thereof) to analyze clinical data, market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research;
5. Customer information, promotional and marketing materials, sales forecasting models, medical education materials, sales training materials, and advertising and display materials;
6. Records relating to employees who accept employment with an Acquirer (excluding any personnel records transfer of which is prohibited by law);
7. Records, including customer lists, sales force call activity reports, vendor lists, sales data, reimbursement data, speaker lists, manufacturing records, manufacturing processes, and supplier lists;
8. Data contained in laboratory notebooks;
9. Adverse experience reports and files related thereto (including source documentation), periodic adverse experience reports, and data contained in electronic databases relating thereto;
10. Analytical and quality control data; and
11. All correspondence with the FDA.

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- T. “Development” means all preclinical and clinical drug development activities, including formulation, test method development and stability testing, toxicology, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing, conducting clinical trials for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing, and sale of a Product (including any government price or reimbursement approvals), Product approval and registration, and regulatory affairs related to the foregoing.
- U. “Development Reports” means the following documents related to the Isradipine Product in Respondents’ possession or in which Respondents have a right to access:
1. Pharmacokinetic study reports;
 2. Bioavailability study reports (including reference listed drug information);
 3. Bioequivalence study reports (including reference listed drug information);
 4. All correspondence between Respondents and the FDA relating to the Applications submitted by, on behalf of, or acquired by Respondents;
 5. Annual and periodic reports related to the Applications, including any safety update reports;
 6. FDA approved Product labeling;
 7. Currently used product package inserts (including historical change of controls summaries);

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8. FDA approved patient circulars and information;
 9. Adverse event/serious adverse event summaries;
 10. Summary of Product complaints from physicians;
 11. Summary of Product complaints from customers; and
 12. Product recall reports filed with the FDA.
- V. “Direct Cost” means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent they are directly incurred to provide the relevant assistance or service; *provided, however*, that Direct Cost shall not exceed the average hourly wage rate of Respondents’ employees used by an Acquirer.
- W. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to Paragraph IV. of this Order.
- X. “Domain Name” means the domain names (universe resource locators), and registrations thereof, issued by any entity or authority that issues and maintains the domain name registration; *provided, however*, this term shall not include any trademark or service mark rights to such domain names other than the rights to the Trademarks required to be divested.
- Y. “Drug Master Files” means the information submitted to the FDA as described in 21 C.F.R. Part 314.420 related to a Product.
- Z. “Employee Information” means, as related to the Isradipine Core Employees, and to the extent permitted by law:

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1. A complete and accurate list containing the name of each relevant employee (including former employees who were employed by Respondents within ninety (90) days of the execution of any Remedial Agreement);
2. The following information for each such employee:
 - a. The date of hire and effective service date;
 - b. Job title or position held;
 - c. A specific job description of the employee's responsibilities related to the Isradipine Product; *provided, however*, in lieu of this description, Respondents may provide the employee's most recent performance appraisal;
 - d. The base salary and current wages;
 - e. The most recent bonus paid, aggregate annual compensation for the Respondents' last fiscal year and current target or guaranteed bonus, if any;
 - f. Employment status (*i.e.*, active, on leave, on disability, and full or part time);
 - g. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and
3. At the Acquirer's option, copies of all applicable employee benefit plans and summary plan descriptions.

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- AA. “Geographic Territory” means the United States of America, including all of the territories within its jurisdiction or control unless otherwise specified.
- BB. “High Volume Accounts” means any of Respondents’ customers whose annual and/or projected annual aggregate purchase amounts, in units or in dollars, on a company-wide level of the Isradipine Product in the United States was, is, or is projected to be among the top twenty highest of such purchase amounts by Respondents’ U.S. customers on any of the following dates: (1) the end of the last quarter that immediately preceded the date of the public announcement of the proposed Acquisition; (2) the end of the last quarter that immediately preceded the Acquisition Date; (3) the end of the last quarter that immediately preceded the Closing Date for the relevant assets; or (4) the end of the last quarter following the Acquisition Date and/or the Closing Date.
- CC. “Intellectual Property” means all of the following related to the Isradipine Product:
1. Patents;
 2. Copyrights;
 3. Trademarks, Trade Dress, trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information; and
 4. Rights to obtain and file for patents and copyrights and registrations thereof;

Provided, however, this term does not include the names or trade dress of “Actavis,” “Abrika,” or the names or trade dress of any other corporation, companies, or brands

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owned or sold by Respondents or related logos to the extent used on Respondents' Retained Products.

DD. "Interim Monitor" means any monitor appointed pursuant to Paragraph III. of this Order.

EE. "Isradipine Assets" means, within the Geographic Territory and to the extent legally transferrable, all of Respondent Abrika's rights, title and interest in all assets related to:

1. The Isradipine Product;
2. Respondent Abrika's business related to the Isradipine Product;
3. The research, Development, manufacture, distribution, marketing and sale of the Isradipine Product; and
4. The Categorized Assets related to the Isradipine Product.

FF. "Isradipine Core Employees" means the Research and Development Employees and the Manufacturing Employees.

GG. "Isradipine Divestiture Agreement" means:

1. The Abrika-Cobalt Agreement; or
2. Any agreement that receives the prior approval of the Commission between Respondents and an Acquirer for the divestiture of the Isradipine Assets entered into pursuant to Paragraph II.A. of this Order, and any attachments, agreements, and schedules related thereto.

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HH. “Isradipine Product” means all Products in Development, manufactured, marketed or sold by Respondent Abrika pursuant to Respondent Abrika’s ANDA No. 77-317 (isradipine instant release capsules 2.5 mg/5.0 mg) and any supplements, amendments, or revisions thereto.

II. “Licensed Intellectual Property” means:

1. Patents that are related to the Isradipine Product that Respondents can demonstrate have been routinely used, prior to the Acquisition Date, for Retained Products:
 - a. That have been marketed or sold on an extensive basis by the Respondents within the two-year period immediately preceding the Acquisition; or
 - b. For which, prior to the announcement of the Acquisition, there was an approved marketing plan to market or sell Retained Products on an extensive basis by Respondents; and
2. Trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development, and other information, and all rights in any jurisdiction to limit the use or disclosure thereof, that are related to the Isradipine Product and that Respondents can demonstrate have been routinely used, prior to the Acquisition Date, by Respondents for Retained Products:
 - a. That have been marketed or sold on an extensive basis by the Respondents within the two-year period immediately preceding the Acquisition; or

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- b. For which, prior to the announcement of the Acquisition, there was an approved marketing plan to market or sell Retained Products on an extensive basis by Respondents;

Provided, however, that, Respondents may take a paid-up, royalty-free, irrevocable, non-exclusive, with a right to sublicense, license back from the Acquirer for such intellectual property for use in connection with Retained Products;

Provided further, however, that, in cases where the aggregate retail sales in dollars within the two-year period immediately preceding the Acquisition of the Retained Products collectively are less than the aggregate retail sales in dollars within the same period of the Isradipine Product collectively, the above described intellectual property shall be considered, at the Acquirer's option, to be Intellectual Property and, thereby, subject to assignment to the Acquirer.

- JJ. "Manufacturing Employees" means all Respondents' salaried employees who have directly participated in the planning, design, implementation or use of the Manufacturing Technology of the Isradipine Product (irrespective of the portion of working time involved unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the eighteen (18) month period immediately prior to the Closing Date;

Provided, however, Respondents may exclude from this term those employees that are determined by the Interim Monitor or an Acquirer, in consultation with Commission staff, not to be material to the planning, design, implementation or use of the Manufacturing Technology of the Isradipine Product.

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KK. “Manufacturing Technology” means all technology, trade secrets, know-how, and proprietary information (whether patented, patentable or otherwise) related to the manufacture of the Isradipine Product (including, for those instances in which the manufacturing equipment is not readily available from a Third Party, at the Acquirer’s option, all such equipment used to manufacture the Isradipine Product), including, but not limited to, all product specifications, processes, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with the FDA Applications conformance and cGMP compliance, labeling, all other information related to the manufacturing process, and supplier lists.

LL. “Marketing Materials” means all marketing materials used specifically in the marketing or sale of the Isradipine Product in the Geographic Territory as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (*e.g.*, detailing reports, vendor lists, sales data), marketing information (*e.g.*, competitor information, research data, market intelligence reports, statistical programs, if any, used for marketing and sales research), customer information (including customer net purchases information to be provided on the basis of either dollars and/or units for each month, quarter or year), sales forecasting models, educational materials, advertising and display materials, speaker lists, promotional and marketing materials, Website content and advertising and display materials, artwork for the production of packaging components, television masters and other similar materials

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related to the Isradipine Product; *provided, however*, this term excludes the pricing information of the Isradipine Product.

- MM. “NDC Numbers” means the National Drug Codes numbers, including both the labeler codes assigned by the FDA and the additional numbers assigned by the Application holder as a product code for a specific Product.
- NN. “Patents” means all patents, patent applications, including provisional patent applications, and statutory invention registrations, in each case existing as of the Closing Date (except where this Order specifies a different time), and includes all reissues, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions, related to any Product of or owned by Respondents as of the Closing Date (except where this Order specifies a different time).
- OO. “PMRS” means Pharmaceutical Manufacturing Research Services, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its headquarters address at 423 Sargon Way, Horsham, Pennsylvania 19044.
- PP. “Product” means any pharmaceutical, biological, or genetic composition containing any formulation or dosage of a compound referenced as its pharmaceutically, biologically, or genetically active ingredient.
- QQ. “Product Registrations” means all registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, required by applicable Agencies related to the research, Development,

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manufacture, distribution, finishing, packaging, marketing, or sale of the Product within the Geographic Territory, including all Applications in existence for the Product as of the Closing Date.

RR. “Remedial Agreements” means:

1. Any agreement related to the Isradipine Assets entered into pursuant to Paragraph II. of this Order; and
2. Any agreement entered into by a Divestiture Trustee pursuant to Paragraph IV. of this Order.

SS. “Research and Development Employees” means all Respondents’ salaried employees who directly have participated in the research, Development, or regulatory approval process, or clinical studies of the Isradipine Product (irrespective of the portion of working time involved, unless such participation consisted primarily of oversight of legal, accounting, tax or financial compliance) within the eighteen (18) month period immediately prior to the Closing Date;

Provided, however, Respondents may exclude from this term those employees who are determined by the Interim Monitor or an Acquirer, in consultation with Commission staff, not to be material to the research, Development, or regulatory approval process, or clinical studies of the Isradipine Product.

TT. “Retained Products” means any Product other than the Isradipine Product.

UU. “Rights of Reference or Use” means the authority to rely upon, and otherwise use, an investigation for the purpose of obtaining approval of Applications, including the ability

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to make available the underlying raw data from the investigation for FDA audit.

- VV. “Third Party” means any private entity other than the following: (1) Respondents; or (2) an Acquirer.
- WW. “Trade Dress” means the current trade dress of the Isradipine Product, including but not limited to, Product packaging, and the lettering of the Product trade name or brand name.
- XX. “Trademarks” means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for the Product.
- YY. “Website” means the content of the Website(s) located at the Domain Names, the Domain Names, and all copyrights in such Website(s), to the extent owned by Respondents; *provided, however*, this term shall not include the following: (1) content owned by Third Parties and other Intellectual Property not owned by Respondents that are incorporated in such Website(s), such as stock photographs used in the Website(s), except to the extent that Respondents can convey their rights, if any, therein; or (2) content unrelated to the Isradipine Product.

II.

IT IS FURTHER ORDERED that:

- A. Not later than ten (10) days after the Acquisition Date, Respondents shall divest the Isradipine Assets, absolutely and in good faith, to Cobalt pursuant to, and in accordance with, the Isradipine Divestiture Agreement (which

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agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of Cobalt or to reduce any obligations of Respondents under such agreement);

Provided, however, that if Respondents have divested the Isradipine Assets to Cobalt prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Cobalt is not an acceptable purchaser of the Isradipine Assets then Respondents shall immediately rescind the transaction with Cobalt and shall divest the Isradipine Assets within one hundred eighty (180) days from the date the Order becomes final, absolutely and in good faith, at no minimum price, to an Acquirer and only in a manner that receives the prior approval of the Commission;

Provided further, however, that if Respondents have divested the Isradipine Assets to Cobalt prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Isradipine Assets to Cobalt (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- B. Not later than thirty (30) days after the Acquisition Date, Respondents shall assign the Abrika-PMRS Supply Agreement to the Acquirer of the Isradipine Assets.

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- C. For a period of eight (8) months after the Closing Date, or December 31, 2007, whichever is later, Respondents shall not solicit any current customer of the Isradipine Product for the supply of Products similar to the Isradipine Product.
- D. At an Acquirer's option, and upon reasonable notice, Respondents shall provide, for a period of four (4) years after the Closing Date, the following technical assistance:
1. An organized, comprehensive, complete, useful, timely, and meaningful transfer of information related to the Product Manufacturing Technology, and, as a part of such transfer, shall designate employees of Respondents knowledgeable with respect to such Product Manufacturing Technology and experienced in such transfers to a committee for the purposes of communicating directly with an Acquirer and the Interim Monitor for the purposes of effecting such transfer; and
 2. In a timely manner and at Direct Cost:
 - a. Assistance and advice to enable an Acquirer, or its designated Third Party manufacturer including, but not limited to, PMRS, to obtain all necessary permits and approvals from any Agency to manufacture and sell the Isradipine Product;
 - b. Assistance to an Acquirer to manufacture the Isradipine Product in substantially the same manner, quality, and quantity(ies) employed or achieved by Respondent Abrika for the Isradipine Product;
 - c. Consultation with Respondents' employees with relevant knowledge, and training at a facility chosen by an Acquirer, sufficient to satisfy

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management of an Acquirer that its personnel are adequately trained in the manufacture of the Isradipine Product; and

- d. Personnel, assistance and training as an Acquirer might reasonably need to transfer the assets related to the Isradipine Product.

E. Respondents shall:

1. At an Acquirer's option and upon reasonable notice, provide, in a timely manner and at no greater than Direct Cost, assistance of Respondents' employees with knowledge to assist an Acquirer to defend against, respond to, or otherwise participate in any litigation related to the Intellectual Property related to the Isradipine Product;
2. For any patent infringement suit in which Respondents are parties or are preparing to be parties to prior to the Closing Date, and where such a suit would have the potential to interfere with an Acquirer's freedom to practice in the research, Development, manufacture, use, import, export, distribution or sale of the Isradipine Product:
 - a. Cooperate with an Acquirer and provide any and all necessary technical and legal assistance, documentation and witnesses from Respondents in connection with obtaining resolution of any pending patent litigation involving the Isradipine Product;
 - b. Waive conflicts of interest, if any, to allow Respondents' outside legal counsel to represent an Acquirer in any ongoing patent litigation involving the Isradipine Product; and

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- c. Permit the transfer to an Acquirer of all of the litigation files and any related attorney work-product in the possession of Respondents' outside counsel relating to the Isradipine Product; and
3. Not join, file, prosecute or maintain any suit, in law or equity against an Acquirer for the research, Development, manufacture, use, import, export, distribution, or sale of the Isradipine Product, if such suit would have the potential to interfere with an Acquirer's freedom to practice the research, Development, manufacture, use, import, export, distribution, or sale of the relevant Isradipine Product, under:
 - a. Any Patent owned or licensed by Respondents as of the Acquisition Date that claims a method of making, using, or administering, or a composition of matter, relating to the Isradipine Product, or that claims a device relating to the use thereof; and
 - b. Any Patents owned or licensed at any time after the Acquisition Date by Respondents that claim any aspect of the research, Development, manufacture, use, import, export, distribution, or sale of the respective Isradipine Product, other than such Patents that claim inventions conceived by and reduced to practice after the Acquisition Date;

Provided, however, Respondents shall also covenant to an Acquirer that, as a condition of any assignment, transfer, or license to a Third Party of the above-described Patents, the Third Party shall agree to covenant not to sue an Acquirer under such Patents if Respondents were prohibited from bringing such suit.

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- F. As related to the Isradipine Product, Respondents shall:
1. Submit and deliver to an Acquirer, at Respondents' expense, in good faith and as soon as practicable, in a manner that ensures its completeness and accuracy, all Confidential Business Information;
 2. Provide an Acquirer and the Interim Monitor with access to all Confidential Business Information and to employees who possess or are able to locate or identify the books, records, and files that contain Confidential Business Information pending complete delivery of all the Confidential Business Information;
 3. Not use, directly or indirectly, any Confidential Business Information related to the research, Development, manufacturing, marketing, or sale of the Isradipine Product other than to comply with the requirements of this Order;
 4. Not disclose or convey any Confidential Business Information, directly or indirectly, to any person except an Acquirer; and
 5. Not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the marketing or sales of the Isradipine Product to the employees associated with business related to those Retained Products that are approved by the FDA for the same or similar indications.
- G. Not later than thirty (30) days after the Acquisition Date, Respondents shall provide written notification of the restrictions on the use of the Confidential Business Information by Respondents' personnel to all of Respondents' employees who:

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1. Are, or were, directly involved in the research, Development, manufacturing, distribution, sale or marketing of the Isradipine Product;
2. Are directly involved in the research, Development, manufacturing, distribution, sale or marketing of Retained Products that are approved by the FDA for the same or similar indications as the Isradipine Product prior to the Acquisition; and/or
3. May have Confidential Business Information.

Provided, however, Respondents shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the relevant Closing Date. Respondents shall maintain complete records of all such agreements at Respondents' corporate headquarters, and provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied with. Respondents shall provide an Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel.

- H. Respondents shall require, as a condition of continued employment post-divestiture of the assets required to be divested pursuant to this Order, that each Isradipine Core Employee retained by Respondents, the direct supervisor of any such employee, and any other employee retained by Respondents and designated by the Interim Monitor, sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Confidential Business Information as strictly confidential, including the non-disclosure of such information to all other employees, executives or other personnel of Respondents (other than as necessary to comply with the requirements of this Order).

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I. Respondents shall:

1. For a period of at least six (6) months after the Closing Date (“Employee Access Period”), provide an Acquirer with the opportunity to enter into employment contracts with the Isradipine Core Employees; and
2. Provide an Acquirer with the Employee Information no later than the earlier of the following dates:
 - a. Ten (10) days after notice by staff of the Commission to Respondents to provide the Employee Information; or
 - b. Ten (10) days after the Closing Date.

Provided, however, failure by Respondents to provide the Employee Information within the time provided herein shall extend the Employee Access Period with respect to any such employee in an amount equal to the delay.

J. Respondents shall:

1. During the Employee Access Period, not interfere with the hiring or employing of the Isradipine Core Employees by an Acquirer, and remove any impediments within the control of Respondents that may deter these employees from accepting employment with an Acquirer, including, but not limited to, any non-compete or non-disclosure provision of employment that would affect the ability or incentive of those individuals to be employed by an Acquirer. In addition, Respondents shall not make any counteroffer to such an Isradipine Core Employee who

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has received a written offer of employment from an Acquirer;

Provided, however, that this paragraph shall not prohibit Respondents from continuing to employ any Isradipine Core Employee during the Employee Access Period (subject to the condition of continued employment prescribed in this Order);

2. Until the Closing Date, provide all Isradipine Core Employees with reasonable financial incentives to continue in their positions and to research, develop, and manufacture the Isradipine Product consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Isradipine Product and to ensure successful execution of the pre-Acquisition plans for such Isradipine Product. Such incentives shall include a continuation of all employee compensation and benefits offered by Respondents until the Closing Date for the divestiture of the Isradipine Product has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

Provided, however, that nothing in this Order requires or shall be construed to require Respondents to terminate the employment of any employee or prevents Respondents from continuing the employment of the Isradipine Core Employees (other than those conditions of continued employment prescribed in this Order) in connection with the Acquisition; and

3. For a period of one (1) year from the Closing Date, not:
 - a. Directly or indirectly, solicit or otherwise attempt to induce any Acquirer Employee to terminate his

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or her employment relationship with an Acquirer;
or

- b. Hire any Acquirer Employees; *provided, however*, Respondents may hire any Acquirer Employee whose employment has been terminated by an Acquirer, or who independently applies for employment with Respondents, as long as such employee was not solicited in violation of the non-solicitation requirements contained herein;

Provided, however, Respondents may do the following: (1) Advertise for employees in newspapers, trade publications or other media not targeted specifically at the Acquirer Employees; or (2) hire a Acquirer Employee who contacts Respondents on his or her own initiative without any direct or indirect solicitation or encouragement from Respondents.

- K. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary to permit Respondents to divest the assets required to be divested pursuant to this Order to an Acquirer, and/or to permit an Acquirer to continue the research, Development, manufacture, sale, marketing or distribution of the Isradipine Product; *provided, however*, Respondents may satisfy this requirement by certifying that an Acquirer has executed all such agreements directly with each of the relevant Third Parties.
- L. Respondents shall not enforce any agreement against a Third Party or an Acquirer to the extent that such agreement may limit or otherwise impair the ability of an Acquirer to acquire the Product Manufacturing Technology related to the Isradipine Product, the related equipment, or the use of such equipment, from the Third Party. Such agreements include, but are not limited to,

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agreements with respect to the disclosure of Confidential Business Information related to such Product Manufacturing Technology.

- M. Not later than ten (10) days after the Closing Date, Respondents shall grant a release to each Third Party that is subject to an agreement as described in Paragraph II.L. that allows the Third Party to provide the relevant Product Manufacturing Technology and/or the related equipment or use thereof, to an Acquirer. Within five (5) days of the execution of each such release, Respondents shall provide a copy of the release to an Acquirer for the relevant assets.
- N. Respondents shall not, in the Geographic Territory:
1. Use the Trademarks related to the Isradipine Product or any mark confusingly similar to such Trademarks, as a trademark, trade name, or service mark;
 2. Attempt to register Trademarks related to the Isradipine Product;
 3. Attempt to register any mark confusingly similar to Trademarks related to the Isradipine Product;
 4. Challenge or interfere with an Acquirer's use and registration of Trademarks related to the Isradipine Product; or
 5. Challenge or interfere with an Acquirer's efforts to enforce its trademark registrations for and trademark rights in Trademarks related to the Isradipine Product against Third Parties;

provided, however, that nothing in this Order shall preclude Respondents from continuing to use those trademarks, tradenames, or service marks related to the Retained Products as of the Acquisition Date.

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- O. The Remedial Agreements shall be deemed incorporated into this Order, and any failure by Respondents to comply with any term of the Remedial Agreements shall constitute a failure to comply with this Order. Respondents shall include in each Remedial Agreement a specific reference to this Order and the remedial purpose thereof. The Remedial Agreements entered into pursuant to Paragraph II. are attached to this Order and contained in non-public Appendices I. and II.
- P. Pending divestiture of the Isradipine Assets required to be divested pursuant to this Order, Respondents shall take such actions as are necessary to maintain the full economic viability and marketability of the business associated with such assets, to minimize any risk of loss of competitive potential for such business, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of these assets until after their respective transfer to an Acquirer in a manner that ensures that there is no disruption, delay, or impairment of the regulatory approval processes related to such assets. Respondents shall not sell, transfer, encumber or otherwise impair such assets (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the above-described businesses.
- Q. The purpose of Paragraphs II. is: (1) to ensure the continued use of such assets in the research, Development, manufacture, distribution, sale and marketing of the Isradipine Product; (2) to create a viable and effective competitor in the relevant market alleged in the Complaint who is independent of Respondents; and, (3) to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

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III.**IT IS FURTHER ORDERED** that:

- A. Denise F. Smart of Smart Consulting Group, LLC, shall serve as the monitor (“Interim Monitor”) to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order and the Remedial Agreements.
- B. If Ms. Smart fails to serve, or if a new Interim Monitor must be selected, the Commission shall select the Interim Monitor, subject to the consent of Respondent Actavis, which consent shall not be unreasonably withheld. If Respondent Actavis has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent Actavis of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.
- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents’ compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.
- D. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

Decision and Order

1. The Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission;
2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission;
3. The Interim Monitor shall serve until the later of:
 - a. The completion by Respondents of:
 - (1) The divestiture of all Isradipine Assets in a manner that fully satisfies the requirements of this Order; and
 - (2) Notification by each Acquirer to the Interim Monitor that such Acquirer is: (1) approved by the FDA to manufacture each of the Isradipine Product, and (2) able to manufacture such Isradipine Product in commercial quantities, in a manner consistent with cGMP, independently of Respondent; or
 - b. The completion by Respondents of the last obligation under the Order pertaining to the Interim Monitor's service;

Provided, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Order;

Decision and Order

4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with their obligations under the Order, including, but not limited to, their obligations related to the Isradipine Assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Order;
5. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities;
6. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Monitor;

Decision and Order

7. Respondents shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by the Acquirer with respect to the performance of Respondents' obligations under the Order or the Remedial Agreements. Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Order; and
 8. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- F. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.

Decision and Order

- G. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.
- H. The Interim Monitor appointed pursuant to this Order may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

IV.**IT IS FURTHER ORDERED** that:

- A. If Respondents have not fully complied with their obligations under Paragraph II. of this Order, the Commission may appoint a trustee (“Divestiture Trustee”) to assign, grant, license, divest, transfer, deliver or otherwise convey the assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed pursuant to Paragraph II. in a manner that satisfies the requirements of such Paragraph. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

Decision and Order

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent Actavis, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent Actavis has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent Actavis of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed;
 2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the

Decision and Order

Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times;

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;
4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the

Decision and Order

Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; and, *provided further, however*, that Respondents shall select such entity within five (5) days after receiving notification of the Commission's approval;

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order;
6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any

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claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee;

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; *provided, however,* that the Divestiture Trustee appointed pursuant to this Paragraph may be the same person appointed as Interim Monitor pursuant to the relevant provisions of this Order;
 8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and
 9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

Decision and Order

V.

IT IS FURTHER ORDERED that, in any instance wherein Respondents' counsel (including in-house counsel under appropriate confidentiality arrangements) either retain unredacted copies of documents or other materials provided to an Acquirer or obtain access to original documents (under circumstances where copies of documents are insufficient or otherwise unavailable) provided to an Acquirer, Respondents shall assure that Respondents' counsel do so only in order to do the following:

- A. Comply with the Remedial Agreements, this Order, any law (including, without limitation, any requirement to obtain regulatory licenses or approvals), any data retention requirement of any applicable government entity, or any taxation requirements; or
- B. Defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena or other proceeding relating to the divestiture, the Isradipine Assets, and businesses associated with the Isradipine Assets;

Provided, however, that Respondents may disclose such information as necessary for the purposes set forth in this Paragraph pursuant to an appropriate confidentiality order, agreement or arrangement; and

Provided further, however, that pursuant to this Paragraph V., Respondents shall: (1) require those who view such unredacted documents or other materials to enter into confidentiality agreements with an Acquirer (but shall not be deemed to have violated this requirement if an Acquirer withholds such agreement unreasonably); and (2) use its best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

Decision and Order

VI.**IT IS FURTHER ORDERED** that:

- A. Within five (5) days of the Acquisition, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
- B. Within thirty (30) days after the date this Order becomes final, and every sixty (60) days thereafter until Respondents have fully complied with Paragraph II. of this Order (*i.e.*, have assigned, licensed, divested, transferred, delivered, or otherwise conveyed all relevant assets or rights to an Acquirer in a manner that fully satisfies the requirements of the Order), Respondents shall:
 - 1. Submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order;
 - 2. At the same time, submit a copy of their verified report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed; and
 - 3. In their verified reports, include, among other things, a full description of the efforts being made to comply with the relevant Paragraphs of the Order, all substantive contacts or negotiations related to the divestiture of the relevant assets and the identity of all persons contacted, copies of all written communications to and from such persons, all internal memoranda, and all reports and recommendations concerning completing the obligations.

Decision and Order

- C. One (1) year after the date this Order becomes final, annually for the next nine years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission that includes information regarding any modifications or amendments to the Isradipine Divestiture Agreement or the Actavis Isradipine Product Supply Agreement, if applicable, that Respondents entered without the prior approval of the Commission, and sets forth in detail the manner and form in which they have complied and are complying with the Order.

VII.

IT IS FURTHER ORDERED that Respondent Actavis shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of Respondent Actavis;
- B. Any proposed acquisition, merger or consolidation of Respondent Actavis; or
- C. Any other change in Respondent Actavis including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

VIII.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondents made to their principal United States offices or headquarters address, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

Decision and Order

- A. Access, during business office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondents related to compliance with this Order, which copying services shall be provided by Respondents at the request of authorized representative(s) of the Commission; and
- B. To interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on May 18, 2017.

By the Commission.

**NON-PUBLIC APPENDIX I
ISRADIPINE DIVESTITURE AGREEMENT
ABRIKA-COBALT AGREEMENT
[Redacted From the Public Record But Incorporated By
Reference]**

Analysis to Aid Public Comment

NON-PUBLIC APPENDIX II
ABRIKA-PMRS SUPPLY AGREEMENT
[Redacted From the Public Record But Incorporated By
Reference]

ANALYSIS OF AGREEMENT CONTAINING CONSENT
ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from Actavis Group hf. (“Actavis”), which is designed to remedy the anticompetitive effects of the acquisition of Abrika Pharmaceuticals, Inc. (“Abrika”) by Actavis. Under the terms of the proposed Consent Agreement, the company would be required to assign and divest the Abrika rights and assets necessary to manufacture and market generic isradipine capsules to Cobalt Laboratories, Inc. (“Cobalt”), the U.S. subsidiary of Arrow Group.

The proposed Consent Agreement has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement, modify it, or make final the Decision and Order (“Order”).

Pursuant to an Agreement and Plan of Merger executed on November 20, 2006, Actavis proposes to acquire all of the voting securities of Abrika for \$235 million. The Commission’s Complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15

Analysis to Aid Public Comment

U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the U.S. markets for the manufacture and sale of generic isradipine capsules. The proposed Consent Agreement will remedy the alleged violation by replacing the lost competition that would result from the acquisition in this market.

Actavis is a leading developer, manufacturer, marketer, and distributor of generic pharmaceutical drugs. Headquartered in Iceland, Actavis sells generic pharmaceuticals in over 30 countries and has manufacturing facilities in Europe, the United States, and Asia. Abrika is a Sunrise, Florida based specialty generic pharmaceutical company engaged in the formulation and commercialization of both controlled release and immediate release products.

Generic Isradipine Capsules

Isradipine belongs to a group of drugs known as calcium channel blockers. Calcium is involved in blood vessel contraction, and by blocking calcium, isradipine relaxes and widens the blood vessels, thereby lowering blood pressure, preventing spasms of the blood vessels of the heart and reducing the oxygen needs of the heart muscle. Isradipine is typically prescribed to patients as a blood pressure lowering medication, and is also used to treat hypertension, ischemia and depression. Generic isradipine was first introduced in the United States in 2006. Sales in that year totaled approximately \$3 million.

Actavis and Abrika are the only two companies selling generic isradipine capsules in the United States. The number of generic suppliers has a direct and substantial effect on generic pricing as each additional generic supplier can have a competitive impact on the market. Because there are multiple generic equivalents for isradipine capsules, the branded version no longer significantly constrains the generic's pricing.

Analysis to Aid Public Comment

Entry into the market for the manufacture and sale of generic isradipine capsules would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract the anticompetitive effects of the acquisition. Entry would not take place in a timely manner because the combination of generic drug development times and FDA drug approval requirements takes at least two years. Entry would not be likely because the relevant market is relatively small and in decline, limiting sales opportunities for any new entrant.

The proposed acquisition would cause significant anticompetitive harm to consumers in the U.S. market for the manufacture and sale of generic isradipine capsules. The acquisition would eliminate Abrika as a competitor and create a monopoly in the market for the manufacture and sale of generic isradipine capsules. The evidence indicates that the presence of more than one competitor allows customers to negotiate lower prices and that the reduction in the number of competitors in this market would allow the merged entity to unilaterally exercise market power with a resulting increase in prices.

The Consent Agreement

The proposed Consent Agreement effectively remedies the proposed acquisition's anticompetitive effects in the relevant product market. Pursuant to the Consent Agreement, Actavis and Abrika are required to divest certain rights and assets related to the generic isradipine capsules to a Commission-approved acquirer no later than ten (10) days after the acquisition. Specifically, the proposed Consent Agreement requires that Abrika divest its rights and assets relating to generic isradipine capsules to Cobalt.

The acquirer of the divested assets must receive the prior approval of the Commission. The Commission's goal in evaluating a possible purchaser of divested assets is to maintain the competitive environment that existed prior to the acquisition.

Analysis to Aid Public Comment

A proposed acquirer of divested assets must not itself present competitive problems.

Cobalt, which specializes in the sale and marketing of generic pharmaceuticals, is the United States arm of the Arrow Group, a private multinational that employs over 700 individuals. The Arrow Group has experience in the development, manufacturing, and sale of pharmaceuticals and has production facilities in Canada, Malta, Australia and Brazil. Cobalt is an acceptable acquirer of generic isradipine because it has experience in distributing and marketing generic pharmaceutical products in the United States. Currently, the company has received FDA approval for the sale of nine generic products. The acquisition by Cobalt does not present a competitive problem in the generic isradipine market because Cobalt currently does not participate in the market and has no independent plans to enter. With its resources, sales and marketing capabilities, and experience with generic products, Cobalt should be successful in restoring the competition that would be lost if the proposed Actavis/Abrika transaction were to proceed unremedied.

If the Commission determines that Cobalt is not an acceptable acquirer of the assets to be divested, or that the manner of the divestitures to Cobalt is not acceptable, the parties must unwind the sale and divest the assets within six (6) months of the date the Order becomes final to another Commission-approved acquirer. If the parties fail to divest within six (6) months, the Commission may appoint a trustee to divest the generic isradipine capsule assets.

The proposed remedy contains provisions to ensure that the divestitures are successful. Abrika's isradipine product is manufactured for Abrika by a third-party manufacturer. As part of the divestiture, Abrika will transfer its supply arrangement to Cobalt. Actavis and Abrika will transfer all confidential business information related to Abrika's isradipine product to Cobalt. Finally, Actavis and Abrika will provide technical assistance to

Analysis to Aid Public Comment

Cobalt to allow it to manufacture isradipine in substantially the same manner and quality employed or achieved by Abrika.

The Commission has appointed Denise F. Smart of Smart Consulting Group, LLC as the Interim Monitor to oversee the asset transfer and to ensure Actavis and Abrika's compliance with all of the provisions of the proposed Consent Agreement. Ms. Smart has over twenty years of experience in the pharmaceutical industry. Her experience includes providing consulting services in healthcare business development and regulatory compliance to major pharmaceutical companies, biotechnology companies and medical device companies. In order to ensure that the Commission remains informed about the status of the proposed divestitures and the transfers of assets, the proposed Consent Agreement requires Actavis and Abrika to file reports with the Commission periodically until the divestitures and transfers are accomplished.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Order or to modify its terms in any way.

Complaint

**IN THE MATTER OF
INPHONIC, INC.****CONSENT ORDER, ETC. , IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT**

*Docket C-4192; File No. 062 3066
Complaint, June 4, 2007 — Decision, June 4, 2007*

This consent order addresses allegedly deceptive and unfair practices regarding respondent InPhonic's advertised mail-in rebates on wireless telephone packages marketed online. The order prohibits InPhonic from making a claim about the amount of any rebate, unless it discloses, clearly and conspicuously, on its website and on any rebate coupon or form, all terms, conditions, or other limitations of the rebate offer. In addition, the order prohibits InPhonic from misrepresenting what documentation consumers must submit and any material terms of any rebate program. It prohibits InPhonic from representing that consumers will have the opportunity to resubmit deficient rebate requests, unless it gives consumers a reasonable period of time in which to resubmit such requests and notifies them precisely how to correct any deficiencies. The order requires InPhonic to provide to consumers all required rebate documentation. It prohibits InPhonic from making any representation about the time in which any rebate will be provided, unless it has a reasonable basis for the representation at the time it is made, and it prohibits InPhonic from failing to provide any rebate within the time specified or, if no time is specified, within 30 days. The order also requires InPhonic to send rebates to eligible purchasers, including consumers whose rebate requests were previously denied on the basis of certain reasons. In addition, the order includes reporting and compliance provisions.

Participants

For the *Commission*: *Matthew D. Gold, Linda K. Badger, and Kerry O'Brien.*

For the *Respondent*: *Dana Frix, Chadbourne & Parke LLP; and F. Martin Dajani, DLA Piper Rudnick Gray Cary.*

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that InPhonic, Inc., a corporation (“InPhonic” or “respondent”), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Delaware corporation with its principal office or place of business at 1010 Wisconsin Avenue, NW, Suite 600, Washington, DC 20007.
2. Respondent has advertised, offered for sale, sold, and distributed products and services to the public, primarily wireless telephone packages. Respondent markets these wireless telephone packages online through Web sites such as www.wirefly.com, www.a1wireless.com, and numerous others. Each wireless telephone package includes a name-brand wireless device and a wireless service contract with a national or regional wireless carrier.
3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

Respondent’s Rebate Terms and Conditions

4. In marketing its wireless telephone packages, respondent has advertised mail-in rebates, which, in many cases, have equaled the purchase price of the wireless device being purchased. (*See, e.g.*, Exhibit A). These rebates have been subject to numerous terms and conditions.
5. Respondent has offered two basic types of rebate programs, each of which has required that the consumer submit a rebate request within a specified time period and provide both proof-of-purchase documentation and proof that the consumer has

Complaint

maintained uninterrupted wireless service for a designated period of time.

- A. Respondent's "customer loyalty" rebate has required the submission of a rebate form that respondent was to send to the consumer with the wireless device, a copy of the sales receipt, a copy of the UPC code from the wireless device's box, and a copy of the wireless service bill demonstrating that the consumer has maintained uninterrupted service for a designated period of time (typically 150 days after phone activation). Further, to be valid, the consumer's rebate request, with all required documentation, has had to be postmarked within a specified window of time, typically 180-210 days after phone activation. (*See, e.g.*, Exhibit B).
 - B. Respondent's "customer appreciation rebate" has required the submission of a rebate form that respondent was to send to the consumer with the wireless device, a copy of the sales receipt, a copy of the UPC code from the wireless device's box, a copy of the "Guide to Wireless Service" that respondent was to send to the consumer with the wireless device, and copies of several wireless service bills. Further, to be valid, this rebate request, with all supporting documentation, has had to be postmarked within 120 days after phone activation. (*See, e.g.*, Exhibit C).
6. Respondent typically advertises available rebates on its Web sites. (*See, e.g.*, Exhibit A). Each listed rebate has a hyperlink. A consumer who clicks the hyperlink is taken to a page which describes some of the extensive terms and conditions of the advertised rebate. Consumers can purchase the package without viewing these terms and conditions. In addition, there is nothing on the link itself to indicate the nature or significance of the terms and conditions. As a result, numerous consumers were not aware of several unusual and restrictive terms and conditions making the rebate offer less attractive. For example, at the time of purchase, numerous consumers were not aware that: (a) they would not be

Complaint

able to submit a request for the rebate until as much as six months after purchase; (b) they would not receive the rebate until as much as nine or ten months after purchase; and (c) even if they continuously maintained their wireless service for the required period of time, they would be disqualified from receiving a rebate if they changed their wireless phone numbers after purchase.

7. Respondent has disseminated or has caused to be disseminated rebate forms for its “customer appreciation rebate,” including but not necessarily limited to the attached Exhibit C. These rebate forms have contained the following statements:

“\$150 Mail-In Rebate

...

3. Include the following information with your rebate form:

...

§ Copy of your 1st, 2nd, and 3rd wireless bills showing customer name, mobile number, and bill/invoice date for this account showing all balances paid in full (bills must be dated within 120 days after purchase date).

....”

(Exhibit C, InPhonic rebate form (Offer BAK).)

8. Numerous consumers seeking to redeem respondent’s “customer appreciation rebate” waited for a fourth wireless bill to show that their third wireless bill had been “paid in full.” As a result, these consumers were unable to submit their rebate requests to respondent within the 120-day time period specified in the offer. Respondent rejected such rebate requests as untimely.

Complaint

Respondent's Rebate Fulfillment Practices

9. Respondent uses third-party companies (“fulfilment houses”) to receive and process rebate requests from consumers. Respondent has directed its fulfilment houses to apply strict criteria when determining the validity of a specific rebate request. For example, respondent has rejected requests in which rebate forms were not filled out completely, even if the missing information was provided elsewhere in the documentation provided by the consumer (*e.g.*, a wireless telephone number that appeared on the enclosed wireless bill) or was not necessary to determine whether those requesting the rebates were bona fide purchasers of respondent’s wireless packages who maintained uninterrupted wireless service for the required period of time (*e.g.*, an email address). Only about one-half of the consumers who have applied for rebates have received one, even though the vast majority of such consumers have been bona fide purchasers of respondent’s wireless packages and have maintained uninterrupted wireless service for the required period of time.

10. In numerous cases, respondent has rejected rebate requests because the requests lacked documentation that respondent failed to supply to consumers. For example, many consumers did not receive the required rebate redemption form when they received their wireless device, did not receive a box containing the required UPC code, and/or did not receive a required “Guide to Wireless Service” and, despite repeated attempts to contact respondent, were unable to obtain one or more of these items in time to send a valid rebate request.

11. In instances where a consumer’s rebate request has been rejected because of a curable deficiency, respondent has directed the fulfilment house to notify the consumer and suggest that the consumer re-submit the request during the required time frame and/or with the required documentation. Many of respondent’s rebate forms also have included the following statement:

Complaint

“IF YOU ARE REQUIRED TO RESUBMIT MISSING, INCORRECT, OR ILLEGIBLE INFORMATION, YOUR CLAIM STATUS WILL BE UPDATED AT [RESPONDENT’S REBATE STATUS] WEBSITE.” (*See, e.g.*, Exhibit B).

12. In spite of these practices, in numerous cases, respondent has denied consumers a reasonable opportunity to resubmit deficient rebate requests. For example, many consumers have not been able to cure a rebate request because the fulfillment house has notified them about the deficiency too late. Specifically, consumers who had submitted requests in a timely manner, but whose request contained missing, illegible or incorrect information, have received notice of the deficiency after the last day on which a request would be accepted under the terms of the original rebate offer. In such cases, respondent has denied as untimely attempts by the consumer to resubmit the rebate request.

13. All of respondent’s rebate offers have represented that consumers would receive their rebate checks within twelve weeks of respondent’s receipt of the rebate request. In numerous cases, consumers experienced significant delays in receiving their promised rebates.

**DECEPTIVE FAILURE TO DISCLOSE MATERIAL
TERMS AND CONDITIONS OF REBATE OFFERS**

14. Through the means described in Paragraphs 4 through 6, respondent has represented, expressly or by implication, that substantial mail-in rebates were available to purchasers of respondent’s wireless telephone packages. Respondent has failed to disclose or has failed to disclose adequately that:

- A. consumers would not be able to submit a request until at least three or six months after purchase;

Complaint

- B. consumers would be required to submit wireless bills establishing three or six months of continuous wireless service in good standing;
- C. consumers would not receive their rebate check until approximately six or nine months after purchase;
- D. an email address would be required to be eligible for the rebate;
- E. consumers who changed their wireless phone numbers after purchase would be disqualified from receiving a rebate; and
- F. any rebate submission that did not strictly comply with all rebate terms and conditions or that was deemed in any way illegible could be rejected with little or no opportunity to resubmit.

These facts would be material to consumers in their purchase or use of the product. The failure to disclose or to adequately disclose these facts, in light of the representation made, was, and is, a deceptive practice.

**MISLEADING REBATE TERMS AND CONDITIONS —
DECEPTIVE PRACTICES**

15. Through the means described in Paragraph , respondent has represented, expressly or by implication, that consumers seeking to redeem respondent's "customer appreciation rebate" needed to establish that their first three months of wireless service had been paid in full by submitting four wireless bills.

16. In truth and in fact, consumers seeking to redeem respondent's "customer appreciation rebate" did not need to establish that their first three months of wireless service had been paid in full by submitting four wireless bills. Numerous consumers who waited to submit their fourth wireless bill in order to establish that their

Complaint

first three months of wireless service had been paid in full were unable to submit the rebate request within the 120-day time period specified in the offer, and respondent rejected such rebate requests as untimely. Therefore, the representation set forth in Paragraph 15 was, and is, false or misleading.

17. Through the means described in Paragraph 11, respondent has represented, expressly or by implication, that consumers whose rebate requests contained missing, incorrect or illegible information would be given a reasonable opportunity to resubmit their request.

18. In truth and in fact, in numerous instances, consumers whose rebate requests contained missing, incorrect or illegible information were not given a reasonable opportunity to resubmit their request. Therefore, the representation set forth in Paragraph 17 was, and is, false or misleading.

**UNFAIR ACT OR PRACTICE PREVENTING
CONSUMERS FROM OBTAINING REBATES**

19. As described in Paragraph 10, respondent has failed to provide rebates to numerous consumers who were bona fide purchasers of respondent's wireless telephone packages, maintained their wireless account in good standing for the appropriate period of time, and made all reasonable efforts to submit rebate applications that complied with the required terms and conditions. In numerous cases, respondent rejected rebate requests, or consumers were prevented from submitting valid requests, because respondent failed to supply to consumers with one or more pieces of required documentation and consumers, despite their best efforts, were unable to obtain such documentation from respondent. Respondent's failure to provide rebates to such consumers has caused or is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. This practice was, and is, an unfair act or practice.

Complaint

LATE DELIVERY — UNFAIR PRACTICE

20. In connection with its rebate programs, respondent promised to provide consumers with rebate checks within 12 weeks of rebate submission, if they purchased a wireless phone and service plan, and submitted a valid rebate request with supporting documentation. After receiving rebate requests in conformance with these terms, respondent failed to deliver the rebates to consumers within the promised time period. Respondent extended the time period in which it would deliver the rebates to consumers without consumers agreeing to this extension of time. Respondent's failure to deliver the rebate checks to consumers within the originally-promised time period has caused or is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. This practice was, and is, an unfair act or practice.

21. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this fourth day of June, 2007, has issued this complaint against respondent.

By the Commission.

Complaint

Complaint Exhibits

Welcome to our Wireless World



FREE PHONES! PICK YOUR CARRIER!
4 DAY SALE ENDS TUESDAY!

Phone Orders
1.888.WIREFLY
(1.888.947.3357)

View Cart (0) | About Us | Check Your Order Status | Contact Us

Verizon Wireless Online Offer for Oakland, CA 94618 [not your zip code?](#)

Order by Phone

| Carrier Selected | Phone Selected | Plan Selected |
|--|--|---|
| <p>Select Another Carrier</p> <p>More Verizon Wireless Options</p> <ul style="list-style-type: none"> • More Phones • Individual Plans • Shared Plans • National Coverage Map <ul style="list-style-type: none"> • Satellite TV <p>Motorola Store</p> <p>FedEx</p> | <p>SAMSUNG Samsung A950 for Verizon Wireless FREE</p> <p>after rebate with a new Verizon Wireless account</p> <ul style="list-style-type: none"> • Image Gallery • Phone Details • Choose this Phone <p>This item is now from Verizon Wireless with full U.S. Warranty</p> <p>Verizon Wireless Motorola Samsung Verizon Wireless</p> <p>Samsung A950 with a new Verizon Wireless account \$299.99 \$199.99</p> <p>2-Day Delivery via FedEx FREE</p> <p>Your Cost Today \$139.99</p> <p>After Rebates, This item is FREE!</p> <p>\$50.00 Customer Loyalty Mail-in Rebate \$50.00 Wireless Device Mail-in Rebate</p> | <p>450 America's Choice 450 Minutes FREE 450 Minutes Roaming \$39.99 per month UNLIMITED In-Network Minutes</p> <ul style="list-style-type: none"> • Plan Details • Plan Coverage Map • Terms and Conditions • More Verizon Wireless Plans <p>Save Even More! Get 2 Phones with a Shared Plan</p> <p>Select this Phone and Plan</p> |

Order by Phone



This Web site has chosen one or more VeriSign SSL Certificate or online payment solutions to improve the security of e-commerce and other confidential communication

EXHIBIT A

Complaint

Welcome to our Wireless World

Orders for products and services are fulfilled by InPhonic, Inc., an authorized agent for Verizon Wireless.
[Please click here for full disclaimer details.](#)

[Shipping](#) | [Site Security](#) | [Privacy Policy](#)

Copyright ©2008.
2-1-10

Complaint

\$150 Customer Loyalty Rebate

| | | | |
|--|--|--|-----|
| First Name | | Last Name | |
| Address | | | |
| City | | State | Zip |
| E-mail Address | | Daytime Phone Number (xxx-xxx-xxxx) | |
| Activation Date (mm/dd/yyyy) | | Order Number (found at top of sales receipt) | |
| Your Wireless Service Provider (circle one) Alltel Cellular One Cingular Verizon Nextel Sprint T-Mobile US Cellular | | Mobile Number (xxx-xxx-xxxx) | |

How to Submit Your Rebate Claim

1. Fill out all information above. All fields are required. Please print clearly. Incomplete or illegible entries will not be processed.

2. Read, sign, and date this form.

3. Include the following information with your rebate form:

- Copy of the dated sales receipt included with your shipment.
- Copy of the 12 digit UPC barcode from the product packaging.
- Your wireless service bill for this account dated between 180-210 days after the activation date shown on your sales receipt. Copies or printouts of online bills will be accepted but **MUST SHOW THE FOLLOWING INFORMATION:**
 - Date of invoice (bill or statement date)
 - Customer name (must match the name on your sales receipt and rebate form)
 - Mobile phone number at time of rebate submission
 - Wireless service account number at time of rebate submission
 - Payment section showing any previous balance paid in full

4. Submit completed rebate form and all documents noted above to the following address:

Department 27930
Customer Loyalty Rebate
PO Box 52900
Phoenix, AZ 85072

5. Submit only one rebate claim per envelope. **REBATE FORMS MUST BE POSTMARKED NO EARLIER THAN 180 DAYS AFTER THE DATE SHOWN ON YOUR SALES RECEIPT AND NO LATER THAN 210 DAYS AFTER THIS ACTIVATION DATE.** Submissions not correctly postmarked within this timeframe will not qualify. Early submissions will not be accepted. The rebate processing is not responsible for late, lost, mutilated, misdirected, or postage due requests. Keep copies of all documents for your records.

This form will serve as your Rebate Authorization. You will receive a check for the amount of \$150.00 within 10-12 weeks of our receipt of your rebate request. Checks not cashed within 90 days of issuance will be considered void and not eligible for re-issue. Rebate claims will not be honored for equipment purchases which are not paid-in-full within 90 days of order completion.

To check your rebate status, visit www.cellphonerebates.com or call (866) 800-4303. Allow 10-14 business days after mailing your claim for your claim to register on this site. IF YOU ARE REQUIRED TO RESUBMIT MISSING, INCORRECT, OR ILLEGIBLE INFORMATION, YOUR CLAIM STATUS WILL BE UPDATED AT THIS WEB SITE WITH THE APPROPRIATE INSTRUCTIONS. It is your responsibility to check status regularly and provide additional information if required. Early submissions will not be accepted and you will be required to resubmit the entire claim with required documentation during the original postmark deadline.

Signature _____ Date _____

Rebate Details: Kyocera Kol / KX2 (Camera Phone)

\$150.00 Customer Loyalty Mail-In Rebate

0641202379

56025232

2INP:029

EXHIBIT B

Complaint

\$150 Mail-In Rebate
 Customer Appreciation Rebate
 Two Year Agreement Required

| | | | |
|---|--|------------------------------|-------------------|
| First Name | | Last Name | |
| Address | | | |
| City | | State | Zip |
| Email Address | | | |
| Daytime Phone Number (xxx-xxx-xxxx) | | Purchase Date (mm/dd/yyyy) | Wireless Provider |
| Customer Order Number (found at top of sales receipt) | | Mobile Number (xxx-xxx-xxxx) | |

Instructions for Submitting Your Rebate Claim

- Fill out all information above. All fields are required! Please print clearly. Entries received without complete or legible information will not be processed. Keep copies of all documents for your records.
- Read, sign, and date this form.
- Include the following information with your rebate form:
 - Copy of the dated sales receipt included with your shipment.
 - Copy of the Guide to Wireless Services included with your shipment that provides details of service plan activated with your phone.
 - Copy of the 12 digit UPC bar code from the product packaging.
 - Copy of your 1st, 2nd, and 3rd wireless bills showing customer name, mobile number, and bill/invoice date for this account showing all balances paid in full (bills must be dated within 120 days after purchase date).
- Submit completed rebate form and above referenced information to the following address. Limit one rebate claim form per envelope. All documentation referenced above must accompany each submitted claim. Entries must be postmarked within 120 days from purchase date.

Rebate Processing Center
 Department BAK
 PO Box 100363
 White Bear Lake, MN 55110

- To check status of rebate, log on to <http://www.rebate-zone.com/inphonic>.

***** Incomplete or illegible entries will not be processed *****

In addition to this rebate, an equipment purchase discount of \$150 has been provided to you in exchange for activating and maintaining a new, non-subsidized wireless service mobile number on any commercially published wireless service rate plan for a minimum of 181 consecutive days. Should this number disconnect (permanently or temporarily, except based on the fault of the Wireless Service carrier) from the chosen Wireless carrier, or if the customer's wireless service rate plan is changed to one of a lower service rate plan, within the same time period (181 consecutive days), both this discount and rebate will be null and void and the customer must reimburse the Authorized Carrier Representative \$150. The customer herein provides authorization for the \$150 to be charged to the customer's credit card without need for further approval; the \$150 will only be charged if the monthly service rate is changed to one of a lower monthly service rate or if the wireless phone bill is not paid for 181 consecutive days.

I authorize that this \$150 can be charged to my credit card and in the event that any legal action is necessary to collect the amount due I agree to pay any legal fees, collection fees, and court costs.

This rebate will be null and void if all balances owed InPhonic Inc are not paid in full within 90 days of purchase date.

This form will serve as your Rebate Authorization. You will receive a check for the amount of \$150 within 10-12 weeks of our receipt of your rebate request. Checks not cashed within 90 days of issuance will be considered void and not eligible for re-issue.

Signature _____

Date _____

INV# 800194

INPC 00086

Dept: BAK

2INP:038

EXHIBIT C

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Western Region proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent InPhonic, Inc. is a Delaware corporation with its principal office or place of business at 1010 Wisconsin Avenue, NW, Suite 600, Washington, DC 20007.

Decision and Order

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER**DEFINITIONS**

For purposes of this order, the following definitions shall apply:

1. Unless otherwise specified, “respondent” shall mean InPhonic, Inc., a corporation, its successors and assigns and its officers, agents, representatives, and employees.
2. “Rebate” shall mean a check, cash, credit towards future purchases, or any other consideration offered to consumers who purchase products or services, and which is to be provided, subsequent to the purchase, to consumers who submit a request for redemption after satisfying the terms and conditions of the offer.
3. “Clearly and prominently” shall mean as follows:
 - a. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. *Provided, however,* that in any advertisement presented solely through video or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive

Decision and Order

media the disclosure shall also be unavoidable and shall be presented prior to the consumer incurring any financial obligation.

- b. In a print advertisement, promotional material (including, but not limited to a rebate coupon or form), or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears. In multipage documents, the disclosure shall appear on the cover or first page.
- c. On a product label, the disclosure shall be in a type size and location on the principal display panel sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

4. “Required rebate documentation” shall mean rebate coupons or forms, receipts, UPC codes, or other materials intended to be supplied by respondent to consumers and which consumers must include as part of a properly completed rebate request.

5. “Eligible purchaser” shall mean each consumer: 1) who was a bona fide purchaser of an InPhonic product for which a rebate was being offered from October 1, 2004 to the present; 2) who submitted a request for such a rebate prior to twelve (12) weeks before the date of service of this order; 3) whose InPhonic rebate has not been paid as of the date of service of this order; and

- a. whose request was denied solely on the basis of one or more of the following reasons:

Decision and Order

1. the consumer changed his/her wireless phone number;
 2. the signature on the rebate form was illegible;
 3. the respondent failed to provide the consumer with required information or documents;
 4. the email address was missing from the rebate form; or
 5. the request was late due to the consumer's submission of a fourth wireless bill; or
- b. whose request was denied for any curable deficiency but the consumer was not given at least thirty (30) days to resubmit the request.
6. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service sold to consumers, in or affecting commerce, shall not make any representation in any advertisement about the amount of any rebate available to purchasers of such product or service, or about the after-rebate cost of such product or service, unless respondent:

- A. discloses, clearly and prominently:
1. any time period that consumers must wait before submitting a rebate request;
 2. that consumers who change their wireless phone numbers after purchase are disqualified from receiving a rebate, if such is the case;

Decision and Order

3. that any rebate submission that does not strictly comply with all rebate terms and conditions, or that is deemed in any way illegible, may be rejected with little or no opportunity to resubmit, if such is the case;
 4. any requirement for submitting bills, records, or any other documentation, with a rebate request;
 5. when consumers can expect to receive their rebates; and
 6. that an email address is required to be eligible for the rebate, if such is the case; and
- B. discloses on the rebate coupon or form, clearly and prominently, all terms, conditions, or other limitations of the rebate offer.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service sold to consumers, in or affecting commerce, shall not:

- A. misrepresent, in any manner, expressly or by implication, what bills, records, or other documentation that consumers must submit with any rebate request; or
- B. misrepresent, in any manner, expressly or by implication, any material terms of any rebate program, including the status of, or reasons for, any delay in providing any rebate.

Decision and Order

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service sold to consumers, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that consumers will have the opportunity to resubmit deficient rebate requests, unless respondent provides such consumers a reasonable period of time in which to resubmit such rebate requests and notifies them precisely how to correct any deficiencies.

IV.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service sold to consumers, in or affecting commerce, shall not:

- A. fail to provide, or to make reasonably available to consumers, all required rebate documentation;
- B. make any representation, in any manner, expressly or by implication, about the time in which any rebate will be mailed, or otherwise provided to purchasers unless, at the time the representation is made, respondent has a reasonable basis for such representation; or
- C. fail to provide any rebate within the time specified or, if no time is specified, within thirty (30) days of receiving a properly completed request for such rebate.

Decision and Order

V.

IT IS FURTHER ORDERED that respondent InPhonic, and its successors and assigns, shall, in accordance with this Part, provide a rebate to each eligible purchaser.

- A. Within ten (10) business days from the date of service of this order, respondent shall compile (1) a mailing list or database containing the name and last known mailing address of each eligible purchaser, and (2) the rebate amount(s) each such person is owed. In addition, respondent shall retain a National Change of Address System (“NCOA”) licensee to update this list by processing the list through the NCOA database.
- B. Within thirty (30) business days from the date of service of this order, respondent shall mail via first-class mail, postage prepaid, a check for the rebate amount(s) owed to each eligible purchaser whose name appears on the list or database required by sub-part A of this Part. Respondent shall also send a notice in the form set forth in Appendix A to this order to each such eligible purchaser. No materials, other than the rebate check and the notice, shall be transmitted therewith.
- C. The envelope containing the items set forth in subpart — of this Part shall substantially be in the form set forth in Appendix — to this order. For each mailing returned by the U.S. Postal Service as undeliverable for which respondent thereafter obtains a corrected address, respondent shall, within fifteen (15) business days after receiving the corrected address, send the items set forth in subpart — of this Part to the corrected address.
- D. For a period of seventy-five (75) days from the date of service of this order, respondent shall mail via first-class mail, postage prepaid, the rebate amount(s) owed to each

Decision and Order

eligible purchaser who has not been provided a rebate pursuant to sub-part — of this Part, and who contacts the respondent or the Commission in any manner. Each such rebate shall be mailed within ten (10) business days after the respondent receives such person's name and contact information.

- E. The rebate checks distributed under this Part shall contain on the back of the checks the following general release language:

“Release: By my endorsement of this check I affirm that I am entitled to one or more rebates that I previously requested from InPhonic, Inc., and I hereby relinquish and forever discharge InPhonic, Inc., its subsidiaries, assigns, officers, directors, employees, and agents, for any and all claims that I have against them with regard to the rebate(s) for which I am being paid.”

This language shall be in a prominent type thickness and in a type size no smaller than twelve (12) point type. The language shall be of a color or shade that readily contrasts with the background of the check.

- F. Within one hundred fifty (150) days from the date of service of this order, respondent shall furnish to Commission staff the following:
1. The mailing list or database required by sub-part A of this Part in computer readable form;
 2. In computer readable form, a list of the names and addresses of all consumers who were sent rebate checks pursuant to this Part, and for each name included on the list, the amount, check number, and mailing date of every rebate check sent;

Decision and Order

3. In computer readable form, a list of the names and addresses of all consumers who contacted respondent or were referred to respondent by the Commission in accordance with sub-part D of this Part;
4. Copies of all correspondence and other communications to, from, or concerning all consumers who, after the date of service of this order, requested a rebate pursuant to this Part but were refused, and the reason(s) for denying the rebate;
5. In computer readable form, a list of the names and addresses of all consumers whose rebate checks were returned to respondent as undeliverable; and
6. All other documents and records evidencing efforts made and actions taken by respondent to identify, locate, contact, and provide funds to consumers pursuant to this Part.

VI.

IT IS FURTHER ORDERED that respondent InPhonic, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. A specimen copy of all advertisements or rebate forms containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All written or electronic complaints relating to rebates (whether received directly, indirectly or through any third party) and any responses to those complaints.

Decision and Order

VII.

IT IS FURTHER ORDERED that respondent InPhonic, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives whose duties include the exercise of managerial responsibility with respect to the subject matter of this order. Respondent shall deliver this order to such current personnel within thirty (30) days after the date of service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

VIII.

IT IS FURTHER ORDERED that respondent InPhonic, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

Decision and Order

IX.

IT IS FURTHER ORDERED that respondent InPhonic, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

X.

This order will terminate on June 4, 2027, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Decision and Order

APPENDIX A

[InPhonic, Inc. Letterhead]

[Date]

Re: The Enclosed Rebate Check

Dear [Customer Name]:

Our records show that during the period from October 1, 2004 to the present, you purchased a cellular phone with service from InPhonic or one of its affiliated companies. You also applied for, but never received, a rebate in the amount of [amount of check].

InPhonic has entered into a settlement with the Federal Trade Commission regarding certain of its rebate offers. We are sending you the enclosed check in accordance with that agreement.

Please note: BY ENDORSING THE CHECK, YOU ARE AFFIRMING THAT YOU ARE ENTITLED TO ONE OR MORE REBATES, AND ARE AGREEING THAT YOU HAVE NO FURTHER CLAIMS AGAINST INPHONIC (OR ANY OF ITS SUBSIDIARIES, ASSIGNS, OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS) WITH REGARD TO THE REBATE(S) FOR WHICH YOU ARE BEING PAID.

For more information on this agreement, go to [link to FTC web page contain InPhonic press release].

Sincerely,

InPhonic, Inc.

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FEDERAL TRADE COMMISSION DECISIONS
VOLUME 143

Decision and Order

APPENDIX B

InPhonic, Inc.
[Address]

FORWARDING

AND RETURN POSTAGE GUARANTEED

[Customer Address]

ATTENTION:
REGARDING YOUR

IMPORTANT REBATE INFORMATION
INPHONIC CELL PHONE PURCHASE

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from InPhonic, Inc. (“InPhonic”).

The proposed consent order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

InPhonic, located in Washington, D.C., is an online marketer of wireless telephone packages. Each wireless telephone package includes a name-brand wireless device and a wireless service contract with a national or regional wireless carrier. This matter concerns allegedly deceptive and unfair practices regarding InPhonic’s advertised mail-in rebates.

The FTC complaint alleges that in representing that substantial mail-in rebates were available to purchasers of its wireless telephone packages, InPhonic failed to disclose, or failed to adequately disclose that: 1) consumers would not be able to submit a rebate request until at least three or six months after purchase; 2) consumers would be required to submit wireless bills establishing three or six months of continuous wireless service in good standing; 3) consumers would not receive their rebate check until approximately six or nine months after purchase; 4) an email address would be required to be eligible for the rebate; 5) consumers who changed their wireless phone numbers after purchase would be disqualified from receiving a rebate; and 6) any rebate submission that did not strictly comply with all rebate terms and conditions or that was deemed in any way illegible could be rejected with little or no opportunity to resubmit. The

Analysis to Aid Public Comment

complaint alleges that the failure to disclose or adequately disclose these material facts is a deceptive practice.

The complaint also alleges that InPhonic misrepresented that consumers seeking to redeem its “customer appreciation rebate” needed to establish that their first three months of wireless service had been paid in full. According to the complaint, numerous consumers who waited to submit their fourth wireless bill in order to establish that their first three months of wireless service had been paid in full were unable to submit the rebate request within the 120-day time period specified in the offer, and InPhonic rejected such rebate requests as untimely. The complaint further alleges that InPhonic misrepresented that consumers whose rebate requests contained missing, incorrect, or illegible information would be given a reasonable opportunity to resubmit their request.

According to the FTC complaint, in numerous cases, InPhonic rejected rebate requests, or consumers were prevented from submitting valid requests, because InPhonic failed to supply to consumers with one or more pieces of required documentation and consumers, despite their best efforts, were unable to obtain such documentation from InPhonic. According to the complaint, many consumers did not receive the required rebate redemption form, a box containing a required UPC code, and/or a required “AGuide to Wireless Service” and, despite repeated attempts to contact respondent, were unable to obtain the documentation. The complaint alleges that this constitutes an unfair practice.

Finally, according to the complaint, InPhonic promised to provide consumers with rebate checks within 12 weeks of rebate submission, if they purchased a wireless phone and service plan, and submitted a valid rebate request with supporting documentation. The complaint alleges that after receiving rebate requests in conformance with these terms, InPhonic extended the time period in which it would deliver the rebates without consumers agreeing to this extension of time and failed to deliver

Analysis to Aid Public Comment

the rebates to consumers within the promised time period. According to the complaint, this constitutes an unfair business practice.

The proposed consent order contains provisions designed to prevent InPhonic from engaging in similar acts and practices in the future and to redress consumers. Part I.A. of the proposed order prohibits InPhonic from making a claim about the amount of any rebate, unless it discloses, clearly and conspicuously, unavoidably, and prior to consumers incurring any financial obligation: any time period that consumers must wait before submitting a rebate request; that consumers who change their wireless phone numbers after purchase are disqualified from receiving a rebate, if that is the case; that any rebate submission that does not strictly comply with all rebate terms and conditions, or that is deemed in any way illegible, may be rejected with little or no opportunity to resubmit, if that is the case; any requirement for submitting bills, records, or any other documentation, with a rebate request; when consumers can expect to receive their rebates; and that an email address is required to be eligible for the rebate, if that is the case. Part I.B. of the proposed order prohibits InPhonic from making a claim about the amount of any rebate unless it also discloses, clearly and prominently, on any rebate coupon or form, all terms, conditions, or other limitations of the rebate offer.

Part II of the proposed order prevents InPhonic from misrepresenting what documentation consumers must submit with any rebate request and from misrepresenting any material terms of any rebate program.

Part III of the proposed order prohibits InPhonic from representing that consumers will have the opportunity to resubmit deficient rebate requests, unless it gives consumers a reasonable period of time in which to resubmit such requests and notifies them precisely how to correct any deficiencies.

Analysis to Aid Public Comment

Part IV.A. of the proposed order prohibits InPhonic from failing to provide, or to make reasonably available to consumers, all required rebate documentation. Part IV.B. prohibits InPhonic from making any representation about the time in which any rebate will be mailed, or otherwise provided to purchasers, unless it has a reasonable basis for the representation at the time it is made. Part IV.C. prohibits InPhonic from failing to provide any rebate within the time specified or, if no time is specified, within thirty days.

Part V of the proposed order requires InPhonic to send rebates to eligible purchasers. Eligible purchasers include consumers whose rebate requests were previously denied solely on the basis of one or more of the following reasons: 1) the consumer changed his/her wireless phone number; 2) the signature on the rebate form was illegible; 3) InPhonic failed to provide the consumer with required information or documents; 4) the email address was missing from the rebate form; or 5) the request was late due to the consumer's submission of a fourth wireless bill. In addition, eligible purchasers include consumers whose requests were denied due to a curable deficiency, but where the consumer was not given at least thirty days to resubmit the request.

Parts VI through IX of the proposed order are reporting and compliance provisions. Part X of the proposed order is a "sunset" provision, dictating that the order will terminate twenty years from the date it is issued or twenty years after a complaint is filed in federal court, by either the United States or the FTC, alleging any violation of the order.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF**SOYO, INC.****CONSENT ORDER, ETC. , IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT**

*Docket No. C-4193; File No. 062 3094
Complaint, June 4, 2007 – Order, June 4, 2007*

This consent order addresses cash rebate offers that Soyo advertised to consumers. The complaint alleges that Soyo engaged in deceptive practices relating to these rebate offers and that thousands of consumers who submitted valid requests for rebates since 2004 experienced substantial, unreasonable delays, including delays of one year or longer. The order prevents Soyo from engaging in similar acts and practices in the future by prohibiting Soyo from misrepresenting any material terms of any rebate program, including the status of or reasons for any delay in providing any rebate. Additionally the order prohibits misrepresenting the time in which any rebate will be mailed and from failing to provide any rebate within the time specified, or if no time is specified, within thirty days.

Participants

For the *Commission*: *Linda K. Badger, Matthew D. Gold, and Kerry O'Brien.*

For the *Respondent*: *Dan P Sedor, Jeffer Mengels Butler & Marmaro LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Soyo, Inc., a corporation (“Soyo” or “respondent”), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Nevada corporation with its principal office or place of business at 1420 South Vintage Avenue, Ontario, California 91761.

Complaint

2. Respondent has advertised, labeled, offered for sale, sold, and distributed products to the public, including computer-related hardware and other consumer electronics products. Respondent has distributed these products to the public through retailers of consumer electronics products. To make its products more attractive to these retailers and their customers, Soyo has offered numerous mail-in rebates ranging from \$15.00 to \$500.00 in value.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

SOYO’s REBATE ADVERTISEMENTS

4. Respondent has disseminated or has caused to be disseminated advertisements and rebate forms for mail-in rebates, including but not necessarily limited to the attached Exhibits A and B. These advertisements contain the following statements:

A. **“SOYO
20 GB 1.8" POCKET HARD DRIVE**

...

| | | | | |
|-------------------|---|-------------------|---|--------------------|
| \$134.99 | - | 35 | = | \$99.99 |
| In-Store Price | | Mail-In Rebate | | Price After Rebate |

...”

(Exhibit A, excerpt from a retailer’s advertisement for a pocket hard drive).

B. **“SOYO
Innovation by design**

Complaint

Buy one SY-K7VME
Get \$30.00 USD Mail-in Rebate
Offer valid 01/03/2005 to 01/30/2005

**THIS REQUEST MUST BE POSTMARKED BY
02/15/2005**

TERMS AND CONDITIONS -

...

Rebate checks will be mailed in 10 - 12 weeks after postmark date of program.

....”

(Exhibit B, excerpt from a Soyo rebate form for a rebate offered on a motherboard).

FALSE SHIPMENT REPRESENTATIONS

5. Through the means described in Paragraph 4, including but not necessarily limited to Exhibit A, respondent has represented, expressly or by implication, that rebate checks will be mailed to purchasers of advertised Soyo products within a reasonable period of time after receipt of their valid requests.
6. Through the means described in Paragraph 4, including but not necessarily limited to Exhibit B, respondent has represented, expressly or by implication, that:
 - A. Rebate checks will be mailed to purchasers of advertised Soyo products within ten to twelve weeks after receipt of their valid requests; and
 - B. Rebate checks will be mailed to purchasers of advertised Soyo products within ten to twelve weeks of the last date on which a valid request could be postmarked.

Complaint

7. In truth and in fact, in numerous instances, rebate checks were not mailed to purchasers of advertised Soyo products within a reasonable period of time after receipt of their valid requests, within twelve weeks after receipt of their valid requests, or within twelve weeks of the last date on which a valid request could be postmarked. Thousands of consumers who submitted valid requests for rebates since 2004 have experienced substantial delays, including delays of one year or longer. From October 2004 to March 2006, over 95 percent of respondent's rebate checks were delivered later than twelve weeks after the last date on which a valid request could be postmarked, with an average delivery time of approximately 24 weeks. Therefore, the representations set forth in Paragraphs 5 and 6 were, and are, false or misleading.

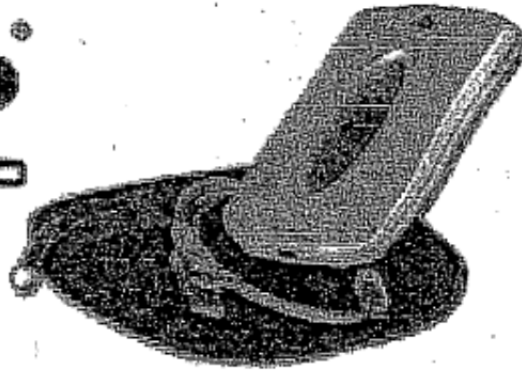
8. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this fourth day of June, 2007, has issued this complaint against respondent.

By the Commission.

Complaint

Exhibit A



20GB

1.8" POCKET HARD DRIVE

- Support USB 2.0 or 1.1 Interface
- Magnesium Alloy Casing

~~\$134⁹⁹~~ - 35 = \$99⁹⁹

In-Store
Price

Mail-In
Rebate


Price After Rebate

#4201324

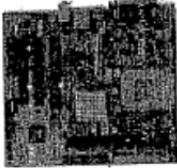
Limit 1 Per Customer

Decision and Order

Exhibit B



Mail-in Rebate Form



**Buy one SY-K7VME
Get \$30.00 USD Mail-in Rebate**


Offer Valid 01/03/2005 to 01/30/2005

Here is how you get your rebate:

1. Register your rebate at <http://www.verifyrebate.com> with Rebate ID 1506 and print out the confirmation form.
2. Mail the confirmation form with the following proof of purchase on the specific product(s) to the address below:
 - a. Original UPC barcode (see sample below)
 - b. Original sales receipt (packing slip if ordered online)

Mail To:
SOYO Rebate Center, #1506
1142 S. Diamond Bar Blvd. #704

Diamond Bar, CA 91765



3. Check your rebate status at <http://www.verifyrebate.com>

THIS REQUEST MUST BE POSTMARKED BY 02/15/2005

TERMS AND CONDITIONS: Offer valid on purchase of SY-K7VME between 01/03/2005 and 01/30/2005 at Micro Center only. Register your rebate online at <http://www.verifyrebate.com> and submit the confirmation page together with original UPC barcode, and original sales receipt. All rebates must be mailed in separate envelopes with the appropriate materials to the address listed on the rebate form. Rebate forms with names and address different from the one on sales receipt will be denied. Your request must be postmarked prior to 02/15/2005. Manufacturer is not responsible for lost or misdirected mail. Limit ONE rebate per person, family, household, family or address. Rebate value will not exceed purchase price. Request from P.O. Boxes will not be accepted. Requests with invalid or undeliverable mailing address will be denied. Offer limited to cash-cases only. Your rebate rights cannot be transferred, and this offer is void where taxed, restricted or prohibited by law. This offer is valid in USA only. Keep copies of all materials submitted; originals become Manufacturer's property and will not be returned. Warning: Fraudulent submission could result in Federal prosecution under mail fraud statutes (Title 18, USC Section 1341 & 1342). Rebate checks will be mailed in 10 - 12 weeks after postmark date of program.

To verify your rebate status, please go to <http://www.verifyrebate.com>. If you have not received your check 14 weeks after rebate program postmark date, or have any questions about your rebate, please contact rebate@soyo.com.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Western Region proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

Decision and Order

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Soyo, Inc. is a Nevada corporation with its principal office or place of business at 1420 South Vintage Avenue, Ontario, California 91761.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER**DEFINITIONS**

For purposes of this order, the following definitions shall apply:

Decision and Order

1. Unless otherwise specified, “respondent” shall mean Soyo, Inc., a corporation, its successors and assigns and its officers, agents, representatives, and employees.
2. “Rebate” shall mean a check, cash, credit towards future purchases, or any other consideration offered to consumers who purchase products or services, and which is to be provided, subsequent to the purchase, to consumers who submit a request for redemption after satisfying the terms and conditions of the offer.
3. “Receiving a properly completed request” shall mean the time at which the respondent receives from the rebate applicant all documentation, information, and other materials required by the express terms of the rebate offer and in compliance with such terms.
4. “Eligible purchaser” shall mean each consumer:
 - a. from whom respondent has received all documentation necessary to qualify that consumer for a rebate under the terms of any Soyo rebate offer; and
 - b. whose rebate is past due as of the date of service of this order.
5. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service sold to consumers, in or affecting commerce, shall not:

Decision and Order

- A. misrepresent, in any manner, expressly or by implication, the time in which any rebate will be mailed, or otherwise provided to consumers;
- B. fail to provide any rebate within the time specified or, if no time is specified, within thirty (30) days of receiving a properly completed request; or
- C. misrepresent, in any manner, expressly or by implication, any material terms of any rebate program, including the status of or reasons for any delay in providing any rebate.

II.

IT IS FURTHER ORDERED that respondent Soyo, Inc., and its successors and assigns, shall, in accordance with this Part, provide a rebate to each eligible purchaser.

- A. Within fifteen (15) business days from the date of service of this order, respondent shall compile: (1) a mailing list or database containing the name and last known mailing address of each eligible purchaser; and (2) the rebate amount(s) each such person is owed. To compile this mailing list, respondent must consult all records in its possession, including records of those eligible purchasers who have complained to the company, any retailer, or consumer protection agency regarding unpaid Soyo rebates. In addition, respondent shall retain a National Change of Address System (“NCOA”) licensee to update this list by processing the list through the NCOA database.
- B. Within thirty-five (35) business days from the date of service of this order, respondent shall mail via first-class mail, postage prepaid, the rebate amount(s) owed to each eligible purchaser whose name appears on the list or database required by sub part A of this Part.

Decision and Order

- C. For a period of seventy-five (75) days from the date of service of this order, respondent shall mail via first-class mail, postage prepaid, the rebate amount(s) owed to each eligible purchaser who has not been provided a rebate pursuant to sub part — of this Part, and who contacts the respondent or the Commission in any manner. Each such rebate shall be mailed within ten (10) business days after the respondent receives such person's name and contact information.
- D. Respondent may provide, along with the rebate check, only information enabling eligible purchasers to contact respondent with questions regarding the rebate. The envelope that contains the rebate check shall contain in the upper left hand corner the following return address: Soyo, Inc., Rebate Department, 1420 South Vintage Avenue, Ontario, California 91761.
- E. Within one hundred fifty (150) days from the date of service of this order, respondent shall furnish to Commission staff the following:
1. The mailing list or database required by sub part A of this Part in computer readable form;
 2. In computer readable form, a list of the names and addresses of all consumers who were sent rebate checks pursuant to this Part, and for each name included on the list, the amount, check number, and mailing date of every rebate check sent;
 3. In computer readable form, a list of the names and addresses of all consumers who contacted respondent or were referred to respondent by the Commission in accordance with sub part C of this Part;

Decision and Order

4. Copies of all correspondence and other communications to, from, or concerning all consumers who, after the date of service of this order, requested a rebate but were refused, and the reason(s) for denying the rebate;
5. In computer readable form, a list of the names and addresses of all consumers whose rebate checks were returned to respondent as undeliverable; and
6. All other documents and records evidencing efforts made and actions taken by respondent to identify, locate, contact, and provide funds to consumers requesting a rebate.

III.

IT IS FURTHER ORDERED that respondent Soyo, Inc., and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. A specimen copy of all advertisements or rebate forms containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All written or electronic complaints relating to rebates (whether received directly, indirectly, or through any third party) and any responses to those complaints.

Decision and Order

IV.

IT IS FURTHER ORDERED that respondent Soyo, Inc., and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives whose duties include the exercise of managerial responsibility with respect to the subject matter of this order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and, to future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

IT IS FURTHER ORDERED that respondent Soyo, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

Decision and Order

VI.

IT IS FURTHER ORDERED that respondent Soyo, Inc., and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VII.

This order will terminate on June 4, 2027, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Analysis to Aid Public Comment

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Soyo, Inc. (“Soyo”). Soyo, located in Ontario, California, is a distributor of computer-related hardware and other consumer electronics products.

The proposed consent order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

This matter concerns cash rebate offers that Soyo advertised to consumers. The complaint alleges that Soyo engaged in deceptive practices relating to these rebate offers. Specifically, the complaint alleges that Soyo falsely represented that: 1) rebates would be mailed within a reasonable period of time after receipt of a consumer’s valid request, 2) within ten to twelve weeks after receipt of a consumer’s valid request, and 3) within ten to twelve weeks of the last date on which a valid request could be postmarked. The complaint alleges that thousands of consumers who submitted valid requests for rebates since 2004 experienced substantial, unreasonable delays, including delays of one year or longer. It is further alleged that from October 2004 to March 2006, over 95 percent of respondent’s rebate checks were delivered later than twelve weeks after the last date on which a valid request could be postmarked, with an average delivery time of approximately 24 weeks.

The proposed order contains provisions designed to prevent Soyo from engaging in similar acts and practices in the future. Part I of the proposed order prohibits Soyo from misrepresenting

Analysis to Aid Public Comment

the time in which any rebate will be mailed and from failing to provide any rebate within the time specified, or if no time is specified, within thirty days. This provision also prohibits the company from misrepresenting any material terms of any rebate program, including the status of or reasons for any delay in providing any rebate. Part II of the proposed order is a redress provision which requires Soyo to pay all valid rebate requests to consumers who purchased Soyo products and whose rebates are past due. This provision also requires Soyo to send a rebate to any eligible purchaser who contacts it or the FTC for a period of seventy-five (75) days after service of the order.

Parts III through VI of the proposed order are reporting and compliance provisions. Part VII provides that the order will terminate after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

**DIRECTREVENUE LLC,
DIRECTREVENUE HOLDINGS LLC,
JOSHUA ABRAM, DANIEL KAUFMAN,
ALAN MURRAY AND RODNEY HOOK**

CONSENT ORDER, ETC. , IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-4194; File No. 052 3131
Complaint, June 26, 2007 — Decision, June 26, 2007*

This consent order addresses respondents' advertising software programs (adware) that monitor consumers' Internet use in order to display targeted pop-up ads. The order, among other things, prohibits the respondents from communicating with any consumer's computer on which the adware was installed prior to October 1, 2005, except to notify such users that they will no longer receive any advertising or communication from the respondents unless they so choose, and telling them how they can fully remove the respondents' adware from their computers. The order prohibits the respondents from downloading or installing any software program or application without consumers' express consent. The respondents are required to establish and maintain a user-friendly mechanism through which consumers can report and the respondents can timely address complaints. In addition, the respondents are required to identify advertisements served via the respondents' adware so that consumers can easily locate the source of the advertisement, the respondents' complaint mechanism, and instructions on how to uninstall such adware; and the respondents must provide reasonable and effective means to uninstall the adware. The order also requires the respondents to pay \$1.5 million to the Commission, which may be used to provide appropriate relief, including the rescission of contracts, payment of damages, and/or public notification respecting unfair or deceptive acts or practices. If the Commission determines that such relief is wholly or partially impracticable, any or all such funds shall be paid to the United States Treasury.

Participants

For the *Commission*: *Alysa S. Bernstein, Stacey Ferguson,*
and *Mamie Kresses.*

Complaint

For the *Respondents*: *Stuart L. Friedel* and *Neal H. Klausner, Davis & Gilbert LLP*; *Andrew G. Celli, Jr., Emery Celli Brinckerhoff & Abady LLP*; and *David J. Goldstone, Goodwin Proctor LLP*.

COMPLAINT

The Federal Trade Commission, having reason to believe that DirectRevenue LLC, a limited liability company, DirectRevenue Holdings LLC, a limited liability company, and Joshua Abram, Daniel Kaufman, Alan Murray, and Rodney Hook, individually and as officers and owners of the companies (“respondents”), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent DirectRevenue LLC, is a Delaware limited liability company with its principal office or place of business at 107 Grand Street, New York, New York 10013.

2. Respondent DirectRevenue Holdings LLC, is a Delaware limited liability company with its principal office or place of business at 107 Grand Street, New York, New York 10013. DirectRevenue Holdings LLC is the 100% owner of DirectRevenue LLC.

3. Respondent Joshua Abram is an officer and owner of the corporate respondents. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of the companies, including the acts or practices alleged in this complaint.

4. Respondent Daniel Kaufman is an officer and owner of the corporate respondents. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of the companies, including the acts or practices alleged in this complaint.

Complaint

5. Respondent Alan Murray is an officer and owner of the corporate respondents. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of the companies, including the acts or practices alleged in this complaint.

6. Respondent Rodney Hook is an officer and owner of the corporate respondents. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of the companies, including the acts or practices alleged in this complaint.

7. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

8. Respondents have developed advertising software programs (“adware”) that are or were distributed to consumers’ computers under several names including Aurora, Ceres, A Better Internet, OfferOptimizer, Twaintec, and Best Offers.

9. When downloaded to and installed on consumers’ computers, respondents’ adware tracks and stores information regarding consumers’ Internet use and displays pop-up, pop-under, and other forms of advertisements on consumers’ computers based on such Internet use.

10. Respondents distribute their adware directly to consumers over the Internet on websites they own or control. Respondents also distribute their adware over the Internet through a network of third parties, known as affiliates. Respondents know or have known that their affiliates, in turn, retained a myriad of third party sub-affiliates to install respondents’ adware on consumers’ computers.

Complaint

11. In numerous instances, respondents, either directly or through their affiliates and sub-affiliates, have distributed their adware to consumers over the Internet by causing it to be bundled with other free or paid software programs, including games, screen-savers, and various computer utility programs (hereinafter “lureware”).

12. Often, the web pages offering the lureware did not disclose that, by installing the lureware, respondents’ adware would also be installed on consumers’ computers. In many instances, the only way for consumers to learn about the existence and effects of respondents’ adware was to click through one or more hyperlinks to reach multi-page user agreements containing such information. These inconspicuous hyperlinks were located in a corner of the home pages offering the lureware and or in a modal box provided by the computer’s operating system. Consumers were not required to click on any such hyperlink, or otherwise view the user agreement, in order to install the programs. Examples of this tactic include, but are not limited to, the following:

- a. Bundling adware, without adequate notice, with lureware distributed directly to consumers over respondents’ websites such as *www.mypanicbutton.com* (program purporting to enable consumers to mask their computer activity with a mouse click or a keystroke); *www.abetterinternet.com* (offering a program known as Atomic Clock that purports to synchronize consumers’ computers with the U.S. Government Atomic Clock); *www.stop-popup-ads-now.com* (program purporting to AGET RID OF POPUP ADS NOW! FREE!”); and *www.freephone.cc* (program purporting to allow consumers to Atalk for FREE” worldwide without receiving “annoying ads or pop-ups”). See Exhibits A-D.

Complaint

- b. Bundling adware, without adequate notice, with their own lureware distributed to consumers via an Active-X box entitled “Security Warning,” which appears on third-party web sites such as *www.iowrestling.com*. *See* Exhibit E.
- c. Bundling adware, without adequate notice, with lureware distributed to consumers by affiliates and sub-affiliates over the Internet, such as through affiliate-operated websites including *www.kazanon.com* (offering a purported file-share anonymizer) and *www.fasterxp.com* (promoting, as “100% spyware free,” a program to block pop-ups and improve computer performance). *See* Exhibits F, G.

These installations forced consumers to receive numerous unwanted pop-up and other advertisements and usurped computer memory and other resources.

13. In numerous instances, respondents, through affiliates and sub-affiliates acting on behalf of and for the benefit of respondents, installed respondents’ adware on consumers’ computers entirely without notice or authorization. These installations forced consumers to receive numerous unwanted pop-up and other advertisements and usurped computer memory and other resources. For example, respondents’ affiliate Standard Internet, through its sub-affiliate Seismic Entertainment Productions, Inc., installed respondents’ adware through an executable file that exploited a vulnerability in Windows Media Player when consumers visited certain web sites. In addition to serving a substantial number of unwanted ads and usurping computer memory, this exploit caused serious failures to consumers’ Windows Media Player application.

14. Respondents did not employ reasonable, appropriate measures to ensure that their affiliates and sub-affiliates obtained consumers’ consent to install respondents’ adware even after it

Complaint

should have been apparent that there was widespread failure among affiliates to obtain consumers' consent to installation. Respondents also failed to promptly discontinue relationships with those affiliates and sub-affiliates whom respondents learned had installed such adware without first obtaining consumers' consent.

15. Respondents made identifying, locating, and removing their adware extremely difficult for consumers by, in numerous instances, among other practices:

- a. Failing to identify adequately the name or source of the adware in pop-up ads or other ads so as to enable consumers to locate the adware on their computers;
- b. Storing the adware files in locations on consumers' hard drives that are rarely accessed by consumers, such as in the Windows operating systems folder that principally contains core systems software;
- c. Writing the adware code in a manner ensuring that it will *not* be listed in the Windows Add/Remove utility in conjunction with the software with which it was originally bundled at installation;
- d. Failing to list the adware in the Windows Add/Remove utility, which is a customary location for user-initiated uninstall of software programs;
- e. Where the adware was listed in the Windows Add/Remove utility, listing it under names resembling core systems software or applications;
- f. Contractually requiring that affiliates write their software code in a manner ensuring that it does *not* uninstall respondents' adware when consumers uninstall the software with which it was bundled at installation;

Complaint

- g. Installing technology on consumers' computers to re-install the adware where it has been uninstalled by consumers through the Windows Add/Remove utility or deleted by consumers' anti-spyware or anti-adware programs; and/or
- h. Where respondents provided an uninstall tool at separate web sites including *www.mypctuneup.com* and *www.bestoffersnetwork.com\uninstall*, requiring consumers to follow a ten-step procedure, including downloading additional software and deactivating all third-party firewalls, thereby exposing consumers' computers to security risks.

FTC ACT VIOLATIONS

Deceptive Failure to Disclose Adware

16. As described in Paragraphs 11 and 12, respondents, directly and through affiliates and sub-affiliates acting on behalf of and for the benefit of respondents, represented to consumers, expressly or by implication, that they would receive software programs either at no cost, or at the advertised cost. Respondents failed to disclose, or failed to disclose adequately, that such software is bundled with respondents' adware, which tracks and stores information regarding consumers' Internet use and displays pop-up and other forms of advertisements on consumers' computers based on such use. The installation of such adware would be material to consumers in their decision whether to install software offered by respondents or their affiliates or sub-affiliates. The failure to disclose or adequately disclose this fact, in light of the representations made, was, and is, a deceptive act or practice.

Complaint

Unfair Installation of Adware

17. As described in Paragraph 13, respondents, through affiliates and sub-affiliates acting on behalf of and for the benefit of respondents, installed respondents' adware on consumers' computers entirely without notice or authorization. These practices caused consumers to receive unwanted pop-up and other advertisements and usurped their computers' memory and other resources. Consumers could not reasonably avoid this injury because respondents, through their affiliates and sub-affiliates, installed the adware on consumers' computers without their knowledge or authorization. Thus, respondents' practices have caused, or are likely to cause, substantial injury to consumers that is not reasonably avoidable by consumers themselves and not outweighed by benefits to consumers or competition. These acts and practices were, and are, unfair.

Unfair Uninstall Practices

18. As described in Paragraph 15, respondents failed to provide consumers with a reasonable and effective means to identify, locate, and remove respondents' adware from their computers. Consumers thus have had to spend substantial time and/or money to locate and remove this adware from their computers. Consumers also were forced to disable various security software to uninstall respondents' adware, thereby exposing these computers to unnecessary security risks. Respondents' failure to provide a reasonable means to locate and remove their adware has caused, or is likely to cause, substantial injury to consumers that is not reasonably avoidable by consumers themselves and not outweighed by benefits to consumers or competition. These acts and practices were, and are, unfair.

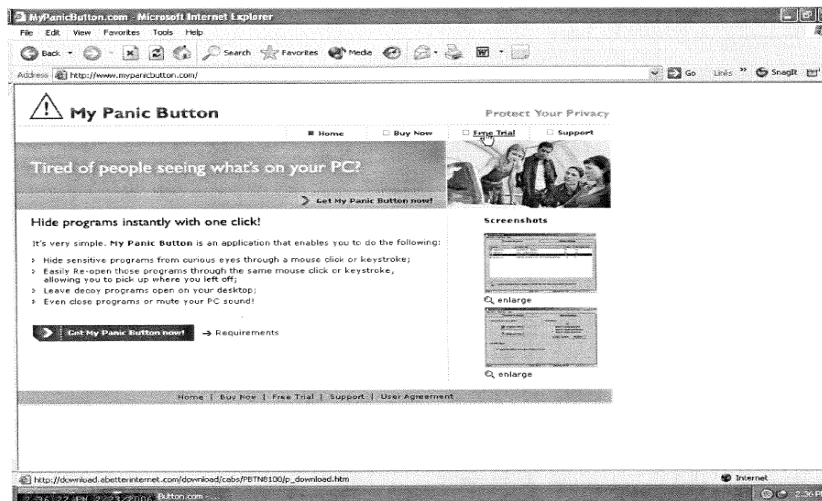
19. The acts and practices alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Complaint

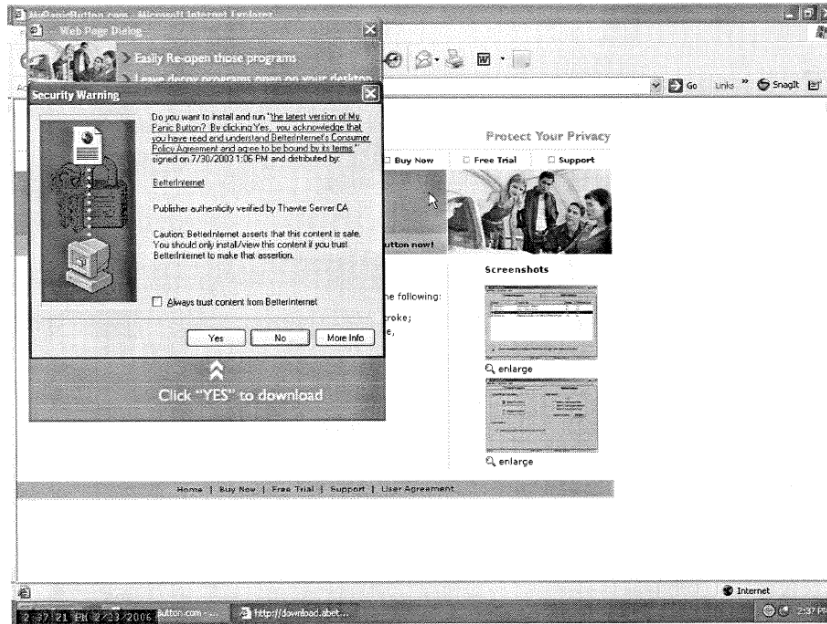
THEREFORE, the Federal Trade Commission this twenty-sixth day of June, 2007, has issued this complaint against respondents.

By the Commission, Commissioner Leibowitz dissenting.

Complaint Exhibits



Complaint



Complaint

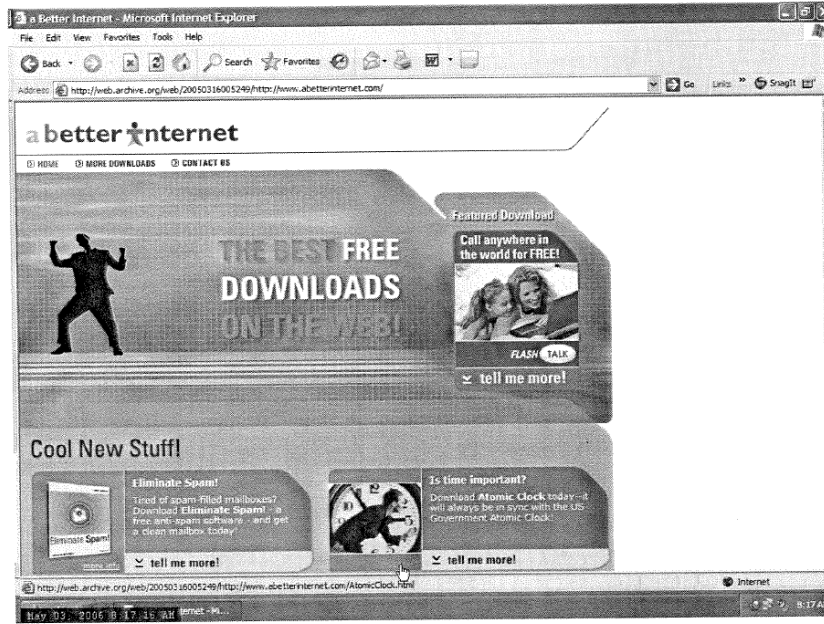
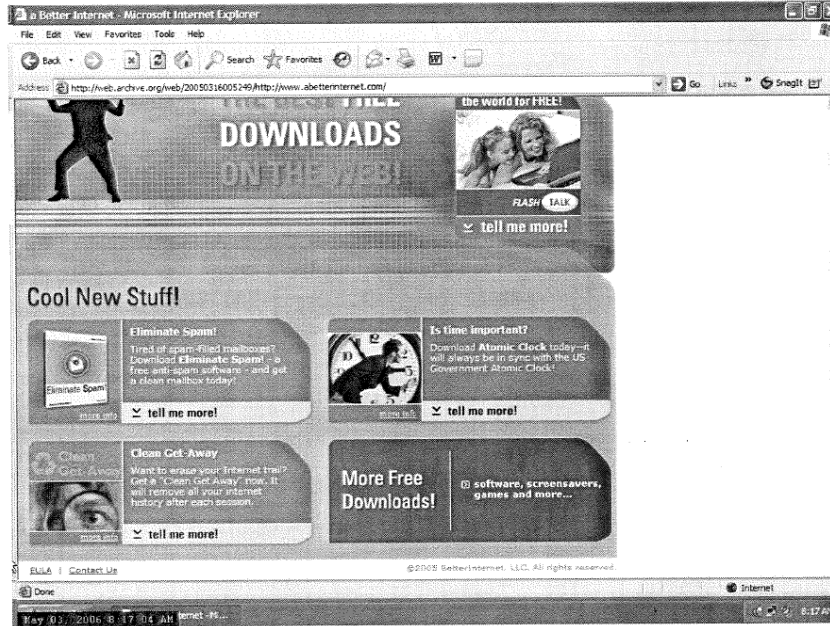
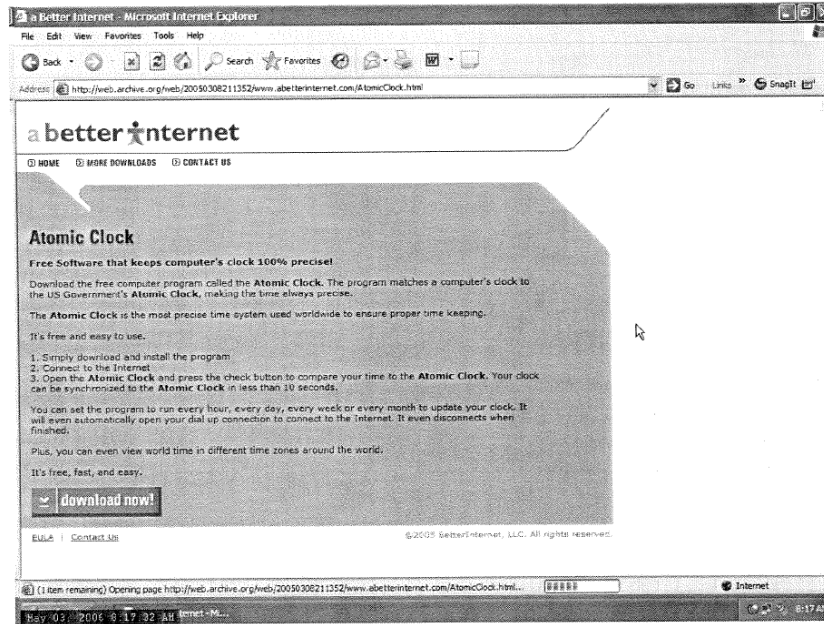


EXHIBIT B
Page 1

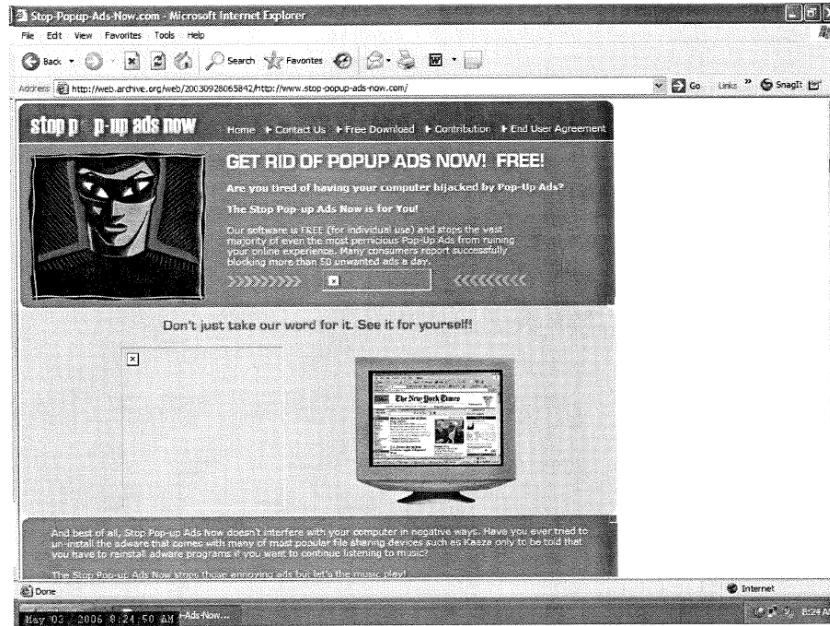
Complaint



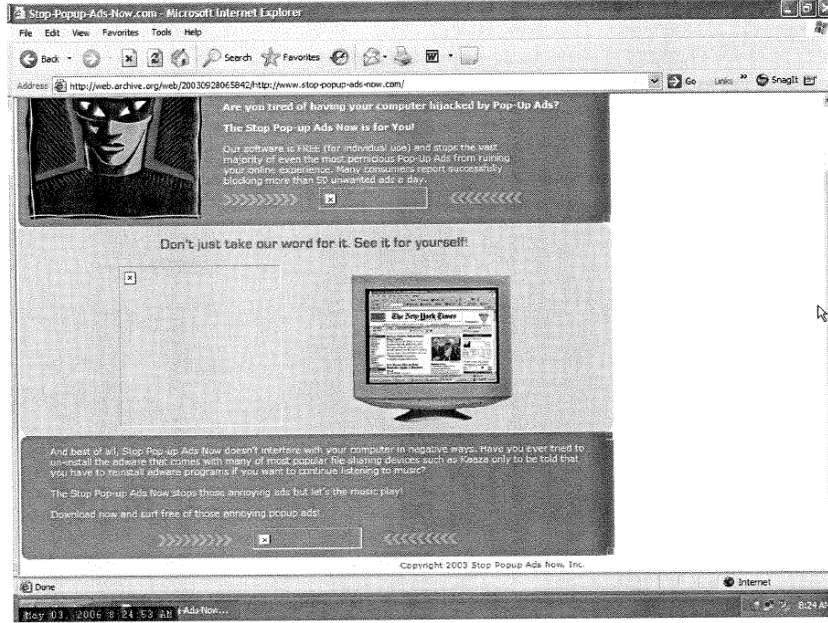
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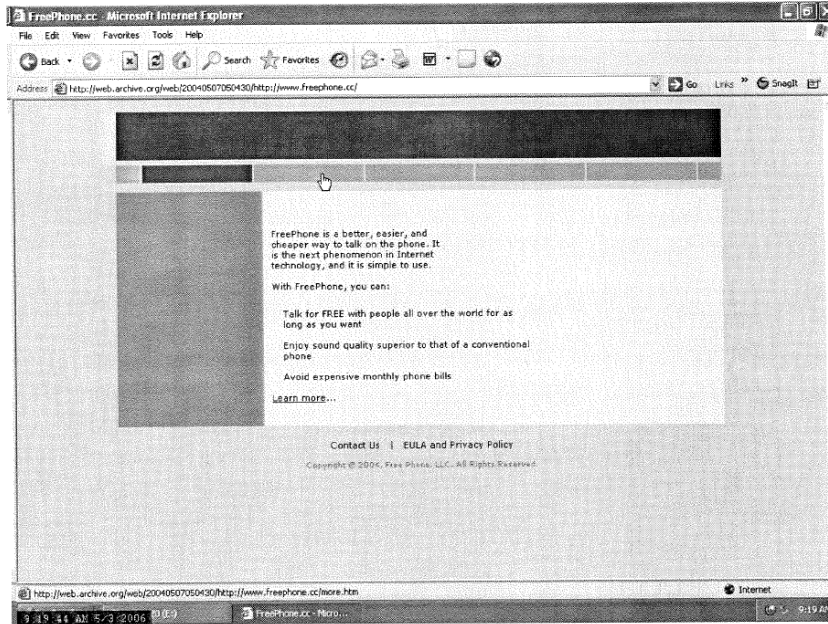
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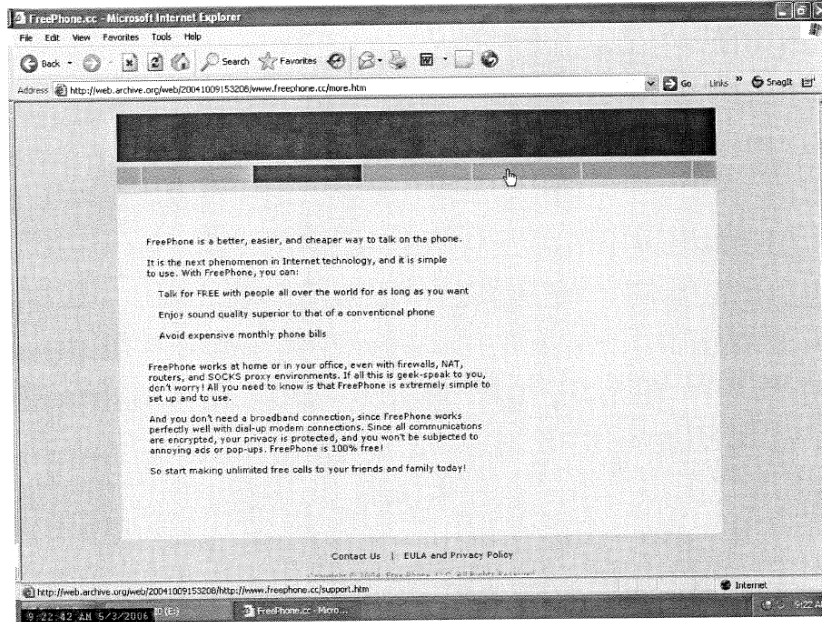
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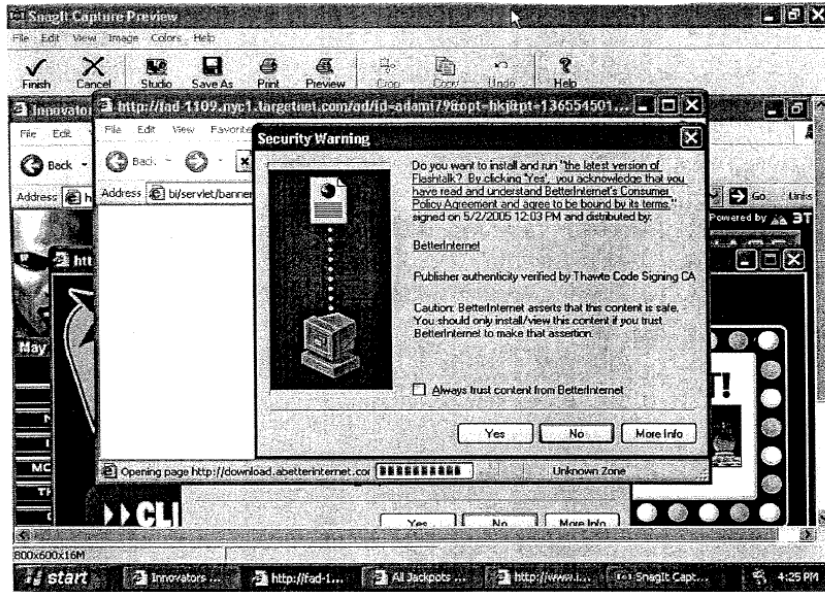
Complaint



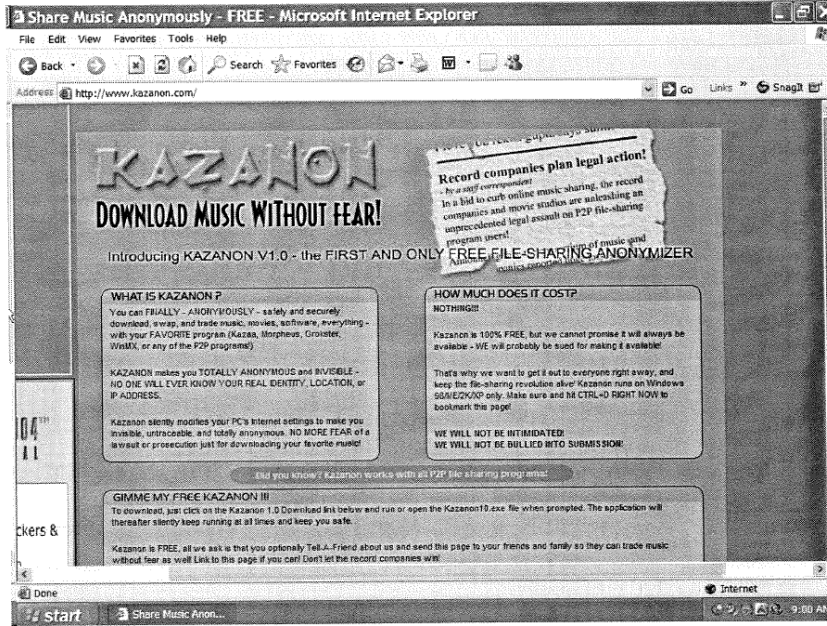
Complaint



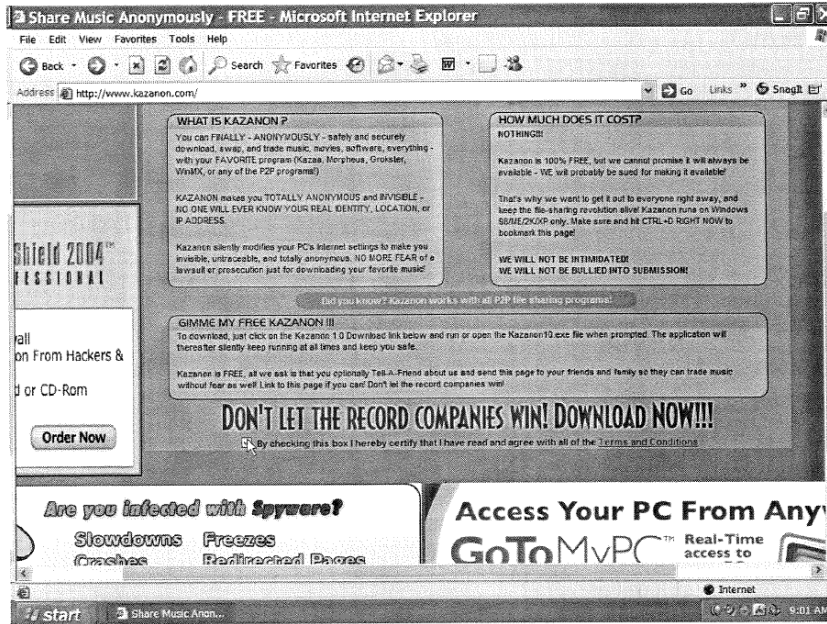
Complaint



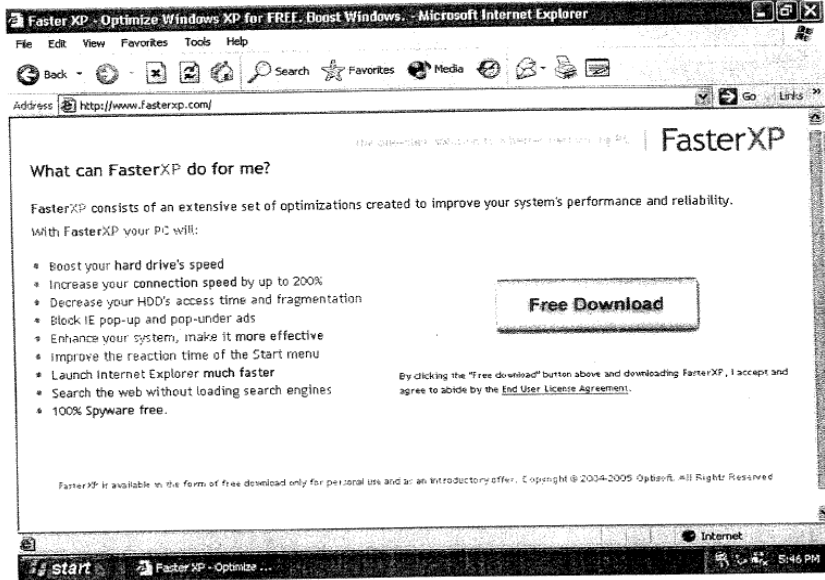
Complaint



Complaint



Complaint



Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Respondents named in the caption hereof, and the Respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the Respondents with violation of the Federal Trade Commission Act; and

The Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the Respondents of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the Respondents that the law has been violated as alleged in such complaint, or that any of the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondents have violated the Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to section 2.34 of its Rules, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent DirectRevenue LLC, is a Delaware limited liability company with its principal office or place of business at 107 Grand Street, New York, New York 10013.

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2. Respondent DirectRevenue Holdings LLC, is a Delaware limited liability company with its principal office or place of business at 107 Grand Street, New York, New York 10013. DirectRevenue Holdings LLC is the 100% owner of DirectRevenue LLC.
3. Respondent Joshua Abram is an officer and owner of the corporate respondents.
4. Respondent Daniel Kaufman is an officer and owner of the corporate respondents.
5. Respondent Alan Murray is an officer and owner of the corporate respondents.
6. Respondent Rodney Hook is an officer and owner of the corporate respondents.
7. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER**DEFINITIONS**

For purposes of this Order, the following definitions shall apply:

1. Unless otherwise specified, “respondents” means DirectRevenue Holdings LLC, and DirectRevenue LLC, and each of their successors and assigns, and their officers; Joshua Abram, individually and as an officer of the companies; Daniel Kaufman, individually and as an officer of the companies; Alan Murray, individually and as an officer of the companies; and Rodney Hook, individually and as an officer of the companies; and each

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of the above's agents, representatives, and employees, or other persons directly or indirectly under the control of any respondent.

2. "Affiliate program" means any program whereby any person or entity agrees to advertise, market, promote, disseminate, distribute, download, or install any program, product, or service, on behalf of respondents including, but not limited to, any software program or application.

3. "Affiliate" means any person or entity who participates in an affiliate program.

4. "Assist others" means knowingly providing any of the following services to any person or entity: (a) developing, supplying, distributing, or publishing any software program, product, or service; or (b) formulating, developing, or providing, or arranging for the formulation, development, or provision of, any Internet advertising or marketing content for any person or entity; or (c) performing advertising or marketing services of any kind for any person or entity.

5. "Clear(ly) and prominent(ly)" shall mean that, in an electronic medium, the material terms shall be: (a) unavoidable; (b) of a size and shade, and appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it; (c) in understandable language and syntax; and (d) additionally, in connection with each advertisement or promotion for the download or installation of any software program or application, shall be presented on the principal screen or landing page of each advertisement or promotion and prior to the consumer downloading or installing such software program or application. Nothing contrary to, inconsistent with, or in mitigation of the material terms shall be used in any advertisement or promotion.

6. "Commerce" means as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

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7. “Express consent” shall mean that, prior to downloading or installing any software program or application to consumers’ computers: (a) respondents clearly and prominently disclose the material terms of such software program or application, including the nature and purpose of the program and the effects it will have on consumers’ computers, prior to the display of, and separate from, any final End User License Agreement; and (b) consumers indicate assent to download or install such software program or application by clicking on a button that is clearly labeled to convey that it will activate the download or installation, or by taking a substantially similar action.
8. “Legacy program” shall mean any software program or application that: (a) is owned or controlled by respondents; and (b) was installed on a consumer’s computer prior to October 1, 2005.
9. A “security vulnerability” is a weakness, flaw, or bug in a software program or application that can be used to increase access privileges to a computer system, compromise data stored on it, or control its operation.
10. “Uninstall” shall mean: (a) removing a software program or application from a computer; (b) removing all files, registry keys, and components that were added to the computer when such software program or application was initially installed; (c) removing all files, registry keys, and components that were subsequently generated by such software program or application; (d) restoring all files, registry keys, and components that such software program or application caused to be altered; and (e) preventing the reinstallation of such software program or application or any of its files, registry keys, or components without notice to, and consent from, consumers.
11. The “World Wide Web” or the “Web” is a system used on the Internet for cross-referencing and retrieving information. Documents (“pages” or Asites”) on the World Wide Web are most

Decision and Order

frequently formatted in a language called HTML or HyperText Markup Language, that supports links to other documents on the World Wide Web.

12. A “website” is a set of electronic files or documents, usually a home page and subordinate pages, readily viewable on a computer by anyone with access to the Web and standard Internet browser software.

13. A “web browser” is a software application used to view, download, upload, surf, or otherwise access documents (“pages” or Asites”) on the World Wide Web. Web browsers read coded documents that reside on servers, and interpret the coding into what users see rendered as a webpage or website. A user may retrieve and view a webpage or website by entering the Uniform Resource Locator (“URL”) or domain name of the webpage in the address bar of the web browser.

I.

IT IS ORDERED that respondents, directly or through any person, corporation, subsidiary, division, affiliate, or other device, shall not use any legacy program to display any advertisement to, or otherwise communicate with, a consumer’s computer. Notwithstanding the foregoing, within thirty (30) days of this order becoming final, respondents may send a maximum of three notices to consumers’ computers on which a legacy program is installed advising consumers: (a) that, pursuant to this order, consumers will no longer receive any advertising or communication from respondents; (b) how consumers may affirmatively authorize respondents to continue serving advertisements if consumers so choose; and (c) how consumers may remove all vestiges of the legacy program from their computers. For purposes of sub-part (b) of this Part I, respondents’ mechanism for obtaining authorization shall comply with the requirements for express consent as defined in this order.

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This notice shall be in the language and format of Attachment A hereto or other language approved by the Federal Trade Commission staff in its sole discretion.

II.

IT IS FURTHER ORDERED that respondents, directly or through any person, corporation, subsidiary, division, affiliate, or other device, shall not publish, disseminate, or distribute, or assist others in publishing, disseminating, or distributing, on or through the Internet, the World Wide Web, any bulletin board system, File Transfer Protocol (“FTP”), electronic-mail, instant message, webpage, or website, in or affecting commerce, any software script, code, program or other content that exploits a security vulnerability of any computer operating system, web browser, or other application to download or install onto any computer any software script, code, program or content.

III.

IT IS FURTHER ORDERED that respondents, directly or through any person, corporation, subsidiary, division, affiliate, or other device, in connection with the advertising, promotion, marketing, offering for sale, sale, or provision of any goods or services on or through the Internet, the World Wide Web, or any webpage or website, in or affecting commerce, shall not download or install, or assist others in downloading or installing, any software program or application without express consent.

IV.

IT IS FURTHER ORDERED that respondents, directly or through any person, corporation, subsidiary, division, affiliate, or other device, in connection with the advertising, promotion, marketing, offering for sale, sale, or provision of any goods or services on or through the Internet, the World Wide Web, or any webpage or website, in or affecting commerce, shall: (1) establish,

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implement, and maintain a functioning email address or other Internet-based mechanism for consumers to report complaints regarding respondents' practices; (2) clearly and prominently disclose the existence of such reporting mechanism on respondents' websites; (3) make reasonable efforts to associate each such complaint with the software, application, website, or good or service that is the subject of the complaint; and (4) receive and respond to such complaints, whether received directly or indirectly, in a timely manner via email or other Internet-based mechanism.

V.

IT IS FURTHER ORDERED that respondents, directly or through any person, corporation, subsidiary, division, affiliate, or other device, in connection with the advertising, promotion, marketing, offering for sale, sale, or provision of any goods or services on or through the Internet, the World Wide Web, or any webpage or website, in or affecting commerce, shall establish, implement, and thereafter maintain, a comprehensive program that is reasonably designed to ensure that affiliates obtain express consent before installing respondents' software program or application onto consumers' computers. Such measures shall include, at a minimum and without limitation, the following:

- A. Obtain contact information from any prospective participant in any affiliate program. In the case of a natural person, respondents shall obtain the prospective participant's first and last name, physical address, country, telephone number, email address, and complete bank account information as to where payments are to be made. In the case of corporations, partnerships, proprietorships, limited liability companies, organizations, associations, cooperatives, agencies, or other legal entities, respondents shall obtain the first and last name, physical address, country, telephone number, and email address for the natural person who owns, manages, or controls the

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prospective participant, and complete bank account information as to where payments are to be made;

- B. Prior to any such prospective participant's acceptance into any affiliate program, (1) provide each such person a copy of this order; (2) obtain from each such person a signed and dated statement acknowledging receipt of this order and expressly agreeing to comply with this order; and (3) provide written notice that engaging in acts or practices prohibited by this order will result in immediate termination of any affiliate program account and forfeiture of all monies earned or owed. Any electronic signature that respondents obtain pursuant to this Part must comply with the signature requirements of the Electronic Signatures in Global and National Commerce Act ("E-Sign Act"), 15 U.S.C. § 7001 *et seq.*;
- C. Require each affiliate to: (1) provide identifying information to respondents, including the same types of information as required by Subpart A of this Part, concerning that affiliate's sub-affiliates, employees, agents, or subcontractors who download or install any software program or application onto consumers' computers on respondents' behalf; (2) provide each such person with a copy of this order; and (3) obtain from each such person a signed and dated statement acknowledging receipt of this order and expressly agreeing to comply with this order. The identifying information referred to herein shall be required prior to that affiliate's participation in respondents' affiliate program or immediately after any change to that affiliate's sub-affiliates, employees, agents or sub-contractors;
- D. In accord with Part IV above: (1) establish, implement, and maintain a functioning email address or other Internet-based mechanism for consumers to report complaints to respondents regarding the practices of any affiliate

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program participant; (2) clearly and prominently disclose the existence of such reporting mechanism on respondents' websites; (3) make best efforts to associate each such complaint with the affiliate that is the subject of the complaint; and (4) receive and respond to such complaints, whether received directly or indirectly, in a timely manner via email or other Internet-based mechanism;

- E. Promptly and completely investigate any complaints that the respondents receive through Subpart D of this Part or any other source to determine whether any such participant is engaging in acts or practices prohibited by this order; and
- F. Following completion of the investigation required by Paragraph V(E) above: (1) immediately terminate any affiliate that respondents reasonably conclude has engaged or is engaging, directly or indirectly, in acts or practices prohibited by this order and cease payments to any such affiliate, and (2) immediately cease displaying any advertisements to, or otherwise communicating with, any consumers' computer that received respondents' software program or application through the prohibited acts or practices of such affiliate.

Provided, however, that this Part does not authorize or require respondents to take any action that violates any federal, state, or local law.

VI.

IT IS FURTHER ORDERED that respondents, directly or through any person, corporation, subsidiary, division, affiliate, or other device, in connection with the service of any advertisement displayed or caused to be displayed by respondents' software program or application on consumers' computers, in or affecting commerce, shall in each such advertisement clearly and

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prominently: (1) identify the program causing the display of such advertisement, together with language specifying that the advertisement is served by such program; (2) provide a hyperlink or other similar technology directly linking to a webpage that provides clear and prominent instructions for (a) uninstalling respondents' software or other application through which consumers received such advertisement; and (b) accessing respondents' complaint mechanism as required by Paragraph IV above. Such hyperlink shall be clearly worded to indicate these functions.

VII.

IT IS FURTHER ORDERED that respondents, directly or through any person, corporation, subsidiary, division, affiliate, or other device, in connection with the advertising, promotion, marketing, offering for sale, sale, or provision of any goods or services on or through the Internet, the World Wide Web, or any webpage or website, in or affecting commerce, shall not install or cause to be installed on consumers' computers any software program or application unless respondents provide a reasonable and effective means for consumers to uninstall the software or application, either through the computers' operating system Add/Remove utility, or other uninstall tool that can be readily located on consumers' computers. Respondents shall not require consumers to: access any website or download or install any additional software program or application; close or deactivate third-party firewalls, operating system firewalls, anti-spyware or anti-adware software, or virus protection software; or provide personally identifiable information in order to complete the uninstall.

VIII.

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of issuance of this order, respondents shall maintain, and upon request make available to the Federal Trade

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Commission for inspection and copying, a print or electronic copy of each document relating to compliance with the terms and provisions of this order, including but not limited to: all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, whether prepared by or on behalf of respondents, relating to such compliance; and all documents, whether prepared by or on behalf of respondents, that contradict, qualify, or call into question respondents' compliance with this order.

IX.

IT IS FURTHER ORDERED that respondents shall pay the sum of One Million Five Hundred Thousand Dollars (\$1,500,000) for payment to the Federal Trade Commission. This payment shall be made in the following manner:

- A. The payment shall be made by wire transfer or certified or cashier's check made payable to the Federal Trade Commission, no later than ten (10) days after the date this Order becomes final.
- B. In the event of any default in payment, which default continues for ten (10) days beyond the due date of payment, the amount due, together with interest, as computed pursuant to 28 U.S.C. § 1961 from the date of default to the date of payment, shall immediately become due and payable to the Commission.
- C. All funds paid pursuant to this Part, together with any accrued interest, shall be used by the Commission in its sole discretion to provide such relief as it determines to be reasonably related to respondents' practices alleged in the complaint, and to pay any attendant costs of administration. Such relief may include, but shall not be limited to, the rescission of contracts, payment of damages, and/or public notification respecting such unfair or deceptive acts or practices. If the Commission determines,

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in its sole discretion, that such relief is wholly or partially impracticable, any funds not so used shall be paid to the United States Treasury. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission. No portion of the payment as herein provided shall be deemed a payment of any fine, penalty, or punitive assessment.

- D. Respondents shall make no claim to or demand for the return of the funds, directly or indirectly, through counsel or otherwise; and in the event of any respondent's bankruptcy, respondents acknowledge that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

X.

IT IS FURTHER ORDERED that respondents shall, in connection with this action or any subsequent investigations related to or associated with the transactions or occurrences that are the subject of the Complaint, cooperate in good faith with the Commission and appear, or cause their officers, employees, representatives, or agents to appear, at such places and times as the Commission shall reasonably request, after written notice, for interviews, conferences, pretrial discovery, review of documents, and for such other matters as may be reasonably requested by the Commission. If requested in writing by the Commission, respondents shall appear, or cause their officers, employees, representatives, or agents to appear, and provide truthful testimony in any trial, deposition, or other proceeding related to or associated with the transactions or occurrences that are the subject of the Complaint, without the service of a subpoena.

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XI.

IT IS FURTHER ORDERED that respondents DirectRevenue LLC and DirectRevenue Holdings LLC, their successors and assigns, and respondents Joshua Abram, Daniel Kaufman, Alan Murray, and Rodney Hook shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of the order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

XII.

IT IS FURTHER ORDERED that respondents DirectRevenue LLC and DirectRevenue Holdings LLC, their successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in either corporation that may affect compliance obligations arising under this order, including but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address.

Provided, however, that with respect to any proposed change in either corporation about which respondents learns less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580.

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XIII.

IT IS FURTHER ORDERED that respondents Joshua Abram, Daniel Kaufman, Alan Murray, and Rodney Hook, for a period of five (5) years after the date of issuance of this order, each shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment conducted through the Internet, the World Wide Web, or any webpage or website. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580.

XIV.

IT IS FURTHER ORDERED that respondents DirectRevenue LLC and DirectRevenue Holdings LLC, their successors and assigns, and respondents Joshua Abram, Daniel Kaufman, Alan Murray, and Rodney Hook shall, within sixty (60) days after service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth the manner and form in which they have complied with this order.

XV.

This order will terminate on June 26, 2027, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

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- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that this order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Leibowitz dissenting.

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Attachment A

NOTICE: The Federal Trade Commission (“FTC”) recently alleged that DirectRevenue, LLC installed The Best Offers Network (“TBON”) advertising software on consumers’ computers without consumers’ consent. The TBON software sent you pop-up ads based on the websites you visited.

To settle this matter, DirectRevenue has stopped sending you ads and the TBON software on your computer is inactive. If you wish to completely uninstall the TBON software, click for Removal Instructions. If you wish to receive TBON’s ads again, click Receive Ads.

Click here for more information about the FTC Settlement Order.

Dissenting Statement

STATEMENT OF COMMISSIONER JON LEIBOWITZ

The consent order in this matter, to which the Commission has now accorded final approval, includes strong injunctive relief that will put an end to practices that allowed DirectRevenue to foist unwanted software on untold millions of consumers. The injunctive provisions, like those in *Zango, Inc., f/k/a 180 Solutions, Inc.*, will serve as a model to adware companies in future. But the \$1.5 million in monetary relief that the Commission obtained as part of the consent order is a disappointment because it apparently leaves DirectRevenue's owners lining their pockets with more than \$20 million from a business model based on deceit. Ben Elgin with Brian Grow, *The Plot To Hijack Your Computer*, Business Week Online, available at www.businessweek.com/magazine/content/06_29/b3993001.htm?chan=search (July 17, 2006).

According to the Commission's complaint, DirectRevenue downloaded adware on consumers' computers — in many cases without notice and consent. In other instances, to entice consumers into downloading its nuisance adware that plagued consumers' computers with pop-ups, it even bundled the adware with software that was supposed to *block* pop-ups^B the height of cynicism and disingenuousness. Moreover, the respondents went to great lengths to ensure that consumers could not uninstall this unwanted software, even employing ingenious (and malicious) technologies such as code that would reinstall it if the consumer attempted to remove it.

Even apart from the hundreds of thousands of hours people spent closing all of these pop-up ads, how many people lost important data because respondents' malware crashed their computer? How many people fruitlessly spent time trying to uninstall it? How many people junked perfectly good computers that were so burdened with unwanted adware that they were useless? One consumer captured the frustration and anger that consumers no doubt felt as they tried to deal with DirectRevenue's malware: "You people are EVIL personified,"

Dissenting Statement

Kevin Horton wrote... ‘I would like the four hours of my life back I have wasted trying to get your stupid uninvited software off my now crippled system.’ “ *The Plot To Hijack Your Computer, supra*. Given the number of unwitting DirectRevenue “customers” — according to the New York Attorney General’s complaint there were more than 150 million software installs, which likely served up literally billions of pop-ups¹ — Mr. Horton’s experience could not have been unusual. Some of the troubles came home to roost: the software made the computer of one of DirectRevenue’s own employees crash four times in one day, and the company had to send someone to fix a computer belonging to one of the company’s venture capital investors. *Id.*

I recognize that staff was able to negotiate comprehensive injunctive relief that will halt these illegal practices once and for all. The consent order, among other things, requires DirectRevenue to co-brand advertisements it serves and provide an effective method to uninstall their software — steps that should allow consumers unhappy with the pop-ups to identify their source and remove the software that generates them. Other provisions ensure that consumers get to choose whether they want the software in the first place. I also recognize that, in litigating this matter, staff would have been presented with novel issues that could pose risks.

¹ On a separate note, I want to commend the New York Attorney General’s office for its recent ground-breaking settlements — which included monetary relief — with Priceline, Travelocity, and Cingular Wireless in the context of its litigation against DirectRevenue. Among other things, the settlements require the companies to do due diligence before advertising via adware, and periodically follow up to see how their online ads are being delivered. These settlements are important because advertising dollars fuel the demand side of the nuisance adware problem by giving companies like DirectRevenue and their affiliates and sub-affiliates the incentive to expand their installed base, with or without consumers’ consent.

Dissenting Statement

That said, I cannot support a consent order that requires the respondents — particularly Joshua Abram, Daniel Kaufman, Alan Murray, and Rodney Hook, the officers and owners of DirectRevenue — to pay a total of only \$1.5 million. Venture capitalists poured more than \$20 million into DirectRevenue,² and between the companies' ad revenues and the venture capital money, millions of dollars flowed into the owners' pockets — \$23 million, according to Business Week. *See The Plot To Hijack Your Computer, supra*. Settlement always involves compromise, and staff must weigh the advantages of a settlement with the risks and costs of litigation. But in cases like this, I would rather go to trial and risk losing than settle for a compromise that makes an FTC action just a cost of doing business.

² See, e.g., Brad Stone, *Invasion of the PC Snatchers*, Newsweek (Dec. 13, 2006), available at <http://www.msnbc.msn.com/id/6653413/site/newsweek/>.

Analysis to Aid Public Comment

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from proposed respondents DirectRevenue LLC, DirectRevenue Holdings LLC, Joshua Abram, Daniel Kaufman, Alan Murray, and Rodney Hook, individually and as officers of DirectRevenue LLC (together, the respondents”). The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

General Allegations

The respondents develop, market, and distribute via Internet downloads advertising software programs (“adware”) — including programs with the names Aurora, Ceres, A Better Internet, OfferOptomizer, Twaintec, and Best Offers — that monitor consumers’ Internet use in order to display targeted pop-up ads. This matter concerns allegations that the respondents: (1) directly, and through a network of numerous affiliates and sub-affiliates, installed their adware on consumers’ computers without adequate notice or consent; (2) through affiliates and sub-affiliates, installed their adware on consumers’ computers entirely without notice or authorization; and (3) made their adware difficult for consumers to identify, locate, and remove.

The Commission’s complaint alleges that in numerous instances the respondents, either directly or through their affiliates and sub-affiliates, purported to offer content to the public, such as games, screen-savers, peer-to-peer file sharing software, and/or computer utility programs (“lureware”) and bundled the respondents’ adware with that content. The complaint further

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alleges that consumers often have been unaware that the respondents' adware would be installed on their computers because it was not adequately disclosed to them that downloading the lureware would result in installation of the respondents' adware. Often, no reference to the adware was made on websites offering the lureware or in the install windows. In other instances, information about the effects of the respondents' adware could only be ascertained, if at all, by clicking on one or more inconspicuous hyperlinks to reach multi-page user agreements containing such information. These inconspicuous hyperlinks were located in the corner of website homepages or in modal boxes provided by the computer's operating system.

The Commission's complaint also alleges that in numerous instances, the respondents, through affiliates and sub-affiliates, installed the respondents' adware on consumers' computers entirely without notice or authorization. The complaint cites as an example unauthorized installations conducted by the respondents' sub-affiliate, Seismic Entertainment Productions, Inc., via an executable file that exploited a vulnerability in Windows Media Player.

The Commission's complaint further alleges that the respondents made identifying, locating, and removing their adware extremely difficult for consumers. Among other practices, the respondents: failed to identify the name or source of the adware in pop-up ads to enable consumers to locate the adware on their computers; stored adware files in locations on consumers' hard drives that are rarely accessed by consumers, such as in the core systems software folders; failed to list the adware in the Windows Add/Remove utility ("customary location for user-initiated uninstall of software programs); where the adware was listed in the Windows Add/Remove utility, listed it under names resembling core systems software or applications; installed technology on consumers' computers to reinstall the adware when it had been uninstalled by consumers through the Windows Add/Remove utility or deleted by anti-spyware or anti-adware programs; and when a separate uninstall tool was provided,

Analysis to Aid Public Comment

required consumers to follow a ten-step procedure including downloading additional software and deactivating firewalls, thereby exposing computers to security risks.

Deception Allegation

The Commission's complaint alleges that by offering content over the Internet such as browser upgrades, utilities, games, screensavers, peer-to-peer file sharing software and/or entertainment content, without disclosing adequately that this content was bundled with the respondents' adware, the respondents committed a deceptive practice. The bundling of the respondents' adware, which monitors consumers' Internet use and causes them to receive pop-up advertisements, would be material to consumers in their decision whether to download the other software programs and/or content.

Unfairness Allegations

The Commission's complaint also alleges that it was an unfair practice for the respondents to install on consumers' computers, entirely without their knowledge or authorization, adware that could not be reasonably identified, located, or removed by consumers. In addition, the complaint alleges that it was an unfair practice, in and of itself, for the respondents not to provide consumers with a reasonable means to identify, locate, and remove the respondents' adware from their computers. The complaint further alleges that these practices have caused or are likely to cause substantial consumer injury that is not reasonably avoidable by consumers themselves and not outweighed by benefits to consumers or competition.

The Proposed Consent Order

The proposed consent order contains provisions designed to prevent the respondents from engaging in similar acts and

Analysis to Aid Public Comment

practices in the future and to halt continuing harm caused by the respondents' prior unlawful practices.

Part I of the proposed order prohibits the respondents from displaying any advertisement to, or otherwise communicating with, any consumer's computer on which the respondents' adware was installed prior to October 1, 2005 ("legacy program"). Part I permits the respondents, within thirty days of entry of the final order, to send a maximum of three notices to legacy program users informing them: that, pursuant to the FTC settlement, they will no longer receive any advertising or communication from the respondents; how they may affirmatively authorize the respondents to continue serving advertisements if consumers so choose; and how they may fully remove the respondents' adware from their computers. If consumers fail to respond to the notice, the adware will remain inactive.

Parts II and III prohibit the respondents from, or assisting others in, installing software onto any computer by exploiting security vulnerabilities or downloading or installing any software program or application without consumers' express consent. "Express consent" is defined in the proposed order to require clear and prominent disclosure of material terms prior to and separate from any end user license agreement, and to require consumer activation of the download or installation by clicking a button or a substantially similar action.

Part IV requires the respondents to establish, implement, and maintain a clearly disclosed, user-friendly mechanism through which consumers can report and the respondents can timely address complaints regarding the respondents' practices.

Part V requires the respondents to establish, implement, and maintain a comprehensive program that is reasonably designed to require affiliates to obtain express consent before installing the respondents' software onto consumers' computers. Part V also contains sub-parts mandating certain measures the respondents must take to monitor their distribution network.

Analysis to Aid Public Comment

Part VI requires the respondents to identify advertisements served via the respondents' adware in order for consumers to easily locate the source of the advertisement, easily access the respondents' complaint mechanism, and access directions on how to uninstall such adware.

Part VII requires the respondents to provide reasonable and effective means for consumers to uninstall the respondents' adware.

Part IX requires the respondents to pay \$1.5 million to the Commission. This payment may be used in the Commission's sole discretion to provide appropriate relief, which may include, but is not limited to, the rescission of contracts, payment of damages, and/or public notification respecting such unfair or deceptive acts or practices. If the Commission determines that such relief is wholly or partially impracticable, any or all such funds shall be paid to the United States Treasury.

Part X requires the respondents to cooperate with the Commission in this action or any subsequent investigations related to or associated with the transactions or the occurrences that are the subject of the Complaint.

The remaining order provisions govern record retention (Part VIII), order distribution (Part XI), ongoing reporting requirements (Parts XII and XIII), filing a compliance report (Part XIV). Part XV provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

SONY BMG MUSIC ENTERTAINMENT

CONSENT ORDER, ETC. , IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-4195; File No. 062 3019
Complaint, June 28, 2007 — Decision, June 28, 2007*

This consent order addresses software that Sony BMG Music Entertainment embedded on its music CDs that restricted use of the audio files and also caused security vulnerabilities on computers. The order, among other things, requires Sony BMG to clearly disclose on its packaging that a CD will install software, has copying limits, and can only be used on certain playback devices. The order bars the respondent from installing content protection software from a CD without consumers' authorization, and requires clear disclosure on the packaging if a CD can be used only by the installation of such software. The order prohibits the respondent from using any information it had collected through enhanced connectivity CDs prior to this order for any marketing purpose. After the date of the order, the respondent is prohibited from collecting any information using its enhanced connectivity CDs unless it obtains consumers' consent to do so, and must disclose this condition on the product packaging. The order also prohibits Sony BMG from preventing consumers from readily locating or removing the software from the computer and requires the respondent to provide a reasonable means to uninstall such software. The respondent must provide free uninstall tools and patches for XCP and MediaMax 5.0 on its website, and must notify consumers of the XCP and MediaMax 5.0 vulnerabilities and tell them how to fix their computers. In the case of MediaMax 5.0 CDs, Sony BMG must disclose on the packaging that, if used on a computer, these CDs will create security vulnerabilities that consumers can eliminate with a free patch from the respondent's website, and that these CDs will establish an Internet connection through which Sony BMG will collect information from, and send back advertising to, the computer. In addition, the order requires that Sony BMG extend the time during which consumers may exchange CDs, and reimburse consumers up to \$150 of their costs to repair computer damage resulting from their attempts to remove the XCP content protection software before an uninstall tool was readily available.

Complaint

Participants

For the *Commission: Matthew Daynard, Stacey Ferguson, and Tracy Shapiro.*

For the *Respondent: Jeremy Feigelson and Asim Rehman, Debevoise & Plimpton; and corporate counsel Jennifer Pariser.*

COMPLAINT

The Federal Trade Commission, having reason to believe that SONY BMG Music Entertainment, a general partnership, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent SONY BMG Music Entertainment (“respondent” or “SONY BMG”) is a Delaware general partnership with its principal office or place of business at 550 Madison Avenue, New York, New York 10022. SONY BMG distributes music CDs in the United States under various labels.
2. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.
3. Respondent has licensed, placed on over 100 music CD titles, and installed on consumers’ computers content protection software programs (also known in the music industry as “Digital Rights Management” or “DRM” software). SONY BMG used three types of DRM software on these CDs. SONY BMG first offered for sale CDs containing “XCP” software in April 2005. SONY BMG has sold approximately 3 million XCP CDs. A predecessor to SONY BMG first offered for sale CDs containing “MediaMax version 3.0” software in 2003, and in January 2005 SONY BMG offered for sale CDs containing “MediaMax version

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5.0" software. SONY BMG has sold approximately 8.4 million MediaMax 3.0 CDs and 5.7 million MediaMax 5.0 CDs.

Background

4. Unlike CDs that do not contain DRM software, the audio files on SONY BMG content-protected CDs cannot be accessed on a Windows-based computer's CD drive unless the consumer installs additional software from those CDs, specifically SONY BMG's DRM software.

5. In addition, in order to initially access the audio files and other digital content, all XCP CDs and MediaMax CDs require the use of a proprietary media player software program that is bundled with the CD (the "bundled media player"). Certain other SONY BMG music CDs contain a bundled proprietary media player, but no DRM software.

6. On the jewel case of respondent's content-protected CDs, there is no adequate reference to the need to install DRM software before being able to access the CD's content on a computer.

Installation of DRM Software

7. When a user first inserts a content-protected CD into a computer, an End User License Agreement ("EULA") appears, requiring the user to accept or reject its terms. Users must accept the EULA to access the audio files and other digital content on the CD.

8. If the user rejects the EULA, the CD automatically ejects from the computer and the user cannot access its content. However, in the case of MediaMax 5.0 CDs, certain files of that content protection software will be installed and remain on a user's computer, even if the user rejects the EULA.

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9. If the user accepts the EULA, the software is installed and becomes operational, and the user gains access to the audio files and other digital content on the CD.

Transmission of Information by the Bundled Media Player

10. The bundled media player runs directly from the CD, launches automatically after acceptance of the EULA, and is pre-set to display for the consumer an image of the artist whose work the CD contains. In addition, if the user's computer is connected to the Internet, the media player on all XCP CDs, certain MediaMax 5.0 CDs, and other CDs that are not content-protected (together, "Enhanced Connectivity CDs") establishes a connection with Internet servers. Through this connection, the user's or proxy server's Internet Protocol ("IP") address and a numerical key identifying the album being played transmit from the consumer's computer to the servers. The servers also register the date and time of the transmission. Based on the information received, the bundled media player retrieves updated images of artists and other targeted images, if any, as well as promotional messages and sends them to the user's computer for display.

11. Respondent does not disclose to consumers, on the jewel case or otherwise prior to purchase, that a proprietary media player contained on the CDs will operate on the user's computer to transmit information to SONY BMG, if the user's computer is connected to the Internet, and that this information will be used to retrieve and send updated images of artists and other targeted images, if any, as well as promotional messages to the user's computer for display.

Effects of the DRM Software and the Bundled Media Player

12. The XCP and MediaMax DRM software limit consumers' use of the music CDs they have purchased by: (1) limiting to three the number of physical copies of the CD that the consumer can make directly from the CD using the computer; and (2) allowing the

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direct transfer of the CD's audio files only to playback devices that use secure Windows formats and, in some cases, the Sony ATRAC format.

13. The XCP software contains a cloaking technology named "Network Control Manager" that hides the existence of the XCP software from the Windows Operating System. The cloaking technology creates a security vulnerability because malicious software that enters users' computers can exploit the cloaking technology to conceal itself from the computers' security software.

14. MediaMax 5.0 also creates a security vulnerability in users' computers, known as a "privilege escalation vulnerability," that could allow third parties who gain physical access to the computer but who have lower-privilege access to exercise full control over a consumer's computer running the Windows operating system. The files creating the security vulnerability are installed before the user accepts or declines the EULA.

15. XCP and MediaMax software are difficult to locate on a user's computer because: (1) neither XCP nor MediaMax software appears in the commonly accessed "Add/Remove Programs" utility in the Windows operating system; (2) XCP software is named "Plug and Play Device Manager" in the services registry key on users' computers rather than being named "XCP" or "ADRM" software; and (3) XCP software's cloaking technology hides its existence from the Windows operating system and thus from security software.

16. XCP and MediaMax are difficult to remove from a user's computer because: (1) an uninstall tool was not provided with these programs; and (2) prior to December 2005, to obtain an uninstall tool for either of these programs, users had to visit SONY BMG's or the software vendor's website, fill out a form that required the user to disclose her e-mail address, then wait for

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an e-mail, download additional software, and install a program that was designed to remove the files.

VIOLATIONS OF THE FTC ACT

17. Respondent has advertised, offered for sale, and sold music CDs containing XCP and MediaMax content protection software. Through the advertising, offering for sale, and sale of these music CDs, respondent has represented, expressly or by implication, that consumers will be able to use the CDs as they are commonly used on a computer: to listen to, transfer to playback devices, and copy the audio files contained on the CD for personal use. Respondent has failed to disclose, or has failed to disclose adequately, that the XCP and MediaMax CDs will: (1) install software on consumers' computers; (2) through the installed software, limit to three the number of physical copies of the CD that the consumer can make directly from the CD using the computer; and (3) through the installed software, allow the direct transfer of the music files only to playback devices that use the secure Windows formats or the Sony ATRAC format. These facts would be material to consumers in their purchase or use of the CDs. Respondent's failure to disclose these facts, in light of the representation made, was, and is, a deceptive practice.

18. Respondent has advertised, offered for sale, and sold certain music CDs that contain a bundled proprietary media player. Through the advertising, offering for sale, and sale of these music CDs, respondent has represented, expressly or by implication, that consumers will be able to listen to the music on these CDs on their computers. Respondent has failed to disclose, or has failed to disclose adequately, that, if consumers' computers are connected to the Internet, the CDs' bundled media player will establish a connection with Internet servers through which the user's or proxy server's Internet Protocol ("IP") address and a numerical key identifying the album being played will be transmitted from the consumer's computer to the servers, and that this information will be used to display images and/or promotional messages on

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consumers' computers that are retrieved from those servers. These facts would be material to consumers in their purchase or use of the CDs. Respondent's failure to disclose these facts, in light of the representation made, was, and is, a deceptive practice.

19. Through the means described in Paragraphs 6 through 9, respondent has caused the XCP and MediaMax 5.0 software to be installed on consumers' computers without adequate notification and consent. As described in Paragraphs 13 and 14, the software has exposed consumers to security risks. Respondent's practices have caused, or are likely to cause, substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. These practices were, and are, unfair acts or practices.

20. Through the means described in Paragraphs 7 through 9, respondent has caused the XCP and MediaMax 3.0 and 5.0 content protection software to be installed on consumers' computers. As described in Paragraphs 15 and 16, consumers were not able to locate and/or remove this software through the use of reasonable efforts. Consumers have, individually or collectively, incurred substantial costs in locating and removing this software from their computers and in stopping its harmful effects. Among other things, if consumers manually removed the XCP software prior to the time that SONY BMG made an uninstall tool readily available, the software disabled the audio CD drive on the computer, rendering the consumer's CD-ROM drive inoperable. Respondent's practices have caused, or are likely to cause, substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. These practices were, and are, unfair acts or practices.

21. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Decision and Order

THEREFORE, the Federal Trade Commission this twenty-eighth day of June, 2007, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the Respondent with violation of the Federal Trade Commission Act; and

The Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the Respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the Respondent that the law has been violated as alleged in such complaint, or that any of the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondent has violated the Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the

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public record for a period of thirty (30) days, and having duly considered the comments received from interested persons pursuant to Section 2.34 of its Rules, and having modified the Decision and Order in one respect, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent SONY BMG Music Entertainment is a Delaware general partnership with its principal office or place of business at 550 Madison Avenue, New York, New York 10022.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER**DEFINITIONS**

For purposes of this order, the following definitions shall apply:

1. Unless otherwise specified, “respondent” shall mean SONY BMG Music Entertainment, its successors and assigns, and its officers, agents, representatives, and employees.
2. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
3. “Clear[ly] and prominent[ly]” shall mean that:
 - A. On or affixed to product packaging, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

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- B. On the screen of a consumer's computer, the disclosure shall be unavoidable and shall be presented prior to the consumer installing any content protection software or, if the disclosure is related to Internet connectivity, prior to causing any transmission to respondent about consumers, their computers, or their use of a covered product through Internet servers. The disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. The disclosure shall be in understandable language and syntax.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used on any advertising, product packaging, or computer screen.

4. "Content protection software" shall mean "XCP," "MediaMax," and any other software residing on a CD that acts to limit a consumer's ability to copy or distribute the CD's audio files or other digital content.
5. "Covered product" shall mean any audio compact disc (CD) intended for commercial release for which SONY BMG controls the master files used to produce the CD.
6. "Enhanced connectivity" shall mean a software feature on a covered product (usually contained in a media player) that permits or causes a computer playing the product while connected to the Internet to communicate information over the Internet about the consumer, the consumer's computer, or his/her use of the covered product.
7. "Operating system" means the computer system software responsible for managing and controlling the computer's hardware and computer resources and its basic operations, including providing a platform on which to download, install, and run any software program.

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8. “Product packaging” means the physical container in which the covered product is delivered to a consumer, such as a jewel case or digipak, or material attached to or surrounding the physical container, such as shrinkwrap.

9. “Uninstall” means: (a) removing a software program from a computer; (b) removing all files, registry keys, and components that were added to the computer when such software program was initially installed; (c) removing all files, registry keys, and components that were subsequently generated by such software program; and (d) restoring all files, registry keys, and components that such software program caused to be altered.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product that contains content protection software, in or affecting commerce, shall clearly and prominently disclose:

- A. On the front of the product packaging, that important consumer information regarding limits on copying and use can be found on the rear of the product packaging, if that is the case; and
- B. On the product packaging, that the software: (1) will install on consumers’ computers, if that is the case; (2) will limit the number of physical copies that can be made from the product, if that is the case, and the number of permitted copies; and (3) allows the direct transfer of the product’s audio files or other digital content only to playback devices that use secure Windows formats or the Sony ATRAC format, if that is the case.

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II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product that contains content protection software, in or affecting commerce, shall not install or cause to be installed any such software on the hard disc drive of a consumer's computer unless respondent clearly and prominently discloses on his/her computer screen the information required to be disclosed under Part I of this order, and the consumer indicates his/her assent to install such software by clicking on a button or link that is clearly labeled or otherwise clearly represented to convey that it will activate the installation, or by taking a substantially similar action.

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product that contains content protection software, in or affecting commerce, shall:

- A. Clearly and prominently disclose on the product packaging that the software will prevent consumers who decline to install the content protection software from listening to or accessing the product's audio files via computer, if that is the case; and
- B. Clearly and prominently disclose on the computer screen that the software will prevent consumers who decline to install the content protection software from listening to or accessing the product's audio files via computer, if that is the case; and obtain the consumer's assent to install such software by clicking on a button or link that is clearly

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labeled or otherwise clearly represented to convey that it will activate the installation, or by taking a substantially similar action.

IV.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product with enhanced connectivity manufactured prior to the date that this order becomes final, in or affecting commerce, shall not:

- A. Use any information about consumers, their computers, or their use of the covered product collected over the Internet for any marketing purpose, and respondent shall destroy such data within three days of its receipt; and
- B. Use any information about consumers, their computers, or their use of the covered product collected over the Internet to deliver any marketing messages.

V.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product with enhanced connectivity, in or affecting commerce, shall:

- A. Clearly and prominently disclose on the product packaging that the software will prevent consumers who decline to permit transmission of information over the Internet about them, their computers, or their use of the product from listening to or accessing the product's audio files via computer, if that is the case; and

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- B. Prior to causing transmission via the Internet of information about consumers, their computers, or their use of the product:
1. Clearly and prominently disclose on their computer screen that such information will be transmitted to respondent and/or that images or promotional messages will be transmitted to their computers; and
 2. Obtain the consumer's assent to its transmission by clicking on a button or link that is clearly labeled or otherwise clearly represented to convey such assent, or by taking a substantially similar action.

VI.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product, in or affecting commerce, shall not install or cause to be installed on a consumer's computer any content protection software that prevents the consumer from readily locating or removing the software, including but not limited to by: (1) hiding or cloaking files, folders, or directories; (2) using random or misleading names for files, folders, or directories; or (3) misrepresenting the purpose or effect of files, directory folders, formats, or registry entries.

VII.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product, in or affecting commerce, shall:

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- A. Not install or cause to be installed on a consumer's computer any content protection software unless respondent provides a reasonable and effective means for consumers to uninstall the software;
- B. For a period of two years after the date that this order becomes final, continue to provide free of charge to consumers a program and a patch that uninstalls XCP and MediaMax content protection software and removes the "Aprivilege escalation vulnerability" associated with any covered product that contains MediaMax 5.0 content protection software, respectively; and
- C. For a period of two years after the date that this order becomes final, post a notice on its website with information for consumers about the uninstall programs and security patch referred to in Part VII.B. of this order. This notice shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. This notice shall be in understandable language and syntax.
- D. For a period of 12 months after the date that this order becomes final, continue its current program of purchasing Internet browser premium keywords ("keyword buys") to give consumers notice of the security vulnerability associated with any covered product that contains XCP or MediaMax 5.0 software and of the steps that they should take to protect their property.

Provided, that, the means that respondent provides to consumers to uninstall software pursuant to this Part need not erase information or data stored on the computer regarding whether the consumer has reached the limit of permitted copies of the covered product, or other comparable content protection data, so long as: (1) prior to installing the software, the respondent has clearly and prominently disclosed on the consumer's computer

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screen that uninstalling the software will not erase information or data stored on the computer regarding whether the user has reached the limit of permitted copies of the product, or other comparable content protection data, if that is the case; and (2) the information or data that is not erased does not impair, hinder, or otherwise adversely affect the operation or performance of the computer or its operating system.

VIII.

IT IS FURTHER ORDERED that, to provide redress to consumers, respondent shall:

- A. Fully comply with the XCP and MediaMax exchange and compensation program terms contained in the class action settlement approved by the court in *In re SONY BMG CD Technologies Litigation*, No. 05 CV 9575 (NRB) (S.D.N.Y.) (May 24, 2006);
- B.
 1. For a period of 180 days after December 31, 2006, continue to accept claims and provide exchange and compensation benefits in a manner that is substantially similar to the program referred to in Part VIII.A. of this order.
 2. For a period of 180 days after December 31, 2006, post a notice on its website with information for consumers about the exchange and compensation benefits described in Part VIII.B.1 of this order. This notice shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. This notice shall be in understandable language and syntax.
- C. Continue to provide the exchange and compensation benefits contained in Sections III.B.1 and 2 and III.C. of the settlement described in Part VIII.A. of this order to consumers who

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purchased CDs containing the XCP content protection software before December 31, 2006;

- D. 1. At the request of any consumer who purchased any covered product that contains XCP content protection software, reimburse the consumer up to \$150 spent to repair his or her computer as a result of damage to the computer that was a direct result of that consumer's efforts to uninstall XCP prior to the issuance of the current version of the SONY BMG uninstaller. Any claim for compensation must be submitted within 180 days after the date that this order becomes final and on a form to be made available on SONY BMG's website no later than the date that this order becomes final. In considering such claims, respondent may require reasonable proof as to the validity of the claim; and
2. For a period of 180 days after the date that this order becomes final, post a notice on its website with information for consumers about its repair reimbursement program. This notice shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. This notice shall be in understandable language and syntax.

IX.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product that contains MediaMax content protection software, in or affecting commerce, shall:

Decision and Order

- A. Prior to the release to retailers of any covered product that contains MediaMax 3.0 or 5.0 content protection software, clearly and prominently disclose on the product packaging that:
1. The software will install on consumers' computers;
 2. The software will limit to three the number of physical copies that can be made from the product;
 3. The software allows the direct transfer of the product's audio files or other digital content only to playback devices that use secure Windows formats or the Sony ATRAC format; and
 4. The software will prevent consumers who decline to install the content protection software from listening to or accessing the product's audio files via computer.
- B. Prior to the release to retailers of any covered product that contains MediaMax 5.0 content protection software, clearly and prominently disclose on the product packaging that:
1. The CD will establish an Internet connection through which it will transmit to respondent information about consumers, their computers, or their use of the covered product and that respondent will transmit targeted images or promotional messages to consumers, if that is the case; and
 2. The CD will create a security vulnerability that consumers can eliminate with a patch that they can download, free of charge, from respondent's website, and include the website address.

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- C. For a period of two years after the date that this order becomes final, expand its financial incentives to retailers program pursuant to the class action settlement referred to in Part VIII.A. of this order to include the return of any covered product that contains MediaMax 5.0 software.

X.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall, for five (5) years after the last date of sale or distribution of any covered product containing content protection software or enhanced connectivity software features, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. Copies of all different versions of disclosures on product packaging, End User License Agreements, and associated disclosures for such products required by this order; and
- B. All tests, reports, studies, surveys, demonstrations, or similar credible evidence in its possession or control that contradict, qualify, or call into question respondent's representations about the nature, purpose, function, or effects of content protection software included in such product on users' use of such product or on their computers, including complaints and other communications with consumers or with governmental or consumer protection organizations.

XI.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to compliance with this order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this

Decision and Order

order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

XII.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

XIII.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Decision and Order

XIV.

This order will terminate on June 28, 2027, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Analysis to Aid Public Comment

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Sony BMG Music Entertainment (“Sony BMG” or “respondent”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

This matter involves respondent’s use of content protection software, also known as Digital Rights Management (DRM) software, embedded on its music CDs and the use of a proprietary media player on many of these CDs that must be used to listen to them. When played on a Windows-based computer, Sony BMG’s DRM software is installed on consumers’ computers and restricts the use of the audio files and other digital material on the CDs. In addition, the “XCP” and “MediaMax 5.0” versions of respondent’s DRM software create security vulnerabilities on consumers’ computers, and, when consumers’ computers are connected to the Internet, the media player monitors users’ listening habits and sends back relevant advertisements.

According to the FTC complaint, Sony BMG engaged in unfair and deceptive practices in distributing its content-protected CDs. The complaint contains two unfairness charges. The first count alleges that it was unfair for respondent to cause its DRM software, which exposed consumers’ to security risks, to be installed on consumers’ computers without adequate notification and consent. As alleged in the complaint, respondent’s “XCP” DRM software contains cloaking technology that hides the existence of the software from the Windows Operating System.

Analysis to Aid Public Comment

The cloaking technology creates a security vulnerability because malicious software that enters users' computers can exploit the cloaking technology to conceal itself from the computers' security software. In addition, respondent's "MediaMax 5.0" DRM software creates a "privilege escalation vulnerability" that could allow third parties who gain physical access to the computer but who have lower-privilege access to exercise full control over a consumer's computer running the Windows Operating System. Consumers could not reasonably prevent this injury because they did not know of the DRM software's existence or its harmful effects. The complaint therefore alleges that respondent's practices caused, or were likely to cause, substantial consumer injury that consumers could not reasonably avoid and which was not outweighed by countervailing benefits to consumers or competition.

The complaint further alleges as unfair respondent's practices in causing its DRM software that made computers insecure to be installed without providing a reasonable means to locate and/or remove it. As alleged in the complaint, Sony BMG's use of cloaking technology and the failure of the "XCP" and "MediaMax 5.0" software to appear in the Windows "Add/Remove" utility hid the existence of the software from consumers and their operating systems. In addition, respondent failed to make an uninstall tool readily available. The complaint alleges that, as a result, consumers incurred substantial costs in locating and removing the DRM software from their computers and in stopping its harmful effects. Thus, the complaint alleges that respondent's practices in failing to provide a reasonable means to locate and remove its DRM software caused, or were likely to cause, substantial consumer injury that could not be reasonably avoided by consumers and did not provide countervailing benefits to consumers or competition.

In addition, the complaint challenges, as deceptive, Sony BMG's failure to disclose adequately that its music CDs install onto computers software that materially limits their use by limiting the number of disc-to-disc copies that consumers can

Analysis to Aid Public Comment

make, and by restricting consumers' ability to transfer to and play music on digital playback devices other than Sony BMG and Microsoft devices. Finally, the proposed complaint alleges as deceptive respondent's undisclosed inclusion of its media player, which monitors the artists that consumers listen to on their computers and displays advertising.

The proposed consent order contains provisions designed to enhance and expand upon respondent's programs to provide refunds to consumers and includes injunctive relief to protect against future consumer injury from similar acts and practices.

Part I of the proposed order requires Sony BMG to include on the front cover of the packaging for any content-protected CD a clear and prominent disclosure that important consumer information regarding limits on copying and use can be found on the rear of the product packaging. This provision also requires respondent to disclose more fully on the back cover that the CD will install software, if that is the case; has copying limits; and can only be used on certain playback devices. Part II bars Sony BMG from installing content protection software from a CD without consumers' authorization. Specifically, before such software can be installed, respondent must disclose on the consumer's computer screen the information required by Part I and the consumer must have signaled her consent by clicking on a properly labeled button or taking a similar action. Further, in cases where Sony BMG conditions consumers' use of its CDs on their installing content protection software onto their computers, Part III requires that respondent clearly and prominently disclose this requirement on the product packaging.

Regarding "enhanced connectivity" CDs (CDs containing respondent's proprietary media player that transmits non-personally identifiable information from consumers' computers to respondent and displays promotional messages on consumers' computers), Part IV of the proposed order, which applies to enhanced connectivity CDs that Sony BMG sells prior to the date

Analysis to Aid Public Comment

that this order becomes final, prohibits respondent from using any information it collects through enhanced connectivity CDs for any marketing purpose and requires respondent to destroy such information within three days of receipt. Part IV also prohibits Sony BMG from using any such information to deliver advertising or marketing messages. Part V, which applies to enhanced connectivity CDs that Sony BMG sells after the order becomes final, requires that if, to use a CD on a computer, consumers must agree to have information collected about them, Sony BMG must disclose this condition clearly and prominently on the product packaging. Further, Part V prohibits Sony BMG from collecting any information using its enhanced connectivity CDs, unless it first discloses that the CD will collect information and/or send back advertising to the computer and obtains consumers' consent to do so.

In connection with the marketing, advertising, or distributing of any CD, Part VI prohibits Sony BMG from installing content protection software that prevents consumers from readily locating or removing the software from the computer. This prohibition includes, but is not limited to, hiding, cloaking, using misleading or random names for, and misrepresenting the purpose or effects of any file, folder, or directory associated with such software.

Part VII requires that respondent provide a reasonable and effective means to uninstall its content protection software. Part VII also provides that Sony BMG is not required to uninstall the "counter" file of its software that determines whether the consumer has exceeded the permitted number of copies on the computer, as long as respondent discloses on consumers' computer screens, prior to installing the content protection software, that this file will not be removed and the file does not impair, hinder, or otherwise adversely affect the computer's operation. Part VII further requires that Sony BMG, for a period of two years from the date that the order becomes final, continue to provide free uninstall tools and patches for XCP and MediaMax 5.0 and to disclose the existence of these tools on its website. In addition, Part VII of the order requires that Sony BMG

Analysis to Aid Public Comment

notify consumers of the XCP and MediaMax 5.0 vulnerabilities and how to fix their computers, by extending its existing program of purchasing key words on search engines to one year after the date the order becomes final, and also by publishing a notice through its website.

Part VIII of the proposed order makes clear that all purchasers, prior to December 31, 2006, of XCP and MediaMax CDs are eligible to participate in its ongoing compensation program. Part VIII also requires Sony BMG to extend the period for accepting exchanges to six months after December 31, 2006. Further, Part VIII of the order requires that Sony BMG reimburse consumers up to \$150 of their costs to repair computer damage resulting from their attempts to remove the XCP content protection software before respondent made an uninstall tool readily available. Finally, Part VIII requires Sony BMG to publish notices on its website informing consumers about the extended period for exchanging CDs and the “repair reimbursement” program.

Part IX of the proposed order requires that, before selling MediaMax CDs from its inventory, Sony BMG must make applicable disclosures about copying and use restrictions on the product packaging. In the case of MediaMax 5.0 CDs, Sony BMG also must disclose on the packaging that, if used on a computer, these CDs will create security vulnerabilities that consumers can eliminate with a patch that they can download, free of charge, from respondent’s website, and establish an Internet connection through which Sony BMG will collect information from, and send back advertising to, the computer. Also, with respect to MediaMax 5.0 CDs that Sony BMG has sold to retailers, Part IX requires that it offer retailers the same financial incentives to return these CDs as those for XCP CDs. Further, Sony BMG must offer these incentives for two years after the date the order becomes final.

Analysis to Aid Public Comment

Parts X through XIII of the proposed order are record-keeping and reporting provisions. Part XIV provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

**INTERLOCUTORY, MODIFYING, VACATING,
AND MISCELLANEOUS ORDERS**

IN THE MATTER OF

**SOUTH CAROLINA STATE BOARD OF
DENTISTRY**

Docket No. 9311 – Order, March 15, 2007

**ORDER WITHDRAWING MATTER FROM ADJUDICATION FOR
THE PURPOSE OF CONSIDERING A PROPOSED CONSENT
AGREEMENT**

Complaint Counsel and Respondent having jointly moved that this matter be withdrawn from adjudication to enable the Commission to consider a proposed Consent Agreement; and

Complaint Counsel and Respondent having submitted a proposed Consent Agreement containing a proposed Decision and Order, executed by the Respondent and by Complaint Counsel and approved by the Director of the Bureau of Competition, which, if accepted by the Commission, would resolve this matter in its entirety;

IT IS ORDERED, pursuant to Rule 3.25(c) of the Commission Rules of Practice, 16 C.F.R. § 3.25(c) (2006), that this matter in its entirety is hereby withdrawn from adjudication, and that all proceedings before the Administrative Law Judge are hereby stayed pending a determination by the Commission with respect to the proposed Consent Agreement, pursuant to Rule 3.25(f), 16 C.F.R. § 3.25(f); and

IT IS FURTHER ORDERED, pursuant to Rule 3.25(b) of the Commission Rules of Practice, 16 C.F.R. § 3.25(b), that the proposed Consent Agreement shall not be placed on the public record unless and until it is accepted by the Commission.

By the Commission.

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IN THE MATTER OF

RAMBUS INCORPORATED

Docket No. 9302 – Order, March 16, 2007

**ORDER GRANTING IN PART AND DENYING IN PART
RESPONDENT’S MOTION FOR STAY OF FINAL ORDER PENDING
APPEAL**

The Commission issued its Opinion and Final Order in this matter on February 2, 2007. The Opinion and Final Order were served on Rambus and its counsel on February 9, 2007, and the Final Order will therefore become effective on April 12, 2007. 16 C.F.R. § 3.56(a); *accord* 15 U.S.C. § 45(g)(1),(2). Pursuant to Rule 3.56 of the Commission’s Rules of Practice, 16 C.F.R. § 3.56, Respondent Rambus Inc. moved for a stay of the Final Order pending judicial review on February 16, 2007. The Commission has determined to grant Respondent’s motion in part and to deny it in part.

Accordingly:

IT IS ORDERED THAT enforcement of, and Respondent’s obligation to comply with, Paragraphs IV, V.A., VI, and VII of the Final Order in this matter be, and they hereby are, stayed in part, upon the filing of a timely petition for review of the Final Order in an appropriate court of appeals and until the court of appeals issues its mandate, in accordance with the following conditions:

1. Respondent will be permitted to acquire, and to seek to acquire, rights to (but not possession of) fees, royalties, payments, judgments, and other consideration in excess of that permitted by Paragraphs IV, V.A., VI, and VII of the Final Order (“Excess Consideration”), provided that:

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- a. all Excess Consideration is (1) collected and held pursuant to an escrow agreement by an escrow agent that has received the approval of the Commission, which approval shall not be unduly delayed, and only in a manner that has received the approval of the Commission, or (2) payable pursuant to a contingent contractual obligation by the party paying such Excess Consideration (“Payer”);

provided, however, that if Respondent proposes an escrow agent and manner of collecting Excess Consideration to the Commission before April 12, 2007, an escrow agent may, for a period of up to six months, collect Excess Consideration accruing prior to the grant of such approval, and may hold it in escrow;

- b. the Excess Consideration (and accrued interest) in escrow will be held pursuant to the terms of the escrow agreement, which will provide for such Excess Consideration (and accrued interest) to be held until redistributed, pursuant to an order of the Commission, either to Respondent or to the parties that paid such consideration; and the Commission will, promptly after receiving a mandate from a court of appeals, order redistribution of the Excess Consideration (and accrued interest) in escrow in accordance with the decision of the court of appeals;
- c. there is only one contingency under which the Excess Consideration (and any accrued interest) payable pursuant to any contingent contractual obligation shall be payable to Respondent: the issuance by the Commission of an order authorizing Respondent to receive such Excess Consideration (and any such accrued interest); and the Commission will, promptly after receiving a mandate from a court of appeals, issue an order, consistent with the decision of the court

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of appeals, clarifying whether Respondent may receive Excess Consideration (and accrued interest) payable pursuant to any contingent contractual obligation;

- d. all costs of collecting the Excess Consideration, of holding and administering it in escrow, and of redistributing it ("Escrow Costs"), shall be paid out of the escrowed funds; and
 - e. the escrow agent, pursuant to its contract with Respondent and with each party paying Excess Consideration into escrow, will have specific obligations, including to pay Escrow Costs from the escrowed funds; and, in the event that escrowed funds are not sufficient to pay Escrowed Costs, to collect sufficient additional funds from Respondent to pay Escrow Costs.
2. The purpose of requiring that Excess Consideration be held in escrow is to insure, to the extent possible, that in the event that the relevant provisions of the Final Order are upheld on appeal, the Payers will promptly be made whole. Consequently, the Commission will approve a manner of collecting Excess Consideration, and of holding it in escrow, only if there will be no commingling of Excess Consideration with non-escrowed funds, and only if there will be a reliable accounting, with quarterly reports to each Payer, of the amount of Excess Consideration of such Payer in escrow. In determining whether to approve a manner of collecting Excess Consideration, and of holding it in escrow, the Commission will consider, *inter alia*, whether the escrow agent has adequate reserves in light of the anticipated amount of the Excess Consideration (including interest); and whether the interest to be earned by the Excess Consideration in escrow is consistent with interest from other investments with similar levels of liquidity and risk. Escrow amounts will be invested in money market accounts or in a list of

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investments set forth as an exhibit to the escrow agreement.

IT IS FURTHER ORDERED THAT Respondent's Motion for Stay be, and it hereby is, **DENIED** in all other respects.

By the Commission, Commissioner Rosch not participating.

ATTACHMENT

OPINION OF THE COMMISSION ON RESPONDENT'S MOTION FOR STAY OF FINAL ORDER PENDING APPEAL

On February 16, 2007, respondent Rambus Inc. applied for a stay pending appeal of the Commission's Final Order of February 2, 2007. Although Rambus seeks a stay of the Commission's Order in its entirety (Stay Motion at 1), it acknowledges that the harms it alleges in support of its motion could be ameliorated by a partial stay of the Order's provisions regarding Rambus's efforts to enforce its patents and collect royalties, while leaving the provisions that concern Rambus's participation in standard setting organizations immediately effective. Rambus Stay Motion at 15-16; Rambus Reply at 6 n.2. Complaint Counsel do not object to a partial stay, provided that any royalties in excess of the maximum allowable royalty rates ("MARR") are placed in escrow during the pendency of Rambus's appeal. Complaint Counsel Opposition at 5. Rambus, having initially proposed such an arrangement (Stay Motion at 15-

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16), nonetheless contends that any provision that limits its access to royalty payments in excess of the MARR during the pendency of an appeal could hinder the company's research and development efforts. Rambus further objects to the specific form of escrow that Complaint Counsel propose (Rambus Reply at 5-6), and proposes an alternative form of order to establish an escrow for any royalties that are in excess of the MARR. Rambus Reply at 7, Exhs. A & B.

For the reasons stated below, the Commission conditionally stays Paragraphs IV, V.A., VI, and VII of its Final Order, effective upon the filing of a timely petition for review in an appropriate court of appeals and until the court of appeals issues its mandate. The Commission denies Rambus's application in all other respects.¹

Applicable Standard

Section 5(g) of the Federal Trade Commission Act ("FTC Act") provides that FTC adjudicative orders, other than divestiture orders, shall take effect automatically upon the sixtieth day after the date of service, unless stayed, in whole or in part and subject to such conditions as may be appropriate, by the Commission or an appropriate court of appeals." 15 U.S.C. § 45(g)(2). A party seeking a stay must first apply for such relief to the Commission. Respondent has satisfied this requirement in its February 2 motion.

¹ Rambus does not articulate any reasons for staying provisions of the Order that prohibit Rambus, while participating in a standard-setting organization, from, *inter alia*, making any misrepresentations concerning its patents and patent applications and from failing to make any required disclosures regarding its patents and patent applications. Final Order ¶ II. Similarly, Rambus does not contend that a stay is warranted as to provisions of the Order that are designed to facilitate compliance. For these reasons alone, Rambus's request for a broader stay must be denied. *See* 16 C.F.R. § 3.56(c) (requiring stay applicant to "state the reasons a stay is warranted and the facts relied upon" and supply "supporting affidavits or other sworn statements").

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Pursuant to Rule 3.56(c) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 3.56(c), an application for a stay must address the following four factors: (1) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm if a stay is not granted; (3) the degree of injury to other parties if a stay is granted; and (4) why the stay is in the public interest. We consider each of these factors below. Rule 3.56(c) further provides that an application for a stay must state the reasons a stay is warranted and include "supporting affidavits or other sworn statements, and a copy of the relevant portions of the record." See, e.g., *North Texas Specialty Physicians*, 2006 FTC LEXIS 10 at *2 (Jan. 20, 2006).

Analysis

Rambus's argument regarding its likely success on the merits relies chiefly on a principle that the Commission has adopted in prior cases — *i.e.*, that the first stay factor can be substantially satisfied by a showing that the Commission's decision was based on a complex factual record. Rambus Stay Motion at 4 (*quoting Novartis Corp.*, 128 F.T.C. 233, 235 (1999) ("it is well settled that arguable difficulties arising from the application of the law to a complex factual record can support a finding that a stay applicant has made a substantial showing on the merits"); *Toys "R" Us, Inc.*, 126 F.T.C. 695, 697 (1998) ("difficulty inherent in applying the applicable law to a complex set of facts is a relevant factor in determining whether a stay applicant has made a substantial showing on the merits")). Rambus contends that the complexity of the factual record, its volume, and the presence of difficult factual and legal issues support issuance of a stay.² Stay Motion at 4-7.

² Rambus also contends that the Commission is not authorized to compel Rambus to license its patents. This line of argument merely restates a position that the Commission considered and rejected in crafting its remedial order and therefore offers no support for Rambus's motion for a stay pending appeal. See, e.g., *Toys "R" Us, Inc.*, 126 F.T.C. at 697; *Detroit Auto Dealers, Inc.*, 1995 FTC LEXIS 256 at *4 (Aug. 23, 1995).

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Although Complaint Counsel contend that Rambus has overstated its case for a stay (Complaint Counsel Opposition at 2-4), they do not deny the complexity and difficulty of the matter. Indeed, they do not object to a partial and limited stay that would require that any royalties in excess of the MARR be placed in escrow during the pendency of an appeal. *Id.* at 1, 5. According to Complaint Counsel, such a limited order “will address virtually all of the concerns identified by Rambus in its Motion, while preserving in large part the beneficial effects to be achieved by the Commission’s Final Order during the time that the appeal is pending. *Id.* at 1.

We conclude that Rambus has made an adequate showing with respect to the first prong of the Commission’s analysis.³ As we recognized in *Toys “R” Us, Inc.*, 126 F.T.C. at 697, the Commission has acknowledged that “[t]he difficulty inherent in applying the applicable law to a complex set of facts is a relevant factor in determining whether a stay applicant has made a substantial showing on the merits.” *See also Novartis Corp.*, 128 F.T.C. at 235; *North Texas Specialty Physicians*, 2006 FTC LEXIS 10 at *5 (Jan. 20, 2006).

We turn, then, to the second prong — *i.e.*, whether Rambus is likely to suffer serious irreparable harm if the Order is not stayed. Rambus alleges four distinct forms of irreparable injury. First, Rambus contends that it will be permanently deprived of any

³ We do not agree, however, with Rambus’s suggestion (Stay Motion at 5 n.2) that this matter is made more difficult or complex, and therefore a stronger candidate for a stay, as a result of the decision of the Federal Circuit in *Rambus Inc. v. Infineon Techs. AG*, 318 F. 3d 1081 (Fed. Cir. 2003). As we explained in our opinion on liability (Liability Op. at 51 n.277), the decision of the Federal Circuit was not based on the same evidentiary record as the Commission’s decision. *See* Liability Op. at 51 n.277. Furthermore, the issue before the court in *Infineon* was whether there was “clear and convincing” proof that Rambus had engaged in fraudulent conduct in violation of state law. A Section 5 claim, however, does not require such a showing. *See, e.g., FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1203 n.7 (10th Cir. 2005).

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royalties or damage awards that would otherwise accrue during the pendency of the appeal. Second, Rambus asserts, it will be deprived of its statutory right to exclude others from using its patented technologies — an opportunity Rambus would not be able to recover even if the Order were overturned on appeal. Third, Rambus argues, the Order would diminish Rambus’s “goodwill” by effectively requiring termination and renegotiation of existing licenses. Fourth, Rambus argues that it would suffer “extraordinary financial harm.” See Stay Motion at 7-8.

As for Rambus’s assertions of unrecoverable financial loss, Complaint Counsel contend that the industry has largely moved on to later iterations of JEDEC standards that leave Rambus free to pursue royalties unimpeded by the Commission’s Order.⁴ Complaint Counsel Opposition at 3. The proposed escrow arrangement would largely address these concerns. Rambus will have immediate access to royalty income up to the MARR, and will be deprived of access to income in excess of that level only during the pendency of its appeal. It will have ready access to the remaining funds in the event the Commission’s Order is overturned. Moreover, the proposed escrow would address Rambus’s concerns about the confusion and loss of good will that Rambus contends would result from termination and renegotiation of its existing licenses.

Apart from its assertions of financial loss, Rambus contends that provisions of the Order that require it to grant a worldwide license to the covered technologies at the MARR abridge its statutory “right to exclude.” Rambus’s reliance on the Federal Circuit’s decisions in *Atlas Powder Co. v. Ireco Chems.*, 773 F.2d 1230, 1233 (Fed. Cir. 1985) and *Hybritech Inc. v. Abbott Labs.*,

⁴ Rambus attempts to rebut this assertion, contending that firms are not signing licenses for DDR2 and DDR3. Rambus Reply at 14. But Rambus fails to show that any such unwillingness of potential licensees to enter into license agreements for these technologies is either the result of the Commission’s Order or would be cured by a stay. On the contrary, the Order expressly imposes no relief with respect to those technologies.

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849 F.2d 1446, 1456-57 (Fed. Cir. 1988) to support this proposition is unavailing. Those decisions merely hold that the nature of the patent grant weighs against holding that monetary damages will *always* suffice to make the patentee whole. As the Federal Circuit explained subsequently in *Illinois Tool Works, Inc. v. Grip-Pak, Inc.*, 906 F.2d 679, 683 (Fed. Cir. 1990), a concept that every patentee is *always* irreparably harmed by an alleged infringer's pre-trial sales disserves the patent system as much as the proposition that no patentee can ever be irreparably harmed when an alleged infringer can respond in damages. *Id.* at 683. The court said that, like all generalities, neither concept was universally applicable. *Id.* See also *Calmar, Inc. v. Emson Research, Inc.*, 838 F. Supp. 453, 456 (C.D. Cal. 1993). In the present case, Rambus's purported right to exclude is abridged pending appeal only as to uses that are compliant with two JEDEC standards, leaving Rambus's patents unaffected for all other purposes.⁵ Given these limitations, we are unable to conclude that Rambus's alleged non-economic injuries are substantial enough to warrant staying the Order in its entirety, or an unconditional stay of the MARR provisions.

Finally, Rambus contends that it will suffer irreparable injury because Paragraph IV.B. of the Commission's Order might be judicially construed to require it to refund any royalties in excess of the MARR that it has already collected. According to Rambus, the provision also could be read to prevent it from collecting royalties in excess of the MARR for past periods that it has not yet collected. Stay Motion at 13; Reply at 5. In our view, these contentions are at odds with the clear terms of the Order,⁶ as well

⁵ Furthermore, the right to exclude requires that a patent be valid and enforceable and a showing of infringement. Even then, exclusion does not necessarily follow. See *eBay Inc. v. MercExchange LLP*, 126 S. Ct. 1837 (2006).

⁶ Both Paragraphs IV.A. and IV.B. are directed to the collection of royalties with respect to "the manufacture, sale, or use of any JEDEC-Compliant DRAM Product or JEDEC-Compliant Non-DRAM Product after the date this Order becomes final."

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as with the Commission's obvious intent, which was to enter a "forward-looking remedy." See Remedy Op. at 2; *see id.* at 7 (referring to relief granted as "prospective only"). The possibility that the Commission's Order would be construed to require refunds, or to prevent collection of past due royalties, seems unlikely and therefore is not a proper basis for a stay. *See, e.g., Toys "R" Us*, 126 F.T.C. at 694-95.

We turn, then, to the public interest and the possibility that a stay of the Commission Order would harm others. Because Complaint Counsel represent the public interest in effective law enforcement, we consider these factors together. *See, e.g., California Dental Ass'n*, 1996 FTC LEXIS 277 at *7 (May 22, 1996). In this regard, we note that a blanket stay of the provisions prohibiting Rambus from collecting excess royalties would frustrate the Commission's efforts to restore competition to the relevant markets. Any damage to the public interest would be irreparable. An escrow arrangement — as proposed by the parties — will impose some burden on licensees during the pendency of an appeal. Nonetheless, that burden will be tempered by the assurance that these funds will be repaid promptly if the Commission's Order is sustained.

Conclusion

The decision to grant a limited stay of our Final Order is a difficult one. Undoubtedly, it will entail some harm to the public interest by allowing Rambus to continue to collect monopoly rents during the pendency of its appeal. However, given the complexity of the factual and legal issues underlying our decision to prohibit

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Rambus from collecting royalty payments in excess of the MARR, we conclude that these interests must be balanced against its competing private interests during the brief pendency of an appeal. Apart from the stayed provisions (Paragraphs IV, V.A., VI, and VII), all other provisions of our Final Order will become effective on April 12, 2007.⁷ *See* 15 U.S.C. § 45(g); 16 C.F.R. §§ 3.56(a), 4.3(a).

⁷ By the terms of the Commission's Order, Paragraphs V.B. through V.E. impose no requirements on Rambus until the effective date of Paragraph V.A.

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IN THE MATTER OF
EQUITABLE RESOURCES, INC. ET AL.

Docket No. 9322 – Order, April 13, 2007

ORDER SETTING SCHEDULING CONFERENCE

The parties are hereby notified that a Scheduling Conference, pursuant to Commission Rule 3.21, 16 C.F.R. § 3.21, will be held in this case on Friday, April 20, 2007 at 2:00 p.m., in the Federal Trade Commission's Hearing Room 532, located at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

IT IS FURTHER ORDERED THAT before appearing at the conference, counsel for the parties shall meet and confer about the substance of the action and the most expeditious means of resolving this litigation. In addition, counsel for the parties are instructed to file with the Commission a joint case management statement, by Thursday, April 19, 2007 at 5:00 p.m., that includes the following information:

1. Facts: A brief chronology of the facts and a statement of the principal factual issues in dispute.
2. Legal Issues: A brief statement, without extended legal argument, of the disputed points of law, including reference to specific statutes and decisions.
3. Motions: The current status of pending motions. In addition, counsel shall address any anticipated motions, including but not limited to motions respecting Respondents' defenses challenging the legal viability of the pleaded relevant market and of the Complaint.

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4. Amendment of Pleadings: The extent to which parties, claims, or defenses are expected to be added or dismissed and a proposed deadline for amending the pleadings.
5. Evidence Preservation: Steps taken to preserve evidence relevant to the issues reasonably evident in this action, including interdiction of any document-destruction program and any ongoing erasures of e-mails, voice mails, and other electronically-recorded material.
6. Discovery: The scope of anticipated discovery, any proposed limitations of discovery, and a proposed discovery plan, including, without limitation, any issues relating to disclosure or discovery of electronically stored information.
7. Related Cases: Any related cases or proceedings pending before another court or administrative body.
8. Scheduling: Proposed dates for designation of experts, discovery cutoff, hearing of dispositive motions, pretrial conference and the hearing.
9. Hearing: The expected length and timing of the hearing.
10. Such other matters as may facilitate the just, speedy and inexpensive disposition of this matter.

By the Commission.

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IN THE MATTER OF
EQUITABLE RESOURCES, INC. ET AL.

Docket No. 9322 – Order, April 13, 2007

ORDER DESIGNATING PRESIDING OFFICIAL

Pursuant to Commission Rule 3.42, 16 C.P.R. § 3.42, and the authority vested in the Federal Trade Commission,

IT IS ORDERED that J. Thomas Rosch, a Commissioner of the Federal Trade Commission, be, and he hereby is, designated and appointed to preside over the Scheduling Conference set for April 20, 2007.

By the Commission.

Order

IN THE MATTER OF
EQUITABLE RESOURCES, INC. ET AL.

Docket No. 9322 – Order, April 16, 2007

**ORDER STAYING FURTHER BRIEFING ON COMPLAINT
COUNSEL'S MOTION TO STRIKE**

Complaint Counsel filed a Motion to Strike the Affirmative Defense of State Action” with the Commission on April 11, 2007, moving that the Commission strike defenses pled by both Equitable Resources and Dominion Resources to the effect that the Commission’s Complaint was precluded by the state action doctrine. Pursuant to Commission Rule 3.22(c), 16 C.F.R. § 3.22(c), the Respondents must file an answer or answers to Complaint Counsel’s motion on or before April 23, 2007.

On April 13, 2007, the Commission filed a complaint and motions for a temporary restraining order and a preliminary injunction against Respondents in federal district court in the Western District of Pennsylvania. At the hearing on the temporary restraining order, the court scheduled briefing and argument on a motion to dismiss the complaint based on state action grounds, and stated that it would contemplate a decision on that motion during the week of May 7, 2007. For these reasons, the Commission stays all further briefing on Complaint Counsel’s motion until further notice.

Accordingly,

IT IS ORDERED THAT all further briefing on Complaint Counsel’s motion to strike be stayed pending the proceedings in the federal district court (Case Number 07CV0490).

By the Commission.

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IN THE MATTER OF
EQUITABLE RESOURCES, INC. ET AL.

Docket No. 9322 – Order, April 24, 2007

SCHEDULING ORDER

In accordance with Federal Trade Commission rule 16 C.F.R. § 3.21(b), a Scheduling Conference with Complaint Counsel and counsel for Respondents was held April 20, 2007, at 11 a.m. before the Federal Trade Commission. By order of the Commission, Commissioner J. Thomas Rosch presided over the Scheduling Conference. The parties' positions on the discovery schedule and other matters were described in a Joint Case Management Statement submitted to the Commission on April 19, 2007, and a Revised Joint Case Management Statement submitted to the Commission on April 24, 2007.

1. Initial Disclosures. Complaint Counsel and Respondents shall fully comply with 16 C.F.R. § 3.31(b).

2. Statement of Facts. On March 1, 2006, Equitable Resources Inc. executed an agreement to acquire the capital stock of The Peoples Natural Gas Company from the Consolidated Natural Gas Company, a subsidiary of Dominion Resources, Inc. Equitable and Peoples are, *inter alia*, local distribution companies that distribute natural gas to residential and nonresidential end users within their service territories. Equitable and Peoples both provide local distribution services to end users in western Pennsylvania.

The Commission issued an administrative complaint on March 14, 2007, alleging that Equitable's acquisition of Peoples violates the antitrust laws. The complaint alleges that a relevant product market is the local distribution of natural gas to individual nonresidential end users, and that the relevant geographic market

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is the individual service location of each nonresidential end user that benefits or could benefit in the future from competition between Equitable and Dominion in western Pennsylvania.

In their answers dated April 9, 2007, Respondents deny certain allegations regarding the nature of their operations. Respondents also deny the allegations setting forth the relevant markets in which the competitive effects of the merger should be evaluated; the allegations that market entry would be difficult; and the allegations that the acquisition would have anticompetitive effects. Respondents also set forth certain affirmative defenses, including, *inter alia*, that, by virtue of the approval of the transaction by the Pennsylvania Public Utility Commission, the complaint is barred by the state action doctrine; that the merger is in the public interest; and that the proposed acquisition will result in substantial merger-specific efficiencies that will benefit consumers.

3. Legal Issues. The principal legal issues in this case are as follows:

- a. Complaint Counsel alleges that the acquisition of Peoples by Equitable may substantially lessen competition or tend to create a monopoly, in violation of section 7 of the Clayton Act, 15 U.S.C. § 18, and that the agreement pursuant to which the acquisition will occur is an unfair method of competition, in violation of section 5 of the FTC Act, 15 U.S.C. § 45. Respondents contend that the transaction is lawful and cite in that regard the merger specific efficiencies that would result from this transaction, which they contend would far outweigh the costs of any alleged loss of competition.
- b. Respondents contend that the FTC's claims are barred by the state action immunity doctrine, enunciated by the United States Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943), and *California Retail Liquor*

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Dealers Ass'n v. Midcal Aluminum, Inc. 445 U.S. 97 (1980). In that regard, Respondents cite the April 13, 2007, decision of the Pennsylvania Public Utility Commission approving the acquisition of Peoples by Equitable, the clear articulation of the Commonwealth's policy to displace competition at issue and the Commonwealth's active supervision of the conduct at issue. Complaint Counsel contends that the Commonwealth of Pennsylvania has not "clearly articulated and affirmatively expressed" a state policy to displace competition, nor is the anticompetitive conduct of Equitable "actively supervised by the state itself."

- c. Respondents also contend that the complaint fails as a matter of law to state a claim upon which relief can be granted and that the alleged market definitions are not legally cognizable.

4. Motions. On April 11, 2007, Complaint Counsel filed a motion to strike the first affirmative defense of each of the Respondents asserting the state action defense. On April 16, 2007, the Commission issued an Order staying all briefing on Complaint Counsel's motion until further notice. Each party may file a motion for summary disposition of the case pursuant to Rule 3.24 after the close of discovery.

5. Amendment of the Pleadings. Complaint Counsel and Respondents do not currently contemplate an amendment to either the complaint or the answers; however, Complaint Counsel reserves the right to seek leave to amend the Complaint pursuant to Rule 3.15.

6. Evidence Preservation. Complaint Counsel and Respondents represent to the Commission that they have taken steps necessary to preserve evidence relevant to the issues reasonably evident in this action, including the interdiction of any

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document-destruction program or ongoing erasures of emails, voice mails, and other electronically-recorded materials.

7. Discovery.

- a. Interrogatories and Requests for Admissions . There is no limit to the number of sets of interrogatories the parties may issue, as long as the total number of interrogatories, including all discrete subparts, does not exceed twenty-five (25) to Complaint Counsel from all Respondents and does not exceed twenty-five (25) to all Respondents from Complaint Counsel. The interrogatories in separate sets shall be numbered sequentially. The number of requests for admissions, including all discrete subparts, shall not exceed forty (40) to Complaint Counsel from all Respondents and shall not exceed forty (40) to all Respondents from Complaint Counsel, except that the limit on requests for admissions shall not apply to requests relating to the authenticity or admissibility of exhibits. Additional interrogatories and requests for admissions will be permitted only for good cause.
- b. Document Requests. There shall be no limit on the number of document requests.
- c. Timing of Requests. Document requests, requests for admission, interrogatories, and subpoenas, except for discovery for purposes of authenticity and admissibility of exhibits, shall be served so that the time for a response to the discovery request shall be on or before the discovery cut-off date.
- d. Timing of Responses. For all interrogatories and requests for production served prior to this Order's issuance, objections to the interrogatories and requests for production shall be due within ten (10) days of the date of this Order, and responses, documents and

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materials shall be produced within thirty (30) days of the date of this Order.

For interrogatories, requests for production and requests for admissions served after the issuance of this Order, objections shall be due within ten (10) days of service of the discovery request, and responses, documents and materials shall be produced within thirty (30) days, of service of the discovery request.

- e. Electronically-Stored Information. Disclosure and discovery of electronically-stored information shall be governed by the Federal Rules of Civil Procedure, as amended on December 1, 2006.
- f. Deposition Notices. Service of a notice of deposition five business days in advance of the date set for the taking of the deposition shall constitute reasonable notice.

8. Related Cases. On April 13, 2007, the Commission filed an action in the United States District Court for the Western District of Pennsylvania, *Federal Trade Commission v. Equitable Resources, Inc., et al.*, Case No. 07cv0490, in which the Commission sought a temporary restraining order and a preliminary injunction enjoining the acquisition of Peoples pending a final decision in this administrative litigation. At a status conference on April 13, 2007, Judge Arthur J. Schwab entered an order establishing certain procedures for the litigation. In particular, Judge Schwab established a briefing schedule for defendants' motion to dismiss the complaint on state action grounds in which the parties will fully brief the motion by May 1, 2007, and the Court plans to issue a ruling on the motion to dismiss the week of May 7, 2007. Judge Schwab has not stayed discovery pending disposition of the motion to dismiss, and discovery has already begun. Also, the Court established a hearing date on the Commission's motion for a preliminary injunction to

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begin June 4, 2007, at 9:00 a.m., and the hearing is expected to last two days.

9. Scheduling. Complaint Counsel and Respondents agree to a stay of discovery and all other obligations in this administrative proceeding from June 1, 2007, to five business days after the completion of the hearing in the related case identified in Paragraph 8. The following is the pre-hearing schedule:

- | | |
|----------------|--|
| May 11, 2007 | Exchange preliminary witness list (not including experts) with description of proposed testimony. |
| June 20, 2007 | Exchange revised witness lists (not including experts), including preliminary rebuttal fact witnesses, with description of proposed testimony. |
| June 25, 2007 | Status report due and, if requested by either party, conference with the Commission. |
| June 29, 2007 | Deadline for issuing document requests, requests for admission, interrogatories, and subpoenas, except for discovery for purposes of authenticity and admissibility of exhibits. |
| July 27, 2007 | Close of discovery, other than discovery permitted under FTC Rules of Practice ' 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits. |
| July 30, 2007 | Complaint Counsel provides expert witness list and expert witness reports. |
| August 3, 2007 | Status report due and, if requested by either party, conference with the Commission. |

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- August 7, 2007 Respondents provide expert witness list and expert witness reports.
- August 14, 2007 Complaint Counsel provides rebuttal expert witness list and rebuttal expert reports. Any such report is to be limited to rebuttal of matters set forth in the Respondents' expert reports. If material outside the scope of fair rebuttal is presented, the Respondents will have the right to seek appropriate relief (such as striking part or all of Complaint Counsel's rebuttal expert report(s) or seeking leave to submit surrebuttal expert reports).
- August 21, 2007 Deadline for completion of depositions of all experts
- August 27, 2007 Exchange final proposed witness and exhibit lists including designated testimony to be presented by deposition, copies of all exhibits (except for demonstrative, illustrative, or summary exhibits), and a brief summary of the expected testimony of each witness.
- Serve on the Commission final proposed witness and exhibit lists, including designated testimony to be presented by deposition, and a brief summary of the testimony of each witness.
- August 27, 2007 For parties that intend to offer into evidence at the hearing confidential materials of an opposing party or non-party, provide notice

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to the opposing party or non-party, pursuant to FTC Rules of Practice § 3.45(b).

- August 30, 2007 Deadline for filing motions for summary disposition, motions in limine, motions to strike, and motions for in camera treatment of proposed trial exhibits.
- September 5, 2007 Exchange and serve courtesy copy on the Commission objections to final proposed witness lists and exhibits lists. Exchange objections to the designated testimony to be presented by deposition and counter designations.
- September 7, 2007 Exchange proposed stipulations of law, facts, and authenticity. Parties file pretrial briefs, not to exceed fifty (50) pages.
- September 14, 2007 Deadline for filing responses to motions for summary disposition, motions in limine, motions to strike, and motions for in camera treatment of proposed trial exhibits.
- September 17, 2007 Deadline for filing reply to response to motions for summary disposition, motions in limine, motions to strike, and motions for in camera treatment of proposed trial exhibits.
- Date to be determined by trier of fact Final prehearing conference to be held at 10:00 a.m. in Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC. The parties are to meet and confer prior to the conference regarding trial logistics, any designated deposition testimony, and proposed stipulations of law, facts, and

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authenticity. Stipulations of law, facts, and authenticity shall be prepared as a Joint Exhibit and offered at the final prehearing conference. Counsel may present any objections to the final proposed witness lists and exhibits, including the designated testimony to be presented by deposition. All trial exhibits must be offered at the final prehearing conference. The offered exhibits will be admitted or excluded at this conference to the extent practicable.

September 24, 2007 Commencement of Hearing, to begin at 10:00 a.m. in Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC.

10. Hearing. The parties estimate that the hearing will take approximately four weeks.

11. Other Matters.

- a. Service on the parties shall be deemed effective on the date of delivery by electronic mail (formatted in Adobe Acrobat), and three days shall be added to the time for any responsive action, consistent with the provisions of Fed. R. Civ. P. 6(e) regarding service by electronic mail. Absent leave of the Commission or presiding official, this provision does not modify any of the dates set forth in Paragraph 9. Service by electronic mail shall be followed promptly by delivery of an original by hand or by U.S. mail, first class postage prepaid, to the following addresses:

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To Complaint Counsel:

Patricia V. Galvan, Esq.
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601 New Jersey Avenue, NW
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For Respondent Equitable Resources, Inc.:

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George S. Cary, Esq.
Cleary Gottlieb Steen
& Hamilton LLP
2000 Pennsylvania Avenue, NW
Washington, D. C. 20006-1801
gcary@cgsh.com

For Respondents Dominion Resources, Inc., Consolidated Natural Gas Company, and The Peoples Natural Gas Company:

Howard Feller, Esq.
McGuire Woods LLP
One James Center
901 East Cary Street
Richmond, VA 23219-4030
Hfeller@mcguirewoods.com
(804) 775-4393

- b. Memoranda in support of, or in opposition to, any non-dispositive motion shall not exceed ten (10) pages, exclusive of attachments.
- c. If papers filed with the Office of the Secretary contain in camera or confidential material, the filing party shall mark any such material in the complete version of their submission with **{bold font and brackets}**. 16 C.F.R.

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§ 3.45. Parties shall act in accordance with the rules for filings containing such information, including FTC Rules of Practice § 4.2. Public versions of the papers with the in camera or confidential material omitted shall be filed pursuant to 16 C.F.R. § 3.45(e).

- d. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas duces tecum and subpoenas ad testificandum. For subpoenas duces tecum, the party issuing the subpoena shall provide copies of the subpoenaed documents and materials to the opposing party within five (5) business days of service. For subpoenas ad testificandum, the party seeking the deposition shall consult with the other parties before the deposition date is scheduled. Additionally, the deposition of any person may be recorded by any means permitted by Fed. R. Civ. P. 30, provided that the party seeking the deposition notifies the deponent and the other party of its intention to record the deposition by other than by stenographic means at least two (2) days in advance of the deposition.
- e. No deposition of a non-party shall be scheduled between the time of production in response to a subpoena duces tecum and three (3) days after copies of the production are provided to the non-issuing party, unless a shorter time is required by unforeseen logistical issues in scheduling the deposition, the documents are produced at the time of the deposition, or as agreed to by all parties involved.
- f. At the time an expert is first listed as a witness by a party, the listing party shall provide to the other party: (a) materials fully describing or identifying the background and qualifications of the expert; (b) a list of all publications authored by the expert; (c) a list of

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all prior cases in which the expert has testified, been deposed, submitted an expert report, or submitted any other signed statement as an expert witness; and (d) a copy of all transcripts, expert reports, and other signed statements relating to such prior cases in the possession, custody, or control of the expert or the listing party.

- g. The parties shall provide for each testifying expert witness a written report containing the information required by the FTC Rules of Practice § 3.31(b)(3). Drafts of expert reports and notes taken by expert witnesses need not be produced. Communications between expert witnesses and counsel or consultants need not be produced.
- h. The preliminary and revised witness lists shall represent the parties' good faith designation of all potential witnesses the parties reasonably expect may be called at the hearing. A party shall notify the other parties promptly of changes in preliminary and revised witness lists to facilitate completion of discovery within the dates specified by the scheduling order. After the submission of the final witness lists, additional witnesses may be added only: (a) by order of the Commission or the presiding official, upon a showing for good cause; (b) by agreement of the parties, with notice to the Commission or the presiding official; or (c) if needed to authenticate or provide the evidentiary foundation for, documents in dispute, with notice to the other parties and the Commission or the presiding official. Opposing counsel shall have a reasonable amount of time to subpoena documents for and depose any witness added to the witness list pursuant to this paragraph, even if the discovery takes place during the hearing.

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- i. The final exhibit lists shall represent the parties' good faith designations of all exhibits the parties reasonably expect may be used in the hearing, other than demonstrative, illustrative, or summary exhibits. Additional exhibits other than demonstrative, illustrative, or summary exhibits may be added after the submission of the final lists only: (a) by order of the Commission or the presiding official, upon a showing of good cause; (b) by agreement of the parties, with notice to the Commission or the presiding official; or (c) where necessary for purposes of impeachment.
- j. Applications for the issuance of subpoenas commanding a person to attend and give testimony at the hearing must comply with FTC Rules of Practice § 3.34, must demonstrate that the subject is located in the United States, and must be served on opposing counsel. Oppositions to applications for issuance of subpoenas shall be due within three (3) business days after the filing of the application.
- k. At least five days prior to the commencement of the case-in-chief, Complaint Counsel shall provide Respondents with a schedule of witnesses expected to be called each day during the case-in-chief. At least five days prior to the commencement of the Respondents' defense case, Respondents shall provide Complaint Counsel with a schedule of witnesses expected to be called each day during the defense case. At least two (2) days prior to Complaint Counsel's rebuttal case, Complaint Counsel shall provide Respondents with a schedule of witnesses expected to be called each day during the rebuttal case. The parties further shall provide one another with copies of any demonstrative exhibits seventy-two (72) hours before they are used with a witness.

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- l. The procedure for marking of exhibits used in the adjudicative proceedings shall be as follows: (a) Complaint Counsel's exhibits shall bear the designation "CX" and Respondents' exhibits shall bear the designation "RX"; and (b) the parties shall number the first page of each exhibit with a single series of consecutive numbers. For example, Complaint Counsel's first exhibit shall be marked "CX-1." When an exhibit consists of more than one page, each page of the exhibit must bear a consecutive control number. Additionally, all exhibit numbers must be accounted for, even if a particular number is not actually used at the hearing.
- m. At the final pre-hearing conference, the parties shall introduce all exhibits they intend to introduce at the hearing. The parties further shall give the originals of exhibits to the court reporter, which the court reporter will maintain as part of the record.
- n. The parties shall endeavor to resolve any discovery disputes quickly and efficiently. If the parties are unable to reach an agreement resolving the disputes they should bring them promptly to the Commission's attention by calling the offices of Commissioner J. Thomas Rosch and arranging for a telephonic hearing on the dispute.

By the Commission.

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IN THE MATTER OF
RAMBUS INCORPORATED*Docket No. 9302 – Order, April 27, 2007***ORDER GRANTING IN PART AND DENYING IN PART
RESPONDENT’S PETITION FOR RECONSIDERATION OF THE
FINAL ORDER AND GRANTING COMPLAINT COUNSEL’S
PETITION FOR RECONSIDERATION OF PARAGRAPH II.C. OF
THE FINAL ORDER**

The Commission issued its Opinion On Remedy and Final Order in this matter on February 2, 2007. The Opinion and Final Order were served on Rambus and its counsel on February 9, 2007, and the Final Order therefore became final and effective on April 12, 2007. 16 C.F.R. § 3.56(a); *accord* 15 U.S.C. § 45(g)(1),(2). On February 16, 2007, Rambus filed a Petition for Reconsideration of the Final Order.¹ On February 26, 2007, Complaint Counsel filed a Petition for Reconsideration of Paragraph III.C. of the Final Order.² The Commission has determined to grant Rambus’s Petition in part, and to deny it in part, and to grant Complaint Counsel’s Petition. Accordingly,

¹ On February 16, 2007, Respondent also filed a Motion For Stay of the Final Order Pending Appeal. On March 16, 2007, the Commission granted in part and denied in part that Motion, and in particular stayed enforcement of Paragraphs IV., V.A., VI., and VII. of the Final Order, upon the filing of a timely petition for review of the Final Order in an appropriate court of appeals and until the court of appeals issues its mandate. On April 4, 2007, Respondent filed a petition for review of the Final Order in the Court of Appeals for the District of Columbia Circuit.

² Complaint Counsel also included in the same filing their Response to Rambus’s Petition for Reconsideration of the Final Order.

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IT IS ORDERED THAT the Final Order issued by the Commission on February 2, 2007, which became final and effective on April 12, 2007, be, and it hereby is, modified — as of the date on which this Order is issued — in the following respects:

1. Subparagraph I.K. is modified to add the following clause to the end of the subparagraph:

“provided further, however, that when a licensee has not sold the relevant JEDEC-Compliant DRAM Product or JEDEC-Compliant Non-DRAM Product alone during the relevant quarter, Net Sales shall be calculated based on the average gross selling price, less the deductions specified above, reported by all licensees to Rambus during the relevant quarter for the relevant JEDEC-Compliant DRAM Product alone or the relevant JEDEC-Compliant Non-DRAM Product alone.”

2. Subparagraph III.C. is modified to delete the following clause from the end of the subparagraph:

“except to the extent that such failure results from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Compliance Officer.”

3. Subparagraph III.E. is modified to delete the clause “on a confidential basis” from the subparagraph.

4. Subparagraph IV.B. is modified to delete the clause “or rescind” from the subparagraph.

5. Subparagraph V.B. is modified by moving the word “and” from after section 1 to after section 2, and adding the following section 3 to the subparagraph:

“3. solely at the option of the licensee, a clause providing that the licensee may pay Rambus a flat fee in lieu of running royalties.”

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6. Paragraph V. is modified to add the following new subparagraph F:

“F. Rambus shall not release any information used in calculating Net Sales subject to the second proviso of Definition I.K., other than to independent auditors not engaged in the manufacture or sale of JEDEC-Compliant DRAM Products or JEDEC-Compliant Non-DRAM Products. Any such release of information must be subject to terms of a confidentiality agreement that prevents disclosure by the auditor of any individual firm’s prices.”

7. Paragraph VI. is modified to add the following clause to the end of the paragraph:

“*Provided, however,* that Rambus may seek and collect up to three times the Maximum Allowable Royalty Rate, in satisfaction of a judgment in which a court has specifically allowed increased damages pursuant to 35 U.S.C. § 284 on the ground of willful infringement, and may seek and collect attorney fees as allowed by a court pursuant to 35 U.S.C. § 285.”

8. Paragraph VII. is modified to add the following clause to the end of the paragraph:

“*Provided, however,* that Respondent may seek and collect up to three times the Maximum Allowable Royalty Rate, in satisfaction of a judgment in which a court has specifically allowed increased damages pursuant to 35 U.S.C. § 284 on the ground of willful infringement, and may seek and collect attorney fees as allowed by a court pursuant to 35 U.S.C. § 285.”

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IT IS FURTHER ORDERED THAT the Motion for Leave to Correct Prior Filing [Rambus's Petition for Reconsideration] that Rambus filed on February 21, 2007 — and the Motion for Leave to File Reply In Support of Its Petition For Reconsideration of the Commission's Final Order that Rambus filed on March 7, 2007 — be, and they hereby are, granted.

IT IS FURTHER ORDERED THAT the Motion For Leave to File Brief As Amici Curiae that Micron Technology, Inc., Samsung Electronics Corp., Ltd., and Hynix Semiconductor, Inc. filed on March 1, 2007 — and the Motion For Leave to File Response to the Brief As Amici Curiae that Rambus filed on March 9, 2007 — be, and they hereby are, granted.

By the Commission, Commissioner Harbour not participating.

ATTACHMENT

OPINION OF THE COMMISSION ON RESPONDENT'S AND COMPLAINT COUNSEL'S PETITIONS FOR RECONSIDERATION OF THE FINAL ORDER

By MAJORAS, *Chairman*:

Respondent, Rambus Inc., has petitioned the Commission, pursuant to 16 C.F.R. § 3.55, for reconsideration, modification, or clarification of certain provisions of the Final Order.¹ Rambus contends that its requests will not undermine in any way the

¹ On February 21, 2007, Rambus filed a motion asking the Commission for leave to correct typographical errors in its proposed order. In the accompanying order, we grant Rambus leave to correct its prior filing. We also grant Rambus's motion of March 7, 2007, for leave to file a reply.

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Commission's expressed objective of ensuring that Rambus charges no more than the specified maximum royalties, as set by the Commission, for the period in which the [Final] Order is in effect." Rambus Pet. at 1-2. Rather, Rambus asserts, the proposed modifications are designed to ensure that Rambus is not placed in a "worse position than it would have been in [in] the Commission's version of the 'but for' world." *Id.* at 1. Complaint Counsel oppose Rambus's requested modifications to the Final Order. They oppose "in particular" any modifications that, in their view, would deny the benefits of the Order to third parties and allow Rambus to collect multiple royalties on systems and to pursue treble damages and injunctive relief. Complaint Counsel's Response at 1. Amici — Micron Technology, Inc., Samsung Electronics Corp., and Hynix Semiconductor, Inc. — also oppose Rambus's requested modifications to the Final Order.²

Complaint Counsel also have petitioned for modification of the Final Order.³ Specifically, they seek the deletion of text in

² On March 1, 2007, Micron Technology, Inc., Samsung Electronics Corp., and Hynix Semiconductor, Inc. moved for leave to file a brief *amicus curiae*, principally in order to state their position regarding proper construction of the Final Order. Rambus contends that the Commission should reject the proposed brief. In the alternative, Rambus asks the Commission for leave to respond to it. As the Commission has stated previously, the standard governing whether the Commission should receive an *amicus* brief is whether the public interest will benefit from Commission consideration of the perspectives enunciated in the . . . brief." Order Granting Motions for Leave to File Briefs *Amici Curiae* at 1 (Oct. 19, 2006). We find that the proffered *amicus* brief satisfies this standard. Additionally, we grant Rambus leave to file its proposed Response to the *Amicus* Brief.

³ Complaint Counsel's petition for reconsideration was timely because, pursuant to the Commission's rules for computation of time, the 14-day period for submitting any petitions for reconsideration to the Commission did not start to run until the first business day *after* service of the Commission's Final Order — *i.e.*, February 12, 2007 — and not on the date on which service was complete. *See* 16 C.F.R. § 4.3(a). On March 15, 2007, after a further

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Paragraph III.C. that they contend could be read to absolve Rambus from liability for the “misfeasance, gross negligence, willful or wanton acts, or bad faith” of its Compliance Officer. Complaint Counsel’s Response at 9. According to Complaint Counsel, such a provision could create a “perverse situation” in which the deliberate acts of a Rambus employee to avoid the required disclosures would not be actionable. *Id.* at 9-10.

For the reasons stated below, Rambus’s petition for modification of the Final Order is granted in part and is denied in part. Additionally, we grant Complaint Counsel’s motion and amend Paragraph III.C. by eliminating the exceptions for the Amisfeasance, gross negligence, willful or wanton acts, or bad faith” of Rambus’s Compliance Officer.

Refunds and Collection of Past Due Royalties

Rambus’s principal contention in support of reconsideration was raised and addressed already in connection with Rambus’s Motion for Stay of Order Pending Appeal. Rambus objects in particular to the text of Paragraph IV.B., which requires Rambus, *inter alia*, to allow any party that previously agreed to pay royalties in excess of the Maximum Allowable Royalty Rate (“MARR”) Ato terminate or rescind [its] license agreement — at the option of the licensee — without penalty.” Rambus Pet. 3. According to Rambus, the reference to “rescission” of patent licenses could be construed to require Rambus to return the royalties it previously collected for use of its invented technologies in SDRAM and DDR SDRAM, and to prevent it from collecting the royalties that are due for pre-Order use. *Id.* Rambus believes that the Commission did not intend such a result, but argues that the text should be modified to make this clear. *Id.* Complaint Counsel agree Ain principle” with Rambus that the Order should not be read to require Rambus to refund royalties,

examination” of Rule 4.3(a), Rambus filed a notice withdrawing its contention that Complaint Counsel’s Petition for Reconsideration was untimely.

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but contend that the Order is clear in this respect. Complaint Counsel's Response at 1 n.1. With respect to the collection of royalties in excess of the MARR for use of Rambus technologies during past periods, Complaint Counsel agree with Rambus that there is a need to clarify the requirements of the Order. *Id.* at 2-4. According to Complaint Counsel, "[a]t issue is the potential ability of Rambus, through prospective enforcement efforts, to collect as much as a billion dollars in unlawful monopoly profits after the effective date of the Commission's Order." *Id.* at 4-5. Plainly, Complaint Counsel contend, "[t]he Commission has authority to order Rambus to cease and desist . . . prospective efforts to continue to collect the fruits of its unlawful conduct..." *Id.* at 2 (citing *Amrep Corp. v. FTC*, 768 F.2d 1171, 1180 (10th Cir. 1985) and *Southwest Sunsites Inc.*, 105 F.T.C. 7, 176, 185 (1985), *aff'd*, 785 F.2d 1431 (9th Cir. 1986)).

In granting a partial stay of the Final Order, we reaffirmed our preference for a "forward-looking remedy" that would "prospectively terminat[e] the ill effects of unlawful conduct." Remedy Op. at 2, 4; *see also id.* at 7 ("prospective only"), 27 ("future related conduct"). Thus, as we have explained, the Final Order does not require Rambus to make refunds, or prohibit it from collecting royalties in excess of the MARR that accrue up to the date on which the Commission Order becomes final — *i.e.*, April 12, 2007. *See* Stay Op. at 4. The Commission's intent in this regard is reflected clearly in the terms of the Final Order. *See* Final Order ¶ IV. (prohibiting Rambus from collecting royalties in excess of the MARR with respect to "the manufacture, sale or use of any JEDEC-Compliant DRAM Product or JEDEC-Compliant Non-DRAM Product *after the date [the] Order becomes final*") (emphasis added).

Nonetheless, we recognize that continuing confusion about these requirements could lead to unnecessary and costly litigation and the loss of goodwill. Accordingly, we grant Rambus's request to amend Paragraph IV.B. of our Order by deleting the word "rescind." However, we do not agree that it is necessary to

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add text (*see* Rambus Pet. at 3 n.4) to clarify that Rambus may collect accrued royalties from terminating licensees. In our view, the existing text is adequate to convey our intent in this regard.⁴

The parties raised the question of whether the Commission has authority to prohibit a respondent from collecting excess consideration for the use of patented technologies prior to the effective date of our order.⁵ In the present case, we believe that competition can be restored without such prohibitions, and therefore we need not reach that question. The relief granted has the further benefit of putting on an equal footing all persons who use the technologies during the relevant period, regardless of whether or not they have already made payments to Rambus.⁶ *See* Rambus Reply at 4-5.

Fixed-Fee License Option

Rambus also proposes modifying Paragraph V.A. of the Final Order to clarify that Rambus may enter into fixed-fee licenses, at

⁴ Another proposed change that appears to be directed to the same issue is the proposed addition of the text “Afor periods after this Order becomes final” in the second numbered clause in Paragraph VIII.A. of the Final Order. Rambus does not offer an explanation for this proposal, and we conclude that the proposed text is not necessary.

⁵ *See* Rambus Pet. at 4; Complaint Counsel’s Response at 2-3; Rambus Reply at 3.

⁶ As to royalties that accrue during the pendency of its appeal, Rambus asks the Commission to clarify that it may recoup excess consideration in the event it prevails on the merits. Consistent with this request, Rambus proposes modifying Paragraph VI. of the Final Order to clarify that Rambus may use contingency clauses in its licenses and receive contingent damage awards. *See* Rambus Pet. at 7-9; Rambus Reply at 5-6. On March 16, 2007, we entered an order staying Rambus’s obligation to comply with Paragraphs IV., V.A., VI., and VII. of our Final Order on the condition that any excess consideration be held by an approved escrow agent pending the outcome of Rambus’s appeal. In light of the relief provided by the partial stay order, these requests for modification of the Final Order are unnecessary.

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the licensees' option. Rambus Pet. at 15- 16. According to Rambus, it can be expensive and burdensome for some licensees to collect the information that is necessary to calculate royalties on a per-unit basis. In such cases, Rambus states that it will agree on fixed payments rather than running royalties that are charged on a per-unit basis. *Id.* at 15 & Exh. — ¶ 7. To allow it to continue this practice, Rambus proposes adding new text, which would specify that any license under Paragraph V.A. may include “a clause providing that the licensee pay Rambus a flat license fee in lieu of running royalties” Rambus Pet., Amended Final Order at 9. Complaint Counsel agree that licensees should have the option to negotiate fixed-fee licenses, but only with the caveat that the “fixed fee amounts are equivalent to or less than the Maximum Allowable Royalty amounts.” Complaint Counsel’s Response at 1 n.1.

We grant Rambus’s request, and amend Paragraph V.A. accordingly. Although the existing text does not expressly preclude Rambus from entering into fixed-fee arrangements with its licensees, it may well have the practical effect of foreclosing such arrangements in those circumstances in which they would benefit licensees. As Complaint Counsel note, the existing language would permit a fixed-fee arrangement only if it results in royalties “equivalent to or less than” the MARR. Complaint Counsel’s Response at 1 n.1. But in those circumstances in which licensees prefer a fixed-fee arrangement because it is impracticable for them to calculate the cost of a per-unit license, presumably neither they nor Rambus can know, at the time they enter into such an arrangement, whether the fixed fee will ultimately be more or less than the MARR. Any fixed-fee arrangement would thus pose the risk of an after-the-fact determination that the MARR had been exceeded.

In granting this relief, we rely on Rambus’s representation that all licensees will remain free to terminate any existing flat-fee licenses and insist on a license limited to MARRs as provided for in the Final Order. Rambus Pet. at 15-16. Any attempt by

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Rambus to use this provision to circumvent the Order by pressuring licensees to accept flat-fee licenses would constitute a serious violation of the Order, subjecting it to further relief, including civil penalties. *See* 15 U.S.C. § 45(l).

Availability of Judicial Remedies in Infringement Actions

Rambus further contends that the Final Order must be modified to clarify that Rambus may seek the full range of judicial remedies — injunctive relief, treble damages for willful infringement, and attorney’s fees — that traditionally may be available in infringement actions. Rambus Pet. at 9. According to Rambus, the existing text could be read to foreclose Rambus from pursuing those remedies to the extent they result in payments in excess of the MARR. Rambus contends that the Commission intended only to limit the compensatory damages that it could seek for post-Order infringement. Accordingly, Rambus asserts, the existing text must be modified to ensure that the Commission’s Order does not create incentives for manufacturers to infringe instead of taking a license. *Id.* at 9-10. Rambus argues that its proposed text permits Rambus to seek the full range of remedies that would have been available to a patentee in a “but for” world, but limits any compensatory damages to the MARR. *Id.* at 10. Complaint Counsel and Amici oppose changes in the existing text. *See* Complaint Counsel’s Response at 5-7; Amicus Brief at 18. They argue that treble damages and injunctive relief are inconsistent with the fundamental purpose of JEDEC, and fear in particular that allowing Rambus to pursue its statutory remedies would both deter third parties from challenging Rambus’s patents and render the rate relief meaningless. *Id.*

The arguments of Complaint Counsel and Amici are not persuasive. As the Commission found, in a “but-for” world Rambus would have been required to offer licenses to the relevant technology on reasonable and nondiscriminatory (“RAND”) terms. *See* Remedy Op. at 17. At the same time, however, Rambus would have been able to seek injunctions against those

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who infringed without seeking licenses, and to collect compensatory damages, and possibly even treble damages against willful infringers. *See* 35 U.S.C. §§ 283-84. In issuing our Final Order, we intended — to the extent possible — to restore competition that would be present in the “but for” world. Thus, although the Order limits Rambus to MARRs for uses after the effective date of the Order, it is not our intent to leave Rambus without access to any remedies for infringement that would have been available to it under applicable law.

For the foregoing reasons, we modify our Order to clarify that Rambus may pursue applicable statutory remedies for post-Order uses of the relevant technologies.⁷ Of course, for the same reasons that the MARR must cap what Rambus can collect as royalties (*see* Remedy Op. at 16-18), the MARR must cap what Rambus can collect as single damages in an infringement suit. Similarly, while our remedy does not foreclose Rambus from pursuing increased damages (*see* 35 U.S.C. § 284), it limits Rambus to no more than three times the MARR. Accordingly, we add the following proviso at the end of Paragraphs VI. and VII.:

Provided, however, that Rambus may seek and collect up to three times the Maximum Allowable Royalty Rate, in satisfaction of a judgment in which a court has specifically allowed increased damages pursuant to 35 U.S.C. § 284 on the ground of willful infringement, and may seek and collect attorney fees as allowed by a court pursuant to 35 U.S.C. § 285.

As for Rambus’s request that we amend the Final Order to specifically permit Rambus to seek injunctive relief against infringers, nothing in the existing text precludes Rambus from

⁷ As explained above, the Order does not govern royalties for uses prior to the effective date of the Final Order — *i.e.*, April 12 2007.

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seeking such relief. Accordingly, we see no need to modify the text to grant Rambus permission to seek it.

Collection of Multiple Royalties on Systems

Rambus contends that the Order must be modified to clarify that Rambus may collect multiple royalties on systems that incorporate multiple JEDEC-Compliant DRAM or Non-DRAM Products. Specifically, Rambus asks for clarification that it may collect “one royalty for each infringing memory chip and one royalty for each infringing component that interfaces with those memory chips that is included in the system” Rambus Pet. at 15. Nothing in the existing text of the Order prevents this.⁸ Paragraph IV of the Order sets MARR terms for the “manufacture, sale, or use” of *each* JEDEC-Compliant DRAM Product and JEDEC-Compliant Non-DRAM Product. As applied to a system incorporating multiple covered products, the existing text permits collection of the MARR for each such component.

Although we find no need to adopt Rambus’s proposed multi-part addition to the MARR (*see* Rambus Pet. Blackline Proposed Order at 3), Rambus’s proposal highlights the need to modify the current text with respect to the collection of royalties from producers of systems. The current text provides a means for calculating the “Net Sales” against which MARR percentages must be applied when a producer or seller sells a JEDEC-Compliant DRAM Product or a JEDEC-Compliant Non-DRAM Product both individually and as par of a system.⁹ However, it

⁸ Of course, Rambus’s ability to collect royalties on systems that incorporate DRAMs and other components is subject to any principles of patent law that might prohibit Rambus from collecting such royalties. The Commission’s Order does not create a right to collect system royalties that otherwise would not exist.

⁹ Pursuant to Paragraph I.K. of the Final Order, the Net Sales of products that are sold at a single price for an entire system are calculated on the basis of the licensee’s average gross selling price in the calendar quarter for the

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does not prescribe a mechanism for calculating the Net Sales of a producer or seller that sells systems only. Rambus proposes calculating Net Sales in such cases on the basis of average prices that are reported by all its licensees, and we modify our Order accordingly by the addition of new text in Paragraph I.K. To guard against the release of sales data in disaggregated form, we further modify our Order to prohibit Rambus from releasing information regarding its licensees' net sales other than to independent auditors and in accordance with a confidentiality agreement that precludes disclosure of any individual firm's pricing information.

Proposed Limitations on Licensees' Rights to Seek Further Relief

In addition to the foregoing requests, Rambus raises the possibility that a prospective licensee might both (1) avail itself of the MARR — by either accepting a license under Paragraph V. of the Final Order or by asserting rights in litigation under Paragraphs VI.- VII. — and (2) contest Rambus's rights to enforce its patents with respect to the period post-Order when MAR rates are in effect. Rambus Pet. at 11- 13.

This is not an appropriate forum for limiting the ability of licensees to pursue any strictly private rights they may have against Rambus. In this proceeding, the Commission vindicates public rights.¹⁰ Hence, an FTC order to cease and desist cannot be used or construed to limit the purely private rights of action of Rambus licensees, who, in any event, are not before the Commission.

relevant JEDEC-Compliant DRAM Product or JEDEC-Compliant Non-DRAM Product alone.

¹⁰ The Federal Trade Commission may bring an action only "if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public." 15 U.S.C. § 45(b).

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Reduction to Zero Royalty Rates

Rambus also asks the Commission to modify the Order by deleting provisions in the Final Order that reduce the MARR to zero in 2010 — three years from the date on which the Order issued. *See* Rambus Pet. at 16-17. If adopted by the Commission, the proposed text would allow Rambus to recover MARRs for the subsequent duration of its patents. Complaint Counsel oppose this request.¹¹

In support of its request, Rambus contends that the Commission’s decision to reduce the MARR to zero after three years was premised on an erroneous finding that royalty rates under Samsung’s RDRAM license ultimately declined all the way to zero.” Rambus Pet. at 16 (*quoting* Remedy Op. at 21). According to Rambus, the rates declined to zero only for RDRAM chips of a specific density-generation, but then reverted to higher rates for the subsequent RDRAM density-generation. Rambus Pet. at 16. Although Rambus’s contentions add detail, they provide no basis for modifying the Order. The Samsung license followed the overall pattern described in the Commission’s decision: royalty rates for *each* RDRAM density-generation declined to zero five years after shipment of the 500,000th unit (assuming shipment of a specified volume of chips).¹²

¹¹ Complaint Counsel note that the zero rate will take effect on April 12, 2010 — just 18 days before most of the relevant patents are set to expire. *See* Complaint Counsel’s Response at 9 n.9. In actuality, because the Order specifies that the Second Royalty Period — in which the MARR falls to zero — commences three years after the date on which the Order issued, the zero rate will take effect on February 3, 2010, not April 12, 2010, as calculated by Complaint Counsel. *See* Final Order ¶ I.D.

¹² *See* CX 1592 at 18 (providing zero-royalty terms for both “Current Rambus DRAM” and the next-generation “Extended Rambus DRAM”). In fact, the Computation Notebook of Rambus Vice President for Intellectual Property Joel Karp makes the Commission point. [**Redacted**] CX1751 at 2 (*in camera*).

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Even assuming, *arguendo*, that we were to focus on individual density-generations, Rambus makes no claim that at the present time — at the tail end of SDRAM and DDR SDRAM life cycles — any new density-generations of those products are continuing to emerge.¹³ In any event, Rambus does not dispute the more fundamental point — namely, that its RDRAM licenses typically provided substantial royalty reductions — falling to rates as low as zero — for high volumes and out-years.¹⁴ Consequently, we find no basis for modifying the Final Order with regard to long-term royalty rates.

Definitions

Rambus raises a number of issues regarding the definitional provisions of the Final Order.

First, Rambus asks the Commission to clarify the definition of “JEDEC-Compliant SDRAM” and “JEDEC-Compliant DDR SDRAM.” Rambus Pet. at 14 n.10. As defined in the Final Order, these terms include DRAMs that “compl[y] with” specified JEDEC standards “as revised.” Final Order ¶ I.H. & I. Rambus contends that the Commission should clarify (1) whether these definitions include any revisions in the standards that are adopted after the date of the Final Order (*i.e.*, July 31, 2006); and (2) when a product can be said to “comply” with a standard. *Id.*

¹³ 2010, when royalties fall to zero under Final Order, is 17 years after publication of the SDRAM standard and 11 years after publication of the DDR SDRAM standard. *See Liability Op.* at 41, 47-48.

¹⁴ *See* CX 1592 at 18 (Samsung royalties falling with time and volume); CX 1600 at 12 (Hyundai royalties falling with time and volume); CX 1612 at 5 (same); CX 1609 at 11 (Mitsubishi royalties falling with time); CX 1617 at 12 (Siemens royalties falling at high volumes).

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Rambus proposes rewording the definitions to include only those DRAMs that comply with the standards as revised on or before July 31, 2006.” Rambus Pet. at 14 n.10. According to Rambus, this would eliminate the possibility that Rambus would become subject to an entirely new set of obligations by virtue of any future revisions to JEDEC standards. *Id.* We do not intend such a result. However, Rambus’s proposed clarifying language introduces unnecessary ambiguities.¹⁵ The existing text, when properly read in context, is adequate and is not reasonably subject to the misinterpretations described by Rambus in its Petition.¹⁶

As for the meaning of the term “comply,” Rambus’s professed need for clarification is unpersuasive.¹⁷ Indeed, Rambus urges that the Commission adopt constructions that could dramatically subvert the remedial purposes of the Final Order. Thus, Rambus first suggests that DRAMs be deemed to comply with the specified JEDEC standards when they “contain[] all the features specified in the relevant portion of” the standards “with the possible exception of features expressly designated as optional.” Rambus Pet. at 14 n.10. An option to delete a feature

¹⁵ For example, if a relevant standard were revised after July 21, 2006, in a manner that has nothing to do with Rambus technologies, a DRAM that complies with the revised standard could fall outside Rambus’s proposed definition (because it would *not* comply with a pre-July 31, 2006, version of the standard). This result would be improper in cases where the relevant Rambus technologies are included in the standard both before and after the revision. Exempting such a DRAM from the Commission’s remedy would defeat the intent of our Order.

¹⁶ Rambus also proposes adding the word “chip” after “JEDEC-Compliant SDRAM” and “JEDEC-Compliant DDR SDRAM.” See Final Order ¶¶ I.F. & J. Rambus has not explained the need to modify the text in this manner. Accordingly, we deny its request. See 16 C.F.R. § 3.55.

¹⁷ In its appeal brief before the Commission, Rambus repeatedly referenced “JEDEC-Compliant” devices without qualification and without any suggestion it was uncertain or confused as to the meaning of the term. See Brief of Appellee and Cross-Appellant Rambus Inc. at 7, 26-28, 31, 54, 115, 129, 130 (June 2, 2004).

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that is needed by almost all DRAM customers — but unnecessary for a small and specialized group — should not and does not eliminate Rambus’s obligation to offer a license.

Rambus also suggests that “a product will comply with a standard as long as it includes those features [that are] required to make the product interoperable.” *Id.* Rambus, however, has already presented arguments that make this formulation an open invitation to mischief. For example, on-chip PLL/DLL technology is a feature that is necessary for a product to comply with JEDEC’s DDR SDRAM standard, even though DLLs can be disabled (*i.e.*, turned off) in DDR SDRAM. *See* Liability Op. at 94 n.525 (noting that on-chip DLLs are needed for normal DDR operation). Rambus’s proposed construction, however, would leave it room to argue that the ability to disable on-chip PLL/DLL means that on-chip PLL/DLL is not “*required* to make the product interoperable” and therefore not a feature necessary to comply with JEDEC’s DDR SDRAM. Indeed, counsel for Rambus already has asserted, “With respect to a DLL, there are no interoperability requirements at all.” Oral Arg. Tr. at 76 (Sept. 21, 2004); *see also id.* at 77 (“with respect to the DLL, there are no interoperability considerations at all”). Any construction that treats on-chip PLL/DLL as a feature that falls outside the coverage of the Order’s licensing requirements would be improper.¹⁸

¹⁸ Rambus’s proposed construction — focusing on whether a feature is “required to make the product interoperable” — similarly could invite arguments that the other technologies addressed by the Commission’s decision are not captured by the Order’s definition of JEDEC-Compliant DRAM Products. Rambus has pointedly avoided conceding that the technologies at issue satisfy its proposed test. For example, Rambus’s counsel argued before the Commission as follows:

[I]t is *desirable in terms of interoperability*, that each different manufacturer’s version of the same product will utilize these three technologies [programmable CAS latency, burst length, and dual-edge clocking] in the same way. *It doesn’t have to be that way* and it’s not

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Finally, Rambus asks the Commission to modify the definition of JEDEC-Compliant Non-DRAM Products. See Rambus Pet. at 14 n.ll. As adopted by the Commission, the definition encompasses memory controllers or other non-memory-chip components that “comply with” specified JEDEC standards. See Final Order ¶ I.E. According to Rambus, the Commission’s definition could force Rambus to license (under MARR terms) technologies that relate to some other portion of a component that interfaces with JEDEC-Compliant DRAM Products elsewhere, and have nothing to do with the JEDEC standards. Rambus contends that the definition should be modified to encompass memory controllers or other non-memory-chip components that are “designed to interface with” JEDEC-Compliant DRAM Products. Rambus Pet. at 14 n.ll. The Commission does not intend to require MARR licensing of technologies that are wholly unrelated to the specified JEDEC standards and to interfaces with those standards. Rambus, however, has not demonstrated a need for modifying the existing text. It has not identified any technologies that might be affected by the Commission’s language in the manner that Rambus suggests, and the alternative wording that it has proposed is not workable.¹⁹ We conclude that

always that way, but we certainly concede that it is desirable that it will be that way most of the time.

Oral Arg. Tr. at 74 (Sept. 21, 2004) (emphasis added). A construction that treats programmable CAS latency, programmable burst length, and dual-edge clocking as merely “desirable” but not “required” for purposes of interoperability, and therefore as features outside the Order’s licensing requirements, is improper and would undermine the remedial objectives of the Final Order.

¹⁹ Rambus’s proposed modification — to cover only non-memory-chip components designed to interface with JEDEC-Compliant DRAM Products — is (i) unnecessary to exempt from the Order’s licensing requirement components unrelated to the relevant JEDEC standards and interfaces with those standards and (ii) inadequate to exempt a technology in a component that interfaces with a relevant JEDEC standard but that is unrelated to the interface. Moreover, Rambus’s proposal seems to introduce unnecessary considerations of intent, in determining whether or not a component was “designed to” interface with JEDEC-Compliant DRAM Products.

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the issues that Rambus has raised are best resolved on a case-by-case basis in the context of a specific set of facts.

Liability for Conduct of Compliance Officer

Complaint Counsel ask the Commission to modify Paragraph III.C. by deleting text that absolves Rambus from liability for the “misfeasance, gross negligence, willful or wanton acts, or bad faith” of its Compliance Officer. Complaint Counsel’s Response at 9. According to Complaint Counsel, the cited language could create a “perverse situation” in which the deliberate acts of a Rambus employee to avoid making the required disclosures would not be actionable. *Id.* at 9-10.

Rambus contends that these concerns are “overstated and misplaced” for three reasons. Rambus Answer at 2. First, Rambus argues, the Commission approves the selection of the Compliance Officer, and can remove him if he fails to act. Second, with only one exception, the Order imposes no substantive obligations on the Compliance Officer that are not also imposed on Rambus. According to Rambus, it should not be responsible for grossly negligent or bad faith violations by the Compliance Officer. Finally, Rambus has an incentive to ensure that the Compliance Officer complies fully with the Order because any violation by a Rambus employee would subject Rambus to civil penalties. *Id.* at 2-4.

Given the deceptive nature of the underlying conduct, we do not agree with Rambus that Complaint Counsel’s concerns are either “overstated” or “misplaced.” The Compliance Officer is a Rambus employee. Therefore, there is no reason why the standards governing Rambus’s liability for misconduct by its Compliance Officer should differ from those that apply generally to other Rambus employees. A corporation can act only through its authorized employees and agents. Therefore, a corporation is bound by and responsible for the misconduct of an employee that occurs within the scope of that employee’s employment. *See,*

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e.g., *Goodman v. FTC*, 244 F.2d 584, 592-93 (9th Cir. 1957); *Parke, Austin & Lipscomb, Inc. v. FTC*, 142 F.2d 437, 440 (2d Cir. 1944); *FTC v. Hoboken White Lead & Color Works, Inc.*, 67 F.2d 551, 553 (2d Cir. 1933). Furthermore, Rambus is in a far better position than the Commission to monitor the Compliance Officer's performance.²⁰ While Rambus's selection of an employee to fill the office is subject to Commission approval (*see* Rambus Answer at 2), Rambus is responsible for appointing him, or designating a current employee to fulfill that role. *See* Final Order ¶ III.A. Indeed, nothing in the Order prohibits Rambus from terminating the Compliance Officer (subject to Commission approval of a replacement) if his conduct is not satisfactory. In sum, we agree with Complaint Counsel that there is no basis for exempting Rambus from liability for its Compliance Officer's misfeasance, gross negligence, willful or wanton acts, or bad faith." Accordingly, we grant Complaint Counsel's request for deletion of the specified text in Paragraph III.C.

Conclusion

For all the foregoing reasons, Respondent's Petition for Reconsideration of the Final Order is granted in part, and denied in part. Complaint Counsel's Petition for Reconsideration of Paragraph III.C. is granted.

²⁰ Rambus contends that it should not be held responsible if the Compliance Officer fails to make "Aconfidential" reports to the Commission because, by definition, (it) cannot ensure that he is making such reports." Rambus Answer at 3. We agree that it is not feasible for Rambus to oversee such a requirement. Accordingly, we modify Paragraph III.E. of the Final Order by eliminating the requirement that any supplements to the Compliance Officer's periodic reports remain "Aconfidential."

Order

IN THE MATTER OF
EQUITABLE RESOURCES, INC. ET AL.

Docket No. 9322 – Order, May 24, 2007

ORDER STAYING DISCOVERY

Respondents filed a “Motion to Remove Matter from Adjudication” with the Commission on May 16, 2007. Yesterday, Complaint Counsel filed a “Motion to Stay Complaint Counsel’s Discovery Obligations Pending Resolution of Respondents’ Motion to Remove Matter From Adjudication.” Absent an order staying discovery, both parties are obligated under the Commission’s April 24, 2007, Scheduling Order to respond today to any discovery requests made before the Scheduling Order was entered.

According to Complaint Counsel’s Motion to Stay, Respondents have stated that they intend to object to Complaint Counsel’s discovery requests on the basis of *res judicata*, and that they do not intend to produce responsive materials at this time. Complaint Counsel’s motion also expresses concern about unfair advantage if they unilaterally produce discoverable materials, and they argue that the Commission’s resolution of Respondents’ Motion to Remove may resolve many of the same issues likely to be raised by Respondents’ forthcoming objections.

Accordingly,

IT IS HEREBY ORDERED that all discovery in this case be stayed pending the Commission’s resolution of Respondents’ Motion to Remove Matter from Adjudication.

By the Commission.

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IN THE MATTER OF

EQUITABLE RESOURCES, INC. ET AL.

Docket No. 9322 – Order, May 30, 2007

**ORDER DENYING WITHOUT PREJUDICE RESPONDENTS’ MOTION
TO REMOVE MATTER FROM ADJUDICATION**

On May 16, 2007, respondents Equitable Resources, Inc., Dominion Resources, Inc., Consolidated Natural Gas Company, and The Peoples Natural Gas Company (“Respondents”) moved, pursuant to Rule 3.26(c) of the FTC’s Rules of Practice, 16 C.F.R. § 3.26(c), to remove this matter from adjudication in order to afford the Commission the opportunity to decide whether or not the public interest would be served by continuing this administrative litigation. Complaint Counsel filed a timely objection to the motion on May 18, 2007, and Respondents filed a reply on May 21, 2007.

We note that Respondents have not sought, and Rule 3.26(c) does not contemplate, an immediate determination of whether the Commission would continue its merger challenge in administrative litigation following a conclusive loss of its action for preliminary injunction in federal court. Accordingly, the Commission focuses here on whether removal from adjudication — with the primary purposes of enabling *ex parte* discussions with the parties about the merits of the case and avoiding duplication of litigation resources while the appeal is pending — is desirable and appropriate.

Having considered the parties’ arguments, in light of the Commission’s policy underlying Rule 3.26(c) and the current posture of the federal court litigation, the Commission hereby denies Respondents’ motion without prejudice.

1. Background. On March 1, 2006, Equitable Resources, Inc. executed an agreement to acquire the capital stock of The

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Peoples Natural Gas Company from the Consolidated Natural Gas Company, a subsidiary of Dominion Resources, Inc. On March 14, 2007, the Commission issued an administrative complaint, alleging that Equitable's acquisition of Peoples would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. On April 9, 2007, Respondent Equitable and Respondents Dominion, Consolidated Natural Gas, and Peoples respectively filed answers to the complaint, respectively asserting the defenses, *inter alia*, that the actions challenged in the Commission's complaint were immunized from liability — and that the claims in the complaint were barred — by the state action doctrine. On April 11, 2007, Complaint Counsel moved to strike the Respondents' state action defenses.

On April 13, 2007, the Commission filed a complaint and motions for a temporary restraining order and a preliminary injunction against Respondents in the Federal District Court for the Western District of Pennsylvania, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), seeking to prevent the merger, and thereby maintain the *status quo*, during the pendency of the administrative proceeding. At the hearing on the temporary restraining order, the court scheduled briefing and argument on a motion to dismiss the complaint based on state action grounds.

On April 16, 2007, the Commission issued an order staying further briefing on Complaint Counsel's motion to strike. On April 24, 2007, the Commission issued a scheduling order, after a scheduling conference with the parties, setting forth discovery and other deadlines for the administrative litigation.

On May 14, 2007, the district court granted Respondents' motion to dismiss the complaint on state action grounds. On May 16, 2007, the Commission filed an emergency motion for an injunction pending appeal in the district court, which was denied on May 21, 2007. On May 18, the Commission filed a notice of appeal of the district court's judgment and, on May 21, 2007, an emergency motion for an injunction pending appeal. On May 24,

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2007, the Commission issued an Order Staying Discovery pending the Commission's resolution of Respondents' Motion to Remove Matter from Adjudication. Today, the Commission has issued a further scheduling order, in light of the current posture of the case.

2. Respondents' Motion to Remove Matter from Adjudication. Respondents argue that this matter should be removed from adjudication, pursuant to Rule 3.26(c), on grounds that, in light of the district court's dismissal of the complaint, the Commission should consider whether further administrative litigation is in the public interest. Respondents state that the Commission would benefit from the opportunity to discuss with the parties the asserted efficiencies and benefits that the transaction would entail, without being constrained by the rules governing *ex parte* contacts during the pendency of administrative litigation. Respondents also argue that the Commission should reconsider its decision to block the transaction before the parties expend further time and resources in litigation.

Complaint Counsel objects to the motion on the ground that it is premature because Rule 3.26(b) contemplates the filing of such a motion after (1) the Commission has forgone its right to seek reconsideration or to appeal a district court ruling denying preliminary injunctive relief; or (2) a court of appeals has denied preliminary injunctive relief. Complaint Counsel asserts that denial of the motion would not prevent Respondents from sharing with the Commission their arguments on the benefits of the transaction, and from substantiating these arguments with evidence produced in discovery in the administrative litigation.

3. Discussion. By its terms, Rule 3.26 contemplates that the Commission need not withdraw a matter from adjudication while litigation on the preliminary injunction, including appellate proceedings, is pending. The Federal Register notice accompanying the Rule made this clear:

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(T)he procedures become available when a district court denies the Commission preliminary injunctive relief and (a) all opportunity has passed for the Commission to seek reconsideration of the district court's denial or to appeal it to a court of appeals, and the Commission has neither sought reconsideration of the denial nor appealed it, or (b) a court of appeals has denied preliminary injunctive relief. Thus, these mechanisms will not be available while the Commission might seek reconsideration by the district court or appeal the denial to a court of appeals.

60 Fed. Reg. 39640, 39641 (Aug. 3, 1995) (footnote omitted). Consistent with that discussion, as Complaint Counsel point out, Rule 3.26(b), 16 C.F.R. § 3.26(b), provides, in relevant part, that a motion [under either Rule 3.26(c) or Rule 3.26(d)] Amust be filed within fourteen (14) days *after*. . . (2) A court of appeals has denied preliminary injunctive relief." (emphasis added). When the Commission issued the administrative complaint, it found reason to believe that the merger may substantially lessen competition, in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. The district court's decision has not altered the Commission's view that its challenge to the merger is in the public interest. The Commission has appealed the district court's dismissal of the complaint, and has sought an emergency injunction pending appeal. In these circumstances, Respondents' motion is procedurally premature.

In any event, the Commission has determined that withdrawal from administrative adjudication would not be appropriate from a public interest perspective. As the Commission has previously stated, a challenge to a merger in administrative litigation may be in the public interest despite the fact that the Commission has not succeeded in obtaining judicial intervention to prevent its consummation. 60 Fed. Reg. at 39641. Moreover, the state action issue that is the subject of the FTC's Third Circuit appeal is an important legal issue generally, and an issue of great interest to the Commission.

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At this stage of the proceedings, the principal effect of withdrawing the case from adjudication would be to remove the bans on *ex parte* communications. Before the Commission issued the administrative complaint, the Respondents submitted lengthy white papers to the Commission setting forth their views on competition and efficiencies and, of course, Respondents take the opportunity in their current motion to again share their views on efficiencies. Respondents also remain free to make their arguments on the record in the administrative litigation. For example, in their reply brief, Respondents state that, if the instant motion is denied, they intend to file a motion to dismiss on *res judicata* grounds. The Commission sees no compelling need for *ex parte* communications with the parties at this point.

Accordingly,

IT IS ORDERED that the motion is denied without prejudice.

By the Commission, Commissioner Harbour not participating.

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IN THE MATTER OF
EQUITABLE RESOURCES, INC. ET AL.

Docket No. 9322 – Order, May 30, 2007

ORDER STAYING DISCOVERY

The Commission's May 24, 2007, Order staying discovery expired today with the issuance of the Commission's Order Denying Without Prejudice Respondents' Motion to Remove Matter From Adjudication. Absent a further order staying discovery, the parties would be obligated to comply with the discovery obligations set out in the Commission's April 24, 2007, Scheduling Order. The Commission has now determined — solely as a matter of discretion, without taking any position as to the merits of any of the arguments presented by the parties with respect to the stay of discovery issue — to continue to stay discovery in this matter until further notice.

Accordingly,

IT IS ORDERED that all discovery in this matter is stayed until further notice.

By the Commission.

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IN THE MATTER OF

PAUL L. FOSTER, ET AL.

Docket No. 9323 – Order, June 7, 2007

**ORDER WITHDRAWING MATTER FROM ADJUDICATION
PURSUANT TO RULE 3.26(C) OF THE COMMISSION RULES OF
PRACTICE**

On June 5, 2007, counsel for all the Respondents in this proceeding filed a Motion to the Commission for Withdrawal of the Matter from Adjudication. Also on June 5, 2007, Complaint Counsel filed a Statement of Non-Opposition to Respondents' Motion, advising that Complaint Counsel do not oppose Respondents' Motion. Accordingly,

IT IS ORDERED, pursuant to Rule 3.26(c) of the Commission Rules of Practice, 16 C.F.R. § 3.26(c) (2007), that this matter in its entirety be and it hereby is withdrawn from adjudication, and that all proceedings before the Administrative Law Judge be and they hereby are stayed.

By the Commission.

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IN THE MATTER OF
RAMBUS INCORPORATED

Docket No. 9302 – Order, June 14, 2007

**LETTER APPROVING AN ESCROW AGENT AND ESCROW
AGREEMENT**

Dear Mr. Stone and Mr. Melamed:

This letter responds to *Respondent's Proposal Regarding Escrow Agent and Manner of Collection Pursuant to March 16, 2007 Order* dated April 11, 2007, and to the *Supplemental Submission by Rambus Inc. Regarding Escrow Issues* (“Supplemental Submission”) dated May 22, 2007, which were both filed in accordance with Paragraph 1.a.(1) of the *Commission's Order Granting in Part and Denying in Part Respondent's Motion for Stay of Final Order Pending Appeal* (March 16, 2007) in the above matter. In these filings respondent Rambus Inc. has sought approval of an escrow agent and an escrow agreement.

After consideration of those filings, the Commission has determined (a) to approve Wells Fargo & Company as an escrow agent and (b) to approve the escrow agreement attached as Attachment A to the Supplemental Submission dated May 22, 2007. In according its approval, the Commission has relied upon the information submitted and representations made in connection with the filings and has assumed them to be accurate and complete.

By direction of the Commission.

RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

COMMONWEALTH MARKETING GROUP, INC.

FTC File No. 912 3352 Decision, March 28, 2007

COMPULSORY PROCESS COMMISSIONER'S RESPONSE TO COMMONWEALTH MARKETING GROUP, INC.'S ("CMG") PETITION TO QUASH OR LIMIT CIVIL INVESTIGATIVE DEMAND

Dear Mr. Hicks:

This letter advises you of the disposition of CMG's Petition to quash or limit various specifications of the Civil Investigative Demand ("CID") issued to it on December 13, 2006. For the reasons stated herein, the Commission denies CMG's Petition. Pursuant to 16 C.F.R. § 2.7(e), CMG is ordered to comply with the CID on or before April 9, 2007 at 5:00 p.m. E.S.T.

This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. *See* 16 C.F.R. § 2.7(d)(4). Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.¹

I. Background and Summary

On December 13, 2006, the Commission issued a CID to CMG as part of an investigation of the sales and marketing activities of CMG. CMG's Petition was timely filed on January 3, 2007. CMG's Petition contends that the CID seeks: (1)

¹ This letter decision is being delivered by facsimile and express mail. The facsimile copy is being provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you received the original by express mail. In accordance with the provisions of 16 C.F.R. § 2.7(f), the timely filing of a request for review of this matter by the full Commission shall not stay the return date established by this decision.

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information that is outside the scope of the resolution authorizing the investigation, CMG's Petition at 3; (2) documents that are not adequately identified, *id.* at 4; and (3) information regarding CMG's financial status that is entirely unlawful and an abuse of the FTC's powers." *Id.*

The resolution authorizing the CID defines the scope of this investigation as follows:

To determine whether unnamed accessors of consumers' bank accounts are or may be engaged in acts or practices in violation of Section 5 of the Federal Trade Commission Act. . . by accessing consumers' bank accounts. . . through unfair or deceptive acts or practices. The investigation is also to determine whether Commission action to obtain redress of injury to consumers or others would be in the public interest.

Resolution Directing Use of Compulsory Process in Nonpublic Investigation, Unnamed Accessors of Consumers' Bank Accounts, File No. 912-3552 (Aug. 6, 1991).

II. The Information Requested Is Relevant to the Commission's Investigation

CMG claims there is no nexus between the information requested in interrogatory specifications III.A.1.,2., and 4.-6. and document production specifications III.B.5.-11. and the law enforcement purpose of the investigation as stated in the Resolution authorizing the use of compulsory process.² We disagree. The information sought by each of the enumerated specifications is sufficiently related to the investigation.

² CMG's Petition at 5-7.

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The Commission is entitled to require respondents to provide any information that is “not plainly incompetent or irrelevant to any lawful purpose of the [agency] . . . and not unduly burdensome to produce[.]” *Federal Trade Commission v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) (internal quotations and citations omitted). Further, “the agency’s own appraisal of relevancy must be accepted so long as it is not obviously wrong.” *Id.* (internal quotations and citations omitted).

“[T]he Commission has no obligation to establish precisely the relevance of the material it seeks in an investigative subpoena by tying that material to a particular theory of violation.” *Id.* at 1090 (citing *Federal Trade Commission v. Texaco, Inc.* 555 F.2d 862, 877 (D.C. Cir. 1977)). Determination of relevancy “in an investigatory proceeding is more relaxed than in an adjudicatory one.” *Id.* The material requested “need only be relevant to the *investigation* — the boundary of which may be defined quite generally, . . . as it was in the Commission’s resolution here. *Id.* (emphasis in original). With these principles in mind, we turn now to the determination of whether the information sought by the challenged specifications is relevant to the scope of the investigation authorized by the Commission’s Resolution of August 6, 1991.

Information sought by CID is relevant to an investigation so long as it is likely to be of some assistance to the Commission in deciding whether there is reason to believe that Section 5 has been violated and whether an enforcement action should be commenced. *Invention Submission Corp.*, 965 F.2d at 1090. The information sought by each of the challenged specifications is clearly relevant to this investigation.

Interrogatory specifications 1 and 2 and document specifications 6 and 7 seek the identification of each person who obtained a credit card from CMG or who CMG enrolled in a particular membership class. The Commission seeks to determine whether CMG may have improperly accessed the bank accounts

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of its customers. Thus, the information requested by these specifications is clearly relevant to identify both witnesses who can provide evidence regarding CMG's marketing practices over time, and persons who might also be victims in the event evidence of a violation is uncovered.

Interrogatory specification 4 and document specification 8 seek the identification of each CMG customer who requested cancellation of either a credit card or membership. Identification of witnesses and potential victims is directly relevant to the investigation.

Interrogatory specification 5 and document specification 11 seek information relating to products and services associated with a membership classification, and the number and identity of persons using such products and services. Information regarding the identity of witnesses/victims as well as the scope and frequency of particular purchases are relevant to this investigation of CMG's marketing practices, and to determine whether CMG had authority to access consumers' bank accounts.

Interrogatory specifications 6 and 7 and document specifications 9 and 10 seek information relating to all merchandise offered for sale by CMG and whether consumers could or could not purchase that merchandise using the credit card issued by CMG. Identification of merchandise that was actually being sold and the conditions of such sales are relevant to whether those sales, terms and conditions were in fact consistent or inconsistent to CMG's sales and promotional representations to consumers. It will also assist the Commission in assessing whether CMG had authority to access consumers' bank accounts.

Finally, document specification 5 requests copies of any performance bond or escrow agreement that might have been obtained by CMG's principal (Frederick Zeigler) in accordance with the terms of a Stipulated Settlement Agreement Containing Order for Permanent Injunction and Monetary Relief with

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Defendants Commonwealth Marketing Group, Inc., Great Escape Vacations & Tours, Inc. and Frederick F. Zeigler, III entered in *Federal Trade Commission v. Commonwealth Marketing Group, Inc., et al.*, Case No. 98-918 (W.D. PA Mar. 6, 2000).³ That Order requires Mr. Zeigler, *inter alia*, to obtain bonding if he engages in telemarketing. Staff has reason to believe that some portion of CMG's current marketing activity has been conduct by way of telemarketing. The existence of such bonding is relevant to the identification of parties from whom consumer redress might be sought under certain circumstances. Accordingly, it is relevant to the current investigation. The fact that it might also be relevant to issues of compliance with an Order of the United States District Court for the Western District of Pennsylvania does not some how make it any less relevant to the current investigation.

III. The Word "Unique" Is Not Vague and Undefined

CMG objects to document specifications III.B.1.-3. on the ground that the adjective "unique" is impermissibly "vague and undefined," CMG's Petition at 8-9,⁴ when used to describe, *inter alia*, telemarketing scripts, Internet websites, and commercial email messages. CMG cites no authority supporting a claim that a word of common usage and understanding is vague simply because it is not separately defined by the CID. Further, CMG has offered no explanation of the manner in which it was confused by the usage of the adjective "unique."

³ CMG notes that staff made virtually identical information requests by way of discovery requests permitted by that Order prior to the issuance of the CID. *See* CMG's Petition at 2-3. Staff withdrew those discovery requests after CMG objected on the grounds that much of the information being requested was outside of the scope of that Order. CMG's Petition at 2-3.

⁴ CMG further argues that use of the word "every," to define certain classes of individuals, constitutes a form of vagueness because it fails to differentiate between alleged authorized and unauthorized accesses to bank accounts. *Id.* CMG would have the Commission put the horse in front of the cart. Under the standard advocated by CMG, the Commission would be obliged to divine in advance all transactions that might violate the law before seeking information limited only to those identified transactions. This standard fails for

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The Commission used the adjective “unique” in these specifications to avoid burdening CMG with the redundant production of multiple copies of the same documents.⁵ The Commission finds CMG’s objection to the use of the word “unique” in these specifications to be wholly without merit.

IV. This Investigation Is Not An Unlawful Fishing Expedition⁶

Use of the “fishing expedition” metaphor, even when accompanied by a citation to some court’s usage of the term, *see* CMG’s Petition at 8, frequently fails to provide any illumination regarding the issues being raised. This is particularly true of FTC investigations where the Supreme Court has clearly stated that the Commission may conduct an investigation even if it does so merely to satisfy an “official curiosity.” *United States v. Morton Salt Co.*, 338 U.S. 632, 639 (1950). The *Morton Salt* Court further advised,

two reasons. First, “[a]t the investigatory stage, the Commission does not seek information necessary to prove specific charges; it merely has a suspicion that the law is being violated in some way and wants to determine whether or not to file a complaint.” *Federal Trade Commission v. Invention Submission Corp.*, 965 F.2d at 1090 (citations omitted). Second, evaluation of the differences between authorized and unauthorized transactions might well provide evidence of a violation. *See Federal Trade Commission v. Texaco, Inc.*, 555 F.2d at 876 (“We agree with the FTC that comparative information of this sort is ‘reasonably relevant’ to its investigation.”). Thus, the distinction between authorized and unauthorized transactions advocated by CMG does not represent any difference in the potential evidentiary value of any transaction records in the context of this investigation. The application of that standard would likely impede rather than advance the Commission’s investigation, and is, therefore, rejected.

⁵ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1288 (10th ed. 2002) defines the adjective “unique” to mean “being the only one; sole. . . being without like or equal.”

⁶ CMG’s Petition at 9.

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We must not disguise the fact that sometimes, especially early in the history of the federal administrative tribunal, the courts were persuaded to engraft judicial limitations upon the administrative process. The courts could not go fishing, and so it followed neither could anyone else. Administrative investigations fell before the colorful and nostalgic slogan *Ano fishing expeditions*.” . . . [However,] [t]he only power that is involved here is the power to get information from those who can best give it and who are most interested in not doing so. . . . [Administrative agencies have] a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.

Id. at 642-43.

CMG has provided the Commission with no factual or legal basis for its claim that the present CID is beyond the FTC’s power to inquire, or that the Commission has no reason to believe that an investigation is in the public interest. That being the case, invocation of the fishing expedition metaphor, by itself, is inadequate to call the present investigation, and this CID, into question.

V. CMG Has Not Established That the CID Seeks Irrelevant Financial Information

CMG claims the present CID was issued as part of a prohibited inquiry “to assess the financial status of CMG before the FTC undertakes [] an investigation,” CMG’s Petition at 4, and

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relies on the unexplained *dictum* found in *Federal Trade Commission v. Turner*, 609 F.2d 743, 745 (5th Cir. 1980), to the effect that the amount of a person's assets are "not relevant to an inquiry into whether a violation of the law exists." Such reliance is unavailing. Unlike in *Turner*, this is an inquiry to determine whether CMG has violated the law and not an inquiry into whether it would be cost effective to seek enforcement of an existing cease and desist order. *See id.* at 744. In similar investigative circumstances, the D.C. Circuit Court of Appeals declined to follow *Turner* and found that "[f]inancial data, including evidence of relative profitability, could facilitate the Commission's investigation of [a respondent] in different ways, not all of which may yet be apparent." *Federal Trade Commission v. Invention Submission Corp.*, 965 F.2d at 1090.

In addition, the terms of the CID itself do not appear to support CMG's claim. Many types of records which would normally be sought in order to assess a company's financial status simply do not appear in this CID. Journals, ledgers, financial statements, tax returns, inventories of assets and liabilities are all classes of financial records particularly relevant to an inquiry into a company's financial status; however, the CID seeks none of those records. Indeed, CMG only claims that information responsive to "the CID will directly reflect on the number of sales made by the company, [and, further, that] CMG has valid reason to believe that the FTC is really seeking to ascertain nothing more than the financial status of this company." CMG's Petition at 11. Neither the fact that CID responses might show gross sales figures nor the fact that such figures might provide some incomplete insights regarding CMG's financial condition would make such sales information either irrelevant to the investigation or beyond the ambit of legitimate inquiry by the FTC or evidence of an improper motive for this investigation of CMG.

"The burden of showing that the request is unreasonable is on the subpoenaed party. Further, that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose

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and the requested documents are relevant to the purpose.” *Federal Trade Commission v. Texaco, Inc.*, 555 F.2d at 882; *Federal Trade Commission v. Invention Submission Corp.*, 965 F.2d at 1090. CMG has offered neither factual nor legal support for its claim that the “FTC has engaged in an unlawful investigation.” CMG’s Petition at 11. It has, thus, failed to carry its burden of establishing its right to have the CID limited or quashed on that ground.

VI. Conclusion and Order

For all of the foregoing reasons **IT IS ORDERED** that CMG’s Petition should be, and it hereby is, **DENIED**.

IT IS FURTHER ORDERED that CMG shall respond to the CID on or before April 9, 2007 at 5:00 p.m. E.S.T.

By direction of the Commission.

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COMMONWEALTH MARKETING GROUP, INC.*FTC File No. 912 3352 Decision, April 17, 2007***FULL COMMISSION RESPONSE TO COMMONWEALTH
MARKETING GROUP, INC.'S ("CMG") REQUEST FOR REVIEW
OF DENIAL OF PETITION TO QUASH OR LIMIT CIVIL
INVESTIGATIVE DEMAND**

Dear Mr. Hicks:

This letter advises you of the Commission's disposition of CMG's Request for Review of the Ruling on March 28, 2007 Denying CMG's Petition to Quash or Limit the Civil Investigative Demand ("CID") issued in conjunction with an investigation of CMG by the Federal Trade Commission (hereinafter "FTC" or "Commission"). The Request for Review is denied for the reasons stated below.

The Commission issued a CID to CMG on December 13, 2006. On January 3, 2007, counsel for CMG timely filed the Petition to Quash. On March 28, 2007, Commissioner Harbour, acting as the Commission's delegate, *see* 16 C.F.R. § 2.7(d)(2), directed the issuance of the decision denying CMG's Petition to Quash or Limit CID because CMG had not shown that:

- (1) the information sought by the CID was irrelevant to the investigation authorized by the Commission's resolution;¹
- or

¹ Petitioner mischaracterizes the scope of the investigation by attempting to claim it is "limited to unauthorized access to consumer bank accounts," Req. for Review at 10. In so doing, Petitioner excises from the authorizing resolution any inquiry into whether CMG has gained access to consumer bank accounts "through unfair or deceptive acts or practices." Petitioner provides no reason why this inquiry should be thus constricted, and the Commission declines to do so.

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- (2) the CID requested the production of documents without designating them with sufficient definiteness; or
- (3) the investigation was being conducted for an unlawful or improper purpose.

The Request for Review was timely filed on April 5, 2007. The Request for Review did not include a request to stay the April 9th return date for the CID, and the filing of the Request for Review does not itself stay the return date. 16 C.F.R. § 2.7(f).

The Petition to Quash or Limit was not accompanied by any affidavits or other materials under oath.² The Request for Review does nothing more than repeat the claims in the Petition without any additional facts or legal arguments.

The Commission has reviewed the record created by CMG in support of its Petition to Quash or Limit CID and its Request for Review. That record does not support any of the claims for relief advanced by CMG. Accordingly, Petitioner has not carried its burden of proof establishing its entitlement to relief from the CID. *See Securities and Exchange Commission v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (2nd Cir. 1973), *cert. denied*, 415 U.S. 915 (1974) (holding that the petitioner has “the burden of showing that an agency subpoena is unreasonable. . . and, where, as here, the agency inquiry is authorized by law and the materials sought are relevant to the inquiry, that burden is not easily met.”)

For the reasons set forth in the Commission’s ruling of March 28, 2007 denying CMG’s Petition to Quash, **IT IS ORDERED** that such ruling should be, and it hereby is, **AFFIRMED**.

By direction of the Commission.

² Indeed, the only bases for relief in that Petition were counsel’s conclusions of fact provided without any citations to facts that would necessarily lead one to the proffered conclusions.

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NEW SEASONS MARKET*File No. 071 0114 Decision, June 26, 2007***COMPULSORY PROCESS COMMISSIONER'S RESPONSE TO NEW
SEASON MARKET'S ("NSM") PETITION TO QUASH OR LIMIT
CIVIL INVESTIGATIVE DEMAND**

Dear Mr. Newell:

This letter advises you of the disposition of NSM's Petition to quash or limit specifications of the Civil Investigative Demand ("CID") issued to it on April 24, 2007. Because NSM's Petition was filed after the deadline by which it had to be filed, the Commission denies NSM's Petition.¹ Pursuant to 16 C.F.R. § 2.7(e), NSM is ordered to comply with the CID on or before July 3, 2007 at 5:00 p.m. E.D.T.

This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. See 16 C.F.R. § 2.7(d)(4). Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the

¹ Reaching the merits of NSM's Petition would not change this result. NSM provided no factual basis for its claims of burden. See *Federal Trade Commission v. Rockefeller*, 591 F.2d 182, 190 (2nd Cir. 1979) (Petitioner must show that compliance would "unduly disrupt or seriously hinder" its daily operations). Further, NSM's claim that information regarding the facts of its grocery store operations in one overlap market are beyond the scope of this investigation of a retail grocery store merger is simply frivolous. *Federal Trade Commission v. Whole Foods Market, Inc., et al.*, Docket No. 1:07-cv-01021 (D. D.C. June 6, 2007), Complaint at ¶35, available at: <http://www.ftc.gov/os/caselist/0710114/070605complaint.pdf> (alleging geographic markets defined by a six mile circle around each store). Finally, NSM offers no authority to support its request that the Commission agree to pay "damages" in the event of an inadvertent public disclosure of confidential business information, and the mere possibility of such disclosure provides no ground for quashing the CID.

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Secretary of the Commission within three days after service of this letter.²

The CID at issue was signed and issued to NSM on April 24, 2007, returnable on April 30, 2007, Petition at 1, and was served on NSM on April 25, 2007. NSM states that "The FTC has granted multiple extensions, ultimately extending the time to respond to June 15, 2007." *Id.* NSM did not seek, nor was it granted, however, an extension of time within which to file a petition to quash or limit a CID. The time for filing a petition to quash, absent an extension of time granted pursuant to and in conformity with 16 C.F.R. § 2.7(d)(3), is the earlier of the date for compliance with the CID or 20 days after service. In the case of this CID, a petition to quash should have been filed no later than the earlier of April 30th (initial compliance date) or May 15th (twenty days after service).. NSM claims to have received extensions of the return date for its CID until June 15th.³

² This letter decision is being delivered by facsimile and express mail. The facsimile copy is being provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you received the original by express mail. In accordance with the provisions of 16 C.F.R. § 2.7(f), the timely filing of a request for review of this matter by the full Commission shall not stay the return date established by this decision.

³ The CID expressly provides that all modifications "must be agreed to in writing by the Commission representative." CID at 3. Further, pursuant to 16 C.F.R. § 2.7(c), all such amendments regarding the manner and timing of compliance for this CID required approval by at least an Assistant Director of the Bureau of Competition. The last written approval of an extension of the time within which to comply that was signed by an Assistant Director only extended the return date to May 29, 2007. The Commission has reason to believe that two additional extensions of the deadline for compliance were approved by an Assistant Director. However, while the next to the last request for an extension, until June 5th, was addressed by an email message, the final request for an extension, until June 15th, was addressed only orally. The CID by its own terms does not permit oral modifications. Accordingly, the last arguably cognizable extension only extended the time for compliance until June 5th, not until June 15th. Thus, even if the Commission assumes, contrary to the evidence, that each extension validly approved included both an extension pursuant to 16 C.F.R. §§ 2.7(c) (extension of compliance date) and

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Extending only the return date, however, still would make May 15th the latest permissible date for filing a petition to quash. An extension of the time to comply does not automatically extend the time within which a petition to quash must be filed. *Compare* 16 C.F.R. § 2.7(c) *with* 16 C.F.R. § 2.7(d)(3). Linking the two extensions together might provide both the means and the incentive to delay investigations unnecessarily. NSM has offered no reason for filing its petition out of time, nor did it seek leave to file its petition out of time.

Accordingly,

IT IS ORDERED that NSM's Petition be, and it hereby is, **DENIED**.

IT IS FURTHER ORDERED that NSM shall respond to the CID on or before July 3, 2007 at 5:00 p.m. E.D.T.

By direction of the Commission.

an extension pursuant to 16 C.F.R. § 2.7(d)(3) (extension of time within which to file a petition to quash), NSM's Petition was due on or before June 5, 2007.