

FEDERAL TRADE COMMISSION DECISIONS

**FINDINGS, OPINIONS, AND ORDERS
JULY 1, 2008, TO DECEMBER 31, 2008**

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MEMBERS OF THE FEDERAL TRADE COMMISSION
DURING THE PERIOD JULY 1, 2008, TO DECEMBER 31, 2008

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Took oath of office January 4, 2006.

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Took oath of office August 4, 2003.

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

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
JULY 1, 2008, TO DECEMBER 31, 2008

IN THE MATTER OF

REED ELSEVIER INC.
AND
SEISINT, INC.

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

*Docket C-4226; File No. 052 3094
Complaint, July 29, 2008 – Decision, July 29, 2008*

This consent order applies to practices of Reed Elsevier Inc. and Seisint, Inc., that failed to provide reasonable and appropriate security for sensitive consumer information stored in Seisint databases. Breaches of the system by identity thieves disclosed sensitive information about more than 300,000 consumers. The order requires each respondent to establish and maintain a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of nonpublic personal information collected from or about consumers. The security programs must contain administrative, technical, and physical safeguards appropriate to the respondent's size and complexity, the nature and scope of its activities, and the sensitivity of the personal information collected from or about consumers. The order requires each respondent to obtain on a biennial basis for a period of 20 years, an assessment and report from a qualified, objective, independent third-party professional, certifying, among other things, that it has in place a security program that provides protections that meet or exceed the protections required by the order. and 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. The order requires the respondents to retain documents relating to their compliance with the order, to disseminate the order to persons with responsibilities relating to the subject matter of the order, to notify the Commission of changes in corporate status, and to submit periodic compliance reports.

Participants

For the Commission: Katrina A. Blodgett, Kathleen L. Claffie,
Kathryn D. Ratté, Jessica Rich, Alain Sheer, and Joel Winston.

Complaint

For the *Respondents: J. Howard Beales, III; Jeffrey I. Cox, Thomas R. Kraemer, and Ronald I Raether, Faruki, Ireland, & Cox P.L.L.; and Emilio W. Cividanes and Lisa Jose Fales, Venable LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Reed Elsevier Inc. and Seisint, Inc. 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 Reed Elsevier Inc. (“REI”) is a Massachusetts corporation with its principal office or place of business at 125 Park Avenue, Suite 2300, New York, New York 10017. REI engaged in the acts and practices at issue in this complaint through LexisNexis, a division of REI with its principal office or place of business at 9333 Springboro Pike, Dayton, Ohio 45401.

2. Respondent Seisint, Inc. (“Seisint”) is a Florida corporation with its principal office or place of business at 6601 Park of Commerce Boulevard, Boca Raton, Florida 33487.

3. Respondent REI acquired respondent Seisint on September 1, 2004, and since then has operated it as a wholly-owned subsidiary within LexisNexis. Respondent REI integrated respondent Seisint into LexisNexis by, among other things, using respondent Seisint’s facilities, personnel, technologies, and products in LexisNexis’ other business operations. Since the acquisition, respondent REI has controlled the acts and practices of respondent Seisint at issue in this complaint. Respondent Seisint is solely liable for its practices prior to the acquisition.

4. The acts and practices of respondents as alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

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RESPONDENTS' BUSINESS PRACTICES

5. At all relevant times before and after the acquisition, respondents Seisint and REI have been in the business of collecting, maintaining, and selling information about consumers. Among other things, each respondent sells products that customers use to locate assets and people, authenticate identities, and verify credentials (collectively, "verification products").

6. Respondent Seisint sells verification products under its Accurint trade name (collectively, "Accurint verification products"). Accurint verification product customers include insurance companies, debt collectors, employers, landlords, law firms, and law enforcement and other government agencies. Respondent REI sells similar verification products, under various LexisNexis trade names.

7. In connection with their verification products, respondents:

(a) collect and aggregate information about millions of consumers and businesses from public and nonpublic sources, including motor vehicle records and consumer identification information from credit reporting agencies, and maintain and store the information in computer databases.

(b) operate computer networks and websites and provide software (such as web applications and search engines) through which a customer can use a verification product to search electronically for information in the respondent's computer databases. To conduct such a search, the customer enters a search term, such as a consumer's name, and retrieves through the search other items of information about the consumer.

Complaint

(c) charge customers a fee to search for and retrieve information from their databases.

8. Respondents' databases contain nonpublic and often highly sensitive personal information about consumers, including consumer identification information obtained from credit reporting agencies, such as Social Security numbers. It is widely recognized that misuse of such information – and in particular consumers' Social Security numbers – can facilitate identity theft and related consumer harms.

9. At all relevant times, respondents have implemented procedures to identify customers seeking access to their databases, limit access to nonpublic information to customers meeting certain criteria, and track searches their customers make. Such procedures include:

(a) steps to authenticate customers (or verify that the customers are who they claim to be) before permitting them to search the databases, usually by requiring each customer to log-in using a user ID and a password (collectively, "user credentials").

(b) rules governing the format of user credentials that customers must present for authentication.

(c) rules governing which customers can access nonpublic information and which are restricted to public information only.

(d) codes, assigned to each customer's user credentials, that permit the customer to access the types of information the customer is authorized to access.

Under these procedures, an unauthorized person logging-in with the user credentials of a legitimate verification product customer would be authenticated and could then access all of the

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information the legitimate customer could access, including sensitive nonpublic information if the customer were so authorized.

RESPONDENTS' SECURITY PRACTICES

10. Until at least mid-2005, respondents engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security to prevent unauthorized access to the sensitive consumer information stored in databases accessible using Accurint verification products ("Accurint databases"). In particular, respondents failed to establish or implement reasonable policies and procedures governing the creation and authentication of user credentials for authorized customers accessing Accurint databases. Among other things, respondents:

(a) failed to establish or enforce rules sufficient to make user credentials hard to guess. For example, respondents allowed Accurint customers to use the same word, including common dictionary words, as both the password and user ID, or a close variant of the user ID as the password;

(b) permitted the sharing of user credentials among a customer's multiple users, thus reducing likely detection of, and accountability for, unauthorized searches;

(c) failed to require periodic changes of user credentials, such as every 90 days, for customers with access to sensitive nonpublic information;

(d) failed to suspend user credentials after a certain number of unsuccessful log-in attempts;

(e) allowed customers to store their user credentials in a vulnerable format in cookies on their computers;

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(f) failed to require customers to encrypt or otherwise protect credentials, search queries, and/or search results in transit between customer computers and respondents' websites;

(g) allowed customers to create new credentials without confirming that the new credentials were created by customers rather than identity thieves;

(h) did not adequately assess the vulnerability of the Accurint web application and computer network to commonly known or reasonably foreseeable attacks, such as "Cross-Site Scripting" attacks; and

(i) did not implement simple, low-cost, and readily available defenses to such attacks.

11. By the security practices set out in Paragraph 10, respondents established user ID and password structures that created an unreasonable risk of unauthorized access to sensitive consumer information stored in Accurint databases. Security professionals have issued public warnings about the security risk presented by weak user ID and password structures since the late 1990s, when well-publicized attacks to obtain customer passwords began to occur. Further, from attacks on user ID and password structures controlling access to Accurint databases, respondents have had notice of the risk since at least 2002. In addition, respondents did not use readily-available security measures to prevent or limit such attacks, such as by using well-known procedures that would limit or block attacks on user credentials. As a result of respondents' security practices, an attacker could easily guess or intercept the user credentials of legitimate customers and use them to gain access to sensitive information – including Social Security numbers – about millions of consumers.

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12. On multiple occasions since January 2003, attackers exploited respondent Seisint's user ID and password structures to obtain without authorization the user credentials of legitimate Accurint customers. The attackers then used these credentials to make thousands of unauthorized searches for consumer information in Accurint databases. These attacks disclosed sensitive information about several hundred thousand consumers, including, in many instances, names, current and prior addresses, dates of birth, and Social Security numbers. Although some of these attacks occurred before respondent REI acquired respondent Seisint, they continued for at least 9 months after the acquisition, during which time respondent Seisint was operating under the control of respondent REI. Since March 2005, respondent REI through LexisNexis has notified over 316,000 consumers that the attacks disclosed sensitive information about them that could be used to conduct identity theft.

13. In a number of the incidents referred to in Paragraph 12, new credit accounts were opened in the names of consumers whose information was disclosed without authorization, and purchases were made on the new accounts. In other instances, identity thieves used sensitive information obtained without authorization from Accurint databases to activate newly-issued credit cards stolen from legitimate cardholders, and then made fraudulent purchases on the cards. In response to such incidents, cards were cancelled and consumers holding them were unable to use them to access their credit and bank accounts until they received replacement cards. Further, because the incidents referred to in Paragraph 12 disclosed Social Security numbers and other sensitive information, several hundred thousand consumers face the possibility of future fraud.

VIOLATIONS OF THE FTC ACT

14. As set forth in Paragraphs 10 through 13, respondents failed to employ reasonable and appropriate measures to prevent

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unauthorized access to sensitive consumer information stored in Accurant databases. Respondents' practices caused, or are likely to cause, substantial injury to consumers that is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. This practice was, and is, an unfair act or practice.

15. The acts and practices of respondents as alleged in this complaint constitute unfair 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 twenty-ninth day of July, 2008, has issued 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 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 Respondents with violation of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq*;

The Respondents, their attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), an admission by the

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Respondents 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 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 has reason to believe that the Respondents have 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. Respondent Reed Elsevier Inc. is a Massachusetts corporation with its principal office or place of business at 125 Park Avenue, Suite 2300, New York, New York 10017. Respondent Seisint, Inc. is a Florida corporation with its principal office or place of business at 6601 Park of Commerce Boulevard, Boca Raton, Florida 33487.

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.

Decision and Order

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) a date of birth; (g) a driver’s license number; (h) credit and/or debit card information, including but not limited to card number and expiration date and transaction detail data; (i) 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 (j) any other information from or about a consumer that is combined with (a) through (i) above.

2. “Information product or service” shall mean each product, service, or other means by which respondents individually or collectively provide direct or indirect access to personal information from or about consumers that is comprised in whole or part of nonpublic information; *provided, however,* that this term shall not include information products or services that: (a) provide access solely to personal information that is publicly available information, or (b) permit customers to upload or otherwise supply, organize, manage, or retrieve information that is under the customer’s control.

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3. “Publicly available information” shall mean information that respondents have a reasonable basis to believe is lawfully made available to the general public from: (a) Federal, State, or local government records, (b) widely distributed media, or (c) disclosures to the general public that are required to be made by Federal, State, or local law. Respondents shall have a reasonable basis to believe information is lawfully made available to the general public if respondents have taken reasonable steps to determine: (a) that the information is of the type that is available to the general public, and (b) whether an individual can direct that the information not be made available to the general public and, if so, that the individual has not done so.
4. “LexisNexis” shall mean Seisint, Inc., and its successors and assigns, officers, agents, representatives, and employees, and the LexisNexis division of respondent Reed Elsevier Inc., and its successors and assigns, officers, agents, representatives, and employees; *provided, however,* that, for the purposes of this order, LexisNexis shall:
 - (a) be treated as a corporation under the control of respondent Reed Elsevier Inc. for the purpose of determining whether any other entity is a successor or assign of LexisNexis; and
 - (b) include any other corporation, subsidiary, division, or other device under the control of respondent Reed Elsevier Inc. (collectively, “entity”) to the extent that such entity advertises, markets, promotes, offers for sale, or sells any information product or service that includes a Social Security number; driver’s license number; date of birth; or bank, credit card, or other financial account number (collectively, “designated information”), including, but not limited to, any

Decision and Order

information product or service that can be used to access, view, or retrieve designated information from databases under the entity's possession or control.

5. Unless otherwise specified, "respondents" shall mean Reed Elsevier Inc., its successors and assigns, officers, agents, representatives, and employees, and Seisint, Inc., and its successors and assigns, officers, agents, representatives, and employees.

I.

IT IS ORDERED that each respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, marketing, promotion, offering for sale, or sale of personal information collected from or about consumers made available through any information product or service of LexisNexis ("the information"), 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 the information. Such program, the content and implementation of which must be fully documented in writing, shall contain administrative, technical, and physical safeguards appropriate to each respondent's size and complexity, the nature and scope of each respondent's activities, and the sensitivity of the information, 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 the information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of the information, and assessment of the

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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) 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 select and retain service providers capable of appropriately safeguarding personal information they receive from respondent, and requiring service providers by contract to implement and maintain appropriate safeguards; *provided, however*, that this subparagraph shall not apply to personal information about a consumer that respondent provides to a government agency or lawful information supplier when the agency or supplier already possesses the information and uses it only to retrieve, and supply to respondent, additional personal information about the consumer.
- 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.

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II.

IT IS FURTHER ORDERED that, in connection with its compliance with Paragraph I of this order, each respondent shall obtain initial and biennial assessments and reports (“Assessments”) from a qualified, objective, independent third-party professional, who uses 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 twenty (20) years after service of the order for the biennial Assessments. Each Assessment shall:

- 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 I 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

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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 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 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.

III.

IT IS FURTHER ORDERED that each 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 its compliance with this order; and
- B. for a period of three (3) years after the date of preparation of each Assessment required under Paragraph II of this order: all materials relied upon to prepare the Assessment, whether prepared by or behalf of respondent, including, but not limited to, all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments and any other materials relating to its compliance with Paragraphs I and II of this order, for the compliance period covered by such Assessment.

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IV.

IT IS FURTHER ORDERED that each 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. Each 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.

V.

IT IS FURTHER ORDERED that each 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.

VI.

IT IS FURTHER ORDERED that each 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

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with the Commission an initial 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 July 29, 2028, 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 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 to Aid Public Comment

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission has accepted, subject to final approval, a consent agreement from Reed Elsevier Inc. (“REI”) and Seisint, Inc. (“Seisint”).

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.

The Commission’s proposed complaint alleges that REI (through its LexisNexis division) and Seisint are data brokers. REI acquired Seisint on September 1, 2004 and has continued to operate Seisint under the Seisint name; REI also uses Seisint’s technologies and facilities in REI’s LexisNexis data broker business. In connection with Seisint’s business, proposed respondents collect, and store in electronic databases, information about millions of consumers, including names, current and prior addresses, dates of birth, driver’s license numbers, and Social Security numbers (“SSNs”). They also sell products customers use to retrieve information from the databases, including products to locate assets and people, authenticate identities, and verify credentials. Until at least mid-2005, access to information in Seisint databases was controlled using only user IDs and passwords (“credentials”). Seisint customers include insurance companies, debt collectors, employers, landlords, law firms, and law enforcement and other government agencies.

The complaint further alleges that REI and Seisint engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for sensitive consumer information stored in Seisint databases. In particular, they: (1)

Analysis to Aid Public Comment

failed to make credentials hard to guess; (2) failed to require periodic changes of credentials (such as every 90 days, for customers with access to sensitive consumer information); (3) failed to suspend credentials after a certain number of unsuccessful log-in attempts; (4) allowed customers to store their credentials in a vulnerable format in cookies on their computers; (5) failed to require customers to encrypt or otherwise protect credentials, search queries, and/or search results in transit between customer computers and Seisint websites; (6) allowed customers to create new credentials without confirming that the new credentials were created by customers rather than identity thieves; (7) permitted users to share credentials; (8) did not adequately assess the vulnerability of Seisint's web application and computer network to commonly known or reasonably foreseeable attacks, such as "Cross-Site Scripting" attacks; and (9) did not implement simple, low-cost, and readily available defenses to such attacks. As a result, an attacker could easily guess or intercept the user credentials of legitimate customers and use them to access sensitive information – including SSNs – about millions of consumers.

The complaint alleges that on multiple occasions since January 2003, identity thieves exploited these vulnerabilities to obtain the credentials of legitimate Seisint customers. The thieves then used the credentials to make thousands of unauthorized searches for consumer information in Seisint databases. These breaches disclosed sensitive information about more than 300,000 consumers, including, in many instances, names, current and prior addresses, dates of birth, and SSNs. In some instances, the thieves opened new credit accounts in the names of consumers whose information was disclosed and made purchases on the new accounts. In other instances, they used the information to activate newly-issued credit cards stolen from legitimate cardholders and then made fraudulent purchases on the cards. Although some of these breaches occurred before REI acquired Seisint on

Analysis to Aid Public Comment

September 1, 2004, they continued for at least 9 months after the acquisition, during which time Seisint was under REI's control.

The proposed order applies to nonpublic information sold by Seisint and LexisNexis, as well as by any other business within REI to the extent that the business sells products that include an SSN, driver's license number; date of birth; or bank, credit card, or other financial account number or information. The order also contains provisions designed to prevent respondents from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order requires each respondent to establish and maintain a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of nonpublic personal information collected from or about consumers. The security programs must contain administrative, technical, and physical safeguards appropriate to the respondent'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 each respondent to:

- Designate an employee or employees to coordinate and be accountable for the information security program.
- 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.

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- Develop and use reasonable steps to select and retain service providers capable of appropriately safeguarding personal information they receive from the respondent, and require service providers by contract to implement and maintain appropriate safeguards.
- Evaluate and adjust its information security programs in light of the results of testing and monitoring, any material changes to 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 II of the proposed order requires each respondent to obtain within 180 days, and on a biennial basis thereafter for a period of twenty (20) 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 I 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.

Parts III through VII of the proposed order are reporting and compliance provisions. Part III requires respondents 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, respondents must retain the documents for a period of three years after the date that each assessment is prepared. Part IV requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part V ensures notification to the FTC of changes in corporate status. Part VI mandates that each respondent submit a compliance report to the FTC within 180 days, and periodically

Analysis to Aid Public Comment

thereafter as requested. Part VII is a provision “sunsetting” the order after twenty (20) years, with certain exceptions.

This is the Commission’s nineteenth case to challenge the failure by a company to implement reasonable information security practices. Each of the Commission’s cases to date has alleged that a number of security practices, taken together, failed to provide reasonable and appropriate security to prevent unauthorized access to consumers’ information. The practices challenged in the cases have included, but are not limited to: (1) creating unnecessary risks to sensitive information by storing it on computer networks without a business need to do so; (2) storing sensitive information on networks in a vulnerable format; (3) failing to use readily available security measures to limit access to a computer network through wireless access points on the network; (4) failing to adequately assess the vulnerability of a web application and computer network to commonly known or reasonably foreseeable attacks; (5) failing to implement simple, low-cost, and readily available defenses to such attacks; and (6) failing to use readily available security measures to limit access between computers on a network and between such computers and the Internet. This proposed action against REI and Seisint is the first to challenge alleged security failures involving the security of passwords. Passwords are a critical part of a reasonable and appropriate security program because passwords are typically the first (and are often the only) method used to authenticate (or authorize) users to access resources, such as programs and databases, available on a computer network or online.

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 its terms in any way.

Complaint

IN THE MATTER OF

THE TJX COMPANIES, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-4227; File No. 072 3055
Complaint, July 29, 2008 – Decision, July 29, 2008*

This consent order addresses practices of The TJX Companies, Inc., that failed to provide reasonable and appropriate security for personal information on its computer networks. TJX sells apparel and home fashions in over 2,500 stores worldwide. A breach of its computer networks compromised tens of millions of unique payment cards used by consumers in the United States and Canada. The order requires TJX 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 TJX's size and complexity, the nature and scope of its activities, and the sensitivity of the personal information collected from or about consumers. The order requires that TJX obtain, on a biennial basis for 20 years, an assessment and report from a qualified, objective, independent third-party professional, certifying, among other things, that TJX has in place a security program that provides protections that meet or exceed the protections required by the order, and that its security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of consumers' personal information is protected. TJX is required to retain documents relating to its compliance with the order; to disseminate the order to principals, officers, directors, and managers having responsibilities relating to the subject matter of the order; to notify the Commission of changes in corporate status; and to file compliance reports with the Commission.

Participants

For the *Commission*: *Molly Crawford, Jessica Rich, Alain Sheer, and Joel Winston.*

For the *Respondents*: *Lisa J. Sotto, Hunton & Williams, and Mit Spears, Ropes & Gray LLP.*

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that The TJX Companies, Inc. (“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 The TJX Companies, Inc. is a Delaware corporation with its principal office or place of business at 770 Cochituate Road, Framingham, Massachusetts, 01701.

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 is an off-price retailer selling apparel and home fashions in over 2,500 stores worldwide, including, but not limited to, T.J. Maxx, Marshalls, A.J. Wright, Bob’s Stores, and HomeGoods stores in the United States; Winners and HomeSense in Canada; and T.K.Maxx stores in the United Kingdom, Ireland, and Germany. Consumers may pay for purchases at these stores with credit and debit cards (collectively, “payment cards”), cash, or personal checks.

4. Respondent operates corporate computer networks in the United States (“central corporate network”) and internationally, as well as networks in each store (“in-store networks”). These networks link worldwide corporate headquarters in the United States with each store, and, among other things, are used to process sales transactions and provide wireless access to the networks for wireless devices, such as devices for marking down prices.

5. In selling its products, respondent routinely uses its computer networks to collect personal information from consumers to obtain authorization for payment card purchases,

Complaint

verify personal checks, and process merchandise returned without receipts (“unreceipted returns”). Among other things, it collects: (1) account number, expiration date, and an electronic security code for payment card authorization; (2) bank routing, account, and check numbers and, in some instances, driver’s license number and date of birth for personal check verification; and (3) name, address, and drivers’ license, military, or state identification number (“personal ID numbers”) for unreceipted returns (collectively, “personal information”). This information is particularly sensitive because it can be used to facilitate payment card fraud and other consumer harm.

6. To obtain payment card authorization, respondent formats personal information from the card into an authorization request. It typically transmits authorization requests from in-store networks to designated computers (“card authorization computers”) on the central corporate network, and from there to the banks that issued the cards (“issuing banks”). Respondent receives responses authorizing or declining the purchase from issuing banks over the same networks.

7. Until December 2006, respondent stored authorization requests and personal information obtained to verify checks and process unreceipted returns in clear text on its in-store and corporate networks. At all relevant times, respondent transmitted authorization requests and responses in clear text between and within its in-store and corporate networks.

8. Since at least July 2005, respondent engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for personal information on its networks. In particular, respondent:

- (a) created an unnecessary risk to personal information by storing it on, and transmitting it between and within, in-store and corporate networks in clear text;

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(b) did not use readily available security measures to limit wireless access to its networks, thereby allowing an intruder to connect wirelessly to in-store networks without authorization;

(c) did not require network administrators and other users to use strong passwords or to use different passwords to access different programs, computers, and networks;

(d) failed to use readily available security measures to limit access among computers and the internet, such as by using a firewall to isolate card authorization computers; and

(e) failed to employ sufficient measures to detect and prevent unauthorized access to computer networks or to conduct security investigations, such as by patching or updating anti-virus software or following up on security warnings and intrusion alerts.

9. Between July 2005 and November 2005, an intruder connected to respondent's networks without authorization, installed hacker tools, found personal information stored in clear text, and downloaded it over the internet to remote computers. Further, between May and December 2006, an intruder periodically intercepted payment card authorization requests in transit from in-store networks to the central corporate network, stored the information in files on the network, and transmitted the files over the internet to remote computers. After learning of the breach, respondent took steps to prevent further unauthorized access and to notify law enforcement and affected consumers.

10. In January 2007, respondent issued a press release stating that payment card and other personal information had been stolen from its computer networks by an intruder. In February 2007, respondent issued another press release stating that additional personal information may have been stolen from stores located in the United States and Canada as early as July 2005.

Complaint

11. The breach compromised tens of millions of unique payment cards used by consumers in the United States and Canada. To date, issuing banks have claimed tens of millions of dollars in fraudulent charges on some of these accounts. Issuing banks also have cancelled and re-issued millions of payment cards, and consumers holding these cards were unable to use them to access their credit and bank accounts until they received the replacement cards. In addition, the breach compromised the personal information of approximately 455,000 consumers who had made un-receipted merchandise returns. This personal information included personal ID numbers, which in some instances were also consumers' Social Security numbers. Further, some consumers have obtained or will have to obtain new personal ID numbers, such as new drivers' licenses.

12. As described in Paragraphs 8 through 11, respondent's failure to employ reasonable and appropriate security measures to protect personal information caused or is likely to cause substantial injury to consumers that is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. This practice was and is an unfair act or practice.

13. The acts and practices of respondent as alleged in this complaint constitute unfair acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission this twenty-ninth day of July, 2008, has issued this complaint against respondent.

By the Commission.

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 Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued, would charge the 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 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 Federal Trade Commission 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, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent The TJX Companies, Inc. is a Delaware corporation with its principal office or place of business at 770 Cochituate Road, Framingham, Massachusetts, 01701.

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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 an individual 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 an individual’s email address; (d) a telephone number; (e) a Social Security number; (f) credit or debit card information, including card number, expiration date, and data stored on the magnetic strip of a credit or debit card; (g) checking account information, including the ABA routing number, account number, and check number; (h) a driver’s license, military, or state identification number; (i) 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 an individual consumer; or (j) any information that is combined with any of (a) through (i) above.
2. Unless otherwise specified, “respondent” shall mean The TJX Companies, 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.

Decision and Order

I.

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) 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

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regular testing or monitoring of the effectiveness of the safeguards' key controls, systems, and procedures.

- D. the development and use of reasonable steps to select and retain service providers capable of appropriately safeguarding personal information they receive from respondent, and requiring service providers by contract to implement and maintain appropriate safeguards.
- E. the evaluation and adjustment of respondent's information security program in light of the results of the testing and monitoring required by sub-Part 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.

II.

IT IS FURTHER ORDERED that, in connection with its compliance with Part I of this order, respondent shall obtain initial and biennial assessments and reports ("Assessments") from a qualified, objective, independent third-party professional, who uses 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 twenty (20) years after service of the order for the biennial Assessments. Each Assessment shall:

- 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

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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 the Part I 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 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 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.

III.

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

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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 Assessment required under Part II of this order, all materials relied upon to prepare the Assessment, whether prepared by or on behalf of the respondent, including but not limited to all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, and any other materials relating to respondent's compliance with Parts I and II of this order, for the compliance period covered by such Assessment.

IV.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers having 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.

V.

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

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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, Washington, D.C. 20580.

VI.

IT IS FURTHER ORDERED that respondent shall, within one hundred eighty (180) 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 it has complied with this order.

VII.

This order will terminate on July 29, 2028, 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.

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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 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 CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission has accepted, subject to final approval, a consent agreement from The TJX Companies, Inc. (“TJX”).

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.

According to the Commission’s complaint, TJX is an off-price retailer selling apparel and home fashions in over 2,500 stores worldwide. Consumers may pay for purchases at these stores with credit and debit cards (collectively, “payment cards”), cash, or personal checks. In selling its products, TJX routinely uses its computer networks to collect personal information from

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consumers to obtain authorization for payment card purchases, verify personal checks, and process merchandise returned without receipts (“unreceipted returns”). Among other things, it collects: (1) account number, expiration date, and an electronic security code for payment card authorization; (2) bank routing, account, and check numbers and, in some instances, driver’s license number and date of birth for personal check verification; and (3) name, address, and drivers’ license or military or state identification number (“personal ID numbers”) for unreceipted returns (collectively, “personal information”). This information is particularly sensitive because it can be used to facilitate payment card fraud and other consumer harm.

The Commission’s proposed complaint alleges that since at least July 2005, TJX engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for personal information on its computer networks. Among other things, TJX: (a) created an unnecessary risk to personal information by storing it on, and transmitting it between and within, in-store and corporate networks in clear text; (b) did not use readily available security measures to limit wireless access to its networks, thereby allowing an intruder to connect wirelessly to in-store networks without authorization; (c) did not require network administrators and other users to use strong passwords or to use different passwords to access different programs, computers, and networks; (d) failed to use readily available security measures to limit access among computers and the internet, such as by using a firewall to isolate card authorization computers; and (e) failed to employ sufficient measures to detect and prevent unauthorized access to computer networks or to conduct security investigations, such as by patching or updating anti-virus software or following up on security warnings and intrusion alerts.

The complaint alleges that the breach compromised tens of millions of payment cards as well as the personal information of approximately 455,000 consumers who had made unreceipted

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returns. The complaint further alleges that issuing banks have claimed tens of millions of dollars in fraudulent charges on some of these payment card accounts. Issuing banks also have cancelled and re-issued millions of payment cards, and according to the complaint, consumers holding these cards were unable to use them to access their credit and bank accounts until they received the replacement cards. Additionally, the complaint alleges that some consumers have obtained or will have to obtain new personal ID numbers, such as new drivers' licenses.

The proposed order applies to personal information TJX collects from or about consumers. It contains provisions designed to prevent TJX from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order requires TJX 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 TJX'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 TJX to:

- Designate an employee or employees to coordinate and be accountable for the information security program.
- Identify 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 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

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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 respondents, 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 the 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 a material impact on the effectiveness of their information security program.

Part II of the proposed order requires that TJX obtain, covering the first 180 days after the order is served, and on a biennial basis thereafter for twenty (20) 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 I 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 is protected.

Parts III through VII of the proposed order are reporting and compliance provisions. Part III requires TJX to retain documents relating to its 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, TJX must retain the documents for a period of three years after the date that each assessment is prepared. Part IV requires dissemination of the order now and in the future to principals,

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officers, directors, and managers having responsibilities relating to the subject matter of the order. Part V ensures notification to the FTC of changes in corporate status. Part VI mandates that TJX submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part VII is a provision “sunsetting” the order after twenty (20) years, with certain exceptions.

This is the Commission’s twentieth case to challenge the failure by a company to implement reasonable information security practices. Each of the Commission’s cases to date has alleged that a number of security practices, taken together, failed to provide reasonable and appropriate security to prevent unauthorized access to consumers’ information. The practices challenged in the cases have included, but are not limited to: (1) creating unnecessary risks to sensitive information by storing it on computer networks without a business need to do so; (2) storing sensitive information on networks in a vulnerable format; (3) failing to use readily available security measures to limit access to a computer network through wireless access points on the network; (4) failing to adequately assess the vulnerability of a web application and computer network to commonly known or reasonably foreseeable attacks; (5) failing to implement simple, low-cost, and readily available defenses to such attacks; (6) failing to use readily available security measures to limit access between computers on a network and between such computers and the internet, and (7) failing to use strong passwords to authenticate (or authorize) users to access programs and databases on computer networks or online.

The purpose of the analysis is to aid public comment on the proposed order. 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

TALX CORPORATIONCONSENT 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-4228; File No. 061 0209
Complaint, August 6, 2008 – Decision, August 6, 2008*

This consent order addresses TALX Corporation's consummated acquisitions of several of its competitors, which substantially reduced competition in the provision of unemployment compensation management services and verification of income and employment services nationwide. The order prohibits the respondent from enforcing certain restrictions on competition, solicitation, and trade secret disclosure against certain current and former employees who accept employment with its competitors. The order lists and categorizes such employees and limits the number of persons in each category subject to this provision. In addition, the provision will end two years after such person's receipt of the required notice from TALX. The order requires TALX to allow certain customers with long-term contracts to terminate their contracts if those customers outsource their services to a competitor of TALX, and it places an upper limit of \$10 million on the total value of terminated long-term contracts. TALX is also required to transfer certain specified customer file information to former customers, upon request. TALX is barred from entering into agreements that would prevent or discourage any entity from supplying goods or services to any of its competitors. The order requires TALX to notify current and former employees and long-term contract customers of their rights under the order, and to notify customers of their right to cancel contracts that would otherwise be renewed automatically, as well as to post information on websites concerning the rights of employees and customers. The order prohibits TALX from entering into certain agreements and requires that TALX notify the Commission before acquiring or entering into a management contract with a provider of unemployment compensation management services or verification of income and employment services. Additional provisions appoint a monitor/administrator to assist in monitoring the respondent's compliance with the order and require the respondent to comply with certain reporting requirements to the Commission.

Complaint

Participants

For the *Commission*: *Morris A. Bloom, David Conn, Linda Cunningham, Mark Frankena, Sean Hughto, Michael H. Knight, Adam W. Strayer, Christopher T. Taylor, and Robert S. Tovsky.*

For the *Respondent*: *Perry Johnson and Rebecca Nelson, Bryan Cave.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that respondent TALX Corporation (“TALX”), now a wholly-owned subsidiary of Equifax, Inc. (“Equifax”), has violated and is violating Section 7 of the Clayton Act, and that TALX has violated and is violating Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

I. Nature of the Case

1. This complaint concerns the acquisitions consummated by TALX of James E. Frick Inc., Unemployment Compensation Business Services Division of Gates, McDonald & Company, Johnson & Associates, L.L.C., substantially all of the assets of the Unemployment Compensation Management (“UCM”) and small employment verification businesses of Sheakley-Uniservice, Inc., UI Advantage, Jon-Jay Associates, Inc., and the unemployment tax management business of Employers Unity, Inc. This series of acquisitions occurred between March 2002 and December 2005.

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II. Respondent TALX, Inc.

2. Respondent TALX was acquired by Equifax on or about May 15, 2007. TALX is a wholly-owned subsidiary of Equifax. Equifax is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business located at 1550 Peachtree Street, N.W., Atlanta, Georgia, 30309. Prior to May 15, 2007, respondent TALX operated as a corporation organized, existing, and doing business under and by virtue of the laws of the State of Missouri with its principal place of business located at 11432 Lackland Drive, St. Louis, Missouri 63146.

3. TALX provides, and at all times relevant herein has provided Verification of Income and Employment (“VOIE”) nationwide. TALX has provided UCM services beginning on or about March 27, 2002, nationwide. VOIE services are provided under the name The Work Number, and UCM services are provided by UC eXpress. TALX had overall revenue of about \$270 million in fiscal year 2007, which ended March 31, 2007.

4. TALX is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

III. The Acquisitions

5. On or about March 27, 2002, TALX acquired James E. Frick, Inc. (“Frick”), of St. Louis, Missouri, and the unemployment cost business management business of Gates McDonald & Company, a subsidiary of Nationwide Mutual Insurance Company, headquartered in Columbus, Ohio. Frick provided both UCM and employment verification services. The acquisition of the unemployment compensation management business of Gates McDonald enabled TALX to acquire an additional UCM services business. TALX did not operate in the

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UCM business until it acquired both Frick and Gates McDonald for a price of about \$125 million in cash. Prior to the acquisitions described in this paragraph, TALX operated as the nation's leading provider of out-sourced employer verification services through its provision of VOIE services.

6. On or about June 30, 2003, TALX acquired Johnson & Associates, L.L.C., an Omaha, Nebraska based company, that specialized in providing UCM and employment tax credit administration services for a price of about \$1.5 million.

7. On or about March 31, 2004, TALX acquired substantially all of the assets of the UCM and small employment verification businesses of Sheakley-Uniservice, Inc., based in Cincinnati, Ohio, for a price of about \$39 million.

8. On or about October 25, 2004, TALX acquired TBT Enterprises, Inc., based in Gaithersburg, Maryland, and its sister corporation, UI Advantage, Inc., a start-up UCM company for a price of about \$9 million.

9. On or about April 20, 2005, TALX acquired Jon-Jay Associates, Inc., a company headquartered in Boston, Massachusetts, that specialized in providing UCM services and a smaller employment verification service, for a price of about \$24 million.

10. On or about November 1, 2005, TALX acquired the unemployment tax management business of Employers Unity, Inc., headquartered in Arvada, Colorado, for a price of about \$32 million. The unemployment tax management business of Employers Unity, Inc., included both UCM services and employment verification.

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IV. TALX Alliances

11. TALX has alliance partners. Its alliance partners include Automated Data Processing, Inc. (“ADP”), Convergys, Inc. (“Convergys”), and Ceridian, Inc. (Ceridian). The main business of TALX’s alliance partners is to provide data processing, human resources, and other employment services to their customers. ADP, Convergys, and Ceridian also contract to provide UCM services to their customers. The alliance partners have agreements with TALX to out-source or sub-contract to TALX some or all of the UCM services component of their customers.

12. The largest outsource alliance partner of TALX is ADP. By terms of the ADP/TALX Agreement of June 27, 2001, ADP may out-source UCM services of its clients with more than 1,000 employees to TALX, out-source those clients to another UCM service provider, or provide UCM services in-house.

V. The Relevant Markets

13. The relevant lines of commerce (product market) in which to analyze the effects of the consummated acquisitions and agreement are:

(a) the provision of out-sourced UCM services for large multistate employers who receive unemployment claims in many states or nationwide; and

(b) the provision of out-sourced employment verification services known as VOIE.

14. The provision of out-sourced “UCM Services” and “Unemployment Compensation Management Services” consists of the management, administration, or processing, on behalf of an employer, of unemployment compensation claims filed with a State or Territory.

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15. The provision of outsourced employment verification services, known as VOIE Services and Verification Of Income And Employment Services, consists of the provision of employment and income verifications including, but not limited to, the collection, maintenance, or dissemination of payroll data and other data relating to employment.

16. The relevant geographic area (geographic market) in which to analyze the effects of the consummated acquisitions and agreement in each of the relevant lines of commerce is the United States as a whole.

VI. Market Structure and Concentration

17. The relevant markets (relevant lines of commerce) are highly concentrated, and the consummated acquisitions increased concentration substantially, whether concentration is measured by the Herfindahl-Hirschman Index (“HHI”), or the number of competitively significant firms remaining in the market.

VII. Entry

18. Entry into the relevant markets (relevant lines of commerce) would not be timely, likely or sufficient in magnitude, character, and scope to counteract anticompetitive effects of the Acquisitions.

19. Entry into the market for the provision of out-sourced UCM services to large multistate employers is difficult and slow. The sales process for each such client can last months, and in many cases years. The market is mature in that most such employers interested in outsourcing UCM management have already done so. Large employers are often reluctant to trust their UCM work to small providers without established track records for the efficient and competent administration of large claim volumes.

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20. Entry and expansion in the provision of out-sourced UCM services to large multistate employers is made more difficult by long term customer contracts and by non-compete and non-solicitation agreements with current and former employees. TALX and the acquired UCM companies have entered into numerous three- and five-year customer contracts. Such long-term contracts have drastically reduced the number of potential clients available for would-be competitors to enter or expand in the near term. The non-compete and non-solicitation agreements with employees reduce the number of experienced and talented employees available to be hired by would-be competitors to enter or expand in the near term.

21. Entry or expansion into out-sourced employment verification services is difficult and expansion is typically slow. Effective entrants must first develop complex software to automate the process. Entrants must then build a reputation for reliability and security so as to attract and significant numbers of employer and verifier customers.

VIII. Anticompetitive Effects

22. The acquisitions by TALX of James E. Frick, Inc. and the UCM business of Gates McDonald & Company eliminated direct and actual competition between Frick and Gates McDonald for the provision of outsourced UCM services. The acquisitions by TALX of Johnson Associates, LLC, the UCM assets of Sheakley-Uniservice, Inc., UI Advantage, Inc, Jon-Jay Associates, Inc., and Employers Unity, Inc., eliminated direct and actual competition between TALX and each of the enumerated acquired firms or businesses in the provision of outsourced UCM services.

23. The acquisitions by TALX of the employment verification businesses of James E. Frick, Inc., Sheakley-Uniservice, Inc, Jon-Jay Associates, Inc., and Employers Unity, Inc., eliminated direct and actual competition in the provision of employer verification services.

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24. The acquisitions by TALX of its competitors have enhanced its ability to increase prices unilaterally and enhanced its ability to decrease the quality of services provided in each of the relevant lines of commerce.

IX. Violations Charged

25. The Acquisitions described in Paragraphs 5 through 10 constitute a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

26. The Acquisitions described in Paragraphs 5 through 10 constitute a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45 because TALX has engaged in unfair methods of competition in or affecting commerce.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this sixth day of August, 2008, issues its complaint against said Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of TALX Corporation (hereafter referred to as “Respondent”), now a wholly-owned subsidiary of Equifax Inc. (“Equifax”), including the acquisitions by Respondent of James E. Frick Inc.; the Unemployment Compensation Business Services Division of

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Gates, McDonald & Company; Johnson & Associates, Inc.; substantially all of the assets of the unemployment compensation management and small employment verification businesses of Sheakley-Uniservice, Inc., UI Advantage, and Jon-Jay Associates, Inc.; and the unemployment tax management business of Employers Unity, Inc.; and

Respondent and Equifax 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 and Equifax, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent and Equifax 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 or Equifax 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 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 duly considered the comments received from interested persons pursuant to section 2.34 of its Rules, and having modified the Decision and Order in certain respects, now in further conformity

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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 TALX Corporation is a corporation organized, existing and doing business under and by virtue of the laws of Missouri with its office and principal place of business located at 11432 Lackland Road, St. Louis, Missouri 63146.

2. Equifax Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia with its office and principal place of business located at 1550 Peachtree Street, N.W. Atlanta, Georgia 30309.

3. The Federal Trade Commission has jurisdiction of 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:

A. “TALX” means:

1. TALX Corporation, and all joint ventures, subsidiaries, divisions, groups, and affiliates controlled by TALX Corporation,
2. Equifax Inc. and all joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Equifax Inc., and

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3. the respective directors, officers, employees, agents, representatives, successors, and assigns of TALX Corporation and of Equifax Inc., and of each joint venture, subsidiary, division, group, and affiliate controlled by TALX Corporation or Equifax Inc.
- B. “Commission” means the Federal Trade Commission.
- C. “Acquired Entities” mean:
1. the following businesses and assets (“Acquired Businesses And Assets”):
 - a. James E. Frick Inc.,
 - b. all businesses and assets acquired, during the calendar year 2002, by TALX Corporation from Gates, McDonald & Company,
 - c. Johnson & Associates, Inc.,
 - d. all businesses and assets acquired, during the calendar year 2004, by TALX Corporation from Sheakley-Uniservice. Inc.,
 - e. all businesses and assets acquired, during the calendar year 2004, by TALX Corporation from UI Advantage,
 - f. all businesses and assets acquired, during the calendar year 2005, by TALX Corporation from Jon-Jay Associates, Inc., and
 - g. all businesses and assets acquired, during the calendar year 2005, by TALX Corporation from Employers Unity, Inc.;

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2. the joint ventures, subsidiaries, divisions, groups and affiliates controlled by the Acquired Businesses And Assets; and
 3. the successors and assigns of the Acquired Businesses And Assets, and the joint ventures, subsidiaries, divisions, groups and affiliates they control.
- D. “ADP” means ADP, Inc., and the joint ventures, subsidiaries, divisions, groups and affiliates controlled by ADP, Inc.
- E. “ADP/TALX Agreement Of June 27, 2001” means the agreement entitled “Services Agreement Between ADP, Inc. and the Frick Company for UCM Services” and dated June 27, 2001, (“Primary Agreement”) as modified by:
1. the addendum entitled “Addendum to Services Agreement Between ADP, Inc. and the Frick Company” and dated February 21, 2003 (“Addendum To The Primary Agreement”),
 2. the amendment entitled “Amendment No. 2 to Services Agreement” and dated January 1, 2006 (“Amendment To The Primary Agreement”), and
 3. the amended agreement entitled “Amended and Restated Service Agreement” and dated September 13, 2007 (“Restated Agreement”)

Provided, however, that “ADP/TALX Agreement Of June 27, 2001” does not mean:

- (i) any change to the Primary Agreement other than the Addendum To The Primary Agreement, the Amendment To The Primary Agreement, and the Restated Agreement;

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- (ii) any change to the Addendum To The Primary Agreement, the Amendment To The Primary Agreement, and the Restated Agreement; and
 - (iii) any agreement other than the Primary Agreement, the Addendum To The Primary Agreement, the Amendment To The Primary Agreement, and the Restated Agreement.
- F. “Affiliated Entity” means, with respect to a Long Term Contract Customer:
- 1. the Ultimate Parent Entity of the Long Term Contract Customer, and
 - 2. each joint venture, subsidiary, division, group, and affiliate controlled, directly or indirectly, by such Ultimate Parent Entity.
- G. “Annualized Value Of Terminated Long Term Contract” means the amount accruing under a Long Term Contract for UCM Services rendered under the contract during the four (4) most recent Billing Quarters preceding the date on which the contract is terminated. For example, if a Long Term Contract is terminated on June 15, 2008, and if the term “Billing Quarter” is defined for purpose of this Long Term Contract as Calendar Quarter, then the Annualized Value Of Terminated Long Term Contract is the amount accruing as base fees and any additional fees or charges under the contract for UCM Services rendered from April 1, 2007, through March 31, 2008.

Provided, however, that, if less than four (4) full Billing Quarters of service have been rendered under a Long Term Contract on the date the contract is terminated, then “Annualized Value Of Terminated Long Term Contract” means the value of the amount accruing for UCM Services

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rendered under the contract during the Billing Quarters fully covered by the contract, divided by the number of such Billing Quarters, and multiplied by four. For example, if the term of a Long Term Contract began on May 10, 2007, if the contract is terminated on May 15, 2008, if the amount of revenue accruing under the contract for UCM Services rendered from July 1, 2007, through March 31, 2008, is sixty thousand dollars (\$60,000), and if the term "Billing Quarter" is defined for purpose of this Long Term Contract as Calendar Quarter, then the Annualized Value Of Terminated Long Term Contract is sixty thousand dollars (\$60,000) divided by three (3) and multiplied by four (4), or eighty thousand dollars (\$80,000).

Provided, further, however, that, if less than one (1) full Billing Quarter of service has been rendered under a Long Term Contract on the date the contract is terminated, then "Annualized Value Of Terminated Long Term Contract" means the amount that has accrued for UCM Services rendered during the effective term of the contract, divided by the number of calendar days, whether full or partial, on which UCM Services were rendered under the contract, and multiplied by three hundred sixty five (365). For example, if the term of a Long Term Contract began at 6:00 p.m. on January 15, 2008, if the contract is terminated at 8:00 a.m. on April 20, 2008, if the term "Billing Quarter" is defined for purpose of this Long Term Contract as Calendar Quarter, and if the total amount accruing under the contract during its effective term is nine thousand seven hundred dollars (\$9,700), then the Annualized Value Of Terminated Long Term Contract is nine thousand seven hundred dollars (\$9,700) divided by ninety seven (97), and multiplied by three hundred sixty five (365), or thirty six thousand five hundred dollars (\$36,500).

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- H. “Appendix A Notice To Relevant Person” means the form of notice attached as Appendix A to the Order.
- I. “Appendix B Notice To Long Term Contract Customer” means the form of notice attached as Appendix B to the Order.
- J. “Appendix C Notice To Negative Option Contract Customer” means the form of notice attached as Appendix C to the Order.
- K. “Appendix D Web Page” means the form of Internet site attached as Appendix D to the Order.
- L. “Appendix E Web Page” means the form of Internet site attached as Appendix E to the Order.
- M. “Appendix F Employee List” means the document attached as Appendix F to the Order.
- N. “Billing Quarter” means Calendar Quarter.

Provided, however, that, if a Long Term Contract Customer is billed four times a year, and no more than four times a year, pursuant to the terms of a Long Term Contract, then, with respect to such Long Term Contract, the term “Billing Quarter” means each of the four billing periods per year during which services covered by a bill are rendered.

- O. “Calendar Quarter” means each of the following periods of time:
 - 1. January 1 through March 31,
 - 2. April 1 through June 30,

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3. July 1 through September 30, and
4. October 1 through December 31.

P. “Designated UCM Services Provider” means:

1. Barnett Associates; Corporate Cost Control, Inc.; Ernst & Young; Employers Edge LLC; PeopleSystems (a.k.a. National Employers Council, Inc.); Thomas & Thorngren, Inc.; UC Advantage, Inc.; U.C. Consultants; and
2. any Person that:
 - a. is neither TALX nor ADP,
 - b. is not a Person that has, at any time since January 1, 2008, directly or indirectly through a subsidiary or joint venture, subcontracted to TALX the responsibility for performing any services listed in Paragraphs I.P.2.c.(1)., I.P.2.c.(2)., I.P.2.c.(3)., I.P.2.c.(4)., or I.P.2.c.(5). of the Order, or any joint venture, subsidiary, division, group, or affiliate controlled by such Person, and
 - c. provides, within the jurisdiction of more than one State or Territory, the following UCM Services to a Major Multi-State Employer that does not have the same Ultimate Parent Entity as such Person:
 - (1) holding a power of attorney, or other authorization, sufficient to act as such Major Multi-State Employer’s qualified agent in dealings with States or Territories Relating To UC Claims,

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- (2) receiving and processing UC Claims on behalf of such Major Multi-State Employer,
 - (3) gathering, organizing, and maintaining information relating to UC Claims filed with respect to such Major Multi-State Employer,
 - (4) evaluating the validity of UC Claims filed with respect to such Major Multi-State Employer, and
 - (5) representing such Major Multi-State Employer in disputing UC Claims.
- Q. “Designated Recipient For Notice” means, with respect to a Long Term Contract Customer that is a party to a Long Term Contract:
1. each natural person, or agent for service of process, to be notified, on behalf of such customer, pursuant to any notice provision of such contract, or
 2. if such contract does not specify any natural person, or agent for service of process, to be notified, on behalf of such customer, pursuant to any notice provision of such contract, then the chief executive officer of such customer.
- R. “Document” means the complete original, or a true, correct, and complete copy, of any written or graphic matter, no matter how produced, recorded, stored, or reproduced, including, but not limited to, matter that is stored electronically.
- S. “Effective Date” means, with respect to a contract or with respect to the amendment or renewal of a contract, the

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earliest date on which any term of a contract, or any amended or renewed term of a contract, goes into effect.

- T. "Former UCM Customer" means:
1. any Person to which TALX has ceased to provide any UCM Service after the date this Order becomes final, and
 2. each joint venture, subsidiary, division, group, or affiliate controlled by such Former UCM Customer.
- U. "Hearing And Appeal Files" means all Documents prepared or collected in preparation for a hearing or appeal Relating To an Open UCM Claim, which may include, but are not limited to, any termination forms, witness statements, signed policy statements, signed handbooks, and written warnings collected in preparation for such hearing or appeal.
- V. "Joint Venture" means a collaboration between TALX and any other Person.
- W. "Long Term Contract" means any agreement:
1. to which TALX or any Acquired Entity is a party,
 2. that provides, in whole or in part, for the sale or provision of UCM Services by TALX or by any Acquired Entity,
 3. that has a term of over one (1) year, and
 4. for which an Effective Date of such agreement, of any amendment to such agreement, or of any renewal of such agreement was on or after November 1, 2005.

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X. “Long Term Contract Customer” means any Person (other than TALX or an Acquired Entity) that is a party to a Long Term Contract:

1. for which an Effective Date of such contract, of any amendment to such contract, or of any renewal of such contract was on or before the date this Order became final, and
2. that had one or more provisions that were in effect on the date this Order became final.

Provided, however, that if after the date this Order becomes final, TALX provides UCM Services to any Long Term Contract Customer pursuant to a contract between TALX and an Affiliated Entity of such Long Term Contract Customer, then such Affiliated Entity will also be deemed to be a Long Term Contract Customer.

Y. “Major Multi-State Employer” means any Person that:

1. employs at least three thousand five hundred (3,500) employees, and
2. does business, and has employees based, within the jurisdiction of more than one State or Territory.

Z. “Monitor/Administrator” means:

1. Erwin O. Switzer, or
2. any Person appointed by the Commission pursuant to Paragraph IX.C. of the Order.

Provided, however, that “Monitor/Administrator” does not mean any Person who has been replaced pursuant to Paragraph IX.C. or Paragraph IX.F. of the Order.

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- AA. “Negative Option Contract” means any contract:
1. to which TALX or any Acquired Entity is a party,
 2. that provides, in whole or in part, for the sale or provision of UCM Services by TALX or by any Acquired Entity, and
 3. that provides that the failure of any party to the contract to exercise a specified right to terminate the contract shall constitute such party’s assent to the automatic renewal of the contract for an additional term.
- BB. “Negative Option Contract Customer” means any party to a Negative Option Contract, other than TALX or an Acquired Entity.
- CC. “Negative Option Notice Date” means the last date by which a Negative Option Contract Customer must provide notice to TALX in order to avoid automatic renewal of its Negative Option Contract.
- DD. “Noncompetition Restriction” means any contractual provision that restricts the ability of a Person to:
1. accept employment with a UCM Services Provider, or
 2. otherwise participate, directly or indirectly, in selling or providing UCM Services to any Person.
- EE. “Non-In-House UCM Services Provider” means, with respect to the sale of UCM Services from a UCM Services Provider to a Long Term Contract Customer, a UCM Services Provider that has a different Ultimate Parent Entity than such Long Term Contract Customer.

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- FF. “Nonsolicitation Restriction” means any contractual provision that restricts the ability of a Person to solicit, or otherwise contact, a potential purchaser or recipient of UCM Services.
- GG. “Open UC Claim” means any UC Claim that is pending with a State or Territory or that is otherwise subject to further action by, or a proceeding with, a State or Territory.
- HH. “Other Relevant Current Person” means any Person that:
1. on February 28, 2008, was employed by TALX Corporation,
 2. on October 1, 2007, or on February 28, 2008, was employed by TALX Corporation as a customer relationship manager, account manager, unemployment insurance consultant, hearing representative, or tax consultant,
 3. is not a Relevant Current Person, and
 4. is not Debra Bretz.
- II. “Person” means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.
- JJ. “Received Delivery” means a delivery in which the sender acquires and retains a delivery receipt signed by the recipient or by an agent of the recipient.
- KK. “Relating To” and “Relate To” mean pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to.

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LL. “Relevant Current Person” means any Person who:

1. is listed in the Appendix F Employee List, and
2. is not a Relevant Past Person.

MM. “Relevant Past Person” means any Person who:

1. on or between February 28, 2005, and the date the Order became final, participated, directly or indirectly, in providing UCM Services while acting in the capacity of a director, officer, or employee of TALX or of an Acquired Entity, and
2. at no time after the date this Order became final, has acted in the capacity of a director, officer, or employee of TALX or of an Acquired Entity.

NN. “Relevant Person” means:

1. Relevant Past Person,
2. Relevant Current Person, and
3. Other Relevant Current Person.

OO. “Relevant Information” means any information Relating To the sale or production of UCM Services.

Provided, however, that “Relevant Information” does not mean information about TALX’s projected or expected profit margins, TALX’s projected or expected sales targets for its overall unemployment compensation management business operations, or TALX’s product development activities.

PP. “Relevant Restriction” means:

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1. Noncompetition Restriction,
2. Nonsolicitation Restriction, and
3. Restriction On The Use Of Relevant Information In Memory.

QQ. “Remaining Term Of The Contract” means, with respect to a Long Term Contract that has been terminated prior to the end of its full term:

1. the calendar day following the date on which such Long Term Contract was terminated, and
2. each subsequent calendar day until, and including, the last date on which UCM Services were to have been provided pursuant to the terms of such Long Term Contract.

RR. “Relevant Value Of Terminated Long Term Contract” means, with respect to a terminated Long Term Contract:

1. Annualized Value Of Terminated Long Term Contract, if the Remaining Term Of The Contract is greater than, or equal to, three hundred sixty five (365) days; or
2. Residual Value Of Terminated Long Term Contract, if the Remaining Term Of The Contract is less than three hundred sixty five (365) days.

SS. “Residual Value Of Terminated Long Term Contract” means, with respect to a terminated Long Term Contract, the Annualized Value Of Terminated Long Term Contract times the number of calendar days in the Remaining Term Of The Contract divided by three hundred sixty five (365).

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TT. “Restriction On The Use Of Relevant Information In Memory” means any contractual provision that restricts the ability of a natural person to use Relevant Information:

1. obtained by such natural person as a director, officer, or employee of TALX or of an Acquired Entity, and
2. retained by such person only in memory after leaving such position with TALX or with such Acquired Entity.

UU. “State” means the government of one of the fifty (50) states of the United States.

VV. “TALX Address” means the following address:

Office of the Chief Executive Officer
TALX Corporation
11432 Lackland Avenue
St. Louis, MO 63146

WW. “Territory” means the government of the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, or the Northern Mariana Islands.

XX. “Total Of Relevant Values Of Terminated Long Term Contracts” means the sum total of Relevant Values Of Terminated Long Term Contract for all Long Term Contracts:

1. that have been terminated both:
 - a. in accordance with Paragraph III. of the Order, and
 - b. before the end of the full term of the Long Term Contract; and

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2. for which, after such termination, the Long Term Contract Customer purchases from a Non-In-House UCM Services Provider the UCM Services previously purchased under the terminated Long Term Contract.

YY. “UC Claim” means any claim for unemployment compensation filed with a State or Territory.

ZZ. “Ultimate Parent Entity” has the same meaning it has under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, and the rules promulgated thereunder, 16 C.F.R. § 801 et seq.

AAA. “UC Tax Rate Notice” means the official notice sent to an employer by a State or Territory informing the employer of its unemployment compensation tax rate.

BBB. “UCM Services” and “Unemployment Compensation Management Services” both mean the management, administration, or processing, on behalf of an employer, of UC Claims, including, but not limited to,

1. receiving and processing UC Claims;
2. acting as an employer’s agent with respect to UC Claims;
3. gathering, organizing, or maintaining information relating to UC Claims;
4. evaluating the validity of UC Claims;
5. disputing UC Claims;
6. representing an employer in an UC Claim hearing or appeal, and in any other dealing with a State or Territory in a matter Relating To UC Claims;

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7. developing procedures to reduce an employer's expenditures on UC Claims;
8. determining whether an unemployment compensation tax rate is correct and disputing errors in such tax rates;
9. performing audits of unemployment compensation benefit charges, and seeking refunds or credits for overpayments;
10. generating reports with regard to UC Claim activity and trends, with regard to the results of efforts to change such activity and trends; and
11. counseling and training an employer or an employer's personnel with regard to UC Claim matters.

CCC. "UCM Services Provider" means any Person that sells or provides any Unemployment Compensation Management Services.

DDD. "VOIE Services" and "Verification Of Income And Employment Services" both mean the provision of employment and income verifications, including, but not limited to, the collection, maintenance, or dissemination of payroll data and other data relating to employment.

EEE. "VOIE Services Provider" means any Person that sells or provides Verification Of Income And Employment Services.

II.

IT IS FURTHER ORDERED that:

A. TALX shall not:

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1. enforce any Relevant Restriction against any Relevant Past Person, or against any Other Relevant Current Person, during the time that such Person is employed by a Designated UCM Services Provider, or
 2. seek damages for the violation by any Relevant Past Person, or by any Other Relevant Current Person, of any Relevant Restriction if such violation occurred during the time that such Person was employed by a Designated UCM Services Provider.
- B. TALX shall not enforce any Relevant Restriction against any Relevant Current Person during the time that such Person is employed by any Designated UCM Services Provider, and shall not seek damages for the violation by any Relevant Current Person of any Relevant Restriction if such violation occurred during the time that such Person was employed by any Designated UCM Services Provider:
1. if such Relevant Current Person:
 - a. submits to the Monitor/Administrator, after the date this Order becomes final and no more than two (2) years after the date that such Relevant Current Person is given notice in accordance with Paragraph VI.A. of the Order, a notice that he or she is terminating his or her employment with TALX and is accepting employment with a Designated UCM Services Provider (“Notice Of New Employment”), and
 - b. subsequently terminates his or her employment with TALX and accepts employment with such Designated Services Provider, or
 2. if such Relevant Current Person:

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- a. is no longer employed by TALX as the result of having his or her employment terminated involuntarily by TALX,
- b. submits to the Monitor/Administrator, after the date this Order becomes final and no more than two (2) years after the date that such Relevant Current Person is given notice in accordance with Paragraph VI.A. of the Order, a Notice Of New Employment stating that he or she is accepting employment with a Designated UCM Services Provider, and
- c. subsequently accepts employment with such Designated Services Provider.

Provided, however, that, if the Person named as a Designated UCM Services Provider in a Notice Of New Employment (“New Employer”) is not listed in Paragraph I.P.1. of the Order, then the submission of such notice shall not comply with Paragraphs II.B.1.a. and II.B.2.b. of the Order, and the Monitor/Administrator shall not forward such notice to TALX, unless the Relevant Current Person submitting such notice also submits to the Monitor/Administrator a signed letter from such New Employer stating that the New Employer qualifies as a Designated UCM Services Provider pursuant to Paragraph I.P.2. of the Order. If and when the Monitor/Administrator forwards such Notice Of New Employment to TALX, the Monitor/Administrator shall attach the letter from the New Employer to such notice.

Provided, further, however, that, if TALX sends the notice required under Paragraph VI.A. of the Order by a form of Receipted Delivery that generates reliable documentation that the notice was in fact sent and if

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TALX retains such documentation for a period of three (3) years after the date that it sends such notice, then for purposes of Paragraph II.B., a Relevant Current Person will be deemed to have been given notice pursuant to Paragraph VI.A. on the earlier of the following dates:

- (i) the date that such Relevant Current Person actually receives such notice, or
- (ii) five (5) business days after TALX deposits the notice to any such Relevant Current Person in the United States mail or with a private courier, shipping, or messenger company.

Provided, further, however, that this Paragraph II.B. shall not apply to such Relevant Current Person if the Monitor/Administrator has not forwarded to TALX the Notice Of New Employment that such Relevant Current Person submitted to the Monitor/Administrator in accordance with Paragraphs II.B.1.a. or II.B.2.b. of the Order, and if:

- (i) such Relevant Current Person is identified in the Appendix F Employee List as a “Client Relationship Manager,” and he or she submits his or her Notice Of New Employment after the Monitor/Administrator has certified to the Commission that ten (10) Relevant Current Persons who are each identified as “Client Relationship Managers” in the Appendix F Employee List have accepted employment with a Designated UCM Services Provider after the date this Order became final;
- (ii) such Relevant Current Person is identified in the Appendix F Employee List as an “Account

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Manager,” and he or she submits his or her Notice Of New Employment after the Monitor/Administrator has certified to the Commission that four (4) Relevant Current Persons who are each identified as “Account Managers” in the Appendix F Employee List have accepted employment with a Designated UCM Services Provider after the date this Order became final;

- (iii) such Relevant Current Person is identified in the Appendix F Employee List as an “Unemployment Insurance Consultant,” and he or she submits his or her Notice Of New Employment after the Monitor/Administrator has certified to the Commission that twenty three (23) Relevant Current Persons who are each identified as “Unemployment Insurance Consultants” in the Appendix F Employee List have accepted employment with a Designated UCM Services Provider after the date this Order became final;
- (iv) such Relevant Current Person is identified in the Appendix F Employee List as a “Hearing Representative,” and he or she submits his or her Notice Of New Employment after the Monitor/Administrator has certified to the Commission that five (5) Relevant Current Persons who are each identified as “Hearing Representatives” in the Appendix F Employee List have accepted employment with a Designated UCM Services Provider after the date this Order became final; or
- (v) such Relevant Current Person is identified in the Appendix F Employee List as a “Tax

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Consultant,”and he or she submits his or her Notice Of New Employment after the Monitor/Administrator has certified to the Commission that four (4) Relevant Current Persons who are each identified as “Tax Consultants” in the Appendix F Employee List have accepted employment with a Designated UCM Services Provider after the date this Order became final.

- C. The purpose of Paragraphs II., III., IV., V., and VI. of the Order are to facilitate the entry and expansion of firms in competition with TALX in markets for UCM Services and to remedy the lessening of competition in markets for UCM Services alleged in the Commission’s Complaint.

III.

IT IS FURTHER ORDERED that, if after the date this Order becomes final and no more than three (3) years after the date that a Long Term Contract Customer receives notice in accordance with Paragraph VI.B. of the Order, such Long Term Contract Customer submits a notice to TALX, via Receipted Delivery to the TALX Address, that such customer is terminating a Long Term Contract and will be purchasing or obtaining the UCM Services previously purchased or obtained under such Long Term Contract from a Non-In-House UCM Services Provider (“Notice Of Long Term Contract Termination”), then TALX shall terminate such Long Term Contract on a pro rata basis (i) ninety (90) days after receiving such Notice Of Long Term Contract Termination from the Long Term Contract Customer or (ii) the date specified for termination by the Long Term Contract Customer, whichever is later:

- A. without the payment by such Long Term Contract Customer to TALX of any liquidated damages or other financial penalty for such termination, and

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- B. without any requirement that the Long Term Contract Customer give TALX notice of competing offers or give TALX the opportunity to meet or surpass competing offers; *provided, however*, that nothing in this Paragraph III.B. of the Order shall prevent TALX from offering to meet or surpass competing offers.

Provided, however, that the failure of TALX to give a Long Term Contract Customer the notice required by Paragraph VI.C. of the Order, shall toll, with respect to such customer, the running of the three (3) year time limits set by this Paragraph III. and by Paragraph VI.C. until such time as TALX provides to such customer the notice required by Paragraph VI.C. of the Order.

Provided, further, however, that, if TALX sends the notice required under Paragraph VI.B. of the Order by a form of Receipted Delivery that generates reliable documentation that the notice was in fact sent and if TALX retains such documentation for a period of three (3) years after the date that it sends such notice, then for purposes of Paragraph III. of the Order, a Long Term Contract Customer will be deemed to have received notice pursuant to Paragraph VI.B. on the earlier of the following dates:

- (i) the date that such Long Term Contract Customer actually receives such notice, or
- (ii) five (5) business days after TALX deposits the notice to any such Long Term Contract Customer in the United States mail or with a private courier, shipping, or messenger company.

Provided, further however, that TALX shall not be required to terminate, pursuant to Paragraph III., the Long Term Contract of a Long Term Contract Customer, if such customer's Notice Of Long Term Contract Termination is received by TALX more than two business days after:

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- (i) the calendar day on which Monitor/Administrator certifies to the Commission that the Total Of Relevant Values Of Terminated Long Term Contracts exceeds ten million dollars (\$10,000,000), and
- (ii) the calendar day on which TALX posts notice of such certification on the Appendix E Web Page.

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

- A. For a period of five (5) years from the date this Order becomes final and at the request of any Former UCM Customer, TALX shall provide to such Former UCM Customer or to the UCM Services Provider that is providing or will provide UCM Services to such Former UCM Customer:
 - 1. for each Open UC Claim that Relates To the termination of employment with such Former UCM Customer, the following information:
 - a. the name of the claimant,
 - b. the claimant's social security number,
 - c. the State or Territory in which the claim is pending,
 - d. the beginning date of the benefit year,
 - e. the type of UC Claim at issue,
 - f. whether the claim is being protested,

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- g. the State (or Territory) identification number for such Former UCM Customer, and
 - h. and the status or determination of each claim;
2. for each UC Claim that is not an Open UC Claim, that Relates To the termination of employment with such Former UCM Customer, and that was filed no more than three (3) years prior to such request for such information by such Former UCM Customer, the following information:
 - a. the name of the claimant,
 - b. the claimant's social security number,
 - c. the State or Territory in which the claim was pending,
 - d. the beginning date of the benefit year,
 - e. the type of UC Claim at issue,
 - f. whether the claim was protested,
 - g. the State (or Territory) identification number for such Former UCM Customer, and
 - h. the determination of the claim;
 3. for each charge or credit made, no more than three (3) years prior to such request for information, against such Former UCM Customer as the result of a UCM Claim that Relates To the termination of employment with such Former UCM Customer, the following information:

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- a. the social security number of the relevant claimant,
 - b. the State or Territory in which the claim was filed,
 - c. the State (or Territory) identification number for such Former UCM Customer,
 - d. the benefit week for which the charge or credit was incurred, and
 - e. the benefit charge amount (or, if applicable, the benefit credit amount);
4. with respect to any UC Tax Rate Notice from a State or Territory that Relates To any unemployment compensation tax rate charged by the State or Territory against such Former UCM Customer within three (3) years of such request for information, or that Relates To the calculation of such unemployment compensation tax rate, the following information:
 - a. the State or Territory,
 - b. the State (or Territory) identification number for such Former UCM Customer,
 - c. the relevant rate year, and
 - d. all other information contained in each such UC Tax Rate Notice; and
 5. with respect to quarterly contribution reports filed with a State or Territory by such Former UCM Customer no more than three (3) years prior to such request for information, the following information from each such report:

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- a. the State or Territory,
 - b. the State (or Territory) identification number for such Former UCM Customer,
 - c. the name of such Former UCM Customer,
 - d. the federal employment identification number for such Former UCM Customer,
 - e. the year and quarter of the report,
 - f. the gross wages,
 - g. the taxable wages, and
 - h. the contribution payment.
- B. Respondent shall be required to provide to a Former UCM Customer, pursuant to Paragraph IV.A. of the Order, only information that is in an electronic database under the control of TALX.
- Provided, however,* that for five (5) years after the date this Order becomes final, TALX shall not discard from the electronic databases under its control any information specified in Paragraph IV.A. of the Order.
- C. If there is no agreement between TALX and a Former UCM Customer that has requested information pursuant to Paragraph IV.A. of the Order on the form in which TALX will provide such information to the Former UCM Customer, then TALX shall provide such information to the Former UCM Customer in the form of Microsoft Excel spreadsheets.

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- D. For a period of five (5) years from the date this Order becomes final, if a Former UCM Customer chooses to transfer from TALX to another UCM Services Provider the responsibility for an Open UCM Claim, then, at the request of such Former UCM Customer, TALX shall provide to such Former UCM Customer, or to any UCM Services Provider it designates, all Hearing And Appeal Files for such Open UCM Claim.

Provided, however, that, with respect to this Paragraph IV.D. of the Order, TALX shall be required only to provide those Hearing And Appeal Files in its possession, and shall not be required to compile or create such Hearing And Appeal Files.

Provided, further, however, that for five (5) years after the date of this Order becomes final, TALX shall not discard any such Hearing And Appeal Files unless and until either:

- (i) the UCM Claim that Relates To such files is no longer an Open UCM Claim, or
 - (ii) copies of such files have been provided to such Former UCM Customer.
- E. TALX shall forward to each Former UCM Customer any notice, letter, or other Document that:
1. TALX receives from a State or Territory, and
 2. is addressed to such Former UCM Customer, or that otherwise is intended for such Former UCM Customer or for a UCM Services Provider providing UCM Services to such Former UCM Customer.

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V.

IT IS FURTHER ORDERED that, for a period of five (5) years from the date this Order becomes final, TALX shall not enter into agreements that would prevent or discourage any Person from selling goods or services to any UCM Services Provider.

Provided, however, that this Paragraph V. does not apply to TALX's contracts of employment with its individual employees.

VI.

IT IS FURTHER ORDERED that:

- A. Within sixty (60) days of the date this Order becomes final, TALX shall send by Receipted Delivery to each Relevant Past Person and to each Relevant Current Person at his or her current home address or current primary business address:
1. an Appendix A Notice To Relevant Person, and
 2. a copy of the Order.

Provided, however, that if, at the time this Order becomes final, TALX does not have any record of the current home or primary business address of a Relevant Past Person, then TALX shall send the Appendix A Notice To Relevant Person and a copy of the Order to the last known home or business address of such Relevant Past Person.

Provided, further, however, that if, at the time this Order becomes final, TALX does not have any record of any home or business address, current or past, of a Relevant Past Person, then TALX shall not be required to send an

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Appendix A Notice To Relevant Person or a copy of the Order to such Relevant Past Person.

- B. Within sixty (60) days of the date this Order becomes final, TALX shall send by Receipted Delivery to each Designated Recipient For Notice for each Long Term Contract Customers:
 1. an Appendix B Notice To Long Term Contract Customer, and
 2. a copy of the Order.
- C. Each calendar year, for a period of three (3) years from the date this Order becomes final, TALX shall provide notice to each Long Term Contract Customer by either one of the following two means:
 1. On each and every invoice, sent by TALX to such customer with regard to any Long Term Contract:
 - a. include the following three sentences on the first page of the invoice (or, if the invoice is transmitted electronically, within the first two hundred (200) words of the invoice): “You may have a right to cancel this contract on ninety (90) days notice pursuant to an order of the Federal Trade Commission. If you have questions about whether you have such right to cancel, please call [*telephone number of the Monitor/Administrator*] for a confidential consultation. Additional information concerning this right to cancel can be found at <http://www.talx.com/contracts>.”
 - b. begin the first word of the first sentence at the left hand margin of the invoice, and

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- c. print the sentences in type that is at least as large as the largest type, and at least as bold as the boldest type (excepting the TALX trademark or logo), appearing on the first page of the invoice (or, if the invoice is transmitted electronically, within the first two hundred (200) words of the invoice), but that, in no event, is smaller or less bold than Times New Roman Bold 12-Point type; or
 2. By Received Delivery, send an Appendix B Notice To Long Term Contract Customer to each Designated Recipient For Notice for each such customer.
- D. Beginning sixty (60) days after the Order becomes final, and continuing until five (5) years after the date this Order becomes final, TALX shall provide notice to each Negative Option Contract Customer by either one of the following two means:
1. On each and every invoice sent by TALX to such customer with regard to any Negative Option Contract:
 - a. include the following sentence on the first page of the invoice (or, if the invoice is transmitted electronically, within the first two hundred (200) words of the invoice): “Your contract for unemployment compensation services, which expires on [date], will be automatically renewed for an additional [number of years and/or months] unless you exercise your right to cancel this contract on or before [date].”
 - b. begin the first word of such sentence at the left hand margin of the invoice, and
 - c. print such sentence in type that is at least as large as the largest type, and at least as bold as the

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boldest type (excepting the TALX trademark or logo), appearing on the first page of the invoice (or, if the invoice is transmitted electronically, within the first two hundred (200) words of the invoice), but that, in no event, is smaller or less bold than Times New Roman Bold 12-Point type; or

2. At least thirty (30) days, but not more than ninety (90) days, before the Negative Option Notice Date for such customer's Negative Option Contract, send by Receipted Delivery to each such customer an Appendix C Notice To Negative Option Contract Customer; *provided, however*, that if such customer has a Negative Option Notice Date greater than thirty (30) days before the end of the term of the customer's Negative Option Contract, TALX may elect to send the notice specified in this Paragraph VI.D.2. of the Order to such customer less than thirty (30) days before the Negative Option Notice Date, but only if (i) TALX sends such notice to such customer at least sixty (60) days before the end of the term of such Negative Option Contract, (ii) TALX permits such customer to give, on any date up to thirty (30) days prior the end of such contract term, the notice such customer is required to give in order to avoid automatic renewal of such Negative Option Contract, and (iii) the Appendix C Notice To Negative Option Contract Customer sent to such customer specifies a Negative Option Notice Date no earlier than thirty (30) days notice prior to the end of such contract term.

Provided, however, that if TALX fails to give the notice required by this Paragraph VI.D. of the Order with respect to a Negative Option Contract, and if such Negative Option Contract is then renewed automatically for a subsequent term, then, during such subsequent term of the

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contract, TALX shall, at the request of such customer, terminate such contract on a pro rata basis within thirty (30) days of receiving such request:

- (i) without the payment by such Negative Option Customer to TALX of any liquidated damages or other financial penalty for such termination, and
- (ii) without any requirement that such Negative Option Customer give TALX notice of competing offers or give TALX the opportunity to meet or surpass competing offers; *provided, however*, that nothing in this paragraph shall prevent TALX from offering to meet or surpass competing offers.

Provided, further, however, that if, within a calendar year, TALX has provided a Negative Option Contract Customer with the notice required by Paragraph VI.C. of the Order, then TALX need not also provide such customer with any notice required by Paragraph VI.D. of the Order.

- E. Beginning ten (10) days after the date the Order becomes final, and until five (5) years after the date the Order becomes final:
1. post and maintain an Appendix D Web Page at <http://www.talx.com/noncompetes>,
 2. post and maintain an Appendix E Web Page at <http://www.talx.com/contracts>.

VII.

IT IS FURTHER ORDERED that, for a period of five (5) years from the date this Order becomes final:

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- A. TALX shall cease and desist from entering into, attempting to enter into, soliciting, attempting to solicit, adhering to, or attempting to adhere to any agreement with any UCM Services Provider, or with any potential UCM Services Provider, in the United States to allocate or divide markets, customers, contracts, or territories for UCM Services in any part of the United States; *provided, however,* that it shall not, of itself, constitute a violation of this Paragraph VII.A. of the Order for TALX to enter into, attempt to enter into, solicit, attempt to solicit, adhere to, or attempt to adhere to an agreement to allocate or divide markets, customers, contracts, or territories for UCM Services if such agreement is, or would be, reasonably related to a lawful Joint Venture and reasonably necessary to achieve the procompetitive benefit of such Joint Venture; and
- B. TALX shall not enter into, attempt to enter into, solicit, attempt to solicit, adhere to, or attempt to adhere to an agreement with ADP that requires ADP to subcontract the rendering of any UCM Services to TALX if, at the time TALX solicits, enters into, or enforces such agreement, the Person for which such UCM Services will be rendered has not yet entered into an agreement to purchase such UCM Services from ADP.

Provided, however, that adherence to the ADP/TALX Agreement Of June 27, 2001, shall not constitute a violation of this Paragraph VII. of the Order.

Provided, further, however, that nothing in this Paragraph VII. of the Order shall prevent TALX from submitting a quote or an estimate to ADP regarding the costs or fees that TALX would charge to ADP for rendering UCM Services to any specific Person under a subcontract.

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VIII.

IT IS FURTHER ORDERED that for a period of ten (10) years from the date this Order becomes final, TALX shall not, without providing advance written notification to the Commission in the manner described in this paragraph, directly or indirectly:

- A. acquire any assets of or financial interest in any UCM Services Provider or VOIE Services Provider; or
- B. enter into any agreement to participate in the management or operation of a UCM Services Provider or VOIE Services Provider.

Said advance written notification shall contain (i) either a detailed term sheet for the proposed acquisition or the proposed agreement with all attachments, 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 “the 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 only with the Secretary of the Commission and need not be submitted to the United States Department of Justice, and (iii) the Notification is required from TALX and not from any other party to the transaction. TALX 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), TALX shall not consummate the transaction until thirty days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and,

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where appropriate, granted by letter from the Bureau of Competition.

Provided, however, that prior notification shall not be required by this Paragraph VIII. of the Order 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.

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

- A. Erwin O. Switzer shall be appointed Monitor/Administrator to assure that TALX complies with all of its obligations and performs all of its responsibilities as required by this Order.
- B. No later than twenty (20) days after the date that TALX executes the Agreement Containing Consent Order, TALX shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor/Administrator all the rights and powers necessary to permit the Monitor/Administrator to carry out the duties and responsibilities of the Monitor/Administrator in a manner consistent with the purposes of this Order.
- C. In the event a substitute Monitor/Administrator is required, the Commission shall select the Monitor/Administrator, subject to the consent of TALX, which consent shall not be unreasonably withheld. If TALX has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor/Administrator within ten (10) days after notice by the staff of the Commission to TALX of the identity of any proposed Monitor/Administrator, TALX shall be deemed to have consented to the selection of the proposed Monitor/Administrator. Not later than ten (10) days after

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appointment of a substitute Monitor/Administrator, TALX shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor/Administrator all the rights and powers necessary to permit the Monitor/Administrator to carry out the duties and responsibilities of the Monitor/Administrator in a manner consistent with the purposes of this Order.

- D. TALX shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor/Administrator:
1. The Monitor/Administrator shall have the power and authority to monitor TALX's compliance with the terms of the Order and to administer the voluntary transfer of Relevant Persons to Designated UCM Services Providers, and Long Term Contract Customers to Non-In-House UCM Services Providers, pursuant to Paragraphs II., III., IV. and VI. of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor/Administrator in a manner consistent with the purposes of this Order and in consultation with the Commission, including, but not limited to assuring that TALX expeditiously complies with all of its obligations and performs all of its responsibilities as required by the Order.
 2. The Monitor/Administrator shall act in a fiduciary capacity for the benefit of the Commission.
 3. The Monitor/Administrator shall serve for such time as is necessary to monitor TALX's compliance with the terms of this Order and to administer the voluntary transfer of Relevant Persons to Designated UCM Services Providers, and Long Term Contract Customers to Non-In-House UCM Services Providers,

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pursuant to Paragraphs II., III., IV., and VI. of the Order.

4. Subject to any demonstrated legally recognized privilege, the Monitor/Administrator shall have full and complete access to TALX's personnel, books, documents, records, facilities and technical information, and such other relevant information as the Monitor/Administrator may reasonably request, Relating To TALX's compliance with its obligations under the Order. TALX shall cooperate with any reasonable request of the Monitor/Administrator and shall take no action to interfere with or impede the Monitor/Administrator's ability to monitor TALX's compliance with the Order.
5. The Monitor/Administrator shall:
 - a. have the authority and, upon request, the responsibility to provide information to:
 - (1) Relevant Persons concerning such Persons' eligibility to be free of Relevant Restrictions pursuant to Paragraph II.A. and Paragraph II.B. of the Order, and
 - (2) Long Term Contract Customers concerning such customers' eligibility to terminate their Long Terms Contracts pursuant to Paragraph III. of the Order;
 - b. expeditiously respond to requests for such information from Relevant Persons and Long Term Contract Customers; and
 - c. treat as confidential any such communication between the Monitor/Administrator and a Relevant Person or Long Term Contract Customer, and not

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reveal to TALX, or to any Person other than the Commission or its staff, the fact or content of such communication without the permission of the Relevant Person or Long Term Contract Customer that is a party to such communication

Provided, however, that, in the event that the Monitor/Administrator is an attorney, he or she shall not have the authority to enter into an attorney-client relationship with any Relevant Person or Long Term Contract Customer.

6. The Monitor/Administrator shall have the authority and responsibility to:
 - a. collect and process data, from TALX and other sources, Relating To the eligibility of:
 - (1) Relevant Persons to be free of Relevant Restrictions pursuant to Paragraphs II.A. and II.B. of the Order, and
 - (2) Long Term Contract Customers to terminate their Long Terms Contracts pursuant to Paragraph III. of the Order;
 - b. certify to the Commission that:
 - (1) ten (10) Relevant Current Persons who are each identified as “Client Relationship Manager” in the Appendix F Employee List have accepted employment with a Designated UCM Services Provider after the date this Order becomes final,

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- (2) four (4) Relevant Current Persons who are each identified as “Account Managers” in the Appendix F Employee List have accepted employment with a Designated UCM Services Provider after the date this Order becomes final,
 - (3) twenty three (23) Relevant Current Persons who are each identified as “Unemployment Insurance Consultants” in the Appendix F Employee List have accepted employment with a Designated UCM Services Provider after the date this Order becomes final,
 - (4) five (5) Relevant Current Persons who are each identified as “Hearing Representatives” in the Appendix F Employee List have accepted employment with a Designated UCM Services Provider after the date this Order becomes final,
 - (5) four (4) Relevant Current Persons who are each identified as “Tax Consultants” in the Appendix F Employee List have accepted employment with a Designated UCM Services Provider after the date this Order becomes final,
 - (6) the Total Of Relevant Values Of Terminated Long Term Contracts exceeds ten million dollars (\$10,000,000);
- c. endeavor to make any certification to the Commission pursuant to Paragraph IX.D.6.b of the Order within five (5) business days of receiving sufficient information from Respondent to make such certification, and

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- d. receive notices of contract termination from Relevant Current Persons and Other Relevant Current Persons, and forward such notices to TALX with the permission of such Relevant Persons.
7. The Monitor/Administrator shall:
 - a. have the authority and responsibility to:
 - (1) expeditiously determine whether Relevant Persons are eligible to be free of Relevant Restrictions pursuant to Paragraph II.B. of the Order, and
 - (2) notify such Relevant Persons of such determinations;
 - b. be given by TALX the discretionary authority to make such determinations even if the Monitor/Administrator is unable to obtain information Relating To such determinations from TALX or other sources; and
 - c. be held harmless by TALX against any losses, claims, damages, liabilities, or expenses arising out of any such determinations, 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 Monitor/Administrator.
 8. The Monitor/Administrator shall serve, without bond or other security, at the expense of TALX on such reasonable and customary terms and conditions as the Commission may set. The Monitor/Administrator shall have authority to employ, at the expense of TALX,

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such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor/Administrator's duties and responsibilities. The Monitor/Administrator shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.

9. TALX shall indemnify the Monitor/Administrator and hold the Monitor/Administrator harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor/Administrator'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 Monitor/Administrator.
10. TALX shall report to the Monitor/Administrator in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission.
11. Within one (1) month from the date the Monitor/Administrator is appointed pursuant to this paragraph, every ninety (90) days thereafter, and otherwise as requested by the Commission, the Monitor/Administrator shall report in writing to the Commission concerning performance by TALX of its obligations under this Order.
12. TALX may require the Monitor/Administrator and each of the Monitor/Administrator's consultants, accountants, attorneys, and other representatives and

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assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the ability of the Monitor/Administrator to provide any information to the Commission.

- E. The Commission may, among other things, require the Monitor/Administrator and each of the Monitor/Administrator'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 Monitor/Administrator's duties.
- F. If the Commission determines that the Monitor/Administrator has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor/Administrator in the same manner as provided in this Paragraph IX. of the Order.
- G. The Commission may on its own initiative, or at the request of the Monitor/Administrator, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.

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

- A. Sixty (60) days after the date this Order becomes final, TALX 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. TALX shall submit at the same time a copy of this report to the Monitor/Administrator.

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- 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 nine (9) years, TALX shall submit to the Commission verified written reports setting forth in detail the manner and form in which it is complying and has complied with this Order. TALX shall submit at the same time a copy of these reports to the Monitor/Administrator.

XI.

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

- A. Any proposed dissolution of TALX,
- B. Any proposed acquisition, merger or consolidation of TALX, or
- C. Any other change in TALX 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 TALX.

XII.

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, TALX shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of TALX and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other Documents in the possession or under the

Decision and Order

control of TALX related to compliance with this Order;
and

- B. Upon five (5) days' notice to TALX and without restraint or interference from TALX, to interview officers, directors, or employees of TALX, who may have counsel present, regarding such matters.

XIII.

IT IS FURTHER ORDERED that this Order shall terminate on August 6, 2018.

By the Commission.

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Appendix A
(Appendix A Notice To Relevant Person)*[Letterhead of TALX Corporation]**[date]**[address]*

Re: Your Contract of Employment

Dear *[name]*:

This is to inform you that, pursuant to a consent agreement between TALX Corporation ("TALX") and the Federal Trade Commission, TALX has agreed, under certain conditions, not to enforce certain provisions of your contract of employment in the event you elect to terminate your contract. Specifically, pursuant to either Paragraph II.A. or Paragraph II.B. of the enclosed Decision and Order issued by the Federal Trade Commission ("Decision and Order"), TALX may not enforce against you certain covenants not to compete, certain covenants not to solicit, and certain restrictions on your use of trade secrets.

If you have questions about whether, and to what extent, you are eligible to be released from such covenants and restrictions, you may call *[telephone number of the Monitor/Administrator]* for a consultation with the independent Monitor/Administrator appointed by the Federal Trade Commission in this matter. Neither the fact that you have consulted with the Monitor/Administrator nor the content of those consultations will be disclosed to TALX without your permission.

Additional information concerning this matter can be found at the following Web address: <http://www.talx.com/noncompetes>.

Sincerely,

[CEO of TALX Corporation]

Enclosure

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Appendix B
(Appendix B Notice To Long Term Contract Customer)

[Letterhead of a TALX Corporation]

[date]

[address]

Re: Termination of Contract

Dear [name]:

This is to inform you that, pursuant to a consent agreement between TALX Corporation ("TALX") and the Federal Trade Commission, TALX has agreed, under certain conditions, to allow many of its customers to terminate, on ninety (90) days notice, the customers' long term contracts for unemployment compensation management services. I direct your attention to Paragraph III. of the enclosed Decision and Order issued by the Federal Trade Commission ("Decision and Order").

If you have questions about whether, and to what extent, you are eligible to terminate your long term contract(s) with TALX, you may call [telephone number of the Monitor/Administrator] for a consultation with the independent Monitor/Administrator appointed by the Federal Trade Commission in this matter. Neither the fact that you have consulted with the Monitor/Administrator nor the content of those consultations will be disclosed to TALX without your permission.

Additional information concerning this matter can be found at the following Web address: <http://www.talx.com/contracts>.

Sincerely,

[CEO of TALX Corporation]

Enclosure

Decision and Order

Appendix C
(Appendix C Notice To Negative Option Contract Customer)*[Letterhead of a TALX Corporation]**[date]**[address]*Re: Automatic Renewal of *[title of contract]*Dear *[name]*:

Your contract for unemployment compensation services, which expires on *[date]*, will be automatically renewed for an additional *[number of years and/or months]* unless you exercise your right to cancel this contract on or before *[date]*.

Sincerely,

[CEO of TALX Corporation]

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Appendix D
(Appendix D Web Page)**Version 1 of Appendix D**

Until (a) two years after the date that all Relevant Current Persons have been given notice in accordance with Paragraph VI.A. of the Order, or (b) the date on which the Monitor/Administrator has certified that ten Client Relationship Managers, four Account Managers, twenty three Unemployment Insurance Consultants, five Hearing Representatives, and four Tax Consultants listed on the Appendix F Employee List have accepted employment with a Designated UCM Services Provider, whichever is earlier, the Appendix D Web Page shall appear as follows:

["TALX" trademark]

Pursuant to a consent agreement between TALX Corporation ("TALX") and the Federal Trade Commission, TALX has agreed, under certain conditions, not to enforce certain provisions of certain contracts with certain current and former directors, officers, and employees of TALX and of certain firms acquired by TALX. Specifically, pursuant to Paragraphs II.A and II.B. of the Decision and Order issued by the Federal Trade Commission [*hypertext "Decision and Order issued by the Federal Trade Commission" to copy of Decision and Order on Commission's Web site*] ("Decision and Order"), TALX may not, under certain circumstances, enforce (a) certain covenants not to compete, (b) certain covenants not to solicit and (c) certain restrictions on the use of trade secrets.

Links to the Decision and Order [*hypertext "Decision and Order" to copy of Decision and Order on Commission's Web site*], to the Complaint issued by the Federal Trade Commission in this matter [*hypertext "Complaint" to copy of Complaint on Commission's Web site*], and to related documents can be found at [*hypertexted Web address of docket in this matter on Commission's Web site*].

If you are a current or former director, officer, or employee of TALX, and you have questions about whether, and to what extent, you are eligible to be released from such covenants and restrictions, you may contact the following independent Monitor/Administrator appointed by the Federal Trade Commission in this matter:

[*name of the Monitor/Administrator*]
[*address of the Monitor/Administrator*]
[*telephone number of the Monitor/Administrator*]

Neither the fact that you have consulted with the Monitor/Administrator nor the content of those consultations will be disclosed to TALX without your permission.

Pursuant to the proviso to Paragraph II.B. of the Decision and Order, the Monitor/Administrator has, or has not, made the following certifications:

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[TALX may update individually the certifications below by inserting or deleting the word "not" where indicated and when appropriate.]

Certification Regarding Client Relationship Managers

The Monitor/Administrator has [*not*] certified to the Commission that ten (10) Relevant Current Persons who are each identified as "Client Relationship Managers" in the Appendix F to the Decision and Order have accepted employment with a Designated UCM Services Provider after the date the Decision and Order became final.

Certification Regarding Account Managers

The Monitor/Administrator has [*not*] certified to the Commission that four (4) Relevant Current Persons who are each identified as "Account Managers" in the Appendix F to the Decision and Order have accepted employment with a Designated UCM Services Provider after the date the Decision and Order became final.

Certification Regarding Unemployment Insurance Consultants

The Monitor/Administrator has [*not*] certified to the Commission that twenty three (23) Relevant Current Persons who are each identified as "Unemployment Insurance Consultants" in the Appendix F to the Decision and Order have accepted employment with a Designated UCM Services Provider after the date the Decision and Order became final.

Certification Regarding Hearing Representatives

The Monitor/Administrator has [*not*] certified to the Commission that five (5) Relevant Current Persons who are each identified as "Hearing Representatives" in the Appendix F to the Decision and Order have accepted employment with a Designated UCM Services Provider after the date the Decision and Order became final.

Certification Regarding Tax Consultants

The Monitor/Administrator has [*not*] certified to the Commission that four (4) Relevant Current Persons who are each identified as "Tax Consultants" in the Appendix F to the Decision and Order have accepted employment with a Designated UCM Services Provider after the date the Decision and Order became final.

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Version 2 of Appendix D

After (a) the date on which the Monitor/Administrator has certified that ten Client Relationship Managers, four Account Managers, twenty three Unemployment Insurance Consultants, five Hearing Representatives, and four Tax Consultants listed on the Appendix F Employee List have accepted employment with a Designated UCM Services Provider or (b) two years after the date that all Relevant Current Persons have been given notice in accordance with Paragraph VI.A. of the Order, whichever is earlier, and until (i) the Commission ends the term of the Monitor/Administrator and (ii) TALX no longer is required to maintain the Appendix D Web Page pursuant to Paragraph VI.E.1. of the Order, the Appendix D Web Page shall appear as follows:

[“TALX” trademark]

Pursuant to a consent agreement between TALX Corporation (“TALX”) and the Federal Trade Commission, TALX has agreed, under certain conditions, not to enforce certain provisions of certain contracts with certain former directors, officers, and employees of TALX and of certain firms acquired by TALX. Specifically, pursuant to Paragraphs II.A and II.B. of the Decision and Order issued by the Federal Trade Commission [*hypertext “Decision and Order issued by the Federal Trade Commission” to copy of Decision and Order on Commission’s Web site*] (“Decision and Order”), TALX may not, under certain circumstances, enforce (a) certain covenants not to compete, (b) certain covenants not to solicit and (c) certain restrictions on the use of trade secrets.

Links to the Decision and Order [*hypertext “Decision and Order” to copy of Decision and Order on Commission’s Web site*], to the Complaint issued by the Federal Trade Commission in this matter [*hypertext “Complaint” to copy of Complaint on Commission’s Web site*], and to related documents can be found at [*hypertexted Web address of docket in this matter on Commission’s Web site*].

If you are a former director, officer, or employee of TALX, and you have questions about whether, and to what extent, you are eligible to be released from such covenants and restrictions, you may contact the following independent Monitor/Administrator appointed by the Federal Trade Commission in this matter:

[*name of the Monitor/Administrator*]
 [*address of the Monitor/Administrator*]
 [*telephone number of the Monitor/Administrator*]

Neither the fact that you have consulted with the Monitor/Administrator nor the content of those consultations will be disclosed to TALX without your permission.

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Pursuant to the proviso to Paragraph II.B. of the Decision and Order, the Monitor/Administrator has[, or has not,] made the following certifications:

[TALX may update individually the certifications below by inserting or deleting the word "not" where indicated and when appropriate.]

Certification Regarding Client Relationship Managers

The Monitor/Administrator has [*not*] certified to the Commission that ten (10) Relevant Current Persons who are each identified as "Client Relationship Managers" in the Appendix F to the Decision and Order have accepted employment with a Designated UCM Services Provider after the date the Decision and Order became final.

Certification Regarding Account Managers

The Monitor/Administrator has [*not*] certified to the Commission that four (4) Relevant Current Persons who are each identified as "Account Managers" in the Appendix F to the Decision and Order have accepted employment with a Designated UCM Services Provider after the date the Decision and Order became final.

Certification Regarding Unemployment Insurance Consultants

The Monitor/Administrator has [*not*] certified to the Commission that twenty three (23) Relevant Current Persons who are each identified as "Unemployment Insurance Consultants" in the Appendix F to the Decision and Order have accepted employment with a Designated UCM Services Provider after the date the Decision and Order became final.

Certification Regarding Hearing Representatives

The Monitor/Administrator has [*not*] certified to the Commission that five (5) Relevant Current Persons who are each identified as "Hearing Representatives" in the Appendix F to the Decision and Order have accepted employment with a Designated UCM Services Provider after the date the Decision and Order became final.

Certification Regarding Tax Consultants

The Monitor/Administrator has [*not*] certified to the Commission that four (4) Relevant Current Persons who are each identified as "Tax Consultants" in the Appendix F to the Decision and Order have accepted employment with a Designated UCM Services Provider after the date the Decision and Order became final.

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Version 3 of Appendix D

After the Commission has ended the term of the Monitor/Administrator and until TALX no longer is required to maintain the Appendix D Web Page pursuant to Paragraph VI.E.1. of the Order, the Appendix D Web Page should appear as follows:

[“TALX” trademark]

Pursuant to a consent agreement between TALX Corporation (“TALX”) and the Federal Trade Commission, TALX has agreed, under certain conditions, not to enforce certain provisions of certain contracts with certain former directors, officers, and employees of TALX and of certain firms acquired by TALX. Specifically, pursuant to Paragraphs II.A and II.B. of the Decision and Order issued by the Federal Trade Commission [*hypertext “Decision and Order issued by the Federal Trade Commission” to copy of Decision and Order on Commission’s Web site*] (“Decision and Order”), TALX may not, under certain circumstances, enforce (a) certain covenants not to compete, (b) certain covenants not to solicit and (c) certain restrictions on the use of trade secrets.

Links to the Decision and Order [*hypertext “Decision and Order” to copy of Decision and Order on Commission’s Web site*], to the Complaint issued by the Federal Trade Commission in this matter [*hypertext “Complaint” to copy of Complaint on Commission’s Web site*], and to related documents can be found at [*hypertexted Web address of docket in this matter on Commission’s Web site*].

Pursuant to the proviso to Paragraph II.B. of the Decision and Order, the Monitor/Administrator has[, or has not,] made the following certifications:

[TALX may update individually the certifications below by inserting or deleting the word “not” where indicated and when appropriate.]

Certification Regarding Client Relationship Managers

The Monitor/Administrator has [*not*] certified to the Commission that ten (10) Relevant Current Persons who are each identified as “Client Relationship Managers” in the Appendix F to the Decision and Order have accepted employment with a Designated UCM Services Provider after the date the Decision and Order became final.

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Certification Regarding Account Managers

The Monitor/Administrator has [not] certified to the Commission that four (4) Relevant Current Persons who are each identified as "Account Managers" in the Appendix F to the Decision and Order have accepted employment with a Designated UCM Services Provider after the date the Decision and Order became final.

Certification Regarding Unemployment Insurance Consultants

The Monitor/Administrator has [not] certified to the Commission that twenty three (23) Relevant Current Persons who are each identified as "Unemployment Insurance Consultants" in the Appendix F to the Decision and Order have accepted employment with a Designated UCM Services Provider after the date the Decision and Order became final.

Certification Regarding Hearing Representatives

The Monitor/Administrator has [not] certified to the Commission that five (5) Relevant Current Persons who are each identified as "Hearing Representatives" in the Appendix F to the Decision and Order have accepted employment with a Designated UCM Services Provider after the date the Decision and Order became final.

Certification Regarding Tax Consultants

The Monitor/Administrator has [not] certified to the Commission that four (4) Relevant Current Persons who are each identified as "Tax Consultants" in the Appendix F to the Decision and Order have accepted employment with a Designated UCM Services Provider after the date the Decision and Order became final.

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Appendix E
(Appendix E Web Page)**Version 1 of Appendix E**

Until (a) three years after the date that all Long Term Contract Customers have been given notice in accordance with Paragraph VI.B. of the Order, or (b) the date on which the Monitor/Administrator has certified that the Total Of Relevant Values Of Terminated Long Term Contracts exceeds ten million dollars, whichever is earlier, the Appendix E Web Page shall appear as follows:

["TALX" trademark]

Pursuant to a consent agreement between TALX Corporation ("TALX") and the Federal Trade Commission, TALX has agreed, under certain conditions, to allow many of its customers to terminate certain long term contracts for unemployment compensation management services. Specifically, pursuant to Paragraph III. of the Decision and Order issued by the Federal Trade Commission [*hypertext "Decision and Order issued by the Federal Trade Commission" to copy of Decision and Order on Commission's Web site*] ("Decision and Order"), customers will be permitted, on ninety (90) days notice, to terminate certain long term contracts on a pro rata basis without the payment of any penalty for termination

Links to the Decision and Order [*hypertext "Decision and Order" to copy of Decision and Order on Commission's Web site*], to the Complaint issued by the Federal Trade Commission in this matter [*hypertext "Complaint" to copy of Complaint on Commission's Web site*], and to related documents can be found at [*hypertexted Web address of docket in this matter on Commission's Web site*].

If you are a customer of TALX and you have questions about whether, and to what extent, you are eligible to terminate any long term contracts for unemployment compensation management services, you may contact the following independent Monitor/Administrator appointed by the Federal Trade Commission in this matter:

[name of the Monitor/Administrator]
[address of the Monitor/Administrator]
[telephone number of the Monitor/Administrator]

Neither the fact that you have consulted with the Monitor/Administrator nor the content of those consultations will be disclosed to TALX without your permission.

Pursuant to the second proviso to Paragraph III. of the Decision and Order, the Monitor/Administrator has **not** certified to the Commission that the Total Of Relevant Values Of Terminated Long Term Contracts exceeds ten million dollars (\$10,000,000).

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Version 2 of Appendix E

Three years after the date that all Long Term Contract Customers have been given notice in accordance with Paragraph VI.B. of the Order, or after the date on which the Monitor/Administrator has certified that the Total Of Relevant Values Of Terminated Long Term Contracts exceeds ten million dollars, whichever is earlier, the Appendix E Web Page shall appear as follows:

[“TALX” trademark]

Pursuant to a consent agreement between TALX Corporation (“TALX”) and the Federal Trade Commission, TALX had agreed, under certain conditions, to allow many of its customers to terminate certain long term contracts for unemployment compensation management services. However, the obligation of TALX to terminate such contracts has now expired because [“three years have passed since the long term contract customers were given notice of their right to terminate” or “the Monitor/Administrator has certified to the Commission that the Total Of Relevant Values Of Terminated Long Term Contracts exceeds ten million dollars (\$10,000,000)”].

Links to the Decision and Order issued by the Federal Trade Commission in this matter [hypertext “Decision and Order” to copy of Decision and Order on Commission’s Web site], to the Complaint issued by the Federal Trade Commission in this matter [hypertext “Complaint” to copy of Complaint on Commission’s Web site], and to related documents can be found at [hypertexted Web address of docket in this matter on Commission’s Web site].

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Appendix F
(Appendix F Employee List)

Account Managers

Corbin Bergmann
Jeanne Brawn
Mark Broeker
Thomas Butera
Benjamin Carlson
Julie Conrad
Melissa Cook
Matthew Falk
Anna Gonzalez
Carey Griffin
Catherine Harvey
Connie Hatfield
James Jablonski
Kathleen James
Esther Kritz
Chung Lee
Polly Manus
Peter Moore
Penny O'Fallon
Amy Pasqualetto
Anna Patron
David Peterson
David Phillips
Edna Pita
Julie Rezes
Meghan Ryder
Meghan Schrupf
Sheila Taylor
Cynthia Witt

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Client Relationship Managers

Landon Armbruster
Jessica Avila
Michael Baer
Marci Beatty
Robert Beck
L. Mark Bickers
Michael Bradley
Russell Braverman
Kelly Brechman
Bruce Burgess
Ashly Caserotti
Jerome Christiani
Carol Cook
Rebecca Copley
Steven Dainard
Denise Doney
Ronna Dubro
John Fiorelli
William Florence
Paul Fountain
Beth Frauhiger
Melanie Frazier
Jennifer Gerhardt
Judith Glazer
Jane Grubnich
Angela Hansen
Berenice Hardin
Scott Hert
Woodrow Hilliard
Jonathan Hilton
John Holihan
Jeffrey Houser
Barbara Hoyos
Charleen Jackson
Bonnie Keady
Mark Koley
Leigh Krohe
Ami LaBarbera
Joshua Landman
Angela Lojacono
Alison Marks

Cynthia McReynolds
Karen Miller
Kim Miller
Rose Mizak
Lisa Moenigmann
Stephanie Morello
Christa Mosser
David O'Connell
Eric Oscarson
Linda Paez
Brandon Palmer
Michael Pennanen
Donald Phillips
Daniel Pongonis
John Ras
Thomas Ribich
Julia Rice
Amanda Romanelli
Jeffrey Royer
Cynthia Schroeder
Susan Sheehan
Carol Shular
Kristin Shuler
John Sullivan
Emily Svoboda
Kristin Torrillo
James Tripodi
Aaron Unell
John Valenti
Susan Vaters
Cassandra Vauls
Scott Verhey
Tiffany Wood
Darrell Woodward
Sandra Wynne

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Hearing Representatives

Pixie-Ann Allan	Donna Klauza
Gloria Ambler	Thomas Kuiper
Gregory Anello	Beverly Lamb
Manija Basherey	Francis Landolphi
Kelly Battista	Kathleen Lauritzen
Kimberly Beaver	Thomas Lindquist
Mara Benjamin	Malia Maples
Klaren Bentley	Ralph McGlothlen
Jonathan Beretta	Keith Mokler
Karen Brewin	Robin Moore
Lesley Buhler	Dennis Mullens
Tanis Burrell	Paul Murphy
Joshua Burrows	Edward O'Brien
Kimberly Buttelwerth	Eugene Parsons
Joseph Canfield	Susan Perry
Richard Carter	Diana Perry-Lehr
Peter Cipriano	Gordon Peterson
Jennifer Coe	Kevin Rafferty
Tammy Conrad	Carol Reading
Lynn Corbeil	Todd Richardson
Craig Cree	Cheryl Rodermund
Charlene Crocker	Cheryl Roethemeier
Robert Cygan	Roxanne Rose
Frank Eckert	Kevin Salmon
Jeanne Edwards	Janice San Souci
Diane Elkins	Gerald Sander
Michael Fedor	Cris Scheibe
Sandra Fitch	Jeffrey Scher
Amelia Gallagher	Scott Schnebbe
Judith Gentry	Marcy Schneider
Shelby Grau	Deborah Shelburne
Linda Green	Dena Shelton
Barbara Hamilton	Elizabeth Sillars
Lisa Harroff	Alyce Smolsky
Michelle Hawkins	Jerry Snow
John Henson	William Stasek
Catherine Hess	Elaine Steele
Constance Hickerson	Kelly Tackett
Lisa Jennings	Michael Thiele
Jacqueline Jones	Barbara Toney
Melissa Keys	Richard Vanderford

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Hearing Representatives (continued)

Gavin Walker
Carol Weidinger
Jacqueline Wiegand
Teresa Wiley
Henry Williams
Robert Winn
Raul Ybanez
Martha Young
Susen Zevin

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Tax Consultants

Gauri Anand	Kathy Jones
Jennifer Arteaga	Sheryl Kingrea
Sharon Ashcraft	Kelley Knickmeyer
Marcie Barber	Katherine Koehler
Kimberly Barnhill	Paul Lappert
Ryan Bartley	Laura Lewis
Deborah Bell	Danielle Looker
Steven Blair	Martha Ludwig
Nancy Boggs	James Mantoan
Carleen Boggs	Caroline Martin
Joanne Bolderson	Bonnie Moncelli
Starline Buchanan-Bowman	Robert Myers
Nicholas Buehler	Mattie Newtall
Stacey Bunch	Debra Ortman
Carol Burrer	Christopher Oscarson
James Cannady	Lauren Owca
Patricia Carpenter	Keith Pender
Cynthia Carr	Brian Perry
Karen Colman	Nathan Phipps
Nicholas Cowan	Cassandra Rhymes
Marcia Daniels	Caitlin Riviere
A David	Stephanie Robinson
Stephen Eckhard	Victoria Roslawski
Robert Eickmeyer	Elizabeth Scott
Mary Elbert	David Snavely
Fern Flacke	Robert Stanze
Abathia Franklin	Gregory Stone
Bonnie Freck	Connie Story
Patrick Ganey	Gretchen Strebeck
Lori Gaskell	Todd Strunk
Cheryl Guice	Sandra Timson
Gloria Hadley	Gabrielle Vining
Cameron-David Hartman	Michele Walters
Vivian Helman	Deborah Wierzbicki
Crystal Hemmer	Nancy Williams
David Hernandez	Tiffany Wood
Natalie Hickman	James Zimmerly
Lindy Hogan	
Joann Hughes	
Richard Johnson	
Rosa Jones	

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Unemployment Insurance Consultants

Rebecca Abbott	Deloris Brown
Brenda Adams	Carolyn Brown
April Allen	Lashae Brown
Jaclyn Allison	Karen Bruce
Justin Alpert	Heather Buchan
Jennifer Amnott	Tammy Burgard
Michelle Andrew	Aaron Burgwald
Jennifer Andrews	Bianca Bustillos
Janet Asay	Goldie Caldwell
Monica Asher	Rhonda Caloia
Hope Aubrey	Kathleen Campbell
Marian Avery	Dawn Casey
Margaret Bach	Nikki Casey
Alice Backus	Paul Cefali
Katie Bailey	Sharron Cernik
Metta Bailey	Lori Ceselski
Patricia Ball	Justin Chandler
Brenda Banks	Sidney Chatfield
Krista Barela	Maria Chen
Nicole Barker	Chamon Childress
Heather Barker	Valerie Chitty
Marjorie Barksdale	Nicole Cleveland
Karen Barrientos	Valerie Clinton
Carrie Bauwens	Susan Coffin
Tamara Beason	Jennifer Coleman
Jeremy Beck	Shelley Coleman
James Been	Rozalyn Collins
Sherilyn Bemben	Walter Comisiak
Kimberly Bieri	Tracy Conner
Audria Bird	Katherine Conway
Alexis Bishop	Timothy Cook
Leslie Blakney	Mary Corvo
Diane Blancett	Yanery Crain
Reneé Blanco	Matthew Crain
Betty Blevins	Jennifer Crawford
Rhonda Boner	Randal Crocker
Linda Boone	Christin Crowder
Natalie Bowling	Jada Curry
Leoung Boyd	Annette Dailey
Viola Briggeman	Amy Darboe
Tamatha Brock	Richard Davenport

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Unemployment Insurance Consultants (continued)

Kristina David	Corinne Flusche
Constance Davis	Felicia Forbes
Terri Davis	Lisa Fouras
Trina Davis-Petty	Lars Fox
Jeff DeLorenzo	Julie Fox
Demeria Dent	Sandra Francois
Laurie Dent	Kristen Frazier
Stephanie Deyampert	Deborah Fulte
Kari Diaz	Nancy Gahagen
Trish Diehl	Rochelle Garcia
Yalonda Dillon	Greggory Garman
Patrick Dotson	Cheryl Garrett
Terry Dotson	Frances Geddis
Brandon Drake	Elizabeth Givens
Christine Draper	Cynthia Grant
Jennifer Driskell	Darlene Gray
Kelly Drumheller	Jan Green
April Dawn Duerbusch-Dorsett	Yolanda Green
Debra Duffin	Lori Gregg
Alison Duncan	Bradley Gregory
Lisa Dunn	Mary Gremo
Lisa Durnell	Tabitha Grennell
Christine Durrant	Abigail Grillo
Tamara Dyer	Deborah Grillo
Kevin Dyer	R. Gross
Kristiene Dyer	Karen Grotzinger
Debbera Eggers	Megan Grube
Deborah Eggleton	Lisa Gulosh
Regina Eldridge	Kristi Gumbel
Annie Erb	Sarina Hall
Jodi Estep	Susan Halls
April Ethridge	Reneé Hamilton
Christina Fankhauser	Kimberly Hampton
Phyllis Farrell	Leslie Hanck
Christine Fastnaught	Christina Hanson
Tamera Febes	Chris Harper
Lois Ferguson	Tamara Harris
Stephanie Festog	Carolyn Harshman
Melissa Fetherolf	Maria Hayes
Debra Fischer	Amy Heckler
Nancy Flaiz	Amy Helfrich
Ryan Flanery	Sharon Helgenberg

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Unemployment Insurance Consultants (continued)

Ellen Henderson	Tracy Jones
Lawanda Henderson	Mary Jones
Laura Hendry	Bernice Jones
Brandi Henry	Annitra Jones
Jennifer Henry	Mark Jones
Gloria Herman	Andrea Junk
Aaron Heyer	Claire Karalekas
Elizabeth Heywood	Samantha Karnes
Karon Hibbler	Lois Kary
Tamara Hibbler	Benjamin Kehoe
Terry Hicks	Lee Kehoe
Carolyn Higgins	Ryan Kehoe
Patricia Hight	Kimberly Keifer
Tracy Hoffman	Betty Keller
Darlene Hogan	Brian Kennedy
Rebecca Hollen	Christopher Kennedy
Sharon Holly	Jessica Kenney
Amy Horn	Bradly Kerr
Kendra Horn	Megan Keys
Lori Horne	Robert Kincaid
Maiesha Houser	Sarah King
Kristin Huff	Amber Kniep
Samantha Hughes	Michele Knoten
Margery Humphrey	Ruth Koch
Rosalind Hurst-McCain	Rachelle Konst
Cynthia Hussmann	Jane Konst
Danielle Irving	Barbara Kumm
Latoya Jackson	Jonathan Lacy
Natalie Jackson	Debra Laplante
Stephanie Jackson	Kathleen Lawler
Kandance James	Shonda Lawton
Katherine Janzen	Kelly Lay
Rochelle Jenkins	Catherine Lee
Amy Jester	Brandy Lee
Jennifer Johansen-Pettit	Allyson Leitner
Gregory Johner	Douglas Lentes
Lindsey Johnson	Jolai Leonti
Samantha Johnson	Charity Lewis
Wanda Johnson	Janice Linzie
Deborah Johnson	Lena Little
Jenavieve Jones	Anna Lively
Kathleen Jones	Andrea Loggins

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Unemployment Insurance Consultants (continued)

Carolyn Loomis	Judith Nagorski
Danila Loquiao	Karla Nalls
Emily Lorton	Jessica Nance
Litisha Loveless	Kent Nardin
Natalie Mantilla	Angela Nelson-Frimpong
Maya Marsek	Tabitha Nichols
Sabrina Marshall	Dorothea Nicholson
Christine Martin	Amber Niles
Krista Martin	Alice Noble
Ruth Martinez	Emily Norton
Raziah Massey	Francesca Nutini
Joann Matthes	Jeffrey O'Connor
Kevin May	Kimberly Oertel
Jill Mayer	Kathleen O'Leary
Christa Mayercin	Elizabeth O'Mara
Christina Maynard	Robert Ouellette
Anita Mayo	Kristin Owen
Zontel McCann	Erica Pace
Brandi McCarty	John Paden
Phyllis McClaskey	Anna Palasciano
Heather McConnell	Michelle Parker
Kendra McDonald	Liza Parodi
Eileen McFarland	Serina Patrustie
Cheri McFarland	Matthew Pearson
Cecelia McGrew	Laura Peltier
Marclene McKee	Daniela Perez
Kimberly McLucas	Lucille Petty
Shatia McPherson	Bonita Pevey
Tamara Medley	Jean Pfeiffer
Lauren Meeks	Cassandra Phelps
Kirsten Miller	Alice Phillips
Steven Mintz	Agnes Phipps
Sarina Mitchell	Kelly Pitts
Nickolas Mitsialis	Deborah Pizzi
David Moehle	Carol Plemons
Gregory Montjoy	Johnny Poehler
Nancy Moore	Christopher Polito
Sherry Moore	Radhika Poreddy
Laura Morgan	Steven Pottmeyer
Julie Mosley	Alesia Pullins
Jaime Myers	April Pusateri
Joy Myers	Barbara Quigley

Decision and Order

Unemployment Insurance Consultants (continued)

Terra Rainey	Dawn Spencer
Jose Ramos	Scott Spriggs
Tequila Rausch	Mom Srey
Abigail Reedstrom	Leslee Staton
Yolanda Reeves	Elizabeth Stonebarger
Laura Reiss	Karen Stonebraker
Ruth Renner	Cynthia Stout
Melissa Repici	Angela Stubbs-Woods
Ebony Richardson	Rachel Stuber
Amanda Rivera	Jennifer Stump
Kimberly Roberson	Anna Sullivan
Mara Robertson	Laura Suter
Marvin Robinson	Joyce Suttles
Tara Robles	Peter Svendsen
Amber Rodebaugh	Cynthia Syme
Glennice Rodgers	Yvonne Tabb
Nancy Rollison	Alisha Talley
Martha Rosenberger	Michelle Taylor
Jacqueline Roulette	Angela Thomas
Josie Ryan	David Thompson
Patricia Sager	Richard Thompson
Melissa Sahrhage	Megan Thomsen
Cynthia Salas	Tina Thomure
Maile Salas	Jamey Tobin
Julie Satory	Donna Toliver
Cynthia Schaaf	Tamala Tramble
David Schaye	Stephanie Trice
Jennifer Schlaffman	Danielle Troiano
Karen Schmitt	Bochen Uang
Ann Schrodt	Ronald Underwood
Janie Sedlacek	Ashley Vaden
Theresa Sherman	Jennifer Venable
Jenifer Shultz	Judi Vilaylak
Ramzie Siebuhr	Jeaneth Villasenor
Jerri Simmons	Michele Violet
Louisa Sitala	Steven Vogel
Ryan Smith	Charon Wade
Patrice Snider	David Wade
Berry Snyder	Nicole Wallace
Sheri Sonko	Heather Walter
Ginger Sowle	Irene Wang
Janet Spence	Andrew Warren

Decision and Order

Unemployment Insurance Consultants (continued)

Julie Warwick
Letisha Washington
Suzanne Weatherby
Tricia Webb
Holly Webb
Lyneigh Welzen-Jones
Stefanie Wenzel
Wallene Werner
Katie Whelan
Melissa White
Misty White
Bethany Whitehair
Nicolette Whitfield
Jacqueline Wilcox-Williams
Amy Willard
Joshua Williams
Debra Williams
Jennifer Wilson
Bobbi Winczewski
Wanda Wipfler
Lisa Woodard
Sherrie Woods
Benjamin Woods
Shirley Woods
Elaine Woolaver
Amy Woolsey
Sherri Wotring
Homer Wren
Roberta Wright
Sharon Wucher
Sharon Yarbrough
Jaclyn Young

Decision and Order

Other

Jay Rooney

Analysis to Aid Public Comment

ANALYSIS OF THE CONSENT ORDER TO AID PUBLIC COMMENT**I. Introduction**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Agreement”) from TALX Corporation (“Proposed Respondent”). The Consent Agreement settles allegations that TALX has violated 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 connection with the provision of outsourced UCM services and employer verification services nationwide through a series of consummated acquisitions. Pursuant to the Agreement, TALX has provisionally agreed to be bound by a proposed consent order (“Proposed Consent Order”).

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 Consent Order.

The purpose of the Agreement is to remedy anticompetitive effects, alleged in the Commission’s Complaint in this matter, that will likely result from the acquisitions by Proposed Respondent of James E. Frick Inc., Johnson & Associates, L.L.C., and certain assets and businesses of Gates McDonald & Company, Sheakley-Uniservice, Inc., UI Advantage, Jon-Jay Associates, Inc., and Employers Unity, Inc.

The Proposed Consent Order provides for relief in two markets where the Commission finds reason to believe that these acquisitions likely will have anticompetitive effects: the national

Analysis to Aid Public Comment

market for outsourced unemployment compensation management (“UCM”) services, and the national market for outsourced employer verification services, also known as the market for verification of income and employment (“VOIE”) services.

The Proposed Consent Order is aimed at expediting the entry and expansion of competitors by, among other things, freeing past, as well as various current, TALX employees to take jobs with competitors and by granting the majority of TALX’s present long term contract customers the unilateral right to get out of those contracts and switch to another UCM provider. While the Commission usually typically prefers divestitures that immediately reset market shares (the sale of a plant in the manufacturing context, for example), unique circumstances combine in this matter to make it appropriate for the Commission to accept relief aimed at encouraging the movement of market share to competitors though self-selection by TALX’s customers, as opposed to mandating the transfer of arbitrary set of these service contracts. These circumstances include, but are not necessarily limited to, the personal service nature of the product, divergent customer preferences and needs, and the existence of several very small, but nevertheless viable, competitors. The proposed remedy seeks to ensure that the entry and expansion necessary to ensure a competitive market can occur much more quickly than it would absent relief. More specifically, the Proposed Consent Order requires TALX to (a) allow many of its customers with long-term UCM contracts to terminate those contracts at the customers’ option, (b) free many of its past and current employees from restrictions that would hamper their ability to be employed by UCM competitors, (c) provide, if requested, to certain former UCM customers of TALX, certain information related to UCM claims work retained by TALX, (d) give notice to certain customers of their right to cancel UCM contracts that are automatically renewed if not cancelled, and (e) not prevent or discourage any entity from supplying goods or services to a UCM competitor of TALX.

Analysis to Aid Public Comment

The Order also requires TALX to give to the Commission prior notice of future acquisitions in markets for UCM services and VOIE services.

II. The Respondent

TALX is a Missouri corporation that, in May 2007, became a wholly-owned subsidiary of Equifax, Inc. TALX's primary businesses are the provision of UCM services under the name "UC eXpress," and the provision of VOIE services under the name "The Work Number."

III. The Complaint

As alleged in the Commission's Complaint, TALX competes in markets for UCM services and VOIE services. UCM services consist, in part, of the managing, administering, and/or processing, on behalf of an employer, of unemployment compensation claims filed with a state or territory. VOIE services consist, in part, of the provision of employment and income verifications including, but not limited to, the collection, maintenance, or dissemination of information concerning the employment status and income of those employees. In order to provide such VOIE services, a VOIE provider must collect and maintain payroll data and other data relating to employment.

The Complaint alleges that the March 2002 acquisitions by TALX of James E. Frick, Inc. and of the UCM services division of Gates McDonald eliminated competition between the two acquired companies in the national market for UCM services. James E. Frick, Inc. and Gates McDonald were the two largest providers of UCM services prior to TALX's acquisition of both companies the same day. The Complaint also alleges that TALX's acquisitions of Johnson and Associates, L.L.C., the UCM assets of Sheakley-Uniservice, Inc., Jon-Jay Associates, and the unemployment tax management business, which includes UCM

Analysis to Aid Public Comment

services, of Employers Unity, Inc. substantially reduced competition in the national market for UCM services.

The Complaint further alleges that TALX substantially reduced competition in the nationwide provision of VOIE services through the acquisitions of James E. Frick, Inc., and the VOIE businesses of Sheakley-Uniservice, Inc. and Employers Unity, Inc.

The Complaint notes that some firms, known as “alliance partners,” outsource to TALX some of the UCM services they sell to others. The largest amount of such outsourcing is done by ADP, Inc.

The Complaint alleges that each of the relevant markets is highly concentrated, and the consummated acquisitions increased concentration substantially, whether concentration is measured by the Herfindahl-Hirschman Index (“HHI”), or the number of competitively significant firms remaining in the market.

The Complaint further alleges that entry would not be timely, likely, or sufficient to prevent anticompetitive effects in either of the relevant markets. As alleged in the Complaint, entry into the market for the provision of outsourced UCM services to large multi-state employers is difficult and slow. According to the Complaint, among the factors that make entry into this market difficult and slow are the length of time it normally takes to make a sale, the maturity of the market, and the lengthy period necessary to establish a track record for successfully managing large volumes of unemployment compensation claims. The Complaint also alleges that entry and expansion in the provision of outsourced UCM services to large multi-state employers is made more difficult by the large number of customers that are tied to long-term contracts with terms as long as five-years. Prior to TALX’s acquisition of its leading competitors who can serve large employers with multi-state claims, the vast majority of industry contracts were renewable one year relationships. In

Analysis to Aid Public Comment

recent years, TALX has successfully and vigorously pursued three and five year deals with its clients. The prevalence of long-term contracts and non-compete and non-solicitation agreements between TALX and its employees, which substantially reduce the number of experienced and talented employees available to be hired by TALX's competitors and potential competitors, has made entry and expansion more difficult and slow.

The Complaint also alleges that entry into the market for VOIE services is difficult and slow. Among the factors that make entry into this market difficult and slow are, according to the Complaint, the need to acquire a sufficient scale and scope of payroll and employment data to attract and service a sufficient customer base, the difficulty of developing software to automate the VOIE process, and the need to build a reputation for reliability and security.

The Complaint alleges that the consummated acquisitions eliminated competition between TALX, and each of its competitors in the provision of outsourced UCM services and employer verification services nationwide. The Complaint further alleges that the consummated acquisitions enhance opportunities for TALX to increase prices unilaterally and to decrease the quality of services provided in each of the relevant markets. The acquisitions by TALX eliminated the closest competitors able to serve large employers with claims in many states or nationwide.

The Complaint alleges that the consummated acquisitions 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 connection with the provision of outsourced UCM services and employer verification services nationwide. The Complaint further alleges that the Acquisitions described have eliminated direct and actual competition in the provision of both UCM and employer verification services. The acquisitions by TALX of its competitors have enhanced its ability to increase prices unilaterally and

Analysis to Aid Public Comment

enhanced its ability to decrease the quality of services provided in each of the relevant lines of commerce, according to the Commission's Complaint.

IV. The Proposed Consent Order

As noted above, the Proposed Consent Order provides for relief in markets for UCM services and VOIE services.

Paragraph II. of the Proposed Consent Order prohibits TALX from enforcing against certain current and former employees who accept employment with certain UCM competitors of TALX certain types of covenants not to compete, not to solicit, and not to disclose trade secrets. Paragraph I.P.1. of the Proposed Consent Order lists some of those UCM competitors by name, and Paragraph I.P.2. lists criteria for identifying other such UCM competitors. Paragraphs I.DD., I.FF., and I.TT. of the Proposed Consent Order describe the types of restrictions on competition, solicitation, and trade secret disclosure that TALX would not be able to enforce in situations where Paragraph II. of the Proposed Consent Order is applicable.

Paragraph II. of the Proposed Consent Order divides the past and current employees subject to this paragraph into three categories: "Relevant Current Persons," "Relevant Past Persons," and "Other Relevant Current Persons." Appendix F to the Proposed Consent Order lists all of such Relevant Current Persons and divides them into five categories: Customer Relationship Managers, Account Managers, Unemployment Insurance Consultants, Hearing Representatives, and Tax Consultants. The third proviso to Paragraph II. of the Proposed Consent Order limits the number of Relevant Current Persons that are subject to Paragraph II. of the Proposed Consent Order to ten Customer Relationship Managers, four Account Managers, twenty-three Unemployment Insurance Consultants, five Hearing Representatives, and four Tax Consultants. In addition, the applicability of Paragraph II. of the Proposed Consent Order to a

Analysis to Aid Public Comment

Relevant Current Person will end two years after such person's receipt of the notice that TALX is required to send such person pursuant to Paragraph VI.A. of the Proposed Consent Order.

The other two categories of past and current employees, "Relevant Past Persons," and "Other Relevant Current Persons," are defined in Paragraphs I.HH. and I.MM. of the Proposed Consent Order. There is no limit on the number of Relevant Past Persons and Other Relevant Current Persons who are subject to Paragraph II. of the Proposed Consent Order; and that paragraph will apply to those persons for the full ten-year term of the Proposed Consent Order.

Paragraph III. of the Proposed Consent Order provides that TALX must allow certain customers with contracts for UCM services with a term longer than one year to terminate their contracts on 90 days notice if those customers outsource their UCM services to a competitor of TALX. Paragraph I.X. of the Proposed Consent Order specifies the customers covered by Paragraph III. of the Proposed Consent Order. The third proviso to Paragraph III. places an upper limit of \$10 million on the "Total Of Relevant Values Of Terminated Long Term Contracts," within the meaning of Paragraph I.XX. of the Proposed Consent Order. In addition, the applicability of Paragraph III. of the Proposed Consent Order to a customer will end three years after such customer's receipt of the notice that TALX is required to send such customer pursuant to Paragraph VI.B. of the Proposed Consent Order.

Paragraph IV. of the Proposed Consent Order provides, that at the request of a "Former UCM Customer," within the meaning of Paragraph I.TT of the Proposed Consent Order. TALX must transfer certain specified customer file information to such customer. The information to be transferred would include data relating to open unemployment compensation claims and to state unemployment tax rates, and include documents generated in

Analysis to Aid Public Comment

preparation for unemployment compensation hearings and appeals.

Paragraph V. of the Proposed Consent Order prevents TALX from entering into agreements that would prevent or discourage any entity from supplying goods or services to a UCM competitor of TALX. This paragraph does not apply to employment agreements.

Paragraphs VI.A., VI.B., and VI.C. of the Proposed Consent Order require TALX to give notice to certain current and former employees and to certain long-term contract customers of their rights under Paragraphs II. and III. of the Order.

Paragraph VI.D. of the Proposed Consent Order requires that TALX notify certain customers of their right to cancel UCM contracts that would otherwise be renewed automatically.

Paragraph VI.E. of the Proposed Consent Order requires the posting on Web sites of specified information concerning the rights of certain current and former employees of TALX and of certain UCM customers of TALX under Paragraphs II. and III. of the Order,

Paragraph VII.A. of the Proposed Consent Order prohibits TALX from entering into, or attempting to enter into, agreements to divide or allocate markets for UCM services.

Paragraph VII.B. of the Proposed Consent Order prohibits TALX from entering into, or attempting to enter into, any agreement requiring ADP, Inc. to subcontract to TALX the rendering of UCM services to a customer if such agreement precedes, rather than follows, ADP, Inc.'s agreement with such customer to provide UCM services. The purpose of Paragraph VII.B. is to increase the ability of TALX's current and future competitors to compete against TALX for the business of providing UCM services to customers of ADP.

Analysis to Aid Public Comment

Paragraph VIII. of the Proposed Consent Order requires that, for ten (10) years, TALX give the Commission thirty (30) days advance notice before acquiring, or entering into a management contract with, a provider of UCM services or VOIE services.

Paragraph IX. of the Proposed Consent Order appoints Erwin O. Switzer to the position of Monitor/Administrator. The Monitor/Administrator will assist the Commission in monitoring TALX's compliance with the Proposed Consent Order, and will assist certain past and present employees of TALX and certain customers of TALX in exercising their rights under Paragraphs II. and III. of the Order.

Paragraphs X., XI. and XII. of the Proposed Consent Order require TALX to comply with certain reporting requirements to the Commission.

Paragraph XIII. provides that the Proposed Consent Order will terminate ten years after it goes into effect.

Complaint

IN THE MATTER OF

**ALIYAH ASSOCIATES, LLC,
D/B/A AMERICAN ADVANCE**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF THE TRUTH IN LENDING ACT

*Docket C-4229; File No. 072 3206
Complaint, August 8, 2008 – Decision, August 8, 2008*

This consent order addresses payday loan advertisements disseminated by Aliyah Associates, LLC, doing business as American Advance. The advertisements failed to disclose the annual percentage rate for these loans. The order prohibits the respondent, in any advertisement of consumer credit, from stating the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by the Truth in Lending Act and its implementing Regulation Z, including the amount or percentage of the down payment, the terms of repayment, and the annual percentage rate. The respondent is prohibited from stating a rate of finance charge without stating it as an annual percentage rate. The respondent is also prohibited from failing to comply in any other respect with the Truth in Lending Act or Regulation Z. Additional provisions of the order include requirements that the respondent retain documents, to ensure compliance with the proposed order; distribute copies of the order to various principals, officers, directors, and managers, and all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of the order; notify the Commission of any changes in its corporate structure that might affect compliance with the order; and file with the Commission one or more reports detailing compliance with the order.

Participants

For the *Commission*: Beverly Childs, Thomas B. Pahl, Cara Petersen, Peggy L. Twohig, and Quisaira Whitney.

For the *Respondent*: Michael Mallow, Loeb & Loeb LLP.

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that Aliyah Associates, LLC d/b/a American Advance (“respondent”), has violated the provisions of the Truth in Lending Act, 15 U.S.C. §§ 1601-1667, as amended, and its implementing Regulation Z, 12 C.F.R. § 226, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Aliyah Associates, LLC d/b/a American Advance is a limited liability company with its principal office or place of business at 7525 E. Camelback, Suite 210, Scottsdale, Arizona 85251.

2. Respondent has disseminated advertisements to the public that promote extensions of closed-end credit in consumer credit transactions, as the terms “advertisement,” “credit,” “closed-end credit,” and “consumer credit” are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended.

3. Respondent advertises credit to consumers in the form of payday loans. Credit is defined as “the right to defer payment of debt or to incur debt and defer its payment.” Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended. Credit includes “a transaction in which a cash advance is made to a consumer in exchange for the consumer’s personal check, or in exchange for the consumer’s authorization to debit the consumer’s deposit account, and where the parties agree either that the check will not be cashed or deposited, or that the consumer’s deposit account will not be debited, until a designated future date. This type of transaction is often referred to as a ‘payday loan’ or ‘payday advance’ or ‘deferred-presentment loan.’” Comment 2 to Section 226.2(a)(14) of the Official Staff Commentary to Regulation Z; 12 C.F.R. Section 226.2(a)(14)-2, Supp.1, as amended. Payday loans have high rates and short repayment periods; they are often due on the borrower’s next payday, usually about every two weeks.

Complaint

4. Respondent has disseminated or has caused to be disseminated payday loan advertisements on the Internet, including but not necessarily limited to the attached Exhibit 1. Respondent collects information from consumers, called leads, through its online application, and then provides this information to lenders that ultimately offer payday loans to the consumers. Respondent is paid by the payday lenders for generating these consumer leads.

A. The advertisement states that “American Advance charges a fee of \$30 for every \$100 borrowed. Please see our Disclosures section for detailed rate information.” The Disclosures section of the website does not provide any additional information about costs or rates.

B. The advertisement also states that the loans are to be “repaid on your next pay date.”

5. On a \$100 loan with a \$30 fee repayable in a typical pay period of 14 days, the APR would be 782%.

Failure to Disclose Information Required by TILA

6. In credit advertisements, including but not necessarily limited to Exhibit 1, respondent has stated the number of payments or period of repayment and/or the amount of any finance charge, as terms for obtaining consumer credit in the form of a payday loan.

7. These advertisements have failed to disclose the “annual percentage rate” or “APR” using that term as required by Regulation Z.

8. Respondent’s practices have violated Section 144 of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1664, and Section 226.24(c) of Regulation Z, 12 C.F.R. § 226.24(c).

Complaint

THEREFORE, the Federal Trade Commission this eighth day of August, 2008, has issued this complaint against respondent.

By the Commission.

Complaint

EXHIBIT 1

American Advance - Instant Online Payday Loans

Page 1 of 1

AMERICAN ADVANCE | INSTANT ONLINE PAYDAY LOANS

[APPLY NOW](#) | [HOW IT WORKS](#) | [FAQ](#) | [DISCLOSURES](#) | [MY ACCOUNT](#) | [CONTACT US](#)



Instant online payday loans

APPLY NOW in under 2 minutes!

American Advance Payday Loans
The online payday loan specialists

American Advance provides express payday loan services for clients nationwide. Bad credit, slow credit, or no credit? We can help! Our application process is fast, easy and completely secure, with no credit checks or hidden application fees. American Advance will have you approved within minutes, and cash deposited directly to your bank account overnight. We offer flexible repayment options and friendly customer service experts.

Fast, secure and confidential – American Advance, your online payday loan specialists.

[Apply now](#)

First Name

Last Name

Email

Yes No
 Yes No I am currently employed or receive recurring income regularly
 Yes No I make at least \$1000 per month
 Yes No I currently have an active checking account


[APPLY NOW](#)

[Apply Now](#) | [How It Works](#) | [FAQ](#) | [Disclosures](#) | [My Account](#) | [Contact Us](#)

Complaint

AMERICAN ADVANCE | ONLINE PAYDAY LOANS

APPLY NOW HOW IT WORKS FAQ DISCLOSURES MY ACCOUNT CONTACT US



Frequently Asked Questions

Is a payday loan and cash advance the same thing?
 Payday loans are short-term personal loans collateralized against your next paycheck(s). For many of our customers it's the easiest and fastest way to emergency cash between paydays. Online payday loans from American Advance are electronically deposited into your checking or savings account overnight, and repaid on your next pay date with an authorized automatic withdrawal.

Who qualifies for a payday loan?
 To qualify for an American Advance payday loan you only need to meet the following requirements:

- Receive income regularly.
- Make at least \$800 a month.
- A checking account in good standing with direct deposit.

We do not perform credit checks, so even if you have bad credit, no credit, or a bankruptcy you can still qualify.

Do I need to fax anything?
 Some lenders do not require you to fax any documents, however sometimes you will be asked to provide some of the following information via a fax:

- Recent bank statement
- Valid ID (drivers license, military ID or state issued ID).
- Current pay stub.
- Personal check marked VOID

When will I receive the payday loan?
 Customers typically receive loan approval within a few hours of applying, and receive the cash advance loan amount via wire transfer overnight!

Will a poor credit history hurt me?
 American Advance doesn't perform credit checks on our payday loans. However we do verify information with several national consumer databases.

Do I need direct deposit?
 Yes.

Is there an application fee?
 Not at this time

Is my financial information secure?
 Please visit our disclosures section.

How often can I get a payday loan?
 You will want to pay off your existing payday loan before getting another one.

How much money can I borrow?
 Your actual loan amount is determined by various factors including state law, income, length of employment, and other outstanding loans.

Complaint

Frequently Asked Questions about Payday Loans

Page 2 of 2

How much does a payday loan cost?

American Advance charges a fee of \$30 for every \$100 borrowed. Please see our Disclosures section for detailed rate information.

When is my loan due

Payday loans are usually due when you receive your next paycheck via direct deposit. The standard time for loan repayment is usually no less than seven days and no longer than eighteen days. You may also pay back your loan early without prepayment penalties.

What are my repayment options?

An email reminder will be sent to you 3 days before your payday loan is due. American Advance offers flexible payment terms on all our payday loans. There are three payment options available to our clients:

1. You may pay the payday loan in full.
2. You may renew the loan by paying the finance fee and a portion of the principle.
3. You may renew by pay only the finance fee.

[Apply Now](#) | [How It Works](#) | [FAQ](#) | [Disclosures](#) | [My Account](#) | [Contact Us](#)

Complaint

Disclosures and Other Important Information

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AMERICAN ADVANCE | AMERICAN ADVANCE FINANCIAL SERVICES, INC.

[APPLY NOW](#)
[HOW IT WORKS](#)
[FAQ](#)
[DISCLOSURES](#)
[MY ACCOUNT](#)
[CONTACT US](#)



Disclosures

Privacy Policy Information

American Advance is committed to protecting our clients privacy. This Privacy Statement explains our views and practices concerning privacy.

"You" or "Your" means you as participant in or as a user of the American Advance site. "We" or "Our" or "Us" means American Advance. "Our site" means americanadvance.com. All information transmitted, printed or otherwise submitted to American Advance via this website shall be deemed to be the property of American Advance and American Advance shall be free to use such information for any lawful purpose as detailed herein. This site contains links to other sites and we are not responsible for the privacy practices or the content of such sites. We reserve the right to release such information to law enforcement or other governmental officials as we, in our sole and absolute discretion, deem necessary to comply with the law.

Section 1.

Collected Information

We automatically collect and/or track the following:

- (1) web page http headers (home server domain names, IP address, type of client computer, and type of Web browser);
- (2) information knowingly provided by you through on-line forms, registration forms, surveys, and/or other entries, such as email addresses, personal, financial or demographic information;
- (3) information, user specific or aggregate, on what pages our visitors access and
- (4) the e-mail addresses of visitors that communicate with American Advance via e-mail.
- (5) Information from outside sources. Information from outside sources regarding their employment, credit and other relationships with our customers or verifying representations made by a customer. Examples include customer employment history, loan balances, balances and bank account information and balances.
- (6) Other general information. Information from outside sources, such as data from public records, that is not assembled or used for the purpose of determining your eligibility for a product or service.

Section 2.

Use of Data Collected

We use your personal, demographic and profile data to enhance your experience at our site and to enable us to present content we think you might be interested in. We use your contact information to send you information about our company and promotional material from our partners. We may also use your personal, demographic and profile data to improve our site, for statistical analysis, for marketing and promotional purposes, and for editorial or feedback purposes for our advertisers. Information collected by us may be added to our databases and used for future e-mails or postal mailings regarding site updates, new products and services, upcoming events, and/or status of orders placed online.

Section 3.

Disclosure of Data to Third Parties

If you choose to provide personal information, it will be used for the following purposes: (1) sharing of your information with trusted third parties such as credit bureaus and/or other financial services providers, (2) as required by law and (3) for marketing products and services which we

Complaint

Disclosures and Other Important Information

Page 2 of 2

determine, in our sole judgment, that you might find of interest. We reserve the right to share, rent, sell, or otherwise disclose data we collect to third parties. Any third party we share, rent, sell, or otherwise disclose data to will be carefully prescreened by us, determined by us to be reputable, and will use the personal data for marketing products and services which we determine, in our sole judgment, that you might find of interest.

Section 4.**Your Opt-Out Rights**

You may opt-out of receiving communications from us and/or our partners by not submitting your information. We also allow you to remove your information from our database. If you remove your information from our database it will no longer be used by us for secondary purposes, disclosed to third parties, or used by us or third parties to send promotional correspondence to you. You can remove your information by using our automated opt-out utility.

Section 5.**We Do Not Intend To Collect Data From Children**

The information and services provided to us or our affiliates, sponsors, and advertisers are not intended to be viewed by children (under 18 years old). No information collected from children is knowingly used for any marketing or promotional purposes whatsoever, either inside or outside American Advance.

Section 7.**Our Right To Contact You**

We reserve the right to contact you regarding your account status and changes to subscriber agreements, privacy policy, or any other policies or agreements relevant to you.

Section 8.**Our Right To Change Policy Information**

We reserve the right to change this policy at any time by notifying you of the existence and location of the new or revised privacy policy or by posting the changes online at our site.

Notice

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Complaint

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A customer support representative will contact you as soon as possible.

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Subject Comments

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Decision and Order

DECISION AND ORDER

The Federal Trade Commission has conducted 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 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 Truth in Lending Act and its implementing Regulation Z; and

The respondent and counsel for the Federal Trade Commission having thereafter executed an agreement containing a consent order, an admission by the respondent 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 the respondent 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 respondent has violated the Truth in Lending Act and its implementing Regulation Z, 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 Aliyah Associates, LLC d/b/a American Advance is a limited liability company with its principal office or place of business at 7525 E. Camelback, Suite 210, Scottsdale, AZ 85251.

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. “Advertisement” shall mean a commercial message in any medium that promotes, directly or indirectly, a credit transaction.
2. “Consumer” means a cardholder or a natural person to whom consumer credit is offered or extended. The term also includes a natural person in whose principal dwelling a security interest is or will be retained or acquired, if that person’s ownership interest in the dwelling is or will be subject to a security interest.
3. “Consumer Credit” shall mean credit offered or extended to a consumer primarily for personal, family, or household purposes.
4. “Clearly and conspicuously” shall mean as follows:
 - A. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read and comprehend it.
 - B. In an electronic medium, the disclosure shall be:
 - (a) unavoidable;

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- (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) understandable language and syntax; and
 - (d) prior to the consumer incurring any financial obligation.
- C. In a television or video advertisement, 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 appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it, and shall be in understandable language and syntax.
- D. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

Nothing contrary to, inconsistent with, or in mitigation of the material terms shall be used in any advertisement or promotion.

5. “Respondent” unless otherwise specified, shall mean Aliyah Associates, LLC d/b/a American Advance, its successors and assigns and its officers, agents, representatives, and employees.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with any advertisement to promote, directly or indirectly, any

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extension of consumer credit in or affecting commerce, shall not, in any manner, expressly or by implication:

- A. State the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Section 144 of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1664, as amended, and Section 226.24(c) of Regulation Z, 12 C.F.R. § 226.24(c), as amended, as more fully set out in Section 226.24(c) of the Federal Reserve Board’s Official Staff Commentary to Regulation Z, 12 C.F.R. § 226.24(c), as amended, including, but not limited to:
 1. The amount or percentage of the down payment;
 2. The terms of repayment;
 3. The annual percentage rate, using that term or the abbreviation “APR.” If the annual percentage rate may be increased after the consummation of the credit transaction, that fact must also be disclosed.
- B. State a rate of finance charge without stating the rate as an “annual percentage rate” or the abbreviation “APR,” using that term, as required by Section 144 of the TILA, 15 U.S.C. § 1664, as amended, and Section 226.24(b) of Regulation Z, 12 C.F.R. § 226.24(b), as amended, as more fully set out in Section 226.24(b) of the Federal Reserve Board’s Official Staff Commentary to Regulation Z, 12 C.F.R. § 226.24(b), as amended.
- C. Fail to comply in any other respect with the TILA, 15 U.S.C. §§ 1601-1667, as amended, and Regulation Z, 12 C.F.R. § 226, as amended.

Decision and Order

II.

IT IS FURTHER ORDERED that respondent 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 all records that will demonstrate compliance with the requirements of this order.

III.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, for a period of five (5) years from the date of issuance of this order, 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, and shall secure from each such person a signed and dated statement acknowledging receipt of the 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.

IV.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, for a period of five (5) years from the date of issuance of this order, shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) 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

Decision and Order

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, Washington, D.C. 20580.

V.

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 they have complied with this order.

VI.

This order will terminate on August 8, 2028, 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

Analysis to Aid Public Comment

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 CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Aliyah Associates, LLC d/b/a American Advance (“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.

Respondent engaged in practices that violate Section 144 of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1664, and Section 226.24(c) of its implementing Regulation Z, 12 C.F.R. § 226.24(c). Respondent disseminated payday loan advertisements on the Internet stating the number of payments or period of repayment, or the amount of a finance charge, as terms for obtaining a payday loan. These advertisements failed, however, to

Analysis to Aid Public Comment

disclose the “annual percentage rate” or “APR” for these loans as required by TILA and its implementing Regulation Z.

TILA and Regulation Z require that advertisers, including payday loan advertisers, disclose APRs on their loans to assist consumers in comparison shopping. The respondent’s failure to disclose the APR for the payday loans it advertised undermined consumers’ ability to compare these loans to those offered by other payday lenders. The respondent’s failure to disclose the APR for the payday loans it advertised also frustrated consumers’ ability to compare these loans to alternative forms of credit. Through its law enforcement actions the Commission intends to promote compliance with the APR disclosure requirements of TILA and Regulation Z, thereby promoting comparison shopping relating to payday loans.

The proposed consent order contains provisions designed to prevent respondent from failing to make disclosures required by TILA and Regulation Z in the future.

Part I.A. of the proposed order prohibits respondent, in connection with any advertisement of consumer credit, from stating the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by TILA and Regulation Z, including the amount or percentage of the down payment, the terms of repayment, and the annual percentage rate, using that term or the abbreviation “APR.”

Part I.B. of the proposed order prohibits respondent from stating a rate of finance charge without stating the rate as an “annual percentage rate” or the abbreviation “APR.”

Part I.C. of the proposed order prohibits respondent from failing to comply in any other respect with TILA or Regulation Z.

Analysis to Aid Public Comment

Part II of the proposed order contains a document retention requirement, the purpose of which is to ensure compliance with the proposed order. It requires that respondent maintain all records that will demonstrate compliance with the proposed order.

Part III of the proposed order requires respondent to distribute copies of the order to various principals, officers, directors, and managers, and all current and future employees, agents and representatives having responsibilities with respect to the subject matter of the order.

Part IV of the proposed order requires respondent to notify the Commission of any changes in its corporate structure that might affect compliance with the order.

Part V of the proposed order requires respondent to file with the Commission one or more reports detailing compliance with the order.

Part VI 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, 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

FLOW INTERNATIONAL 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-4231; File No. 081 0079

Complaint, August 15, 2008 – Decision, August 15, 2008

This consent order addresses the acquisition of OMAX Corporation by Flow International Corporation. The companies are the leading manufacturers of waterjet cutting systems in the United States, and the transaction may substantially lessen competition in the market for the development, manufacture, marketing, and sale of such systems. Both companies offer an efficient PC-based controller that compensates for the unique characteristics of how a waterjet cuts. Under the terms of the order, Flow must grant a royalty-free license to each competitor who seeks to license the two broad OMAX patents relating to controllers that Flow will acquire with its acquisition of OMAX. This will eliminate the entry barrier faced by current waterjet cutting system competitors and future entrants and ensure that other firms are able to replace the competition that would otherwise be eliminated by the acquisition. In addition, Flow may not provide, disclose, or otherwise make available any confidential business information to any person except as set forth in the order. If Flow fails to grant a license within the time periods specified, the Commission may appoint a Licensing Trustee to grant the license to any competitors to satisfy the requirements of the order. Additional provisions include the requirements that Flow notify the Commission of any changes in corporate structure and file written reports on its compliance with the order.

Participants

For the *Commission*: *Stuart Hirschfeld, Joe Lipinsky, Alan Loughnan, Susan Raitt, Robert J. Schroeder, Art Strong, and Lore Unt.*

For the *Respondent*: *Ramona Emerson and Jim Weiss, K&L Gates.*

Complaint

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested by said Acts, the Federal Trade Commission (the “Commission”), having reason to believe that respondent Flow International Corporation (“Flow”), a corporation, and OMAX Corporation (“OMAX”), a corporation, both subject to the jurisdiction of the Commission, have agreed to an acquisition by Flow of OMAX 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

1. Respondent Flow is a corporation organized and existing under the laws of the State of Washington, with its principal place of business at 23500 - 64th Avenue South, Kent, Washington 98032. Flow is a global company engaged in the development, manufacture, marketing, and sale of waterjet cutting systems.

II. JURISDICTION

2. Flow 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 PROPOSED TRANSACTION

3. OMAX is a Washington company with its head office in Kent, Washington. OMAX is a global company engaged in the

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development, manufacture, marketing, and sale of waterjet cutting systems.

4. In December 2007, the parties signed an exclusive option agreement for the acquisition of OMAX. Under the agreement, Flow and OMAX will work to negotiate a definitive agreement for Flow to acquire OMAX. Upon closing, Flow will pay approximately \$109 million in cash and stock with the potential for a contingent earn-out in two years of up to \$26 million.

IV. WATERJET CUTTING SYSTEMS

5. The demand for waterjet cutting systems is growing very rapidly due to the versatility and ease of operation of these systems. Waterjet cutting systems can be used to cut and machine a much wider range of materials than other cutting systems. For most users of waterjet cutting systems, alternative cutting systems would not provide comparable features and therefore would not serve as adequate substitutes. Customers now using or seriously considering adopting waterjet cutting systems would be unlikely to switch to an alternative cutting technology if the prices of all waterjet cutting systems were to be raised by a small but significant non-transitory amount.

6. A waterjet cutting system contains four main parts: (1) pump, (2) cutting head, (3) cutting table, and (4) controller.

- The “pump” rated in pressure at or above 50,000 pounds per square inch creates ultra-high pressure water;
- The cutting head is a two-stage nozzle where the ultra-high pressure water passes through a small-diameter jewel orifice to form a narrow waterjet. In abrasive waterjet cutting systems, the resulting waterjet then passes through a small chamber where a slight vacuum pulls abrasive material into this area through a feed tube. The abrasive particles are accelerated by the narrow waterjet and

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together they pass into a long, hollow cylindrical ceramic mixing tube. The resulting mix of abrasive and narrow waterjet exits the mixing tube as a coherent stream and cuts the material;

- The cutting table holds the material to be cut and can utilize either a gantry or cantilever system to move the cutting head; and
- The controller is hardware and software that directs the cutting head. Controllers can be adapted from other cutting tools, such as lasers, that also use cutting tables, or they may be specifically designed to compensate for the unique characteristics of how the waterjet cuts, including taper (the waterjet expands after leaving the nozzle, forming a cone shape) and lag (the faster the cutting head moves, the more the waterjet will trail behind the cut).

7. Waterjet cutting systems are used by a wide variety of industrial machine tool customers. These customers include:

- job shops that produce a wide variety of short-run parts use waterjet cutting systems to complement their traditional Computer Numerical Control milling machines and flame cutters;
- wire Electrical Discharge Machining (“EDM”) shops because waterjet cutting systems are up to ten times faster than wire EDM and can cut both conductive and non-conductive material without creating a heat-affected zone;
- laser shops, which can capitalize on the ability of waterjet cutting systems to cut thicker materials than lasers can, and, unlike lasers, can cut reflective materials;

Complaint

- aerospace shops because waterjet cutting systems can cut without damaging materials that are affected by heat, such as titanium and aluminum;
- tooling shops because waterjet cutting systems can work with hardened tool steel;
- architectural fabricators, which use waterjet cutting systems to create large signs, decorative tiles, or intricate design work in a wide variety of materials; and
- metal fabricators, which value the enhanced ability of waterjet cutting systems to cut clean edges for plate work.

8. Most waterjet customers derive a gain in productivity, which is a function of cutting speed and set-up time, by using a waterjet cutting system instead of an alternative cutting technology. Cutting speed is affected by pump strength, the number of cutting heads used on the system, and the sophistication of the controller. Controllers are often the least expensive means of improving cutting speed and have the further virtue of reducing set-up time if they are easily programmable. Controllers can also improve the quality of the cut by, among other things, automatically adjusting the speed of the cut.

V. COMPETITION BETWEEN FLOW AND OMAX

9. Flow is the largest manufacturer of waterjet cutting systems in the United States. OMAX is the second largest.

10. OMAX has received U.S. Patent Nos. 5,508,596 and 5,892,345 relating, among other things, to controllers that may include a personal computer for determining appropriate machining commands to control velocity, acceleration and/or jerk for a cutting head. These commands help compensate for the

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unique characteristics of how the waterjet cuts, including taper and lag.

11. Both Flow and OMAX produce waterjet cutting systems that feature relatively inexpensive yet sophisticated PC-based controllers. Flow and OMAX are each other's closest competitors because they are the only two competitors that manufacture comparably priced waterjet cutting systems with the most advanced and efficient controllers.

VI. RELEVANT MARKET

12. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the development, manufacture, marketing, and sale of waterjet cutting systems.

13. For the purposes of this Complaint, the relevant geographic market within which to analyze the effects of the Acquisition is the United States.

VII. CONCENTRATION IN THE RELEVANT MARKET

14. The relevant market would be highly concentrated as a result of the acquisition. Post-acquisition, Respondent would account for more than 55 percent of waterjet cutting system sales in the United States.

VIII. LIKELIHOOD OF ENTRY

15. New entrants and existing competitors are deterred by the risk of violating OMAX patents from developing and producing competitive waterjet cutting systems. Developing an efficient controller that clearly works around the potential reach of OMAX's patents would likely be an expensive and time-consuming process, with no guarantees of success. Therefore, entry into the relevant market would not be timely, likely, or

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sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the acquisition.

IX. EFFECTS OF THE ACQUISITION

16. The effects of the acquisition, if consummated, may be substantially to lessen competition and to tend 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. Specifically, the acquisition would:

a. Eliminate actual, direct, and substantial competition between Flow and OMAX in the relevant market by eliminating competition for the development, manufacture, and sale of waterjet cutting systems that utilize PC-based controllers; and

b. Increase Respondent's ability to exercise market power unilaterally in the relevant market.

X. VIOLATIONS CHARGED

17. The agreement described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

18. The transaction described in Paragraph 4, if consummated, would constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fifteenth day of August, 2008, issues its Complaint against said Respondent.

By the Commission.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent Flow International Corporation (hereinafter “Flow International”, “Respondent”, or “Respondent Flow International”) of OMAX Corporation, 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 attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“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 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 Flow International is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its offices and principal place of business located at 23500 64th Avenue South, Kent, Washington 98032.

2. 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 the Order, the following definitions shall apply:

- D. “Flow International” or “Respondent” means Flow International Corporation, its directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Flow International Corporation, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- E. “OMAX” means, OMAX Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its offices and principal place of business located at 21409 72nd Avenue, Kent, Washington 98032; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by OMAX Corporation.
- F. “Commission” means the Federal Trade Commission.

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- G. “Acquisition” means the proposed acquisition of OMAX by Flow International pursuant to an exclusive option agreement to negotiate the acquisition of Omax signed on December 5, 2007.
- H. “Acquisition Date” means the date the Acquisition is consummated.
- I. “Competitor” means any person that, during the five (5) years after this Order becomes final, is or seeks to become engaged in the research, development, manufacturing, marketing, or sale of Waterjet Cutting Systems or Waterjet Cutting System Controllers in the United States.
- J. “Confidential Business Information” means any information relating to the research, development, manufacture, distribution, marketing, or sale of Waterjet Cutting Systems or Waterjet System Cutting System Controllers by any Licensee or Authorized Sublicensee that comes into the possession or control of the Respondent as the result of the License, including, but not limited to, any information that any Licensee is required to provide to the Respondent under the terms of the License. “Confidential Business Information” includes, but is not limited to, any information provided to Respondent in any License Report.
- K. “Controller” means computer software and hardware that direct the cutting head.
- L. “License” means:
1. the license with a Licensee for the Licensed Patents attached as Exhibit A to this Decision and Order; or,

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2. a license that substantially complies with Exhibit A, that achieves the purposes of this Order, and that receives the prior approval of the Commission.
- M. “Licensed Patents” mean the OMAX ‘596 Patent and the OMAX ‘345 Patent.
- N. “Licensee” means any signatory (other than Respondent) to any License.
- O. “License Reports” means any report or information provided by any Licensee to Respondent under the terms of any License.
- P. “OMAX ‘345 Patent” means United States Patent No. 5,892,345, including all related patent applications, extensions, current or future United States patents that share a common parent application with or that claim a priority from an application for U.S. Patent No. 5,892,345, and all other rights included in the term Patent as it is defined in this Order.
- Q. “OMAX ‘596 Patent” means United States Patent No. 5,508,596, including all related patent applications, extensions, current or future United States patents that share a common parent application with or that claim a priority from an application for U.S. Patent No. 5,508,596, and all other rights included in the term Patent as it is defined in this Order.
- R. “Patent” means the United States patent and all related patent applications and includes all reissues, divisions, continuations, continuations-in-part, substitutions, reexaminations, restorations, and/or patent term extensions thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all

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rights to obtain and file for patents and registrations thereto in the United States.

- S. "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.
- T. "Waterjet Cutting System" means a system that uses a high pressure stream of water to cut plastic, metal, composite, and other materials. A Waterjet Cutting System contains one or more of each of four main parts: (1) pump, (2) cutting head, (3) cutting table, and (4) controller.

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

- A. Respondent Flow International shall grant a License to any and all Competitors that, during the five (5) years after this Order becomes final, request a License. Respondent shall execute the License not more than thirty (30) days after Respondent receives a written request from a Competitor.
- B. At the request of a Licensee, and subject to the prior approval of the Commission, the Respondent shall enter into an agreement to modify the License if the modification reasonably is related to achieving the purpose of this Order.
- C. Respondent Flow International shall not threaten to file, file suit, or make any claim for damages against any Licensee relating to any actual or claimed infringement of any of the intellectual property that is the subject of and within the scope of the License.

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- D. Respondent shall comply with all terms of each License, and any breach by Respondent of any term of a License shall constitute a violation of this Order. If any term of the License varies from the terms of this Order (“Order Term”), then to the extent that Respondent cannot fully comply with both terms, the Order Term shall determine Respondent’s obligations under this Order. Notwithstanding any paragraph, section, or other provision of the License, any modification of the License, without the prior approval of the Commission, shall constitute a failure to comply with this Order.
- E. The purpose of the License required by Paragraph II.A. of this Order is to create viable, independent Competitors to develop, manufacture, and sell Waterjet Cutting Systems or Waterjet Cutting System controllers, using the Licensed Patents, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission’s Complaint.

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

- A. Respondent shall:
1. not provide, disclose or otherwise make available any Confidential Business Information to any Person except as set forth in Paragraph III.B. of this Order;
 2. not use any Confidential Business Information for any reason or purpose other than as otherwise required or permitted by the License and this Order; and,
 3. require all License Reports to be sent to the attention of Flow’s general counsel, who shall not provide, disclose, or otherwise make available any information

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contained in any License Report except to persons whose duties relate solely to providing legal services and representation to Respondent.

- B. Respondent may use Confidential Business Information only (i) for the purpose of performing Respondent's obligations under this Order; and, (ii) for the purpose of exercising Respondent's rights explicitly granted to Respondent by the License.

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

- A. If the Commission finds that Respondent has failed to grant a License as required by Paragraph II. of this Order within the time periods specified therein, then the Commission may appoint a Licensing Trustee to grant the License to any Competitors to satisfy the requirements of Paragraph II of this Order.
- B. Neither the decision of the Commission to appoint a Licensing Trustee, nor the decision of the Commission not to appoint a Licensing Trustee, to grant the License under this Paragraph IV 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, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, for any failure by the Respondent to comply with this Order.
- C. If a Licensing Trustee is appointed by the Commission or a court, Respondent shall consent to the following terms and conditions regarding the Licensing Trustee's powers, duties, authority, and responsibilities:

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1. The Commission shall select the Licensing Trustee, 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 any proposed Licensing Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Licensing Trustee, Respondent shall be deemed to have consented to the selection of the proposed Licensing Trustee.
2. Subject to the prior approval of the Commission, the Licensing Trustee shall have the exclusive power and authority to grant the License to a Competitor pursuant to the terms of this Order.
3. Within ten (10) days after appointment of the Licensing Trustee, Respondent shall execute a (or amend the existing) trust agreement (“Licensing Trustee Agreement”) that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the Licensing Trustee all rights and powers necessary to permit the Licensing Trustee to grant the License to a Competitor pursuant to the terms of this Order.
4. The Licensing Trustee may grant the License to any Competitor pursuant to the terms of this Order at any time after the Licensing Trustee Agreement is effective.
5. The Licensing Trustee shall have full and complete access to the personnel, books, records and facilities of Respondent related to each License, as the Licensing Trustee may request. Respondent shall develop such financial or other information as the Licensing Trustee may request and shall cooperate with the Licensing

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Trustee. Respondent shall take no action to interfere with or impede the Licensing Trustee's accomplishment of his or her responsibilities.

6. The Licensing Trustee shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Licensing Trustee shall have the authority to employ, at the expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Licensing Trustee's duties and responsibilities. The Licensing Trustee shall account for all monies derived from the divestiture and all expenses incurred. Respondent shall pay the Licensing Trustee's fees and expenses in accordance with the Licensing Trustee Agreement.
7. Respondent shall indemnify the Licensing Trustee and hold the Licensing Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Licensing 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 gross negligence, willful or wanton acts, or bad faith by the Licensing Trustee.
8. If the Commission determines that the Licensing Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in this Paragraph IV of this Order.

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9. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Licensing Trustee issue such additional orders or directions as may be necessary or appropriate to comply with the terms of this Order.
 10. The Licensing Trustee shall report in writing to Respondent and to the Commission every two (2) months concerning his or her efforts to grant Licenses under this Order, and Respondent's compliance with the terms of this Order.
- D. Respondent shall comply with all terms of the Licensing Trustee Agreement, and any breach by Respondent of any term of the Licensing Trustee Agreement shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Licensing Trustee Agreement, any modification of the Licensing Trustee Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

V.

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

- A. any proposed dissolution of Respondent;
- B. any proposed acquisition, merger or consolidation of Respondent; or
- C. 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:

- A. Within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter for one hundred and eighty (180) days, Respondent shall submit to the Commission (with simultaneous copies to the Licensing Trustee(s), as appropriate) verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraph II of this Order. Respondent shall include in the reports, among other things that are required from time to time, the name, address, and phone number of each person who has inquired about receiving a License (whether or not Respondent granted a License to such person), the name, address, and phone number of each Person to whom Respondent granted a License, and a full description of any dispute between Respondent and any person to whom Respondent granted a License concerning any claimed actual or alleged breach (whether or not Respondent believes there has been a breach) of any License. Respondent shall include in the reports:
1. Copies of all Licenses executed in each reporting period, together with copies of all written communications to and from each Licensee; and,
 2. The name, address, and phone number of each person who requested a License, but to whom Respondent did not grant a License, together with a description in reasonable detail of the reasons why Respondent did not grant the person a license.
- B. One (1) year from the date this Order becomes final on the anniversary of the date this Order becomes final, annually for the next nine years on the anniversary of the date this

Decision and Order

Order becomes final, and at other times as the Commission may require, Respondent shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order. Respondent shall include in the reports, among other things that are required from time to time, the name, address, and phone number of each person who has inquired about receiving a License (whether or not Respondent granted a License to such person), the name, address, and phone number of each Person to whom Respondent granted a License, and a full description of any dispute between Respondent and any person to whom Respondent granted a License concerning any claimed actual or alleged breach (whether or not Respondent believes there has been a breach) of any License. Respondent shall include in the reports:

1. Copies of all Licenses executed in each reporting period, together with copies of all written communications to and from each Licensee; and,
2. The name, address, and phone number of each person who requested a License, but to whom Respondent did not grant a License, together with a description in reasonable detail of the reasons why Respondent did not grant the person a license.

VII.

IT IS FURTHER ORDERED that for the purpose of determining or securing compliance with this Order, upon written request, 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

Decision and Order

records and documents in the possession or under the control of Respondent relating to any matters contained in this Order; and,

- B. Upon five (5) days' notice to Respondent and without restraint or interference from it, to interview officers, directors, employees, agents or independent contractors of Respondent relating to any matter contained in this Order.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on August 15, 2018.

By the Commission.

Decision and Order

EXHIBIT A**PATENT LICENSE AGREEMENT
(FOR U.S. PATENT NOS. 5,508,596 AND 5,892,345)**

This Patent License Agreement (the "Agreement") is entered into between Flow International Corporation, a Washington corporation, with offices at 23500 - 64th Avenue South, Kent, Washington 98032 U.S.A. ("Flow"), and _____, a _____ corporation, at the address specified below, ("Licensee"), effective as of the date it has been signed on behalf of all parties (the "Effective Date").

Section 1. Definitions

- 1.1 "Authorized Sublicensee" means any waterjet cutting system manufacturer, distributor, dealer or customer of Licensee granted a sublicense under Section 2.4 to make, use, sell or offer for sale copies of the Licensed Technology.
- 1.2 "Distributor" means any distributor that Licensee authorizes, directly or indirectly, to Distribute a Licensed Product that contains Licensed Technology to End Users in accordance with the terms of this Agreement.
- 1.3 "Distribute" or "Distribution" means selling, offering to sell, licensing, distributing, importing or otherwise making available in any manner to a third party.
- 1.4 "End User" means a third party customer to which a product containing the Licensed Technology is Distributed, and not for further sublicense or further Distribution.
- 1.5 "License" means the license granted by Flow to Licensee under Section 2 of this Agreement.
- 1.6 "Licensed Patent(s)" means U.S. Patent Nos. 5,508,596 (Motion Control With Precomputation) and 5,892,345 (Motion Control For Quality In Jet Cutting).
- 1.7 "Licensed Product" means any product that includes the Licensed Technology and is used by the End User as part of a waterjet cutting system.
- 1.8 "Licensed Technology" means those portions of a Licensed Product, designed and developed by or for Licensee or any Authorized Sublicensee, the making, using, selling, offering for sale or importing of which infringes at least one claim of the applicable Licensed Patents.

Section 2. License and Licensee Requirements

2.1 License Grant. Subject to Sections 2.2, 2.7 and 2.8 below, Flow hereby grants to Licensee a royalty-free, fully-paid personal, nonexclusive, nonsublicensable (except as specifically provided for in Section 2.4 of this Agreement) license under the Licensed Patents to do the following during the Term:

- (a) make and use the Licensed Technology for the research and development, production, offer for sale or sale of waterjet cutting systems;
- (b) Distribute the Licensed Technology to manufacturers of waterjet cutting systems; and
- (c) Distribute the Licensed Technology in the Licensed Products to End Users

2.2 Conditions. The licenses granted in Section 2.1 are conditioned upon: (i) Licensee's compliance with the notice requirements of Section 2.6; (ii) Licensee's compliance with the requirements of Sections 2.7 and 2.8; and (iii) Licensee's compliance with the reporting requirements of Section 3.

2.3 Covenant Not to Sue. Flow hereby covenants not to sue Licensee, or any Sublicensees or End Users or any of their subsidiaries, for any and all claims of infringement of the Licensed Patents, or a claim on any other patent the scope of which may be coextensive with any of the claims of the Licensed Patents, based on having at any time prior to or during the term of this License made, used, sold, offered for sale or imported, or on the making, use, selling, offering for sale or importing of the Licensed Technology, but only to the extent that such activities are permitted under the License.

2.4 Limited Right to Sublicense.

- (a) The License includes the right of Licensee to grant to any of its Distributors a sublicense to any waterjet cutting system manufacturer, distributor, dealer or customer of Licensee.

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(b) Licensee will ensure that each Authorized Sublicensee complies with this Agreement. The License does not include the right to grant or authorize any other sublicense under the License or otherwise to take or authorize any action outside the scope of the License.

2.5 Reservation of Rights. All rights not expressly granted in this Agreement are reserved. The License does not include, and Flow does not grant, any right under any patent or intellectual property other than the Licensed Patents.

2.6 Waiver. Licensee agrees and acknowledges that by signing this Agreement, Licensee waives its right to contest the validity of the Licensed Patents as applied to waterjet cutting systems.

2.7 Limitation. Licensee shall not represent directly or indirectly that any product it makes or sells pursuant to this License is made or endorsed by Flow International Corporation or OMAX Corporation.

2.8 Licensee Requirements. To qualify to be a licensee under this Agreement, the licensee must be engaged in the business of manufacture or distribution of, or creation of control equipment for, waterjet cutting systems. Additionally, the License does not modify the Licensee's obligations to comply with the law of the United States or any other jurisdiction, including export and trade laws (such as U.S. Export Administration Regulations, and end-user, end-use, and destination restrictions).

Section 3. Reporting

Licensee will provide quarterly reports to Flow, no later than 45 days following the end of each calendar quarter, identifying the number, location (by state or province or by country if outside the U.S. or Canada) and type (to Distributor, End User, etc.) of any sale, lease or other disposition of a Licensed Product. Such reports should be sent to the addresses designated in Section 8.4. Flow shall treat the quarterly reports provided under this Section as Confidential Business Information, the use and dissemination of which are subject to the terms of the Decision & Order of the Federal Trade Commission.

Section 4. Term and Termination

4.1 General. The term of the License will commence as of the Effective Date and terminate upon the first of the following to occur: (a) the expiration of the last of the Licensed Patents to expire or (b) Flow gives Licensee written notice of termination in accordance with Section 4.2 or 8.6 ("Term").

4.2 Early Termination by Flow. Flow may terminate the Term by giving Licensee written notice of termination if Flow has determined, in good faith, that Licensee has breached the Agreement and has failed to cure such breach within sixty (60) days after Flow has given Licensee written notice of such breach.

4.3 Effect of Expiration or Termination. Only Sections 2.3, 2.6, 5, 6, 7 and 8 of this Agreement will survive any expiration or termination of the Term.

Section 5. Warranties, Exclusion of Warranties, Exclusive Remedy and Sole Liability

5.1 Warranties. Flow represents and warrants to Licensee that: (a) it is the owner of the Licensed Patents; and (b) it has the right to grant the License. Each Party represents and warrants that it has the power and authority to enter into this Agreement.

5.2 Exclusion of Warranties. EXCEPT AS EXPRESSLY SET FORTH IN SECTION 5.1, TO THE MAXIMUM EXTENT PERMITTED BY LAW, FLOW EXCLUDES ALL CONDITIONS, WARRANTIES AND OTHER TERMS WHICH MIGHT HAVE EFFECT BETWEEN THE PARTIES OR BE IMPLIED OR INCORPORATED INTO THIS AGREEMENT (INCLUDING WITHOUT LIMITATION, THE IMPLIED CONDITIONS, WARRANTIES AND OTHER TERMS AS TO SATISFACTORY QUALITY, FITNESS FOR PURPOSE, NON-INFRINGEMENT, TITLE AND THE USE OF REASONABLE SKILL AND CARE). WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, FLOW HAS NOT MADE, AND DOES NOT MAKE, ANY REPRESENTATION OR WARRANTY OF ANY KIND: (i) WITH REGARD TO THE SCOPE, COVERAGE, VALIDITY OR ENFORCEABILITY OF ANY OF THE LICENSED PATENTS; (ii) WITH RESPECT TO ANY LICENSED PRODUCT OR LICENSED TECHNOLOGY; OR (iii) THAT ANY LICENSED TECHNOLOGY MADE, USED, SOLD, OFFERED FOR SALE OR IMPORTED UNDER THE LICENSE IS OR WILL BE FREE FROM INFRINGEMENT OF ANY PATENT OR OTHER INTELLECTUAL PROPERTY RIGHT OF ANY THIRD PARTY.

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Section 6. Exclusive Remedy of Licensee and Sole Liability of Flow.

BOTH PARTIES AGREE THAT LICENSEE'S SOLE AND EXCLUSIVE REMEDY FOR ANY BREACH OF THIS AGREEMENT BY FLOW WILL BE TERMINATION OF THIS AGREEMENT AND COMPENSATORY DAMAGES LIMITED TO AN AMOUNT NOT TO EXCEED ONE HUNDRED DOLLARS.

Section 7. Limitation of Liability

IN NO EVENT WILL FLOW BE LIABLE FOR ANY INCIDENTAL, SPECIAL, CONSEQUENTIAL, EXEMPLARY OR INDIRECT LOSSES OR DAMAGES OR ANY LOSS OF REVENUE, PROFIT, USE, BUSINESS OPPORTUNITY OR GOODWILL ARISING OUT OF OR RELATED TO THE LICENSE OR THIS AGREEMENT EVEN IF FLOW HAS BEEN APPRISED OF THE LIKELIHOOD OF SUCH DAMAGES, INCLUDING THAT FLOW SHALL NOT BE LIABLE FOR ANY DEATH, PERSONAL INJURY OR OTHER HARM ARISING FROM ANY MANUFACTURE, USE, OFFER FOR SALE, SALE, EXPORT OR OTHER ACTIVITY RELATING TO ABRASIVE WATERJET MACHINES MADE, USED, OFFERED FOR SALE, OR SOLD UNDER THIS LICENSE..

Section 8. Miscellaneous

8.1 No Right to Technology. Flow will not have any obligation under this Agreement to disclose or otherwise make available to Licensee any Technology, trade secrets, programs, specifications, designs, technical data, know how or other technology, whether or not the same may be required for the exercise or commercial exploitation of the License.

8.2 Compliance with Laws. Licensee and Sublicensed Subsidiaries will comply with all applicable international and national laws and regulations in the performance of all of their activities under the License and this Agreement.

8.3 Actions on Behalf of the Parties. Flow and Licensee are each liable for, and will be deemed for all purposes of this Agreement to have done or failed to do, any act or omission of their respective officers, employees, temporary personnel, or independent contractors related to acts or omissions in connection with this Agreement.

8.4 Notices. All notices and requests in connection with this Agreement are deemed given on the day they are received either by messenger, delivery service, or in the United States of America mails, postage prepaid, certified or registered, return receipt requested, and addressed to Licensee using the contact information indicated on the first page of this Agreement, to Flow using the contact information below, or to either party at such other address as the party to receive the notice or request so designates per this notice provision:

Flow International Corporation
John Leness
General Counsel and Corporate Secretary
23500 - 64th Avenue South
Kent, WA 98032
U.S.A.

8.5 Jurisdiction, Governing Law and Attorneys' Fees. This Agreement will be governed by and construed in accordance with the laws of the state of Washington. Each party hereby submits to the exclusive jurisdiction of the state and federal courts of the state of Washington. Process may be served on either party in the manner authorized by applicable law or court rule. In any formal action or suit to enforce any right or remedy under this Agreement or to interpret any provision of this Agreement, the prevailing party is entitled to recover its costs, including reasonable attorneys' fees, costs and other expenses.

8.6 Assignment. Either party may assign this Agreement or any of its rights or obligations hereunder, provided that the Licensee gives the Licensor written notice of its assignment within thirty (30) days of its assignment having been made. Such written notice will also include a signed statement by the assignee that it is willing to be bound by the terms and conditions of this Agreement. This Agreement will be binding upon, enforceable by, and inure to the benefit of the parties and their respective successors and permitted assignees. For purposes of this Agreement, an "assignment" by Licensee under this Section will be deemed to include, without limitation, each of the following: (a) a change in beneficial ownership of Licensee of greater than twenty percent (20%) (whether in a single transaction or series of transactions) if Licensee is a partnership, trust, limited liability company or other like entity; (b) a merger of Licensee with another entity, whether or not Licensee is the surviving entity; (c) the acquisition of more than twenty percent (20%) of any class of voting stock (or any class of non-voting security convertible into voting stock) of Licensee by another

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entity (whether in a single transaction or series of transactions); and (d) the sale or other transfer of more than fifty percent (50%) of such Licensee's assets (whether in a single transaction or series of transactions). Any attempted transfer or assignment in violation of this Section will be void, and, in the event of any such assignment or attempted assignment by Licensee, Flow will have the right to immediately terminate the License.

8.7 **No Third Party Beneficiaries.** This Agreement is for the benefit of, and will be enforceable by, the Parties only. This Agreement is not intended to confer any right or benefit on any third party. No action may be commenced or prosecuted against a Party by any third party (including, without limitation, Subsidiaries) claiming as a third-party beneficiary of this Agreement or the License.

8.8 **Counterparts and Facsimile.** This Agreement may be executed on facsimile copies in two counterparts, each of which will be deemed an original and all of which together will constitute one and the same Agreement. Notwithstanding the foregoing, the parties will deliver original executed copies of this Agreement to one another as soon as practicable following execution thereof.

8.101 **Entire Agreement, Modifications and Waiver.** This Agreement constitutes the entire agreement between the Parties with respect to its subject matter and supersedes all prior and contemporaneous agreements, arrangements and understandings, whether written or oral, between the Parties in connection with this Agreement and on such subject matter. This Agreement will not be modified except by a written agreement signed by an authorized representative of the Party against whom such modification is sought to be enforced. Failure by either Party to enforce any provision of this Agreement will not be deemed a waiver of future enforcement of that provision.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be made and executed by duly authorized officers.

<p>[LICENSEE NAME]</p> <p>_____</p> <p>By (Sign)</p> <p>_____</p> <p>Name (Print)</p> <p>_____</p> <p>Title</p> <p>_____</p> <p>Date</p> <p>_____</p>	<p>FLOW INTERNATIONAL CORPORATION</p> <p>_____</p> <p>By (Sign)</p> <p>_____</p> <p>Name (Print)</p> <p>_____</p> <p>Title</p> <p>_____</p> <p>Date</p> <p>_____</p>
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Licensee Information:
 Licensee Full Legal Name:
 Type of Legal Entity (corporation, company, partnership, sole proprietorship or other):
 State/Province Organized:
 Street Address:
 City, State (or equivalent), Country and Postal Code:
 Licensee Contact Name:
 Phone Number:
 Fax Number:
 Email Address:
 Licensee Legal Advisor Contact Information, if any:
 Legal Advisor Name:
 Legal Advisor Contact Phone Number:
 Legal Advisor Contact Fax Number:
 Legal Advisor Contact Email Address:

Analysis to Aid Public Comment

ANALYSIS OF THE 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 Flow International Corporation (“Flow”). The proposed Consent Agreement is designed to remedy the likely anticompetitive effects arising from Flow’s proposed acquisition of OMAX Corporation (“OMAX”). Under the terms of the Consent Agreement, Flow will grant a royalty-free license to two Omax patents relating to waterjet controllers to any firm that seeks a license.

II. Background

Flow and OMAX are the leading manufacturers of waterjet cutting systems in the United States. Waterjet cutting systems use high pressure water and garnet to cut a wide variety of materials from steel to stone. The two companies have developed PC-based controllers that automatically compensate for the unique characteristics of how the waterjet cuts, such as taper (the waterjet expands after leaving the nozzle, forming a cone shape) and lag (the faster the cutting head moves, the more the waterjet will trail behind the cut). The controllers and related technology differentiate these two firms from other competitors in the marketplace. However, the controllers and related technology are also the subject of ongoing litigation between the two companies. In 2004, OMAX filed suit alleging that Flow’s products infringed its patents pertaining to controllers. Flow counterclaimed alleging that OMAX infringed its patents pertaining to controllers.

Flow, a publicly traded company headquartered in Kent, Washington, is the leading manufacturer of waterjet cutting systems in the United States market. OMAX is a privately-held company headquartered in Kent, Washington. OMAX owns two

Analysis to Aid Public Comment

very broad U.S. patents covering its controller. OMAX's controller is a significant factor behind its position as the second leading supplier of waterjet cutting systems in the United States.

On December 5, 2007, Flow signed an exclusive option agreement to negotiate the acquisition of OMAX. Under the agreement, Flow and OMAX will work to negotiate a definitive agreement for Flow to acquire OMAX. Upon closing, Flow would pay approximately \$109 million in cash and stock with the potential for a contingent earn-out in two years of up to \$26 million. The closing will also settle the long-running and expensive patent litigation between Flow and OMAX.

III. The Draft Complaint

The draft complaint alleges that the transaction may substantially lessen competition in the market for the development, manufacture, marketing, and sale of waterjet cutting systems. A waterjet cutting system contains four main parts: (1) pump, (2) cutting head, (3) cutting table, and (4) controller.

Waterjet cutting systems are used by a wide variety of industrial machine tool customers. These customers range from job shops, which produce a wide variety of short-run parts, and use waterjet cutting systems to complement their traditional milling machines, lasers and flame cutters, to aerospace shops that use waterjet cutting systems because they cut without damaging materials that are affected by heat, such as titanium and aluminum. Industrial machine tool customers, as well as others, can increase cutting speed and minimize set-up time by using a waterjet cutting system instead of an alternative cutting technology. Cutting speed is affected by pump pressure, the number of cutting heads used on the system, and the sophistication of the controller. Controllers are often the least expensive means of improving cutting speed and have the further virtue of reducing set-up time if they are easily programmable. To compensate for the unique characteristics of how the waterjet

Analysis to Aid Public Comment

cuts, controllers can improve the quality of the cut by, among other things, automatically adjusting the speed of the cut.

Both Flow and OMAX produce waterjet cutting systems that feature relatively inexpensive yet sophisticated PC-based controllers that compensate for the unique characteristics of how the waterjet cuts. These controllers make Flow and OMAX each other's closest competitors because only they manufacture waterjet cutting systems with the most advanced and efficient controllers.

The relevant geographic market within which to analyze the likely effects of the proposed transaction is the United States. The draft complaint further alleges that new entry would not prevent or counteract the anticompetitive effects of this acquisition. New entrants and existing competitors are deterred by the risk of violating the OMAX patents from developing and producing competitive waterjet cutting systems. Developing an efficient controller that clearly works-around the potential reach of OMAX's patents would likely be an expensive and time-consuming process, with no guarantee of success.

The draft complaint also alleges that Flow's acquisition of OMAX, if consummated, may substantially lessen competition in the market for the development, manufacture, marketing, and sale of waterjet cutting systems in the United States 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, by eliminating direct competition between Flow and OMAX and increasing the likelihood that Flow will unilaterally exercise market power.

IV. The Terms of the Consent Agreement

The proposed Consent Agreement will remedy the Commission's competitive concerns about the proposed acquisition. Under the terms of the proposed consent order, Flow

Analysis to Aid Public Comment

must grant a royalty-free license to each competitor who seeks to license the two broad OMAX patents relating to controllers that Flow will acquire with its acquisition of OMAX.

Currently Flow and OMAX are each other's closest competitor because they each offer an efficient PC-based controller that compensates for the unique characteristics of how a waterjet cuts. OMAX's two patents make the development of such a controller substantially more expensive and risky. Requiring Flow to grant a royalty-free license to these patents will ensure that other firms are able to replace the competition that would otherwise have been eliminated by the proposed acquisition.

While Flow has two patents relating to controllers, its patents are significantly narrower in scope than the OMAX patents and, as a result, do not prevent current or future competitors from offering a viable waterjet cutting system. Current and future competitors will not need licenses to these narrow patents in order to compete effectively in this market. Other aspects of Flow's and OMAX's business, such as customer lists, brand names, key employees, or the other parts of waterjet cutting systems, are easily duplicated by current competitors or future entrants. Consequently, to restore the competition lost by Flow's acquisition of OMAX, the proposed consent order eliminates the entry barrier faced by current waterjet cutting system competitors and future entrants by giving them a royalty-free license to the OMAX patents.

V. Opportunity for Public Comment

The proposed consent order 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 proposed consent order and the comments received and will

Analysis to Aid Public Comment

decide whether it should withdraw from the agreement or make the proposed consent order final.

By accepting the proposed consent order 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 consent order, in order to aid the Commission in its determination of whether to make the proposed consent order final. This analysis is not intended to constitute an official interpretation of the proposed consent order nor is it intended to modify the terms of the proposed consent order in any way.

Complaint

IN THE MATTER OF

WE GIVE LOANS, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF THE TRUTH IN LENDING ACT

*Docket C-4232; File No. 072 3205
Complaint, September 3, 2008 – Decision, September 3, 2008*

This consent order addresses payday loan advertisements disseminated by We Give Loans, Inc. The advertisements failed to disclose the annual percentage rate for these loans. The order prohibits the respondent, in any advertisement of consumer credit, from stating the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by the Truth in Lending Act and its implementing Regulation Z, including the amount or percentage of the down payment, the terms of repayment, and the annual percentage rate. The respondent is prohibited from stating a rate of finance charge without stating it as an annual percentage rate. The respondent is also prohibited from failing to comply in any other respect with the Truth in Lending Act or Regulation Z. Additional provisions of the order include requirements that the respondent retain documents, to ensure compliance with the proposed order; distribute copies of the order to various principals, officers, directors, and managers, and all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of the order; notify the Commission of any changes in its corporate structure that might affect compliance with the order; and file with the Commission one or more reports detailing compliance with the order.

Participants

For the *Commission*: *Beverly Childs, Thomas B. Pahl, Cara Petersen, Peggy L. Twohig, and Quisaira Whitney.*

For the *Respondent*: *Glen Trudel, Connolly Bove Lodge & Hutz LLP.*

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that We Give Loans, Inc., a Delaware corporation (“respondent”) has violated the provisions of the Truth in Lending Act, 15 U.S.C. §§ 1601-1667, as amended, and its implementing Regulation Z, 12 C.F.R. § 226, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent We Give Loans, Inc., is a Delaware corporation with its principal office or place of business at 2300 Lincoln Avenue, Apt. 201, Cloquet, MN 55720. We Give Loans, Inc. does business primarily through the website WeGiveLoans.com, but also operates under various other websites including but not limited to 1200Today.com.

2. Respondent has disseminated advertisements to the public that promote extensions of closed-end credit in consumer credit transactions, as the terms “advertisement,” “credit,” “closed-end credit,” and “consumer credit” are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended.

3. Respondent advertises credit to consumers in the form of payday loans. Credit is defined as “the right to defer payment of debt or to incur debt and defer its payment.” Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended. Credit includes “a transaction in which a cash advance is made to a consumer in exchange for the consumer’s personal check, or in exchange for the consumer’s authorization to debit the consumer’s deposit account, and where the parties agree either that the check will not be cashed or deposited, or that the consumer’s deposit account will not be debited, until a designated future date. This type of transaction is often referred to as a ‘payday loan’ or ‘payday advance’ or ‘deferred-presentment loan.’” Comment 2 to Section 226.2(a)(14) of the Official Staff Commentary to Regulation Z; 12 C.F.R. Section 226.2(a)(14)-2, Supp.1, as amended. Payday loans have high rates and short repayment periods; they are often

Complaint

due on the borrower's next payday, usually about every two weeks.

4. Respondent has disseminated or has caused to be disseminated payday loan advertisements on the Internet, including but not necessarily limited to the attached Exhibits 1 and 2. Respondent collects information from consumers, called leads, through its online application, and then provides this information to lenders that ultimately offer payday loans to the consumers. Respondent is paid by the payday lenders for generating these consumer leads.

5. The WeGiveLoans.com advertisement attached as Exhibit 1 states that We Give Loans provides borrowers with the means to "shop and compare more than 100 pay day lenders side by side."

A. This advertisement states that a payday lender's fee is "typically \$10-\$25 per \$100 borrowed," and the lender will debit your account for the fees it is owed on a "pre-agreed date (usually your next pay date)."

B. The WeGiveLoans.com advertisement states that payday loan "fees are based on a per \$100 borrowed basis. The lowest fee in [We Give Loan's] network is just \$10 per \$100 borrowed. The average is \$15 per \$100."

C. This advertisement also provides an interactive "payday loan calculator" that provides the total amount of fees due depending on how many payments it takes to pay off the loan. For example, the calculator shows that a \$100 loan that has a \$20 fee when the loan is paid off in full in a single payment will increase to \$30 in fees when the loan is paid off over 2 payments, \$41 in fees when the loan is paid off over 3 payments, and \$50 in fees when the loan is paid off over 4 payments.

Complaint

6. The 1200Today.com advertisement attached as Exhibit 2 states that “[y]ou may qualify for up to \$1,200 from a single lender” and that 1200Today.com will “match you with up to four different lenders.”

A. This advertisement states that the “lowest fee available in [1200Today.com’s] network of lenders is just \$10 per \$100 borrowed. The average is between \$10 and \$20 per \$100 borrowed.”

B. The 1200Today.com advertisement also states that payments are typically due on your next pay date.

7. On a \$100 loan with a \$10 fee, repayable in a typical pay period of 14 days, the APR would be 260%. On a \$100 loan with a \$15 fee repayable in a typical pay period of 14 days, the APR would be 391%. A \$100 loan with a \$20 fee, repayable in a typical pay period of 14 days, would have an APR of 521%.

Failure to Disclose Information Required by TILA

8. In credit advertisements, including but not necessarily limited to Exhibits 1 and 2, respondent has stated the number of payments or period of repayment and/or the amount of any finance charge, as terms for obtaining consumer credit in the form of a payday loan.

9. These advertisements have failed to disclose the “annual percentage rate” or “APR” using that term as required by Regulation Z.

10. Respondent’s practices have violated Section 144 of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1664, and Section 226.24(c) of Regulation Z, 12 C.F.R. § 226.24(c).

Complaint

THEREFORE, the Federal Trade Commission this third day of September, 2008, has issued this complaint against respondent.

By the Commission.

Complaint

EXHIBIT 1

Loans for; Auto, Home, Payday, and Personal Loan Needs - We Give Loans

Page 1 of 1



Loans for; Auto, Home, Payday, and Personal Loan Needs

Easy Loan Approval



We Give Loans provides; online loan services throughout the USA, and in Canada. Borrowers can shop and compare more than 800 lenders side by side. Then, securely apply online for their; auto, home, payday, and personal loan needs. Most of our loan approvals are instant, so many borrowers receive their money the same day.

Make sure you get the best rate and terms available anywhere. Tell us about your borrowing needs with our "Get Matched" online application. We'll instantly display a side by side comparison of the top six or so lenders matching your needs. Compare the rates, terms, and other key details. Then, apply for the best loan or loans for you.

Loan Features

- Secure
- 100% Online
- 24/7 Support
- Bad Credit ok
- 800+ Lenders
- USA & Canada
- Easy Approval
- Instant Results

Home Loans

Compare home loan offers. Programs for: purchase, refinance, home equity, second mortgage, and home equity line of credit needs. Bad credit ok.

Payday Loans

Take up to 10 pay-periods to repay. Receive up to \$1000 in one hour, or \$1500 by tomorrow. No credit check, fax or faxing required. Safe and secure.

Personal Loans

Unsecured personal loan amounts from \$1500 to \$35,000. Instant online results, funds as-quick-as tomorrow. Offers for Renters and Homeowners with fair + credit.

Auto Loans

Online auto loan approvals up to \$100,000. Programs for new, used, purchase, refinance, dealer, and private party transactions. Bad credit ok. You can receive your funds by tomorrow. Oh yeah, motorcycle loans too.

Credit Cards

Instant credit card approvals. Limits up to \$100,000. Discover, Visa, MasterCard, and American Express. Card offers for; personal, business, student, unsecured, secured, and prepaid cards. Bad credit & no credit ok.

Credit Services

Find credit service companies that provide: debt help, debt consolidation loans, debt management, credit counseling, and credit monitoring services. Also, information on how to obtain a free credit report with score.

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Complaint

Online Payday Loans, and Cash Advance Loan Services

Page 1 of 1

You are here: [Logout](#) > ["Payday Loans"](#) - MainOnline Payday Loans, and Cash Advance Loan Services
Take up to 10 Pay-Periods to Repay.**Payday Qualifications**

18+ years old.
US or Canadian citizen.

Have a checking or
savings account.

Receive \$800+
per month from all
sources combined
(before deductions)

APPLY NOW!

We Give Loans provides: online **payday loans**, **bad credit personal loans**, and **cash advance loan services** throughout the USA, and in Canada. Borrowers can shop and compare more than 100 pay day lenders side by side. Then, when they're ready; **apply online securely**. Most of our loan approvals are **instant**, so borrowers can receive their money **within one hour**, or by the next day.

Make sure you get the lowest fees, and best pay day loan terms available anywhere. Tell us about your unique payday loan needs with our **online application form**. We'll instantly display a side by side comparison of the top six or so payday lenders matching your needs. Compare the fees, terms, and other important loan details. Then, apply for the best payday loan or loans for your needs. Safe and secure services.

Payday Loan Services

- Confidential
- 100% online
- \$100 - \$1500
- Fast & secure
- **No credit check**
- 100% faxless
- No fax or faxing
- 100+ lenders
- USA & Canada
- Easy approval
- Instant results
- Cash deposited **in one hour - or - by tomorrow.**

Payday Loan Resources

- [Online Application](#)
- [Payday Loan FAQ](#)
- [Payday Loan Example](#)
- [Payday Loan Calculator](#)
- [How a Payday Loan Works](#)

What's a "Payday Loan"?

A **Payday loan** is a short term loan that's based entirely on your source of income. With pay day loans, your source of income is your credit. For this reason no credit check or credit history is required. You simply provide who you are, what your source of income is, and where you want the money deposited. Borrowers can receive up to \$1000 in one hour, or as-much-as \$1500 by tomorrow. Cash advance services are convenient, quick, hassle free, and always confidential.

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Complaint



Online Payday Loan Application
Take up to 10 Pay-Periods to Repay!

You are here: [Loans](#) > [Payday Loans](#) - Main > "Online Payday Loan Application"

Payday Loan Qualifications and Requirements are: You Must

- Be at least 18 years old and a resident of the USA or Canada.
- Have a checking or savings account.
- Earn at least \$800 per month (before deductions) from all sources combined.

*No a bank account? Consider a [personal loan](#).

Benefits of a Payday Loan

- No Fax or Faxing Required
- Fast and Easy Approval -
- No Credit Check Required
- Confidential and Secure -
- 100% Online
- Money in Your Account within 1 to 24 Hours

- Step-1** Complete the secure online payday loan application below.
- Step-2** We'll instantly search our database of more than 100 payday lenders. Then display which lenders match your loan requirements, and can approve your loan.
- Step-3** Compare the offers you matched with, and apply to the one (s) best for you.

State you live in. Select Canada if you live in Canada. Select - One

How much would you like to borrow? \$100 - \$1500 Select - One

How fast do you need to receive the money? Select - One

How often do you get paid or receive your benefits? Select - One

How many pay-periods would you like to pay the loan back in? Select - One

Estimated total MONTHLY earnings before deductions? Select - One

Is your paycheck or benefits electronically (directly) deposited to your account? Select - One


Do you have a checking account? Select - One

First Name _____

Last Name _____

(No SPAM) see our policy below. Email Address _____

Re-type Email Address _____

For increased security, please type the image code. 

Within 5 seconds of clicking submit, the top lenders that matched your requirements will display on-screen for you to review. By clicking "Submit - Find Matching Lenders" you are not submitting a loan application. You are requesting that we compare more than 100 payday lenders with your needs, and display the results.

(NO SPAM) We will not share the results of your search with anyone other than yourself and authorized employees of WeGiveLoans.com. All of your information, including your name and email address will never be sold, rented, traded or otherwise be made available to anyone for any reason. We guarantee it! For more details view our [privacy and security policies](#).

Complaint

Payday Loan FAQ- Answers to Your Payday Loan Questions

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Payday Loan FAQ - Answers to Your Payday Loan Questions

You are here: Loans > Payday Loans - Main > "Frequently Asked Questions"

Payday Loan Resources

- [Online Application](#)
- [Payday Loan FAQ](#)
- [Payday Loan Example](#)
- [Payday Loan Calculator](#)
- [How Payday Loans Work](#)

APPLY NOW

- [Payday Loan - What is a payday loan?](#)
- [Alternatives - What are the alternatives to a payday loan?](#)
- [Application - How do I apply?](#)
- [Approval - When will I know if I'm approved?](#)
- [Credit Check - Is there a credit check?](#)
- [Faxing - Will I need to fax anything, or is it faxless?](#)
- [Fees - Cost - What are the fees? How much will it cost?](#)
- [How Fast - How quick can I receive my cash?](#)
- [Loan Amount - How much can I borrow?](#)
- [Payment - How much, and when will my payment be due?](#)
- [Qualifications - What are the qualifications?](#)
- [Security - Is my information safe and secure?](#)

What's a "Payday Loan"?

A *payday loan* is a short term loan that's based entirely on your source of income. With payday loans, your job or source of income is your credit. For this reason no credit check or credit history is required. You simply provide who you are, what your source of income is, and where you want the money deposited.

Payday Loan Alternatives

Payday loans are best used to take care of a temporary emergency need or cash flow crises. One alternative is a personal loan. If you have fair or better credit you could borrow up to \$35000 with repayment terms of up to seven years. If your credit is poor, and you know it, consider borrowing from friends and family as an alternative.

How do I Apply?

By using our [online payday loan application](#).

When will I know if I'm approved?

In most cases, you'll know instantly. In a few instances you will receive an email or call within one hour. You will always be provided with instant notification of whether your loan is approved, declined, or when to expect an email or call.

Is there a credit check?

No. Apply Now

Will I need to fax anything?

Odds are no. No fax or faxing is required from more than 90% of the lenders in our network. Some lenders that can deposit the money into your account within one hour may require some faxing.

What are the fees?

The fees are based on a per \$100 borrowed basis. The lowest fee in our network is just \$10 per \$100 borrowed. The average is \$15 per \$100. You'll always know what your fees are before accepting a loan.

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Complaint

Payday Loan Example - We Give Loans

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Payday Loan Example

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- [Payday Loan FAQ](#)
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- [Payday Loan Calculator](#)
- [Payday Loan Application](#)
- [How Payday Loans Work](#)

[APPLY NOW](#)

Payday Loan Example

Here's an actual example of a payday loan and how it's paid back. OK, you've submitted our get matched [online payday loan application](#), selected your lender, and completed their online application. Your loan approval was instant, you reviewed the terms, and accepted the loan.

Let's assume that you borrowed \$500, and after using our helpful [payday loan calculator](#), decided that you want to pay the loan off in a single payment. We'll also assume that you were matched with and selected one of the lowest fee lenders in the network with a fee of just \$10 per \$100 borrowed.

Since the fee in this scenario was \$10 per \$100 borrowed, and you borrowed \$500. That's $\$10 \times 5 = \50 in total fees.

On the pre-agreed date (usually your next pay date) the lender will debit your account for the \$50 in fees they are owed. Generally that's all they're going to take out, just the fee. Unless you state specifically otherwise when completing the lenders application.

In most cases you will have to tell the lender how much additional monies you want debited from your account, to reduce or payoff the loan balance. In this example you wanted to pay the loan off in a single payment. So the total amount needed to be debited from your account is \$550. The \$500 that you borrowed and the lender fee of \$50. To run and check multiple loan payment strategies, try out our [payday loan calculator](#).

[Apply for a Payday Loan](#) | [Payday Loan FAQ](#) | [How the Loans Work](#)

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Complaint

How a Payday Loan Works - We Give Loans

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- [Payday Loan FAQ](#)
- [Payday Loan Example](#)
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- [How Payday Loans Work](#)

APPLY NOW:**How a Payday Loan Works**

Consumers looking for an emergency loan of \$100 - \$1500 without the hassles of a credit check or mounds of paperwork, turn to payday lenders who are willing to take the risk on a short term loan. Typically these loans are for a period of four to sixty days.

Payday lenders agree to deposit the \$100 - \$1500 loan into the borrowers checking or savings account, usually the same or next day. The borrowers agree to let the lender debit their account on specific future dates (almost always the date the borrower receives their income) for a specific minimum amount (usually just the fee). Borrowers get the emergency funds when they need them without hassles, and lenders receive their fee (typically \$10 - \$25 per \$100 borrowed) for giving the short term loan.

Borrowers should pay these loans off as quick as possible. If stretched out more than four pay-periods or so, the fees add up.

A Borrower applies for a payday loan by providing very basic information to the lender. Typically the list looks like this:

The borrowers; name, address, phone numbers, and email address.

Some yes/no questions like: do you receive at least \$800 per month income? Do you have a checking or savings account?

Information to confirm the borrowers identity (to comply with the patriot act) such as date of birth and social security number.

Lastly, the lender will need the banks routing number and the account number that the money should be deposited into. This is also the account the lender will use to debit the money from later.

[Apply for a Payday Loan](#) | [Payday Loan FAQ](#) | [Payday Loan Example](#)

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Payday Loan Calculator - We Give Loans

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Payday Loan Calculator

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Payday

Qualifications

To qualify, you must:
Be 18+ years of age.

US or Canadian citizen.

Have a checking or savings account.

Receive \$800+ per month from all income sources combined (before deductions)

The **payday loan calculator** below calculates: minimum payments, total fees, and shows how to pay your payday loan off in a set number of payments, saving you money.

100 \$20 - Average+ Calc

Pay loan off in:	Total fees
1 payment of 120	20
or 2 payments of 70-60	30
or 3 payments of 54-47-40	41
or 4 payments of 45-40-35-30	50

As you can see, the longer it takes to pay a loan off, the more it costs. IMPORTANT see the calculator advice section below for more information and advice.

APPLY NOW!

Payday Loan Service

- Confidential
- 100% online
- \$100 - \$1500
- Fast & secure
- No credit check
- 100% faxless
- No fax or faxing
- 100+ lenders
- USA & Canada
- Easy approval
- Instant results
- Cash deposited in one hour - or by tomorrow.

Payday Loan Resources

- [Online Application](#)
- [Payday Loan FAQ](#)
- [Payday Loan Example](#)
- [Payday Loan Calculator](#)
- [How a Payday Loan Works](#)

Payment Calculator Advice

Lenders only require you pay the minimum payment, and allow you to make more than four payments. Our advice is this; if you won't be able to pay your payday loan off in four payments or less, don't get a payday loan. It just costs too much over an extended time. Consider a personal loan, or other source of funds such as friends, or family.

The calculator above is for illustration purposes only. Your payments may be more or less than what's shown above depending on multiple factors. Know what the terms of a loan are before accepting one.

Complaint

We Give Loans - How to Contact Us

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You are here: [Loans](#) > [About Us](#) > "Contact Us"

We Give Loans - How to Contact Us



Contact We Give Loans using any of the methods below. To learn more about a specific type of loan online, follow the appropriate link.

- [Auto Loans](#)
- [Credit Cards](#)
- [Credit Services](#)
- [Home Loans](#)
- [General Loan Questions](#)

Online: 24/7

By Phone:
1 (800) 985-5110
M-F 8am - 7pm EST

By mail, write to:
We Give Loans, Inc.
40 E. Main Street
#800
Newark, DE, 19711

Subject:

Question or Comment:

First Name:

Last Name:

Email:

Verify Email:

Enter security code from left.

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EXHIBIT 2

1200 Today

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Receive up to \$1200 Cash Today
 10 Pay-Periods to Repay Funds
 No Credit Check and No Faxing
 Checking or Savings Accounts OK
 Instant Response
 Direct Deposit Not Required
 Funds in as Fast as 1 Hour

Bookmarks, History, Home, Favorites, Help

1200Today.com

To qualify you must...
 Have a checking or savings account
 Be a U.S. Citizen at least 18 years old
 Receive at least \$800 per month income. (employed, retired, receiving benefits - all OK)

Step 1 - Complete the secure form below.

For security, please enter the 4-digit code displayed

State where you live?

How much would you like to borrow?

of pay-periods you would like to pay the loan back in?

How is your pay or benefits deposited into your bank?

How often do you receive your pay or benefits?

Estimated total MONTHLY earnings before deductions?

First name

Last name

Email address (NO SPAM - see our policy below)

Please retype the e-mail address

Within seconds of clicking submit, the top few lenders matching your requirements will display on-screen. By clicking "Submit - Find Matching Lenders" you are not submitting an application. You are requesting that we compare more than 100 lenders with your needs, and display the matching results on-screen for you to see and compare. Then you, simply choose which lender or lenders to submit your application to.
 (NO SPAM) We will not share the results of your search with anyone other than yourself and authorized employees of 1200Today.com. All of your information, including your name and email address will never be sold, rented, traded or otherwise be made available to anyone for any reason. We guarantee it! For more details view our privacy policy.
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1200 Today

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[Bookmark the page](#) [FAQ](#) [Contact Us](#)**Frequently Asked Questions** revised 02-01-2007**How much can I qualify for?**

You may qualify for up to \$1,200 from a single lender. We will match you with up to four different lenders. We suggest that if you do not get approved for all of the funds that you need from a single lender, that you accept what you are approved for, and apply with another lender that we matched you with to obtain the balance of funds that you need. [Apply Now](#)

When do I have to pay it back?

You will have up to ten pay-periods to pay off your loan. Typically payments will start on your next pay date that is at least four days away from when you apply. Specific dates can be obtained by reviewing the terms of your loan provided by your lender.

How long does approval take?

Most approvals are instant, some approvals may take up to an hour. It depends on the programs of the lender (s) that you select and are qualified for. [Apply Now](#)

How fast will I receive my funds?

Depending on the program and lender (s) that you select and are qualified for, you could receive your funds in as soon as a few minutes from now, or it may take a full 24 hours. Many borrowers receive their funds within hours of applying.

How much is the cost or fee?

You will always know your fee before you accept your loan terms. The lowest fee available in our network of lenders is just \$10 per \$100 borrowed. The average is between \$10 and \$20 per \$100 borrowed. [Apply Now](#)

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[Privacy](#) [Opt-Out](#)

Complaint

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Online: 24/7

Subject:

Question or Comment:

First Name:

Last Name:

Email:

Verify Email:

Enter security code from left.

[Bookmark this page](#) [FAQ](#) [Contact Us](#)

By Phone:
1 (800) 985-5110
M-F 9am - 7pm EST

By mail, write to:
1200Today.com
40 E. Main Street
#800
Newark, DE, 19711

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Decision and Order

DECISION AND ORDER

The Federal Trade Commission has conducted 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 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 Truth in Lending Act and its implementing Regulation Z; and

The respondent and counsel for the Federal Trade Commission having thereafter executed an agreement containing a consent order, an admission by the respondent 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 the respondent 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 respondent has violated the Truth in Lending Act and its implementing Regulation Z, 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 received from 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. Respondent We Give Loans, Inc. is a corporation with its principal office or place of business at 2300 Lincoln Avenue, Apt. 201, Cloquet, MN 55720. We Give Loans, Inc. does business

Decision and Order

primarily through the website WeGiveLoans.com, but also operates under various other websites including but not limited to 1200Today.com.

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. “Advertisement” shall mean a commercial message in any medium that promotes, directly or indirectly, a credit transaction.
2. “Consumer” means a cardholder or a natural person to whom consumer credit is offered or extended. The term also includes a natural person in whose principal dwelling a security interest is or will be retained or acquired, if that person’s ownership interest in the dwelling is or will be subject to a security interest.
3. “Consumer Credit” shall mean credit offered or extended to a consumer primarily for personal, family, or household purposes.
4. “Clearly and conspicuously” shall mean as follows:
 - A. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read and comprehend it.

Decision and Order

- B. In an electronic medium, the disclosure 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) understandable language and syntax; and
 - (d) prior to the consumer incurring any financial obligation.
- C. In a television or video advertisement, 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 appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it, and shall be in understandable language and syntax.
- D. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

Nothing contrary to, inconsistent with, or in mitigation of the material terms shall be used in any advertisement or promotion.

5. “Respondent” unless otherwise specified, shall mean We Give Loans, Inc., a Delaware corporation, its successors and assigns and its officers, agents, representatives, and employees.

Decision and Order

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with any advertisement to promote, directly or indirectly, any extension of consumer credit in or affecting commerce, shall not, in any manner, expressly or by implication:

- A. State the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Section 144 of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1664, as amended, and Section 226.24(c) of Regulation Z, 12 C.F.R. § 226.24(c), as amended, as more fully set out in Section 226.24(c) of the Federal Reserve Board’s Official Staff Commentary to Regulation Z, 12 C.F.R. § 226.24(c), as amended, including, but not limited to:
 1. The amount or percentage of the downpayment;
 2. The terms of repayment;
 3. The annual percentage rate, using that term or the abbreviation “APR.” If the annual percentage rate may be increased after the consummation of the credit transaction, that fact must also be disclosed.
- B. State a rate of finance charge without stating the rate as an “annual percentage rate” or the abbreviation “APR,” using that term, as required by Section 144 of the TILA, 15 U.S.C. § 1664, as amended, and Section 226.24(b) of Regulation Z, 12 C.F.R. § 226.24(b), as amended, as more fully set out in Section 226.24(b) of the Federal Reserve Board’s Official Staff Commentary to Regulation Z, 12 C.F.R. § 226.24(b), as amended.

Decision and Order

- C. Fail to comply in any other respect with the TILA, 15 U.S.C. §§ 1601-1667, as amended, and Regulation Z, 12 C.F.R. § 226, as amended.

II.

IT IS FURTHER ORDERED that respondent 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 all records that will demonstrate compliance with the requirements of this order.

III.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, for a period of five (5) years from the date of issuance of this order, 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, and shall secure from each such person a signed and dated statement acknowledging receipt of the 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.

IV.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, for a period of five (5) years from the date of issuance of this order, shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other

Decision and Order

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, Washington, D.C. 20580.

V.

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 they have complied with this order.

VI.

This order will terminate on September 3, 2028, 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 CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from We Give Loans, Inc. (“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.

Respondent engaged in practices that violate Section 144 of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1664, and Section 226.24(c) of its implementing Regulation Z, 12 C.F.R. §

Analysis to Aid Public Comment

226.24(c). Respondent disseminated payday loan advertisements on the Internet stating the number of payments or period of repayment, or the amount of a finance charge, as terms for obtaining a payday loan. These advertisements failed, however, to disclose the “annual percentage rate” or “APR” for these loans as required by TILA and its implementing Regulation Z.

TILA and Regulation Z require that advertisers, including payday loan advertisers, disclose APRs on their loans to assist consumers in comparison shopping. The respondent’s failure to disclose the APR for the payday loans it advertised undermined consumers’ ability to compare these loans to those offered by other payday lenders. The respondent’s failure to disclose the APR for the payday loans it advertised also frustrated consumers’ ability to compare these loans to alternative forms of credit. Through its law enforcement actions the Commission intends to promote compliance with the APR disclosure requirements of TILA and Regulation Z, thereby promoting comparison shopping relating to payday loans.

The proposed consent order contains provisions designed to prevent respondent from failing to make disclosures required by TILA and Regulation Z in the future.

Part I.A. of the proposed order prohibits respondent, in connection with any advertisement of consumer credit, from stating the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by TILA and Regulation Z, including the amount or percentage of the down payment, the terms of repayment, and the annual percentage rate, using that term or the abbreviation “APR.”

Part I.B. of the proposed order prohibits respondent from stating a rate of finance charge without stating the rate as an “annual percentage rate” or the abbreviation “APR.”

Analysis to Aid Public Comment

Part I.C. of the proposed order prohibits respondent from failing to comply in any other respect with TILA or Regulation Z.

Part II of the proposed order contains a document retention requirement, the purpose of which is to ensure compliance with the proposed order. It requires that respondent maintain all records that will demonstrate compliance with the proposed order.

Part III of the proposed order requires respondent to distribute copies of the order to various principals, officers, directors, and managers, and all current and future employees, agents and representatives having responsibilities with respect to the subject matter of the order.

Part IV of the proposed order requires respondent to notify the Commission of any changes in its corporate structure that might affect compliance with the order.

Part V of the proposed order requires respondent to file with the Commission one or more reports detailing compliance with the order.

Part VI 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, 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

McCORMICK & COMPANY, INCORPORATED

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-4225; File No. 081 0045
Complaint, July 29, 2008 – Decision, September 12, 2008

This consent order addresses the proposed acquisition by McCormick & Company of Lawry's and Adolph's brands of seasoning products from Unilever N.V., which would lessen competition in the market for branded seasoned salt in the United States. Under the terms of the order, McCormick is required to divest its entire Season-All (seasoned salt spice blends) business to Morton International, Inc., or another Commission-approved buyer. The order enables the Commission to appoint a trustee to divest any assets identified in the order that respondent has not divested to satisfy the requirements of the order. In addition, the order enables the Commission to seek civil penalties against respondent for noncompliance. The order further requires McCormick to maintain the viability of the assets identified for divestiture. Among other requirements related to maintaining operations of the assets, the order requires McCormick to (1) maintain the viability, competitiveness, and marketability of the assets to be divested; (2) not cause the wasting or deterioration of the assets to be divested; (3) not sell, transfer, encumber, or otherwise impair the assets' marketability or viability; (4) maintain the assets consistent with past practices; (5) use best efforts to preserve the assets' existing relationships with suppliers, customers, and employees; and (6) keep and maintain the assets at inventory levels consistent with past practices. The order prohibits McCormick, for 10 years, from acquiring, without providing the Commission with prior notice, any other seasoned salt product, or any interest in any other spice blends business. The order does not restrict McCormick from expanding its line of spices. Finally, McCormick is required to file periodic compliance reports with the Commission.

Participants

For the *Commission*: *Joseph Eckhaus, Jill M. Frumin, Joan Heim, Jeanne Liu, Elizabeth Piotrowski, Amy Posner, Divya Rao, Matthew Reilly, Samuel I. Sheinberg, and W. Stephen Sockwell.*

Complaint

For the *Respondent*: *Philip Larson and Janet McDavid, Hogan & Hartson LLP*; and *Janusz Ordover, New York University*.

COMPLAINT

Pursuant to the provisions of the Clayton Act and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (“Commission”), having reason to believe that Respondent McCormick & Company, Incorporated (“McCormick”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire the Lawry’s and Adolph’s brands from Conopco, Inc., an affiliate of Unilever N.V., 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. THE PARTIES**A. Respondent McCormick**

1. Respondent McCormick is a corporation organized, existing, and doing business under and by virtue the laws of the state of Maryland, with its office and principal place of business located at 18 Loveton Circle, Sparks, Maryland 21152-6000.

2. Respondent McCormick is, and at all times relevant herein has been, among other things, engaged in the manufacture, marketing, sales, and distribution of branded and private label spices, seasonings, and flavors to grocery retailers and the food industry internationally and throughout the United States. In 2006, Respondent McCormick had total worldwide net sales of all products of approximately \$2.7 billion. McCormick sells seasoned

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salt in the United States under the McCormick Season-All brand name.

3. Respondent McCormick 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.

B. Unilever

4. Unilever N.V., a corporation organized under the laws of the Netherlands with its principal place of business located at Weena 455, 3013 AL Rotterdam, Netherlands, is a manufacturer of leading brands in the food, home care, and personal care industry. In 2006, Unilever N.V. had total worldwide sales of over \$49 billion.

5. Unilever United States, Inc., a subsidiary of Unilever N.V., is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its principal place of business at 700 Sylvan Avenue, Englewood Cliffs, New Jersey 07632-3113. Conopco, Inc., doing business as Unilever (“Unilever”), a wholly-owned subsidiary of Unilever United States, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the state of New York, with its principal place of business as 700 Sylvan Avenue, Englewood Cliffs, New Jersey 07632-3113. Unilever is, and at all times relevant herein has been, among other things, engaged in the manufacture, marketing, sales, and distribution of Unilever’s spices, seasonings, and flavors to grocery retailers and the food industry throughout the United States under the Lawry’s and Adolph’s brands. Unilever sells seasoned salt in the United States under the Lawry’s Seasoned Salt brand name. In 2006, Lawry’s and Adolph’s had annual sales of approximately \$150 million, primarily in the United States and Canada.

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6. Unilever is, and at all times herein has been, through Unilever United States, Inc., 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.

II. THE PROPOSED ACQUISITION

7. Pursuant to an Agreement and Plan of Merger dated November 13, 2007 (the “Agreement”), McCormick proposes to acquire Unilever’s Lawry’s and Adolph’s spice blends and other products for approximately \$605 million (the “Acquisition”).

III. THE RELEVANT MARKETS

8. The relevant line of commerce in which to analyze the effects of the acquisition is the manufacture and sale of branded seasoned salt products. Branded seasoned salt products include any dry branded product or product formulation (not including private or store label) sold at retail, usually in glass or plastic bottles, that consist primarily of salt, contain at least two other different herbs, spices, and/or other seasonings, and are labeled or otherwise described on the container as seasoned salt. Seasoned salt is one of the most popular spice blends products.

9. The United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant line of commerce.

IV. CONCENTRATION

10. The relevant market for the manufacture and sale of branded seasoned salt products in the United States is highly concentrated as measured by the Herfindahl-Hirschman Index (“HHI”). Lawry’s dominates the market for branded seasoned salt products and McCormick is its most significant competitor.

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Together, they account for over almost 80% of the sales in this highly concentrated market. The proposed acquisition would entrench McCormick as the dominant supplier of branded seasoned salt products in the United States and increase concentration significantly.

V. CONDITIONS OF ENTRY

11. Entry into the 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 12 below. Entry into the branded seasoned salt products market would require the investment of high sunk costs to establish a brand name and provide promotional funding and advertising to support the product, which would be difficult to justify given the market structure and sales opportunities. 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.

VI. EFFECTS OF THE ACQUISITION

12. McCormick and Unilever compete in the manufacture and sale of branded seasoned salt products in the United States. The effect of the proposed acquisition, if consummated, may be to substantially lessen competition and tend to create a monopoly in the manufacture and sale of branded seasoned salt products in the United States in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 15 U.S.C. § 18, in the following ways, among others:

- (a) by eliminating direct competition in the manufacture and sale of branded seasoned salt products between McCormick and Unilever;

Complaint

(b) by eliminating Unilever as an important competitive constraint in the relevant market and increasing the ability of McCormick to raise prices of branded seasoned salt products unilaterally in the United States; and

(c) by reducing McCormick's incentives to improve service or product quality for branded seasoned salt products in the United States.

VII. VIOLATIONS CHARGED

13. The Agreement entered into between Respondent McCormick and Unilever, pursuant to which Respondent McCormick proposes to acquire Unilever's branded seasoned salt business, as described in Paragraph 8, constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

14. 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 Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-ninth day of July, 2008, issues its Complaint against said Respondent.

By the Commission.

Order to Maintain Assets

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by McCormick & Company, Incorporated (“McCormick”), hereinafter “Respondent,” of the Lawry’s and Adolph’s brands from Conopco, Inc., an indirect subsidiary of Unilever N.V. (“Unilever”), 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 attorneys, 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 waives and other provisions as required by the Commission’s Rules; and

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 McCormick is a corporation organized, existing and doing business under and by virtue of the laws of the

Order to Maintain Assets

state of Maryland, with its office and principal place of business located at 18 Loveton Circle, Sparks, MD 21152-6000.

2. The Commission has jurisdiction of 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 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), which are incorporated herein by reference and made a part hereof, shall apply:

- A. “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.
- B. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets.
- C. “Orders” means the Decision and Order and this Order to Maintain Assets.

II.

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final:

Order to Maintain Assets

- A. Until the Closing Date for the divestiture of the Season-All Assets, Respondent shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the Season-All Assets, to minimize any risk of loss of competitive potential for the Season-All Business associated with the Season-All Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Season-All Assets except for ordinary wear and tear; *provided, however,* that nothing herein shall relieve Respondent of its obligation to comply fully with the terms and provisions of any Season-All Transitional Agreements. Respondent shall not sell, transfer, encumber or otherwise impair the full economic viability, marketability or competitiveness of the Season-All Assets.
- B. Until the Closing Date for the divestiture of the Season-All Assets, Respondent shall maintain the operations of the Season-All Assets in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance) and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Season-All Assets, and shall use its best efforts to preserve the existing relationships with customers, employees, suppliers, vendors, distributors, and others having business relations with the Season-All Assets. Respondent's responsibilities shall include, as applicable, but are not limited to, the following:
1. providing the Season-All Brand Products with sufficient working capital to ensure the Season-All Business continues to operate at least at current rates of operation, to meet all capital calls with respect to the Season-All Brand Products and to carry on, at least at their scheduled pace, all supply chain, manufacturing, sales and merchandising support, customer service and support, promotional activities

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- and other business plans for the Season-All Brand Products;
2. continuing, at least at their scheduled pace, any additional expenditures for the Season-All Assets authorized prior to the date the Consent Agreement was signed by Respondent including, but not limited to, all research, development, sales and marketing expenditures;
 3. providing such resources as may be necessary to respond to competition against the Season-All Brand Products and/or to prevent any diminution in retail sales of the Season-All Brand Products during and after the Acquisition and prior to the Closing Date;
 4. providing such resources as may be necessary to maintain the competitive strength and positioning of the Season-All Brand Products associated with the Season-All Assets at all customer accounts;
 5. making available funds sufficient to perform all routine and other maintenance as may be necessary to, and all replacements of, the Season-All Assets;
 6. providing the Season-All Assets with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the Season-All Assets; and
 7. providing such support services to the Season-All Brand Products as were being provided to the Season-All Business by Respondent as of the date the Consent Agreement was signed by Respondent.
- C. Until the Closing Date for the divestiture of the Season-All Assets, Respondent shall maintain a work force at least as equivalent in size, training, and expertise to what has been associated with the Season-All Brand Products pursuant to the most recent pre-Acquisition marketing plans.

Order to Maintain Assets

- D. Until the Closing Date for the divestiture of the Season-All Assets, Respondent shall provide all Season-All Brand Products Key Employees with reasonable financial incentives to continue in their positions and to market and promote the Season-All Brand Products consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Season-All Assets and to promote successful execution of the pre-Acquisition marketing plans related to the Season-All Brand Products. Such incentives shall include a continuation of all employee compensation and benefits offered by Respondent until the Closing Date has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to prevent any diminution of the competitiveness of the relevant Season-All Brand Products.
- E. During the Employee Access Period, Respondent shall not interfere with the hiring or employing by the Commission-approved Acquirer of the Season-All Brand Products Key Employees, and shall remove any impediments within the control of Respondent that may deter these employees from accepting employment with the Commission-approved Acquirer, including, but not limited to, any noncompete provisions of employment or other contracts with Respondent that would affect the ability or incentive of those individuals to be employed by the Commission-approved Acquirer. In addition, Respondent shall not make any counteroffer to a Season-All Brand Products Key Employee who receives a written offer of employment from the Commission-approved Acquirer;

provided, however, that this Paragraph E. shall not prohibit the Respondent from making offers of employment to or employing any Season-All Brand Products Key Employee during the Employee Access Period if the Commission-approved Acquirer has notified the Respondent in writing

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that the Commission-approved Acquirer does not intend to make an offer of employment to that employee;

provided further that, if the Respondent notifies the Commission-approved Acquirer in writing of its desire to make an offer of employment to a particular Season-All Brand Products Key Employee and the Commission-approved Acquirer does not make an offer of employment to that employee within twenty (20) Days of the date the Commission-approved Acquirer receives such notice, the Respondent may make an offer of employment to that employee.

- F. Pending divestiture of the Season-All Assets, Respondent shall:
1. not use, directly or indirectly, any Season-All Confidential Business Information related to the research, development, manufacture, marketing, commercialization, importation, exportation, cost, pricing, promotion, supply, sales, sales support or use of the Season-All Brand Products other than as necessary to comply with: (a) the requirements of the Orders; (b) Respondent's obligations to the Commission-approved Acquirer under the terms of any Divestiture Agreement related to the Season-All Assets; or (c) applicable law(s);
 2. not disclose or convey, directly or indirectly, any Season-All Confidential Business Information to any Person except the Commission-approved Acquirer other than as necessary to comply with: (a) the requirements of the Orders; (b) Respondent's obligations to the Commission-approved Acquirer under the terms of any Divestiture Agreement related to the Season-All Assets; or (c) applicable law(s);
 3. not disclose or convey, directly or indirectly, any Season-All Confidential Business Information related

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to the research, development, manufacture, marketing, commercialization, importation, exportation, cost, pricing, promotion, supply, sales, sales support or use of the Season-All Brand Products to Respondent's employees associated with McCormick's Branded Seasoned Salt Products and related business other than as necessary to comply with: (a) the requirements of the Orders; (b) Respondent's obligations to the Commission-approved Acquirer under the terms of any Divestiture Agreement related to the Season-All Assets; or (c) applicable law(s); and

4. institute procedures and requirements to ensure that employees identified above:
 - a. do not provide, disclose or otherwise make available, directly or indirectly, any Season-All Confidential Business Information in contravention of this Order to Maintain Assets; and
 - b. do not solicit, access or use any Season-All Confidential Business Information in contravention of this Order to Maintain Assets.

G. Not later than five (5) days after the date this Order to Maintain Assets becomes final, Respondent shall provide all of Respondent's employees and other personnel who may have Season-All Confidential Business Information with written or electronic notification (in a form similar to that attached as Appendix A to this Order to Maintain Assets), with return receipt requested, of the restrictions on the use of such information by Respondent's personnel. Respondent shall keep such receipts (or an electronic file of such receipts) for one (1) year after the Closing Date. Respondent shall provide a copy of the form of such notification to the Commission-approved Acquirer and the Commission. Respondent shall also obtain from each employee covered by this Paragraph G an agreement to abide by the applicable restrictions. Respondent shall

Order to Maintain Assets

maintain complete records of all such agreements at Respondent's 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. Respondent shall monitor the implementation by its 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.

- H. Respondent shall adhere to and abide by the Season-All Transitional Agreements. These 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 Respondent 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 business associated with the Season-All Assets, to minimize any risk of loss of competitive potential for the business associated with the Season-All Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Season-All Assets, except for ordinary wear and tear, pending divestiture of the Season-All Assets to a Commission-approved Acquirer.

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

- A. At any time after Respondent signs the Consent Agreement in this matter, the Commission may appoint an Interim Monitor to assure that Respondent expeditiously

Order to Maintain Assets

complies with all of its obligations and performs all of its responsibilities as required by the Orders and the Divestiture Agreement.

- 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 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 the Orders in a manner consistent with the purposes of the Orders.
- D. If an Interim Monitor is appointed pursuant to this Paragraph, 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 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 Commission staff;
 - 2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission;

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3. The Interim Monitor shall serve until the later of:
 - a. the completion by Respondent (or a Divestiture Trustee) of the divestiture of all Season-All Assets in a manner that satisfies the requirements of the Orders; or
 - b. the completion by Respondent of its obligations under the Orders pertaining to the Interim Monitor's service;

provided, however, that the Commission may extend or modify the period of the Interim Monitor's service as may be necessary or appropriate to accomplish the purposes of this Order to Maintain Assets.

- E. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request related to Respondent's compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant Season-All 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 the Orders.
- F. 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 Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

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- G. 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 gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
- H. Respondent 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 Respondent and any reports submitted by the Acquirer with respect to the performance of Respondent's obligations under the Orders or the Divestiture 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 Respondent of its obligations under the Orders.
- I. 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.
- 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.

Order to Maintain Assets

- 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.
- 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.

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 Respondent has fully complied with its obligations to divest the Season-All Assets as required by Paragraphs II. A-E, G and III. of the related Decision and Order in this matter, 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 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 Respondent pursuant to Paragraph VI. of the Decision and Order.

V.

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

- A. any proposed dissolution of Respondent;
- B. any proposed acquisition, merger or consolidation of Respondent; or

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- C. 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.

VI.

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 Respondent, Respondent shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

- A. access, during business office hours of the 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 the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and
- B. to interview officers, directors, or employees of the Respondent, 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 day after the divestiture of the Season-All Assets, as required by and described in the Decision and Order, has

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been completed and Respondent notifies the Commission that all related assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions are complete, or the Commission otherwise directs that this Order to Maintain Assets be terminated.

By the Commission.

**PUBLIC APPENDIX A
TO THE ORDER TO MAINTAIN ASSETS**

**NOTICE OF FTC ORDERS AND REQUIREMENT TO
MAINTAIN CONFIDENTIALITY**

McCormick & Company, Incorporated (“McCormick”), sometimes referred to as “Respondent,” has entered into an Agreement Containing Consent Orders (“Consent Agreement”) with the Federal Trade Commission (“FTC”) providing for divestiture of certain assets and other relief in connection with McCormick’s acquisition of the Lawry’s and Adolph’s brands from Unilever N.V. (the “acquisition”). That Consent Agreement includes two orders: the Decision and Order and the Order to Maintain Assets (“Orders”). Both Orders are attached to this notice.

The Decision and Order requires McCormick to divest the Season-All® line of branded seasoned salt products. This line is hereinafter referred to as the “Season-All Business.” Both the Decision and Order and the Order to Maintain Assets require McCormick to restrict its use of “Season-All Confidential Business Information”, which is any information exclusively related to the research, development, manufacturing, marketing or

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sale of the Season-All Brand Products. When documents or data contain information related to Season-All and other products and topics, only the portion of the document or data related to Season-All is Confidential Business Information. Public information about Season-All or information McCormick lawfully receives about Season-All from a third party is not Confidential Business Information. Complete definitions of all capitalized terms in this notice can be found in Section I of the attached Decision and Order.

The Orders require McCormick to commit that, except in limited circumstances, no Season-All Confidential Business Information will be disclosed to or used by any employee who works for McCormick after the acquisition of the Lawry's and Adolph's branded products, including the Lawry's branded seasoned salt products. In particular, this is to protect Season-All Confidential Business Information from being used *in any way* for the development, manufacture, promotion, marketing or sale of any branded season salt product that is manufactured, marketed or sold by McCormick after the acquisition. The Decision and Order also requires McCormick to provide the buyer all the Season-All Assets with documents or portions of documents (including electronically stored material) that contain Season-All Confidential Business Information.

Under the Decision and Order, McCormick is required to divest the Season-All Assets to Morton International, Inc. ("Morton"). Until a complete divestiture of all of the Season-All Assets occurs, the requirements of the second order – the Order to Maintain Assets – are in place to maintain the continued marketability, viability and competitive vigor of the Season-All Assets, and to ensure that no Season-All Confidential Business Information is communicated to anyone other than Morton personnel or representatives, except to comply with the Orders, McCormick's agreement with Morton, or applicable laws.

You are receiving this notice because you are a McCormick employee who is or was directly involved in the research,

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development, manufacturing, distribution, sale, or marketing of the Season-All Brand Products and may have Season-All Confidential Business Information.

Except as permitted under the Orders, you must keep all Season-All Confidential Business Information confidential and must not provide, discuss, exchange, circulate, or otherwise disclose any Season-All Confidential Business to or with any other person whose job responsibilities relate to McCormick's Branded Season Salt Products. Finally, if you have documents that might contain Season-All Confidential Business Information and you have not received specific instructions as to how these documents should be delivered to Morton, you should contact Geoff Carpenter, Associate General Counsel.

The Decision and Order also restricts the functions that certain employees of McCormick can perform for the Respondent until January 1, 2009.

Any violation of the Decision and Order or the Order to Maintain Assets may subject McCormick to civil penalties and other relief as provided by law. If you have any questions regarding the contents of this notice, the confidentiality of information, the Decision and Order or the Order to Maintain Assets, you should contact Geoff Carpenter, Associate General Counsel.

ACKNOWLEDGMENT

I, _____ (print name), hereby acknowledge that I have read the above notification and agree to abide by its provisions.

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DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by McCormick & Company, Incorporated (“McCormick”), hereinafter “Respondent,” of the Lawry’s and Adolph’s brands from Conopco, Inc., an indirect subsidiary of Unilever N.V. (“Unilever”), 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 attorneys, 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 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”):

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1. Respondent McCormick 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 18 Loveton Circle, Sparks, MD 21152-6000.

2. The Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

II.

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

- A. “McCormick” or “Respondent” means McCormick & Company, Incorporated, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by McCormick, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- B. “Unilever” means Unilever N.V., a corporation organized under the laws of the Netherlands, with its office and principal place of business located at Weena 455, 3013 AL Rotterdam, Netherlands. Unilever includes Conopco, Inc. (“Conopco”), the wholly-owned subsidiary of Unilever’s wholly-owned subsidiary, Unilever United States, Inc.
- C. “Commission” means the Federal Trade Commission.
- D. “Morton” means Morton International, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the state of Indiana, with its office and

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principal place of business located at 123 North Wacker Drive, Chicago, IL 60606-1743. Morton is a wholly-owned subsidiary of Rohm and Haas Company, a Delaware corporation, with its principal executive offices located at 100 Independence Mall West, Philadelphia, PA 19106.

- E. “Acquisition” means the acquisition by McCormick of the Lawry’s and Adolph’s brands described in and contemplated by the Asset Purchase Agreement by and between McCormick and Conopco, dated as of November 13, 2007 (“McCormick/Unilever Agreement”).
- F. “Acquisition Date” means the date on which McCormick closes on the Acquisition pursuant to the McCormick/Unilever Agreement.
- G. “Branded Seasoned Salt Products” means any dry branded products or product formulations (not including private or store label) sold at retail, usually in glass or plastic bottles, that consist primarily of salt, contain at least two other different herbs, spices and/or other seasonings, and are labeled or otherwise described on the container as seasoned salt, including, but not limited to, any products meeting the foregoing definition and acquired by Respondent in connection with the Acquisition.
- H. “Closing Date” means the date on which Respondent (or a Divestiture Trustee) consummates the divestiture of the Season-All Assets to a Commission-approved Acquirer pursuant to and as required by Paragraph II. (or Paragraph III.) of this Order.
- I. “Commission-approved Acquirer” means: (1) Morton; or (2) another entity approved by the Commission to acquire the Season-All Assets that the Respondent is required to divest pursuant to this Order.

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- J. “Divestiture Agreement” means: (1) the Morton Asset Purchase Agreement; or (2) any agreement between the Respondent and another 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, including all amendments, exhibits, attachments, agreements (including, but not limited to, all Season-All Transitional Agreements), and schedules thereto, related to the relevant assets to be divested, transferred, assigned, licensed, granted, delivered or otherwise conveyed, that have been approved by the Commission to accomplish the requirements of this Order.
- K. “Divestiture Trustee” means a trustee appointed by the Commission pursuant to Paragraph III. of this Order.
- L. “Manufacturing Agreement” means the Morton Transitional Manufacturing Agreement as defined in Paragraph I.BB.2 of this Order, or, if Morton is not the Commission-approved Acquirer, any other manufacturing agreement entered into by and between Respondent and another Commission-approved Acquirer, provided such other agreement receives the prior approval of the Commission.
- M. “Morton Asset Purchase Agreement” means the Asset Purchase Agreement by and between the Respondent and Morton, dated as of June 2, 2008, that is referenced and attached to this Order as Confidential Appendix I, including all amendments, exhibits, attachments, agreements (including, but not limited to: the Trademark and Formulation License Agreement dated as of the Closing Date, entered into by and between Morton and McCormick, appended Exhibit A; the Morton Transition Services Agreement, appended Exhibit B; the Morton Transitional Manufacturing Agreement, appended Exhibit

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C; and the Morton Transitional License Agreement, appended Exhibit D), and schedules thereto, related to the relevant Season-All Assets to be divested, transferred, assigned, licensed, granted, delivered or otherwise conveyed to Morton, and that have been approved by the Commission to accomplish the requirements of this Order in connection with the Commission's determination to make the Order final.

- N. "Order to Maintain Assets" means the Order to Maintain Assets issued by the Commission in this matter.
- O. "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.
- P. "Season-All Assets" means all of Respondent McCormick's rights, title and interest, tangible and intangible, worldwide, without limitation, in and to all of the following assets of the Season-All Business:
1. all Season-All Intellectual Property;
 2. all Season-All Confidential Business Information;
 3. all Season-All Sales and Marketing Materials;
 4. at the Commission-approved Acquirer's option, all finished inventory, on hand or in transit, packaging materials, marketing materials, raw materials and work-in-process relating to the Season-All Brand Products;
 5. all customer information, including a list of all customers and/or targeted customers for the Season-All Brand Products and the pricing and/or planned or

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proposed pricing of the Season-All Brand Products for such customers;

6. all unfilled customers orders for finished goods as of the Closing Date related to the Season-All Brand Products (a list of such orders is to be provided to the Commission-approved Acquirer within two (2) days after the Closing Date);
7. a copy of all vendor lists, and the names of all manufacturers and suppliers under contract with Respondent that produce for, or supply, Respondent with ingredients or packaging in connection with the manufacture, production, distribution or sale of the Season-All Brand Products;
8. at the option of the Commission-approved Acquirer as set forth in the Divestiture Agreement with such Acquirer and to the extent presently transferable, divisible or assignable, all rights, title and interest in and to agreements (except contracts of employment), express or implied, relating to the research, design, development, production, distribution, marketing, promotion, sale or after-sales support of the Season-All Brand Products, including contracts with customers, suppliers, contract manufacturers, sales representatives, distributors, agents, licensors and licensees;
9. all rights under warranties and guarantees, express or implied, to which McCormick is entitled and which it can presently convey, relating to the Season-All Brand Products;
10. all consents, licenses, certificates, registrations or permits issued, granted, given or otherwise made available by or under the authority of any government

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body or pursuant to any legal requirement, and all pending applications therefor or renewals thereof, to the extent presently assignable; and

11. all of the Respondent's books, records, books of account, sales and purchase records, lists of customers and prospects, lists of suppliers, marketing and promotional materials and other product information, including website content, pricing information, operations information, sales programs and any deviations and all other documents, files, records and other data and information of the Respondent (whether stored on hard or floppy disks or other media), relating to the operation of the Season-All Business; *provided, however*, that in cases in which documents or other materials included in the Season-All Assets contain information: (1) that relates both to the Season-All Business and to other products or businesses of Respondent and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Season-All Business; or (2) for which Respondent has a legal obligation to retain the original copies, Respondent shall be required to provide only copies or relevant excerpts of the documents and materials containing the information relating to the Season-All Business. In instances where such copies are provided to the Commission-approved Acquirer, and subject to appropriate confidentiality restrictions, Respondent shall provide the Commission-approved Acquirer or its outside counsel access to original documents under circumstances in which copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Respondent provides the Commission-approved Acquirer with the above-described information without requiring Respondent completely to divest itself of information that, in content, also relates to products and businesses other than the

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Season-All Business or allowing the Commission-approved Acquirer to use or disclose such information in connection with products or businesses other than the Season-All Business.

12. *Provided, however,* that the Season-All Assets shall not include:
- a. cash on hand, cash equivalents, bank deposits and investments (including stock, debt instruments, options and other instruments and securities) of Respondent;
 - b. accounts, notes receivable and similar rights of Respondent to receive payments arising out of the operation of the Season-All Business on or before the Closing Date;
 - c. tax refunds, tax, insurance and other claims or rights to recoveries and similar benefits of the Season-All Business on or before the Closing Date, and any prepaid items with respect to the Season-All Business on or before the Closing Date, except as otherwise provided in a Divestiture Agreement;
 - d. subject to any limited or transitional rights conveyed to the Commission-approved Acquirer in a Divestiture Agreement, including any Season-All Transitional Agreements, the name and mark “McCormick” and all derivatives and formatives thereof, including, but not limited to, the trademarks pertaining to the products set forth on Schedule 1.1(b)(vi) to the Morton Asset Purchase Agreement, together with all issued registrations and pending applications for registration with respect to the foregoing and all goodwill associated therewith;

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- e. unless requested by the Commission-approved Acquirer in a Divestiture Agreement: machinery, fixtures, equipment, vehicles, furniture, tools and other personal property associated with the manufacture, packaging, distribution, marketing or sale of the Season-All Brand Products;
- f. any other assets not covered in Paragraphs I.P.12.a – I.P.12.e, including without limitation trademarks and all issued registrations and pending applications for registration and all goodwill associated therewith, rights, products, property, documents, materials, records, information, or data relating or pertaining to Respondent McCormick’s products, operations, businesses or activities, that are not exclusively related to the Season-All Business or that are otherwise expressly excluded in a Divestiture Agreement; or
- g. any rights to use Respondent’s general business strategies or practices relating to products, product formulations, market research activities, methods or methodologies that McCormick uses in connection with other products in addition to Season-All Brand Products for the purpose of developing, marketing, manufacturing, promoting, managing, distributing, or selling its own brands and products, except as conveyed to the Commission-approved Acquirer in a Divestiture Agreement or through a nonexclusive license by Respondent as otherwise necessary to permit the continued use of the Season-All Assets in the Season-All Business in the same manner in which such assets were engaged at the time of the announcement of the proposed Acquisition.

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- Q. “Season-All Brand Products” means (A) those products consisting of: (1) Original Season-All® brand seasoned salt; (2) Garlic Season-All® brand seasoned salt; (3) Pepper Season-All® brand seasoned salt; (4) Spicy Season-All® brand seasoned salt; (5) 25% Less Sodium Season-All® brand seasoned salt; and (6) Season-All® brand coating mix; and (B) any other product under development or developed prior to the Closing Date to be marketed as a Branded Seasoned Salt Product under the Season-All® brand.
- R. “Season-All Brand Products Key Employee(s)” means salaried and management level employees of Respondent McCormick who have participated directly (irrespective of the portion of working time involved, but excluding participation that was a part of a broad executive management portfolio, or of oversight of legal, accounting, tax or financial compliance) in leading the formulation of retail brand marketing strategies, including marketing, promotion, and advertising strategies relating to the Season-All Brand Products in the United States within the one (1) year period immediately prior to the Closing Date. These employees include employees with primary responsibility for brand management, sales training, and market research for Season-All Brand Products, and those employees of Respondent that, within one (1) year prior to the Closing Date, have dedicated at least twenty (20) percent of working time to the Season-All Brand Products. In the event that Morton is the Commission-approved Acquirer, those employees will be deemed to be the individuals that are specifically identified in Appendix II to this Order.
- S. “Season-All Business” means all of the operations and business of Respondent McCormick relating to the research, development, manufacture, marketing,

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advertising, promotion, distribution, sale or after-sales support for the Season-All Brand Products.

- T. “Season-All Confidential Business Information” means, subject to Paragraphs I.P.11 – I.P. 12 of this Order, all information owned by, or in the possession or control of, Respondent 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 Season-All Brand Products; *provided, however*, that Season-All Confidential Business Information shall not include the following:
- (i) information that Respondent acquires from a third party or that subsequently falls within the public domain through no violation of this Order or breach of any confidentiality or non-disclosure agreement with respect to such information by Respondent;
 - (ii) information that is required by law to be publicly disclosed; or
 - (iii) information that does not relate to the Season-All Assets.
- U. “Season-All Copyrights” means, subject to Paragraphs I.P.11 - I.P.12 of this Order, all rights to all original works of authorship of any kind related to the Season-All Brand Products and any registrations and applications for registrations thereof, including, but not limited to, the following, as applicable: the Season-All Confidential Business Information; the Season-All Sales and Marketing Materials; development data and reports relating to the research, development, manufacture, marketing or sale of the Season-All Brand Products; sales forecasting models; Website content and advertising and display materials; all records, including customer lists and information, sales

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force call activity reports, vendor lists, sales data, slotting allowance data, manufacturing records, manufacturing processes and supplier lists; and all data contained in quality assurance and quality control information and documentation.

V. “Season-All Intellectual Property” means, subject to Paragraphs I.P.11 – I.P.12 of this Order, all of Respondent’s rights to:

1. Season-All Trademarks;
2. Season-All Trade Dress;
3. Season-All Manufacturing Technology;
4. Season-All Copyrights;
5. Season-All Patents; and
6. trade secrets, know-how, techniques, inventions, practices, methods, data contained in software, and other confidential or proprietary technical, business, research, development and other materials and information, and all rights in any jurisdiction to limit the use or disclosure thereof, anywhere in the world, of or relating to the Season-All Brand Products.

Provided, however, that where such intellectual property (other than Season-All Trademarks or Season-All Trade Dress) also relates to other brands or businesses of Respondent McCormick, Respondent McCormick shall grant the Commission-approved Acquirer the rights to use such intellectual property on a non-exclusive basis in connection with the Season-All Business as is needed to accomplish the purposes of this Order.

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- W. “Season-All Manufacturing Technology” means, subject to Paragraphs I.P.11 – I.P.12 of this Order, all technology, technical information, data, trade secrets, know-how, and proprietary information, anywhere in the world, related to the manufacture (including, at the Commission-approved Acquirer’s option as set forth in the Divestiture Agreement, all equipment used to manufacture), bottling and packaging of the Season-All Brand Products, including, but not limited to, all recipes, formulas, formulations, blend specifications, processes, procedures, product development records, trade secrets, manuals, quality assurance and quality control information and documentation, regulatory communications, and all other information relating to the manufacturing and packaging process, and vendor and supplier lists.
- X. “Season-All Patents” means, subject to Paragraphs I.P.11 – I.P.12 of this Order, all patents, patents pending, patent applications and statutory invention registrations, including 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, anywhere in the world, related to the Season-All Brand Products.
- Y. “Season-All Sales and Marketing Materials” means, subject to Paragraphs I.P.11 – I.P.12 of this Order, all sales, marketing and promotional materials used anywhere in the world with respect to the Season-All Brand Products as of the Closing Date, including, without limitation: all advertising materials; customer lists; contribution statements; Internet/Web sites and domain name(s) (uniform resource locators), and registration(s) thereof, and related materials; product data; profit and loss statements; price lists; mailing lists; sales materials; marketing information (*e.g.*, customer sales and

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competitor data); catalogs, sales promotion literature and other promotional materials; spend records related to advertising, marketing or promotion; training and other materials associated with the Season-All Brand Products; and all copyrights in and to the Season-All Sales and Marketing Materials. Season-All Sales and Marketing Materials include all assets, rights and other intellectual property set forth on Schedule 1.1(a)(iii)(B) to the Morton Asset Purchase Agreement.

- Z. “Season-All Trade Dress” means, subject to Paragraphs I.P.11 – I.P.12 of this Order, the current trade dress of the Season-All Brand Products, including, but not limited to, product packaging associated with the sale of Season-All Brand Products anywhere in the world, logos, domain names, and the lettering of the Season-All Brand Products’ trade name or brand name; but excluding any portion of any such trade dress rights that is solely related to Respondent McCormick or is also related to any of its businesses, products, or brands other than the Season-All Brand Products. Season-All Trade Dress includes all assets, rights and other intellectual property set forth on Schedule 1.1(a)(iii)(B) to the Morton Asset Purchase Agreement.
- AA. “Season-All Trademarks” means, subject to Paragraphs I.P.11 – I.P.12 of this Order, all trademarks, trade names and brand names, including registrations and applications for registration thereof (and all renewals, modifications, and extensions thereof), and all common law rights, and the goodwill symbolized by and associated therewith, anywhere in the world, for or relating to the Season-All Brand Products. Season-All Trademarks include all assets, rights and other intellectual property set forth on Schedule 1.1(a)(ii)(B) to the Morton Asset Purchase Agreement.

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- BB. “Season-All Transitional Agreements” means any transitional agreements or arrangements entered into by and between Respondent McCormick and a Commission-approved Acquirer that receives the prior approval of the Commission, including, but not limited to, the following agreements:
1. The Agreement for Transition Services entered into by and between McCormick and Morton dated as of the Closing Date, appended to the Morton Asset Purchase Agreement as Exhibit B, and all amendments, exhibits, attachments, and schedules thereto (“Morton Transition Services Agreement”);
 2. The Manufacturing Agreement entered into by and between Morton and McCormick dated as of the Closing Date, appended to the Morton Asset Purchase Agreement as Exhibit C, and all amendments, exhibits, attachments, and schedules thereto (“Morton Transitional Manufacturing Agreement”); and
 3. The License Agreement entered into by and between McCormick and Morton dated as of the Closing Date, appended to the Morton Asset Purchase Agreement as Exhibit D, and all amendments, exhibits, attachments, and schedules thereto (“Morton Transitional License Agreement”).
- CC. “Transition Services Agreement” means the Morton Transition Services Agreement as defined in Paragraph I.BB.1. of this Order, or, if Morton is not the Commission-approved Acquirer, any other transition services agreement entered into by and between Respondent and another Commission-approved Acquirer, provided such other agreement receives the prior approval of the Commission.

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

- A. Not later than fifteen (15) days after the Acquisition Date, Respondent shall divest the Season-All Assets, absolutely and in good faith, to Morton pursuant to and in accordance with the Morton Asset Purchase Agreement. The Morton Asset Purchase Agreement is incorporated by reference into this Order and made a part hereof as Confidential Appendix I. Any failure by Respondent to comply with the Morton Asset Purchase Agreement shall constitute a failure to comply with this Order. The Morton Asset Purchase Agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order. Nothing in this Order shall reduce, or be construed to reduce, any rights or benefits of Morton, or any obligations of Respondent, under the Morton Asset Purchase Agreement. If any term of the Morton Asset Purchase Agreement varies from the terms of this Order (“Order Term”), then to the extent that Respondent cannot fully comply with both terms, the Order Term shall determine Respondent’s obligations under this Order. Notwithstanding any paragraph, section, or other provision of the Morton Asset Purchase Agreement, any failure by Respondent to meet any condition precedent to closing (whether waived or not) or any modification of the Morton Asset Purchase Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

Provided, however, that if Respondent has divested the Season-All Assets to Morton prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that Morton is not an acceptable purchaser of the Season-All Assets, then Respondent shall

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immediately rescind the transaction with Morton and shall divest the Season-All Assets within one hundred eighty (180) days from the date the Order becomes final, absolutely and in good faith, at no minimum price, to a Commission-approved Acquirer and only in a manner that receives the prior approval of the Commission;

Provided further, however, that if the Respondent has divested the Season-All Assets to Morton 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 Respondent that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct the Respondent, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Season-All Assets to Morton (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine is necessary to satisfy the requirements of this Order;

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

- B. No later than the Closing Date, Respondent shall secure all consents, assignments, and waivers from all Persons that are necessary to effectuate the divestiture, transfer, assignment or other conveyance of the Season-All Assets to a Commission-approved Acquirer.
- C. Respondent shall:
 - 1. submit and deliver to the Commission-approved Acquirer, at Respondent's expense, in good faith and as soon as practicable, in a manner that ensures its completeness and accuracy, all Season-All Confidential Business Information;

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2. provide the Commission-approved Acquirer with access to all Season-All Confidential Business Information and to employees who possess or are able to locate or identify the books, records, and files that contain Season-All Confidential Business Information pending complete delivery of all the Season-All Confidential Business Information;
 3. not use, directly or indirectly, any Season-All Confidential Business Information related to the research, development, manufacturing, marketing, or sale of the Season-All Assets other than as necessary to comply with the requirements of this Order or applicable law;
 4. not provide, disclose, convey or otherwise make available, directly or indirectly, any Season-All Confidential Business Information to any person except the Commission-approved Acquirer, except as required by law.
- D. Not later than five (5) days after the Acquisition Date, or the date on which the Order to Maintain Assets becomes final, whichever is earlier, Respondent shall provide written or electronic notification of the restrictions on the use of the Season-All Confidential Business Information by Respondent's personnel to all of Respondent's employees who:
1. are, or were, directly involved in the research, development, manufacturing, distribution, sale or marketing of the Season-All Brand Products; and
 2. may have Season-All Confidential Business Information.

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E. Respondent shall:

1. provide such notification (in a form similar to that attached as Appendix B to the Order to Maintain Assets) by e-mail with return receipt requested or by whatever manner or form of transmission as will assure receipt and acknowledgment by Respondent's employees, and keep a file of such receipts for one (1) year after the Closing Date.
2. maintain complete records of all such files at Respondent's corporate headquarters, and provide an officer's certification to the Commission stating that such an acknowledgment and file retention program has been implemented and is being complied with.

F. Respondent shall prohibit any Season-All Brand Products Key Employee from participating in formulation of the marketing, promotion or advertising strategies or in the research and development of Respondent's Branded Seasoned Salt Products until January 1, 2009.

G. Respondent shall require, to the extent lawful, as a condition of continued employment following the divestiture of the Season-All Assets, that each Season-All Brand Products Key Employee retained by Respondent, and the direct supervisor(s) of any such employee, sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Season-All Confidential Business Information related to the Season-All Brand Products strictly confidential, including the nondisclosure of such information to all other employees, executives, or other personnel of Respondent (other than as necessary to comply with the requirements of this Order) until January 1, 2009.

H. Respondent shall:

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1. for a period of up to one (1) year from the Closing Date, provide the Commission-approved Acquirer with the opportunity to enter into employment contracts with the Season-All Brand Products Key Employees. This period is hereinafter referred to as the “Employee Access Period”; and
 2. not later than ten (10) days after the Closing Date at the request of the Commission-approved Acquirer, or otherwise upon reasonable notice and request by the Commission-approved Acquirer, and subject to compliance with all laws: (1) provide the Commission-approved Acquirer with a list of all the Season-All Brand Products Key Employees; (2) allow the Commission-approved Acquirer to interview any of the Season-All Brand Products Key Employees; and (3) allow the Commission-approved Acquirer access to the personnel files and other documentation (“Employee Information”) relating to any such Season-All Brand Products Key Employee.
 3. provide an opportunity for the Commission-approved Acquirer to: (1) meet personally, and outside of the presence or hearing of any employee or agent of Respondent, with any one or more of the Season-All Brand Products Key Employees; and (2) make offers of employment to any one or more of the Season-All Brand Products Key Employees.
- I. Respondent shall:
1. during the Employee Access Period, not interfere with the hiring or employing by the Commission-approved Acquirer of Season-All Brand Products Key Employees, and remove any impediments within the control of Respondent that may deter these employees from accepting employment with the Commission-

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approved Acquirer, including, but not limited to, any noncompete provisions or nondisclosure provisions (to the extent that they relate to Season-All Brand Products) of employment or other contracts with Respondent that would affect the ability or incentive of those individuals to be employed by the Commission-approved Acquirer. In addition, Respondent shall not make any counteroffer to a Season-All Assets Key Employee who receives a written offer of employment from the Commission-approved Acquirer;

Provided, however, that this Paragraph II.I.1. shall not prohibit the Respondent from making offers of employment to or employing any Season-All Brand Products Key Employee during the Employee Access Period where the Commission-approved Acquirer has notified the Respondent in writing that the Commission-approved Acquirer does not intend to make an offer of employment to that employee;

Provided further that if the Respondent notifies the Commission-approved Acquirer in writing of their desire to make an offer of employment to a particular Season-All Brand Products Key Employee and the Commission-approved Acquirer does not make an offer of employment to that employee within twenty (20) days of the date the Commission-approved Acquirer receives such notice, the Respondent may make an offer of employment to that employee;

2. until the Closing Date, provide all Season-All Brand Products Key Employees with reasonable financial incentives to continue in their positions and to market and promote the Season-All Brand Products consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Season-All Assets and to promote successful execution of the pre-Acquisition

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marketing plans related to the Season-All Brand Products. Such incentives shall include a continuation of all employee compensation and benefits offered by Respondent until the Closing Date 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 Respondent to terminate the employment of any employee or prevent Respondent from continuing the employment of Season-All Brand Products Key Employees (other than those conditions contained in this Order) in connection with the Acquisition or prevents the Respondent from continuing the employment of the Season-All Brand Products Key Employees 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 employee of the Commission-approved Acquirer with any amount of responsibility related to the Season-All Assets (“Divestiture Employee”) to terminate his or her employment relationship with the Commission-approved Acquirer; or
 - b. hire any Divestiture Employee;

Provided, however, Respondent may hire any former Divestiture Employee whose employment has been terminated by the Commission-approved Acquirer or who independently applies for employment with the Respondent, as long as such employee was not solicited in violation of the nonsolicitation requirements contained herein;

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

- J. Upon reasonable notice and request by the Commission-approved Acquirer, and for a period not to exceed eighteen (18) months, Respondent shall make available to the Commission-approved Acquirer such personnel, assistance and training as the Commission-approved Acquirer might reasonably need to transfer the Season-All Assets pursuant to a Transition Services Agreement, and shall continue providing such personnel, assistance and training, at the request of the Commission-approved Acquirer, until the Season-All Assets are completely transferred to the Commission-approved Acquirer in a manner that fully promotes their viability and commercial usefulness. In the case of a Commission-approved Acquirer other than Morton, this assistance may include, at the Commission-approved Acquirer's sole discretion, but is not limited to, such assistance as is contemplated in the Morton Transition Services Agreement, attached to this Order as Exhibit B of the Morton Asset Purchase Agreement.
- K. Upon reasonable notice and request by the Commission-approved Acquirer, and subject to appropriate safeguards against the transmittal of confidential or competitively-sensitive information, Respondent shall provide, in a timely manner, the assistance of knowledgeable employees of the Respondent to assist the Commission-approved Acquirer (1) to prosecute any pending patent or trademark applications included in the divested Season-All Assets, and (2) to defend against, respond to, or otherwise

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participate in any litigation related to the divested Season-All Assets.

- L. Upon reasonable notice and request by the Commission-approved Acquirer, and subject to appropriate safeguards against the transmittal of confidential or competitively-sensitive information, Respondent shall enter into a Manufacturing Agreement with the Commission-approved Acquirer for the supply of the divested Season-All Brand Products for a period not to exceed eighteen (18) months to provide a steady supply of the divested Season-All Brand Products until such time as the Commission-approved Acquirer is able to obtain or manufacture an independent supply; *provided, however*, Respondent may not modify or amend such Manufacturing Agreement without receiving the prior approval of the Commission.

- M. The purpose of this Paragraph II. of this Order is to ensure the continuation of the Season-All Assets as part of an ongoing viable enterprise engaged in the Season-All Business in the same manner in which such assets were 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 divested all of the Season-All Assets and fully complied with all of the divestiture-related obligations as required by Paragraph II. of this Order, the Commission may appoint a trustee to divest the Season-All Assets in a manner that satisfies the requirements of Paragraph II. of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission

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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 relevant assets in accordance with the terms of this Order. 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 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 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. Within ten (10) days after 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 relevant divestiture or transfer required by the Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondent 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 relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.
2. The Divestiture Trustee shall have twelve (12) months from 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 twelve (12) month 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. 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 III. in an amount equal to the delay, as determined by the Commission

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or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable best 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 a Commission-approved Acquirer as required by this Order;

Provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondent from among those approved by the Commission;

Provided further, however, that Respondent shall select such Person within five (5) days of 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 and, in the case of a court-appointed Divestiture

Decision and Order

Trustee, by the court, 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, 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 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 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.
8. The Divestiture Trustee shall act in a fiduciary capacity for the benefit of the Commission.
9. 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.
10. Respondent may require the Divestiture Trustee and each of the Divestiture Trustee's consultants,

Decision and Order

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 III.
- 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.

IV.

IT IS FURTHER ORDERED that for a period of ten (10) years from the date this Order becomes final, Respondent shall not, without providing advance written notification to the Commission in a manner described in this paragraph, directly or indirectly:

- A. Acquire:
 - 1. any assets for use in the development, manufacture or sale of a Branded Seasoned Salt Product from any Person other than Respondent who develops, manufactures, or sells Branded Seasoned Salt Products in the United States, other than an acquisition in the ordinary course of business; or

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2. a cumulative financial interest in excess of one (1) percent in any Person other than Respondent who develops, manufactures, or sells Branded Seasoned Salt Products in the United States; or
- B. Enter into any contract to participate in the management of any Person other than Respondent who develops, manufactures, or sells Branded Seasoned Salt Products in the United States. Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondent and not of any other party to the transaction. Respondent shall provide the notification to the Commission at least thirty (30) days prior to consummating any such 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), Respondent shall not consummate the transaction until thirty (30) days after substantially complying with such request. 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.

Decision and Order

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

- A. Within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter until Respondent has fully complied with the provisions of Paragraphs II. A-E, G, and III. of this Order, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it has complied, is complying, and will comply with this Order and with the Order to Maintain Assets. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with this Order and with the Order to Maintain Assets, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

- B. Beginning one (1) year after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order becomes final, for the next nine (9) years, Respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which it is complying and has complied with this Order, the Order to Maintain Assets, and the Divestiture Agreements.

Decision and Order

VI.

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

- A. any proposed dissolution of Respondent,
- B. any proposed acquisition, merger or consolidation of Respondent, or
- C. 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.

VII.

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 Respondent, Respondent shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

- A. access, during business office hours of the 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 the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and
- B. to interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

Decision and Order

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on September 12, 2018.

By the Commission.

CONFIDENTIAL APPENDIX I

**MORTON ASSET PURCHASE AGREEMENT
[Redacted From Public Record
But Incorporated By Reference]**

APPENDIX II

SEASON-ALL BRAND PRODUCTS KEY EMPLOYEES

Margaret Kime, Director of Flavor Enhancers

Dina Clark, Senior Marketing Manager for Flavor Enhancers

Beth Brubaker, Product Manager for Flavor Enhancers

Kim Hart, Associate Product Manager for Flavor Enhancers

Analysis to Aid Public Comment

**ANALYSIS OF THE 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 McCormick & Company, Incorporated (“McCormick” or “Respondent”), which is designed to remedy the anticompetitive effects that would otherwise result from McCormick’s proposed acquisition of Unilever’s Lawry’s and Adolph’s brands of seasoned salt products. Under the terms of the proposed Consent Agreement, McCormick is required to divest its entire Season-All business to an up-front buyer, Morton International, Inc. (“Morton” or “Purchaser”).

The proposed Consent Agreement has been placed on the public record for thirty (30) days to solicit comments from 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 an Asset Purchase Agreement dated November 13, 2007 (the “Acquisition Agreement”), McCormick proposes to acquire the Lawry’s and Adolph’s brands of marinades, spice, and seasoning products (“Lawry’s”) from Unilever N.V., a Netherlands corporation, for approximately \$605 million in cash. 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 market for branded seasoned salt in the United States.

Analysis to Aid Public Comment

II. Description of the Parties

McCormick is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Maryland. The company manufactures, markets, and sells spices, seasonings, and flavors to grocery retailers and the food industry. In 2006, McCormick's sales were approximately \$2.7 billion.

Unilever N.V., a Netherlands corporation, is an international manufacturer of leading brands in the food, home care, and personal care industry, including Lawry's and Adolph's. In 2006, Lawry's and Adolph's brands combined sales were approximately \$153 million.

III. Branded Seasoned Salt

The relevant product market in which to assess the competitive effects of the proposed Acquisition is the manufacture and sale of branded seasoned salt products. Branded seasoned salt products include several different types of spices, including seasoned salt, garlic salt, and reduced sodium varieties. The evidence indicates that consumers, if faced with a five to ten percent increase in the price of branded seasoned salt, would not switch to other spice blends or seasoning products.

The relevant geographic market in which to assess the impact of the Proposed Acquisition is the United States. Brand equity plays a critical role in determining the competitive strength of a seasoned salt product. Consistent with Commission findings in previous branded consumables cases, the need for distribution, infrastructure, and a U.S. sales force creates significant impediments to the ability of foreign firms to successfully and competitively sell branded seasoned salt into the United States.

The United States market for branded seasoned salt is highly concentrated. Today, this approximately \$100 million market consists of two significant branded products: Lawry's line of seasoned salt products and McCormick's Season-All products.

Analysis to Aid Public Comment

The Proposed Acquisition would significantly increase market concentration and eliminate substantial competition between the only two significant suppliers of branded seasoned salt products in the United States. As a result of the acquisition, McCormick would account for nearly 80% of the sales of branded seasoned salt products in the United States.

Consumers have benefitted from the competition between McCormick and Lawry's on pricing, discounts, promotional trade spending, and product innovation. Thus, unremedied, the proposed acquisition likely would cause significant anticompetitive harm by enabling McCormick 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. Entry

Entry into this market would require the investment of high sunk costs to, among other things, develop products, 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.

V. The Terms of the Agreement Containing Consent Orders

The proposed Consent Agreement will remedy the Proposed Acquisition's anticompetitive effects in the relevant market. The Consent Agreement preserves competition in the branded seasoned salt market by requiring McCormick to divest its Season-All (seasoned salt spice blends) business to an up-front buyer, Morton. The Season-All assets include: Season-All

Analysis to Aid Public Comment

seasoned salt, Garlic Season-All seasoned salt, Pepper Season-All seasoned salt, Spicy Season-All seasoned salt, 25% Less Sodium Season-All seasoned salt, and Season-All coating mix.

The Commission is satisfied that Morton is a well-qualified acquirer of the Season-All business. Morton supplies an extensive variety of salt products to the food service industry. These products currently include table salt, kosher salt, French fry salt, as well as disposable shakers, portion packets, water softening salts, and ice control salts. Morton has the resources, technical skills, and experience to ensure the continued success of the Season-All business.

The proposed Consent Agreement requires that the divestitures occur no later than ten (10) business days after the acquisition is consummated. However, if McCormick divests the Season-All business to Morton during the public comment period, and if, at the time the Commission decides to make the order final, the Commission notifies Respondent that Purchaser is not an acceptable acquirer or that the asset purchase agreement with Purchaser is not an acceptable manner of divestiture, then Respondent must immediately rescind the transaction in question and divest those assets to another buyer within three (3) months of the date the order becomes final. At that time, Respondent must divest those assets only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

The proposed Consent Agreement also enables the Commission to appoint a trustee to divest any assets identified in the order that Respondent has not divested to satisfy the requirements of the order. In addition, the order enables the Commission to seek civil penalties against Respondent for non-compliance with the order.

The proposed Consent Agreement further requires McCormick to maintain the viability of the assets identified for divestiture. Among other requirements related to maintaining

Analysis to Aid Public Comment

operations of the assets, the proposed Consent Agreement requires McCormick to: (1) maintain the viability, competitiveness, and marketability of the assets to be divested; (2) not cause the wasting or deterioration of the assets to be divested; (3) not sell, transfer, encumber, or otherwise impair the assets' marketability or viability; (4) maintain the assets consistent with past practices; (5) use best efforts to preserve the assets' existing relationships with suppliers, customers, and employees; and (6) keep and maintain the assets at inventory levels consistent with past practices.

The proposed Consent Agreement prohibits McCormick, for ten (10) years, from acquiring, without providing the Commission with prior notice, any other seasoned salt product, or any interest in any other spice blends business. The provisions regarding prior notice are consistent with prior Orders. The proposed Consent Agreement does not restrict McCormick from expanding its line of spices.

McCormick is required to file compliance reports with the Commission, the first of which is due within thirty (30) days of the date on which Respondent signed the proposed Consent Agreement, and every thirty (30) days thereafter until the divestitures are completed, and annually for ten (10) years.

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 and the Order to Maintain Assets, or to modify their terms in any way.

Complaint

IN THE MATTER OF

SUN PHARMACEUTICAL INDUSTRIES LTD.

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-4230; File No. 071 0193

Complaint, August 12, 2008 – Decision, September 16, 2008

This consent order addresses the proposed acquisition of Taro Pharmaceutical Industries Ltd. by Sun Pharmaceutical Industries Ltd. Both companies develop and manufacture generic pharmaceutical products. The transaction likely would lead to anticompetitive effects in the U.S. markets for three different forms of carbamazepine, an anticonvulsant that is used primarily as an anti-epileptic drug. Pursuant to the order, Sun is required to divest all of its rights and assets necessary to manufacture and market (1) generic immediate-release carbamazepine tablets, (2) generic chewable carbamazepine tablets, and (3) generic extended-release carbamazepine tablets to Torrent Pharmaceuticals Ltd. or another Commission-approved acquirer. If the parties fail to divest within six months, the Commission may appoint a trustee to divest the products. To ensure that the divestitures are successful, the order requires Sun to provide transitional services to enable the acquirer 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 Sun.

Participants

For the *Commission*: *Daniel P. Ducore, Leslie Farber, Mark Frankena, Laura Hosken, David L. Inglefield, Christopher Metcalf, Michael R. Moiseyev, James Southworth, and David Von Nirschl.*

For the *Respondent*: *Jessica K. Delbaum and Kenneth S. Prince, Shearman & Sterling 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 Sun Pharmaceutical Industries Ltd. (“Sun”), a corporation subject to the jurisdiction of the Commission, proposes to acquire all of the voting securities of Taro Pharmaceutical Industries Ltd. (“Taro”), 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. “Sun” or “Respondent” means Sun Pharmaceutical Industries Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Sun (including, but not limited to, Alkaloida Chemical Company Exclusive Group Ltd. and Aditya Acquisition Company Ltd.) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Sun shall include Taro.
4. “Taro” means Taro Pharmaceutical Industries Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Taro (including, but not

Complaint

limited to, Taro Pharmaceuticals U.S.A., Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

II. RESPONDENT

5. Respondent Sun Pharmaceutical Industries Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of Republic of India, with its headquarters address at Acme Plaza, Andheri Kurla Road, Andheri (East), Mumbai 400 059 India, and registered office of its United States subsidiary, Sun Pharmaceutical Industries Inc., at 29714 Orion Court, Farmington Hills, Michigan 48334-4144.

6. Respondent, through its majority-owned U.S. subsidiary Caraco Pharmaceutical Laboratories, Ltd., is engaged in the research, development, manufacture, and sale of generic pharmaceutical products in the United States.

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. ACQUIRED COMPANY

8. Taro is a corporation organized, existing, and doing business under and by virtue of the laws of Israel with its headquarters address at Italy House, Euro Park, Yakum 60972, Israel. Taro, among other things, is engaged in the research, development, manufacture, and sale of generic pharmaceutical products. Taro markets and sells generic products in the United States through its U.S. subsidiary, Taro Pharmaceuticals USA, Inc., located at 3 Skyline Drive, Hawthorne, New York 10532.

Complaint

9. Taro 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 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.

IV. THE PROPOSED ACQUISITION

10. On May 18, 2007, Taro and subsidiaries of Sun entered into an Agreement of Merger (the “Merger Agreement”) whereby a subsidiary of Sun would acquire Taro via a merger. On May 28, 2008, Taro attempted to terminate the Merger Agreement. Sun has challenged the termination and has announced that it will exercise options, through its subsidiary Alkaloida Chemical, to purchase all the shares held by the controlling shareholders of Taro (the “Options”). In addition, Alkaloida Chemical, commenced a tender offer on June 30, 2008 for all outstanding ordinary shares (the “Tender Offer”). Through the exercise of the Options and/or the Tender Offer, Sun proposes to acquire all of the voting securities of Taro (“the Acquisition”).

V. THE RELEVANT MARKETS

11. 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 the following generic pharmaceutical products:

- a. immediate-release (“IR”) carbamazepine tablets;
- b. chewable carbamazepine tablets; and
- c. extended-release carbamazepine tablets.

Complaint

12. 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.

VI. THE STRUCTURE OF THE MARKETS

13. Sun and Taro are two of only four suppliers of generic IR carbamazepine tablets in the United States: Taro, Sun, Teva Pharmaceutical Industries Ltd. (“Teva”), and Apotex, with respective market shares of approximately 51 percent, 18 percent, 27 percent, and 1 percent. Carbamazepine is an anticonvulsant used primarily to control and prevent epileptic seizures. The market for generic immediate-release carbamazepine tablets is already highly concentrated, and the Acquisition would raise the HHI concentration from 3,766 points to 5,653 points.

14. Generic chewable carbamazepine tablets are currently supplied by only three companies in the United States: Teva, Taro, and Sun, with respective market shares of approximately 65 percent, 30 percent, and 4 percent. Chewable carbamazepine tablets contain the same carbamazepine anticonvulsant drug as the immediate-release tablets, and thus, is used in the same manner to control and prevent epileptic seizures. The Acquisition would increase the HHI concentration in this market from 5,202 points to 5,456 points.

15. Sun and Taro are each awaiting FDA approval of their respective generic versions of Novartis’ Tegretol®-XR extended-release carbamazepine tablets. They are the only two companies developing generic extended-release carbamazepine tablets that will be AB-rated substitutes for Tegretol®-XR tablets. The Acquisition would create a monopoly in the market for generic extended-release carbamazepine tablets when both companies’ products are approved.

Complaint

VII. ENTRY CONDITIONS

16. Entry into the relevant product markets described in Section V 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 markets are relatively small and in decline, limiting sales opportunities for any potential new entrant.

VIII. 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 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 Sun and Taro in the markets for the manufacture and sale of generic immediate-release carbamazepine tablets and chewable carbamazepine tablets, thereby: (1) increasing the likelihood that Sun 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 the expected actual, direct, and substantial competition between Sun and Taro upon their respective approvals in the market for the manufacture and sale of extended-release carbamazepine tablets, thereby: (1) increasing the likelihood that Sun will be able to unilaterally exercise market power in this market, and (2) increasing the

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likelihood that customers would be forced to pay higher prices.

IX. VIOLATIONS CHARGED

18. The Acquisition described in Paragraph 10 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

19. The Acquisition described in Paragraph 10, 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 August, 2008, issues its Complaint against said Respondent.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Sun Pharmaceutical Industries Ltd. (“Sun”), hereinafter referred to as “Respondent,” of Taro Pharmaceutical Industries Ltd. (“Taro”) 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 that, 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

Order to Maintain Assets

Respondent, its attorneys, 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 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 Sun Pharmaceutical Industries Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of Republic of India, with its headquarters address at Acme Plaza, Andheri Kurla Road, Andheri (East), Mumbai 400 059 India, and the address of the registered office of its United States subsidiary, Sun Pharmaceutical Industries Inc., at 29714 Orion Court, Farmington Hills, Michigan 48334-4144.

2. Taro Pharmaceutical Industries Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Israel, with its headquarters address at Italy House, Euro Park, Yakum 60972, Israel, and the address of the principal place of business of its United States subsidiary, Taro Pharmaceuticals U.S.A., Inc., at 3 Skyline Drive, Hawthorne, New York 10532.

3. The Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

Order to Maintain Assets

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), which are incorporated herein by reference and made a part hereof, shall apply:

- A. “Sun” or “Respondent” means Sun Pharmaceutical Industries Ltd., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Sun (including, but not limited to, Alkaloida Chemical Company Exclusive Group Ltd. and Aditya Acquisition Company Ltd.) and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each. After the Acquisition, Sun shall include Taro.
- B. “Taro” means Taro Pharmaceutical Industries Ltd., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Taro (including, but not limited to, Taro Pharmaceuticals U.S.A., Inc.), and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- C. “Commission” means the Federal Trade Commission.
- D. “Decision and Order” means the:
 - 1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final Decision and Order by the Commission; and

Order to Maintain Assets

2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission in this matter.
- E. “Divestiture Assets” means the Carbamazepine Product Assets, as defined in the Decision and Order.
- F. “Divestiture Product Business(es)” means the Respondent’s 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.
- G. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets.
- H. “Orders” means the Decision and Order and this Order to Maintain Assets.

II.

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final:

- A. Until Respondent fully transfers the Divestiture Assets to the Acquirer, Respondent shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the Divestiture Product Business, to minimize any risk of loss of competitive potential for the Divestiture Product Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Divestiture Product Business except for ordinary wear and tear. Respondent 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

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the full economic viability, marketability or competitiveness of the Divestiture Product Business.

- B. Until Respondent fully transfers the Divestiture Assets to the Acquirer, Respondent shall maintain the operations of the Divestiture Product Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such business) and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Divestiture Product Business and shall use its best efforts to preserve 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 Business. Respondent's responsibilities shall include, but are not limited to, the following:
1. providing the Divestiture Product Business with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the Divestiture Product Business;
 2. continuing, at least at their scheduled pace, any additional expenditures for the Divestiture Product Business authorized prior to the date the Consent Agreement was signed by Respondent 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;

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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 Business 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;
 6. providing the Divestiture Product Business with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the Divestiture Product Business; and
 7. providing such support services to the Divestiture Product Business as were being provided to this business by Respondent as of the date the Consent Agreement was signed by Respondent.
- I. Until Respondent fully transfers the Divestiture Assets to the Acquirer, Respondent shall maintain a work force at least as equivalent in size, training, and expertise to what has been associated with the Divestiture Products for the relevant Divestiture Product's last fiscal year.
 - J. Until the Closing Date for the Divestiture Assets, Respondent 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. Such incentives shall include a continuation of all employee benefits offered by Respondent until the Closing Date for the divestiture of the Divestiture Assets has occurred, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by Law), and additional

Order to Maintain Assets

incentives as may be necessary to prevent any diminution of the relevant Divestiture Product's competitiveness.

K. Respondent shall:

1. for a period of at least six (6) months from the relevant Closing Date or upon the hiring of ten (10) Divestiture Product Core Employees by the 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 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 Respondent 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 Respondent that may deter these employees from accepting employment with such Acquirer, including, but not limited to, any noncompete provisions of employment or other

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contracts with Respondent that would affect the ability or incentive of those individuals to be employed by such Acquirer. In addition, Respondent shall not make any counteroffer to a Divestiture Product Core Employee who receives a written offer of employment from the relevant Acquirer;

provided, however, Respondent may continue to employ such a Divestiture Product Core Employee (subject to the conditions of continued employment prescribed in this Order) under the terms of such employee's employment as of the Effective Date.

- L. Pending divestiture of the relevant Divestiture Assets, Respondent 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) Respondent's 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 or persons specifically authorized by the relevant Acquirer to receive such information; and
 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 contain the same active pharmaceutical ingredient as the Divestiture Products.

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4. institute procedures and requirements to ensure that the above-described employees:
 - 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 it is prohibited under this Order to Maintain Assets from receiving for any reason or purpose.
- M. Not later than thirty (30) days following the Closing Date, Respondent shall provide to all of Respondent's employees and other personnel who may have access to Confidential Business Information related to the Divestiture Products written or electronic notification of the restrictions on the use of such information by Respondent's personnel. At the same time, if not provided earlier, Respondent 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. Respondent shall provide a copy of the form of such notification to the Acquirer, the Interim Monitor(s), and the Commission. Respondent shall also obtain from each employee covered by this Paragraph II.G. an agreement to abide by the applicable restrictions. Respondent shall maintain complete records of all such agreements at Respondent's registered office within the United States and shall provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied with. Respondent shall monitor the implementation by its 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

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acknowledgments required by this Order to Maintain Assets. Respondent shall provide the Acquirer with copies of all certifications, notifications and reminders sent to Respondent's employees and other personnel.

- N. Respondent 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 Respondent under such agreement(s)), which are incorporated by reference into this Order to Maintain Assets and made a part hereof.
- O. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Divestiture Product Business within the Geographic Territory through its full transfer to the Acquirer, to minimize any risk of loss of competitive potential for the Divestiture Product Business within the Geographic Territory, 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 Respondent signs the Consent Agreement in this matter, the Commission may appoint an Interim Monitor to assure that Respondent expeditiously complies with all of its obligations and perform all of its responsibilities as required by the Orders and the Remedial Agreements. The Commission may appoint one or more Interim Monitors to assure Respondent's compliance with the requirements of the Orders, and the related Remedial Agreements.

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- 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 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 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, Respondent 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 Respondent's 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:

Order to Maintain Assets

- a. the completion by Respondent of:
 - (1) the divestiture of all Divestiture Assets in a manner that fully satisfies the requirements of this Order; and
 - (2) notification by the Acquirer to the Interim Monitor that the Acquirer is: (1) approved by the FDA to manufacture each of the relevant Divestiture Products, and (2) able to manufacture such Divestiture Products in commercial quantities, in a manner consistent with cGMP, independently of Respondent and Taro; and
- b. the completion by Respondent 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 this Order to Maintain Assets;

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 Respondent's 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 Respondent's compliance with its obligations under the Orders, 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

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take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with the Orders.

- F. 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 Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.
- G. 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 gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
- H. Respondent 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 Respondent, and any reports submitted by the Acquirer with respect to the performance of Respondent's 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 Respondent of its obligations under the Orders; *provided, however*, beginning one hundred twenty (120) days after Respondent has filed its final report pursuant to Paragraph

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VI.B. of the Decision and Order, and every one hundred twenty (120) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by the Acquirer toward obtaining FDA approval to manufacture each Divestiture Product and obtaining the ability to manufacture each Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondent and Taro.

- I. 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.

- 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

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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 Respondent has fully complied with its obligations to assign, grant, license, divest, transfer, deliver or otherwise convey relevant assets as required by Paragraph II.A., and II.B., of the related Decision and Order in this matter, 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 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 Respondent pursuant to Paragraph VI of the Decision and Order.

V.

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

- A. any proposed dissolution of Respondent;
- B. any proposed acquisition, merger or consolidation of Respondent; or
- C. any other change in 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.

Order to Maintain Assets

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 Respondent made to its principal United States offices or its headquarter's address, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during business 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, which copying services shall be provided by Respondent at the request authorized representative(s) of the Commission and at the expense of the Respondent; and
- B. to interview officers, directors, or employees of such Respondent, 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

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the Acquirer(s), notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions related to such divestitures 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.

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Sun Pharmaceutical Industries Ltd. (“Sun”) of Taro Pharmaceutical Industries Ltd. (“Taro”), 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 that, 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 attorneys, 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

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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 Respondent has 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"):

1. Respondent Sun Pharmaceutical Industries Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of Republic of India, with its headquarters address at Acme Plaza, Andheri Kurla Road, Andheri (East), Mumbai 400 059 India, and the address of the registered office of its United States subsidiary, Sun Pharmaceutical Industries Inc., at 29714 Orion Court, Farmington Hills, Michigan 48334-4144.

2. Taro Pharmaceutical Industries Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Israel, with its headquarters address at Italy House, Euro Park, Yakum 60972, Israel, and the address of the principal place of business of its United States subsidiary, Taro Pharmaceuticals U.S.A., Inc., at 3 Skyline Drive, Hawthorne, New York 10532.

3. The Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

Decision and Order

ORDER**I.**

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

- A. “Sun” or “Respondent” means Sun Pharmaceutical Industries Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Sun (including, but not limited to, Alkaloida Chemical Company Exclusive Group Ltd. and Aditya Acquisition Company Ltd.) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Sun shall include Taro.
- B. “Taro” means Taro Pharmaceutical Industries Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Taro (including, but not limited to, Taro Pharmaceuticals U.S.A., Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Commission” means the Federal Trade Commission.
- D. “Acquirer” means the following:
 - 1. an entity specified by name in this Order to acquire particular assets or rights that Respondent is 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

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Commission's determination to make this Order final;
or

2. an entity approved by the Commission to acquire particular assets or rights that Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.
- E. "Acquisition" means Respondent Sun's acquisition of shares representing fifty percent (50%) or more of the voting rights in Taro.
- F. "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, without limitation, the United States Food and Drug Administration ("FDA").
- G. "Application(s)" means all of the following: "New Drug Application" ("NDA"), "Abbreviated New Drug Application" ("ANDA"), "Supplemental New Drug Application" ("SNDAs"), or "Marketing Authorization Application" ("MAA"), 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 Respondent 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 Respondent and the FDA related thereto.

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- H. “Carbamazepine Products” means all of the following: all Products in Development, manufactured, marketed or sold by Respondent Sun pursuant to the following of Respondent Sun’s ANDAs:
1. Carbamazepine 100 mg chewable tablet, pursuant to ANDA No. 75-712;
 2. Carbamazepine 200 mg IR tablet, pursuant to ANDA No. 77-272;
 3. Carbamazepine 100 mg ER tablet, pursuant to ANDA No. 78-268;
 4. Carbamazepine 200 mg ER tablet, pursuant to ANDA No. 78-268;
 5. Carbamazepine 400 mg ER tablet, pursuant to ANDA No. 78-268; and
 6. any supplements, amendments, or revisions thereto; *provided, however,* that for the purposes of the Contract Manufacture provisions of this Order, the term “Carbamazepine Products” shall include all presentations of any Retained Product that, as of the Effective Date, are being, or will be, manufactured, marketed or sold by Sun or Taro for sale within the United States that contain the active pharmaceutical ingredient carbamazepine in the dosages strengths and presentations specified above.
- I. “Carbamazepine Product Assets” means all of Respondent Sun’s rights, title and interest in and to all assets related to Respondent Sun’s business within the Geographic Territory related to the Carbamazepine Products to the extent legally transferable, including the research, Development, manufacture, distribution, marketing, and

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sale of the Carbamazepine Products, including, without limitation, the Categorized Assets related to the Carbamazepine Products.

- J. “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, non-exclusive, 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, distributed, offered for sale, promoted, advertised, sold, imported, or exported the Divestiture Product(s) within the specified Geographic Territory;
 3. all Product Approvals 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. all Website(s) related to such Divestiture Product(s);
 7. 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 Respondent to discontinue the use of those NDC Numbers in the sale or marketing of Products other than with respect to returns, rebates,

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allowances, and adjustments for Divestiture Products sold prior to the Effective Date;

- b. to prohibit Respondent 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 Respondent of any such cross-referencing that is discovered by Respondent);
 - d. to seek cross-referencing from a customer of those NDC Numbers with the Acquirer's NDC Numbers related to the Divestiture Product(s);
 - e. to approve the timing of Respondent's 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 Effective Date;
 - f. to approve any notification(s) from Respondent to any customer(s) regarding the use or discontinued use of such numbers by Respondent prior to such notification(s) being disseminated to the customer(s);
8. all rights to all of Respondent's Applications related to such Divestiture Product(s);
 9. 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);

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10. all Product Development Reports related to such Divestiture Product(s);
11. at the Acquirer's option, all Product Assumed Contracts related to such Divestiture Product(s) (copies to be provided to the Acquirer on or before the Closing Date);
12. all strategic safety program(s) submitted to the FDA related to such Divestiture Product(s) that is designed to decrease product risk by using one or more interventions or tools beyond the package insert;
13. 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);
14. 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;
15. at the 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, packaging

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materials, work-in-process and finished goods related to such Divestiture Product(s);

16. copies of all unfilled customer purchase orders for such Divestiture Product(s) as of the Closing Date, to be provided to the Acquirer not later than five (5) days after the Closing Date;
17. at the Acquirer's option, subject to any rights of the customer, all unfilled customer purchase orders for such Divestiture Products; and
18. all of the Respondent's books, records, and files directly related to the foregoing or to such Divestiture Product(s);

provided, however, that "Categorized Assets" shall not include: (1) documents relating to Respondent's 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; (2) shall not include administrative, financial, and accounting records; (3) 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); and (4) any real estate and the buildings and other permanent structures located on such real estate;

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 Respondent 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 Respondent has a legal obligation to retain the original copies, the Respondent shall be required to provide only

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copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer, the Respondent 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 Respondent provides the Acquirer with the above-described information without requiring Respondent completely to divest itself of information that, in content, also relates to Retained Product(s).

- K. “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.
- L. “Closing Date” means, as to each Divestiture Product, the date on which 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.
- M. “Confidential Business Information” means all information owned by, or in the possession or control of, Respondent 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 Divestiture Product(s); *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:
 - 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 Respondent;

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2. information related to the Carbamazepine Products that Taro can demonstrate it obtained without the assistance of Respondent Sun 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 Products;
 5. information relating to Respondent's 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 Products; or
 6. information specifically excluded from the Categorized Assets.
- N. "Contract Manufacture" means the manufacture of a Divestiture Product to be supplied by Respondent, Taro, or a Designee to an Acquirer.
- O. "Designee" means any entity other than Respondent or Taro that will manufacture a Divestiture Product for an Acquirer.
- P. "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

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any government price or reimbursement approvals), Product approval and registration, and regulatory affairs related to the foregoing. “Develop” means to engage in Development.

- Q. “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. “Direct Cost” to the Acquirer for its use of any of Respondent’s employees’ labor shall not exceed the average hourly wage rate for such employee; *provided, however*, 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, “Direct Cost” means such cost as is provided in such Remedial Agreement for that Divestiture Product.
- R. “Divestiture Product(s)” means the following Products: the Carbamazepine Products.
- S. “Divestiture Product Core Employees” means the Product Research and Development Employees and the Product Manufacturing Employees related to each Divestiture Product.
- T. “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.
- U. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to the relevant provisions of this Order.

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- V. “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.
- W. “Drug Master Files” means the information submitted to the FDA as described in 21 C.F.R. Part 314.420 related to a Product.
- X. “Effective Date” means the date on which the Acquisition occurs.
- Y. “Generic Divestiture Product Agreement(s)” means the following agreements:
1. “Asset Purchase Agreement” between Sun Pharmaceutical Industries, Ltd., Caraco Pharmaceutical Laboratories, Ltd., and Torrent Pharmaceutical Ltd., Torrent Pharma, Inc, dated as of July 11, 2008, and all amendments, exhibits, attachments, agreements, and schedules thereto;
 2. “Supply Agreement” between Sun Pharmaceutical Industries, Ltd., Caraco Pharmaceutical Laboratories, Ltd., and Torrent Pharmaceutical Ltd., Torrent Pharma, Inc dated as of July 11, 2008, and all amendments, exhibits, attachments, agreements, and schedules thereto;
 3. “Quality Agreement” between Sun Pharmaceutical Industries, Ltd., Caraco Pharmaceutical Laboratories, Ltd., and Torrent Pharmaceutical Ltd., Torrent Pharma, Inc dated as of July 11, 2008, and all amendments, exhibits, attachments, agreements, and schedules thereto; and

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related to the Carbamazepine Product Assets that have been approved by the Commission to accomplish the requirements of this Order. The Generic Divestiture Product Agreements are attached to this Order and contained in non-public Appendix II.A.

- Z. “Geographic Territory” shall mean the United States of America (including all of the territories within its jurisdiction or control) unless otherwise specified.
- AA. “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.
- BB. “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 was, is, or is projected to be among the top twenty highest of such purchase amounts by the Respondent’s 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.
- CC. “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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- DD. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.
- EE. “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.
- FF. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.
- GG. “Patents” means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention 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, additions, 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 Respondent as of the Closing Date (*except* where this Order specifies a different time).
- HH. “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.
- II. “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.

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- JJ. “Product Approval(s)” means any approvals, 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, sale, storage or transport of the Product within the United States of America, and includes, without limitation, all approvals, registrations, licenses or authorizations granted in connection with any Application.
- KK. “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 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 the Respondent unless such contract applies generally to the Respondent’s sales of Products to that Third Party;
 2. pursuant to which Respondent 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);

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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);
6. pursuant to which a Third Party manufactures or packages the Divestiture Product(s) on behalf of Respondent;
7. pursuant to which a Third Party provides the Product Manufacturing Technology related to the Divestiture Product(s) to Respondent;
8. pursuant to which a Third Party is licensed by Respondent to use the Product Manufacturing Technology;
9. constituting confidentiality agreements involving the Divestiture Product(s);
10. involving any royalty, licensing, or similar arrangement involving the Divestiture Product(s);
11. pursuant to which a Third Party provides any specialized services necessary to the research, Development, manufacture or distribution of the Divestiture Products to Respondent including, but not limited to, consultation arrangements; and/or
12. pursuant to which any Third Party collaborates with Respondent in the performance of research, Development, marketing, distribution or selling of the Divestiture Product(s) or the Divestiture Product(s) business;

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provided, however, that where any such contract or agreement also relates to a Retained Product(s), Respondent 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).

LL. "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, and 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 copyrights in 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; all copyrights in 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 copyrights in records, including customer lists, sales force call activity reports, vendor lists, sales data,

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reimbursement data, speaker lists, manufacturing records, manufacturing processes, and supplier lists; all copyrights in data contained in laboratory notebooks relating to the Divestiture Product(s) or relating to its biology; all copyrights in adverse experience reports and files related thereto (including source documentation) and all copyrights in periodic adverse experience reports and all data contained in electronic databases relating to adverse experience reports and periodic adverse experience reports; all copyrights in analytical and quality control data; and all correspondence with the FDA.

MM. "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 from the FDA and from the Respondent to the FDA relating to the Application(s) submitted by, on behalf of, or acquired by, the Respondent 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);

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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);
 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).
- NN. "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 Respondent 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;

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- c. a specific description of the employee's responsibilities related to the relevant Divestiture Product; *provided, however*, in lieu of this description, Respondent 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 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 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.
- OO. "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

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

provided, however, “Product Intellectual Property” does not include the corporate names or corporate trade dress of “Sun” or “Taro”, or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by Respondent or Taro or the related logos thereof.

PP. “Product Licensed Intellectual Property” means the following:

1. Patents that are related to a Divestiture Product that Respondent can demonstrate have been routinely used, prior to the Effective Date, for a Retained Product(s) that:
 - a. has been marketed or sold on an extensive basis by the Respondent 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 the Respondent; 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 the Geographic Territory to limit the use or disclosure thereof, that are related to a Divestiture Product and that Respondent can demonstrate have been routinely used, prior to the Effective Date, for a Retained Product(s) that:

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- a. has been marketed or sold on an extensive basis by the Respondent 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 the Respondent;

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, Respondent may take a license back from the Acquirer for such intellectual property for use in connection with the Retained Products and such a license to Respondent may be perpetual, fully paid-up and royalty-free license(s) with rights to sublicense.

QQ. "Product Manufacturing Employees" means all salaried employees of Respondent who have directly participated in the planning, design, implementation or operational management 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; *provided, however*, that in each instance where: (1) a Carbamazepine Product Divestiture Agreement is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for the Divestiture

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Products, “Product Manufacturing Employees” means the employees as specified in such Remedial Agreement for the Divestiture Products.

RR. “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 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;
2. all active pharmaceutical ingredients related to the Divestiture Product(s); and,
3. 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).

SS. “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

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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); provided however, "Product Marketing Materials" excludes the pricing of each of the Divestiture Products to customers.

TT. "Product Research and Development Employees" means all salaried employees of Respondent 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; *provided, however*, that in each instance where: (1) a Carbamazepine Product Divestiture Agreement is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for the Divestiture Products, "Product Research and Development Employees" means the employees as specified in such Remedial Agreement for the Divestiture Products.

UU. "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.

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VV. “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 Divestiture Product(s).

WW. “Proposed Acquirer” means an entity proposed by Respondent (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, divested, transferred, delivered or otherwise conveyed by Respondent pursuant to this Order.

XX. “Remedial Agreement(s)” means the following:

1. any agreement between Respondent 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 Respondent and a Third Party to effect the assignment of assets or rights of Respondent 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

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connection with the Commission's determination to make this Order final;

3. any agreement between Respondent 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
4. any agreement between Respondent and a Third Party to effect the assignment of assets or rights of Respondent 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.

YY. "Retained Product" means any Product(s) other than a Divestiture Product.

ZZ. "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.

AAA. "Supply Cost" means a cost not to exceed the manufacturer's average direct per unit cost in United States dollars 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; *provided, however*, that in each instance where: (1) an agreement to Contract Manufacture is specifically referenced and attached to this

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Order, and (2) such agreement becomes a Remedial Agreement for a Divestiture Product, “Supply Cost” means the cost as specified in such Remedial Agreement for that Divestiture Product.

BBB. “Third Party(ies)” means any private entity other than the following: Respondent, Taro, or the Acquirer for the affected assets, rights and Divestiture Product(s).

CCC. “Torrent” means Torrent Pharmaceuticals Limited, a corporation organized, existing and doing business under and by virtue of the laws of Republic of India, with its headquarters address at Torrent House, off Ashram Road, Ahmedabad 380 009 India, and registered office of its United States subsidiary, Torrent Pharmaceuticals Inc., at 5380 Holiday Terrace, Suite 40, Kalamazoo, Michigan 49009.

DDD. “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 Respondent; *provided, however*, “Website” shall not include the following: (1) content owned by Third Parties and other Product Intellectual Property not owned by Respondent that are incorporated in such Website(s), such as stock photographs used in the Website(s), *except* to the extent that Respondent can convey its rights, if any, therein; or (2) content unrelated to the Product(s).

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

A. Not later than the earlier of: (1) the day ten (10) days after the Effective Date or (2) the day ten (10) days after the date on which this Order becomes final, Respondent shall divest the Carbamazepine Product Assets, absolutely and

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in good faith, to Torrent pursuant to, and in accordance with, the Generic Divestiture Product Agreements (which agreements shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Torrent or to reduce any obligations of Respondent under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Carbamazepine Product Assets is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondent has divested the Carbamazepine Product Assets to Torrent prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that Torrent is not an acceptable purchaser of the Carbamazepine Product Assets then Respondent shall immediately rescind the transaction with Torrent, in whole or in part, as directed by the Commission, and shall divest the Carbamazepine 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 and only in a manner that receives the prior approval of the Commission;

provided further that if Respondent has divested the Carbamazepine Product Assets to Torrent prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondent, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Carbamazepine Product Assets to Torrent (including, but not limited to, entering into additional agreements or arrangements) as the

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Commission may determine are necessary to satisfy the requirements of this Order.

- B. Prior to the Closing Date, Respondent shall secure all consents and waivers from all Third Parties that are necessary to permit Respondent to divest the assets required to be divested pursuant to this Order to the Acquirer, and/or to permit such Acquirer to continue the research, Development, manufacture, sale, marketing or distribution of the Divestiture Products;

provided, however, Respondent may satisfy this requirement by certifying that the Acquirer has executed all such agreements directly with each of the relevant Third Parties.

- C. Respondent shall transfer the Product Manufacturing Technology related to the Divestiture Products to the Acquirer in an organized, comprehensive, complete, useful, timely, and meaningful manner. Respondent shall, *inter alia*:
1. designate employees of Respondent knowledgeable with respect to such Product Manufacturing Technology to a committee for the purposes of communicating directly with such Acquirer and the Interim Monitor (if any has been appointed) for the purposes of effecting such transfer;
 2. prepare technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the Divestiture Products, such protocols and acceptance criteria to be subject to the approval of the Acquirer;
 3. prepare and implement a detailed technological transfer plan that contains, *inter alia*, the transfer of all relevant information, all appropriate documentation,

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all other materials, and projected time lines for the delivery of all Product Manufacturing Technology to the Acquirer; and

4. during the term of the Contract Manufacture, upon reasonable written notice and request from the Acquirer to Respondent, provide in a timely manner, at no greater than Direct Cost, assistance and advice to enable the Acquirer (or the Designee of the Acquirer) to:
 - a. manufacture the Divestiture Products in the same quality achieved by the Respondent and in commercial quantities;
 - b. obtain any Product Approvals necessary for the Acquirer to manufacture, sell, market or distribute the Divestiture Products; and
 - c. receive, integrate, and use such Product Manufacturing Technology.

D. Respondent shall:

1. upon reasonable written notice and request from the Acquirer to Respondent, Respondent shall Contract Manufacture and deliver to the Acquirer, in a timely manner and under reasonable terms and conditions, a supply of each of the Divestiture Products at Respondent's Supply Cost, for a period of time sufficient to allow the Acquirer (or the Designee of the Acquirer) to obtain all of the relevant Product Approvals necessary to manufacture in commercial quantities, and in a manner consistent with cGMP, the finished drug product independently of Respondent and Taro and to secure sources of supply of the active pharmaceutical ingredients, excipients, other ingredients, and/or necessary components specified in

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the Respondent's Application(s) for the Product from entities other than Respondent or Taro;

2. make representations and warranties to the Acquirer that the Product(s) supplied through Contract Manufacture pursuant to a Remedial Agreement meet the relevant Agency-approved specifications. For the Product(s) to be marketed or sold in the Geographic Territory, Respondent 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 a Remedial Agreement by Respondent to meet cGMP. This obligation may be made contingent upon the Acquirer giving Respondent prompt, adequate written notice of such claim and cooperating fully in the defense of such claim. The Remedial Agreement shall be consistent with the obligations assumed by Respondent under this Order; *provided, however*, that Respondent 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 Respondent's responsibilities to supply the ingredients and/or components in the manner required by this Order; *provided further* that this obligation shall not require Respondent 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 Respondent 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 (2) such agreement becomes a Remedial Agreement for a Divestiture Product, each such agreement may contain limits on Respondent's aggregate liability resulting

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from the failure of the Products supplied to the Acquirer pursuant to such Remedial Agreement by Respondent to meet cGMP;

3. make representations and warranties to the Acquirer that Respondent shall hold harmless and indemnify the Acquirer for any liabilities or loss of profits resulting from the failure by Respondent to deliver the Products in a timely manner as required by the Remedial Agreement(s) unless Respondent can demonstrate that its failure was entirely beyond the control of Respondent and in no part the result of negligence or willful misconduct by Respondent; *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 Respondent's aggregate liability for such a breach;
4. during the term of the Contract Manufacture between Respondent and the Acquirer, upon written request of the Acquirer or Interim Monitor (if any has been appointed), 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;
5. during the term of the Contract Manufacture between Respondent and the Acquirer, maintain manufacturing facilities necessary to manufacture each of the Divestiture Products in finished form, *i.e.*, suitable for sale to the ultimate consumer/patient; and
6. during the term of the Contract Manufacture between Respondent and the Acquirer, provide consultation with knowledgeable employees of Respondent and

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training, at the written request of the Acquirer and at a facility chosen by the Acquirer, for the purposes of enabling the Acquirer (or the Designee of the Acquirer) to obtain all Product Approvals to manufacture the Divestiture Products in the same quality achieved by the Respondent and in commercial quantities, and in a manner consistent with cGMP, independently of Respondent and Taro, and sufficient to satisfy management of the Acquirer that its personnel (or the Designee's personnel) are adequately trained in the manufacture of the Divestiture Products;

The foregoing provisions, II.D.1. - 6., shall remain in effect with respect to each Divestiture Product until the earliest of: (1) the date the 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 Respondent; (2) the date the Acquirer notifies the Commission and the Respondent of its intention to abandon its efforts to manufacture such Divestiture Product; (3) the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture such Divestiture Product, or (4) four (4) years from the Closing Date.

E. Respondent shall:

1. submit to the Acquirer, at Respondent's expense, all Confidential Business Information related to the Divestiture Products;
2. deliver such Confidential Business Information as follows:

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- a. in good faith;
 - b. in a timely manner, *i.e.*, 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 Divestiture Products 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 Divestiture Products other than as necessary to comply with the following:
 - a. the requirements of this Order;
 - b. Respondent's obligations to the Acquirer under the terms of any Remedial Agreement related to Divestiture Products; or
 - c. applicable Law;
 5. not disclose or convey any such Confidential Business Information, directly or indirectly, to any person except the Acquirer or other persons specifically

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- authorized by the Acquirer to receive such information; and
6. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the Divestiture Products to the employees associated with business related to those Retained Products that contain the same active pharmaceutical ingredient as the Divestiture Products.
- F. Respondent 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 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.
- G. Not later than ten (10) days after the Closing Date, Respondent shall grant a release to each Third Party that is subject to an agreement as described in Paragraph II.F. 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, Respondent shall provide a copy of the release to the Acquirer.
- H. Respondent shall:
1. for each Divestiture Product, for a period of at least six (6) months from the Closing Date or upon the hiring of ten (10) Divestiture Product Core Employees by the Acquirer, whichever occurs earlier, provide the Acquirer with the opportunity to enter into employment contracts with the Divestiture Product

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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 Core 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 to provide the Product Employee Information; or (2) ten (10) days after the Closing Date, provide the Acquirer or the Proposed Acquirer with the Product Employee Information related to the Divestiture Product Core Employees. Failure by Respondent to provide the Product Employee Information for any Divestiture Product Core Employee within the time provided herein shall extend the Divestiture Product Core Employee Access Period(s) with respect to that employee in an amount equal to the delay;
3. during the Divestiture Product Core Employee Access Period(s), not interfere with the hiring or employing by the 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 Respondent that may deter these employees from accepting employment with the Acquirer, including, but not limited to, any noncompete or nondisclosure provision of employment with respect to a Divestiture Product or other contracts with Respondent that would affect the ability or incentive of those individuals to be employed by the Acquirer. In addition, Respondent shall not make any counteroffer to such a Divestiture Product Core Employee who has received a written offer of employment from the Acquirer;

provided, however, that, subject to the conditions of continued employment prescribed in this Order, this

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Paragraph II.H.3. shall not prohibit Respondent from continuing to employ any Divestiture Product Core Employee under the terms of such employee's employment with Respondent prior to the date of the written offer of employment from the Acquirer to such employee;

4. 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 Respondent 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);

provided, however, that, subject to those conditions of continued employment prescribed in this Order, this Order does not require nor shall be construed to require Respondent to terminate the employment of any employee or to prevent Respondent from continuing to employ the Divestiture Product Core Employees in connection with the Acquisition; and

5. for a period of one (1) year from the 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

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Product (“Divestiture Product Employee”) to terminate his or her employment relationship with the Acquirer; or

- b. hire any Divestiture Product Employee; *provided, however,* Respondent may hire any former Divestiture Product Employee whose employment has been terminated by the Acquirer or who independently applies for employment with Respondent, as long as such employee was not solicited in violation of the nonsolicitation requirements contained herein;

provided, however, Respondent 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 Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from Respondent.

- I. Respondent 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 Respondent 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 Respondent (other than as necessary to comply with the requirements of this Order).

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- J. Not later than thirty (30) days after the Closing Date, Respondent shall provide written notification of the restrictions on the use of the Confidential Business Information related to the Divestiture Products by Respondent's personnel to all of Respondent's employees who:
1. are or were directly involved in the research, Development, manufacturing, distribution, sale or marketing of each of the Divestiture Products;
 2. are directly involved in the research, Development, manufacturing, distribution, sale or marketing of Retained Products that contain the same active pharmaceutical ingredient as the Divestiture Products; and/or
 3. may have Confidential Business Information related to the Divestiture Products.

Respondent 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 Closing Date. Respondent shall provide a copy of such notification to the Acquirer. Respondent shall maintain complete records of all such agreements at Respondent's registered office within the United States and shall provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied with. Respondent shall provide the Acquirer with copies of all certifications, notifications and reminders sent to Respondent's personnel.

- K. Until Respondent completes the divestitures required by Paragraph II.A. and fully transfers the related Product Manufacturing Technology to the Acquirer,

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1. Respondent shall take such actions as are necessary to:
 - a. maintain the full economic viability and marketability of the businesses associated with each Divestiture Product;
 - b. minimize any risk of loss of competitive potential for such business;
 - c. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to each Divestiture Product;
 - d. ensure the assets required to be divested are transferred to the Acquirer in a manner without disruption, delay, or impairment of the regulatory approval processes related to the business associated with each Divestiture Product;
 - e. ensure the completeness of the transfer of the Product Manufacturing Technology; and
 2. Respondent shall not sell, transfer, encumber or otherwise impair the assets required to be divested (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the businesses associated with each Divestiture Product.
- L. Respondent shall not join, file, prosecute or maintain any suit, in law or equity, against the Acquirer or the Divestiture Product Releasee(s) for the research, Development, manufacture, use, import, export, distribution, or sale of the Divestiture Product(s) under the following:
1. any Patent owned or licensed by Respondent as of the day after the Effective Date that claims a method of making, using, or administering, or a composition of

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matter, relating to the Carbamazepine Products, or that claims a device relating to the use thereof;

2. any Patents owned or licensed at any time after the Effective Date by Respondent that claim any aspect of the research, Development, manufacture, use, import, export, distribution, or sale of the Carbamazepine 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 Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of the Carbamazepine Products; or (2) the use, import, export, supply, distribution, or sale of the Carbamazepine Products within the Geographic Territory. Respondent shall also covenant to the 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 Acquirer or the related Divestiture Product Releasee(s) under such Patents, if the suit would have the potential to interfere with the Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of the Carbamazepine Products; or (2) the use, import, export, supply, distribution, or sale of the Carbamazepine Products within the Geographic Territory.

- M. Upon reasonable written notice and request from an Acquirer to Respondent, Respondent shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondent to assist that Acquirer to defend against, respond to, or otherwise participate in any litigation related to the Product Intellectual Property related to any of the Divestiture Products, if such litigation would have the potential to

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interfere with the Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of the Carbamazepine Products; or (2) the use, import, export, supply, distribution, or sale of the Carbamazepine Products within the Geographic Territory.

N. For any patent infringement suit in which the Respondent is alleged to have infringed a Patent of a Third Party prior to the Closing Date or for such suit as the Respondent has prepared or is preparing as of the Closing Date to defend against such infringement claim(s), and where such a suit would have the potential to interfere with the Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of the Divestiture Products; or (2) the use, import, export, supply, distribution, or sale of the Divestiture Products within the Geographic Territory, Respondent shall:

1. cooperate with the Acquirer and provide any and all necessary technical and legal assistance, documentation and witnesses from Respondent in connection with obtaining resolution of any pending patent litigation involving such Divestiture Product;
2. waive conflicts of interest, if any, to allow Respondent's outside legal counsel to represent the Acquirer in any ongoing patent litigation involving such Divestiture Product; and
3. permit the transfer to the Acquirer of all of the litigation files and any related attorney work-product in the possession of Respondent's outside counsel relating to such Divestiture Product.

O. Respondent shall not, in the Geographic Territory:

1. use the Product Trademarks related to the Divestiture Products or any mark confusingly similar to such

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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 use and registration of such Product Trademarks; or
5. challenge or interfere with the Acquirer's efforts to enforce its trademark registrations for and trademark rights in such Product Trademarks against Third Parties;

provided however, that this Order shall not preclude Respondent from continuing to use those trademarks, tradenames, or service marks related to the Retained Products as of the Effective Date.

- P. Respondent shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to any of the Divestiture Products a decision the result of which would be inconsistent with the terms of this Order and/or the remedial purposes thereof.

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 perform all of its responsibilities as required by this Order,

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the Order to Maintain Assets and the Remedial Agreements.

- 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 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 the Order in a manner consistent with the purposes of the 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 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.

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3. The Interim Monitor shall serve until the date of completion by Respondent of the divestiture of all Carbamazepine Product Assets and the transfer of the Product Manufacturing Technology in a manner that fully satisfies the requirements of this Order and until the earliest of:
 - (1) with respect to each Divestiture Product, the date the 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 Respondent and Taro;
 - (2) with respect to each Divestiture Product, the date the Acquirer notifies the Commission and the Respondent of its intention to abandon its efforts to manufacture such Divestiture Product; or
 - (3) with respect to each Divestiture Product, the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture such Divestiture Product;

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(s) to Contract Manufacture such Divestiture Product.

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4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent's 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 Respondent's compliance with its obligations under the 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 the 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 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 gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.

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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 Acquirer with respect to the performance of Respondent's obligations under the Order or the Remedial Agreement(s). 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 the Order; *provided, however*, beginning one hundred twenty (120) days after Respondent has filed its final report pursuant to Paragraph VI.B., and every one hundred twenty (120) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by the Acquirer toward obtaining FDA approval to manufacture each Divestiture Product and obtaining the ability to manufacture each Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondent and Taro.
 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

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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 Respondent has not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey the Carbamazepine Product Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver or otherwise convey these assets in a manner that satisfies the requirements of this Order. 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 assign, grant, license, divest, transfer, deliver or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the

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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 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 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 assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required

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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. 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

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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 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 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.

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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 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 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 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

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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.

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

With respect to Confidential Business Information, Respondent shall assure that, in any instance wherein its counsel (including in-house counsel under appropriate confidentiality arrangements) either retains unredacted copies of documents or other materials provided to the Acquirer or accesses original documents (under circumstances where copies of documents are insufficient or otherwise unavailable) provided to the Acquirer, that Respondent's 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, and rules promulgated by the Commission), 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 Respondent may disclose such information as necessary

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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, Respondent shall: (1) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Acquirer (but shall not be deemed to have violated this requirement if the 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.

VI.

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 the following: Paragraphs II.A , II.B., II.C.1.- 3., II.E.1.-3., II.G., II.H.1.-4., II.J., and II.K., Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend 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, 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

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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 years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondent 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 shall notify the Commission at least thirty (30) days prior to:

- A. any proposed dissolution of Respondent;
- B. any proposed acquisition, merger or consolidation of Respondent; or
- C. any other change in Respondent 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.

VIII.

IT IS FURTHER ORDERED that:

- A. Any Remedial Agreement shall be deemed incorporated into this Order.
- B. Any failure by Respondent to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.

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- C. Respondent shall include in each Remedial Agreement related to each of the Divestiture Products a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of Respondent's obligations to the Acquirer pursuant to this Order.
- D. Respondent shall also include in each Remedial Agreement a representation from the Acquirer that such Acquirer shall use commercially reasonable efforts to secure the FDA 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 Respondent and Taro, all as soon as reasonably practicable.
- E. Respondent shall not modify or amend any of the terms of any Remedial Agreement 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 Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during business 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 such Respondent related to compliance with this Order, which

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copying services shall be provided by such Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and

- B. to interview officers, directors, or employees of such Respondent, who may have counsel present, regarding such matters.

X.

IT IS FURTHER ORDERED that the purpose of the divestiture of the Carbamazepine Product Assets and the transfer of the Product Manufacturing Technology related to the Carbamazepine Products and the related obligations imposed on the Respondent by this Order is:

- A. to ensure the continued use of the Carbamazepine Product Assets in the research, Development, and manufacture of each of the Carbamazepine Products for the purposes of the business associated with each Divestiture Product within the Geographic Territory;
- B. to provide for the future use of the Carbamazepine Product Assets for the distribution, sale and marketing of the Carbamazepine Products in the Geographic Territory;
- C. to create a viable and effective competitor, who is independent of the Respondent and Taro:
 - 1. in the research, Development, and manufacture of each of the Carbamazepine Products for the purposes of the business associated with each Carbamazepine Product within the Geographic Territory; and
 - 2. the distribution, sale and marketing of the each of the Carbamazepine Products in the Geographic Territory; and,

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- D. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

XI.

IT IS FURTHER ORDERED that this Order shall terminate on September 16, 2018.

By the Commission.

**NON-PUBLIC APPENDIX II.A.
GENERIC DIVESTITURE PRODUCT AGREEMENTS**

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

**ANALYSIS OF CONSENT ORDERS TO AID PUBLIC
COMMENT**

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Sun Pharmaceutical Industries Ltd. ("Sun") which is designed to remedy the anticompetitive effects of the acquisition of Taro Pharmaceutical Industries Ltd. ("Taro") by Sun. Under the terms of the proposed Consent Agreement, Sun is required to divest all of Sun's rights

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and assets necessary to manufacture and market: (1) generic immediate-release carbamazepine tablets; (2) generic chewable carbamazepine tablets; and (3) generic extended-release carbamazepine tablets to Torrent Pharmaceuticals Ltd. (“Torrent”).

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 of Merger executed on May 18, 2007, Sun proposed to acquire all of the issued and outstanding shares of Taro in a transaction then valued at approximately \$454 million. In the event that agreement has been properly terminated, as Taro claims, Sun intends to acquire controlling interest in Taro via an Option Agreement executed at the time of the merger agreement and/or via a tender offer. 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 U.S. markets for the manufacture and sale of generic immediate-release carbamazepine tablets and chewable carbamazepine tablets, and in the research, development, manufacture and sale of extended-release carbamazepine tablets (collectively, the “Products”). The proposed Consent Agreement will remedy the alleged violations by replacing the lost competition that would result from the acquisition in each of these markets.

Sun, headquartered in Mumbai, India, is a leading developer, manufacturer, marketer, and distributor of niche pharmaceuticals in its home country and active pharmaceutical ingredients (APIs’)

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and generic drugs worldwide. Sun is intent on growing its U.S. generic drugs business and sells generic pharmaceuticals in the United States through wholly-owned Caraco Pharmaceutical Laboratories Ltd. Taro, headquartered in Israel, also develops and manufactures generic pharmaceutical products, primarily for sale in the United States.

The Products and Structure of the Markets

The proposed acquisition of Taro by Sun would increase Sun's worldwide position in generic pharmaceuticals and augment Sun's pipeline of future generic products. Sun and Taro overlap in a number of generic pharmaceutical markets, and if consummated, the transaction likely would lead to anticompetitive effects in the markets for three different forms of carbamazepine. Carbamazepine is an anticonvulsant that is used primarily as an anti-epileptic drug. It is taken daily, either alone or in combination with other drugs, to prevent and control seizures.

The transaction would reduce the number of competing generic suppliers in the overlap markets. 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 at least two generic equivalents for each of the products at issue, the branded versions no longer significantly constrain the price of the generic drugs.

Generic immediate-release carbamazepine tablets are AB-rated generic versions of Novartis's Tegretol®. In this market, Taro is the leading supplier with half the market. Teva Pharmaceutical Industries Ltd. ("Teva") follows with more than a quarter of the market, and Sun's Caraco is the third-leading supplier with a share of about 18 percent. The only other supplier currently in the market is Apotex.

Generic chewable carbamazepine tablets are a chewable form of the anticonvulsant that carry the same label and indications as the immediate-release tablets. They are prescribed in the same

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way as the immediate-release products, but come in a more convenient dosing form, which makes them better-suited for pediatric, geriatric, and other patients who may have difficulty swallowing pills. With a market share of 65 percent, Teva is the leading seller of the generic chewable carbamazepine tablets in 2007, followed by Taro with a share of about 31 percent and Sun, with a share of only 4 percent in 2007. Cadista, the only other approved supplier of generic chewable carbamazepine tablets, is not supplying the product currently.

Sun and Taro are the only companies that have applied for Food and Drug Administration (“FDA”) approval of generic versions of Novartis’s Tegretol®-XR extended-release carbamazepine tablets. This extended-release formulation of the drug is indicated for the same uses as the immediate release products but offers the added convenience of a less frequent dosing regimen.

Entry

Entry into the markets for the manufacture and sale of any of these three carbamazepine products 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 markets are relatively small and in decline, so the limited sales opportunities available to a new entrant are likely insufficient to warrant the time and investment necessary to enter.

Competitive Effects

The proposed acquisition would cause significant anticompetitive harm to consumers in the U.S. markets for the manufacture and sale of generic immediate-release carbamazepine

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tablets, generic chewable carbamazepine tablets, and generic extended-release carbamazepine tablets. In generic pharmaceutical markets, pricing is heavily influenced by the number of competitors that participate in a given market. Both empirical research and the Commission's many investigations into generic drug competition confirm that finding. Here, the evidence shows that, given the small number of suppliers or prospective suppliers in the relevant markets, the prices of the generic pharmaceutical products at issue decrease with the entry of each additional competitor.

Among currently-marketed products, the acquisition would reduce the number of firms producing generic chewable carbamazepine tablets from three to two, with Teva being the only remaining competitor (at least until Cadista is able to re-enter the market). Similarly, the proposed transaction would reduce from four to three the number of firms remaining in the immediate-release carbamazepine tablet market, leaving Teva as the only other significant player. In the market for generic versions of extended-release carbamazepine tablets, the merging parties are the only two firms in the process of entering, so the proposed transaction likely would eliminate the generic competition that would otherwise exist in that market when the products are introduced.

As the market share information suggests, the proposed transaction would eliminate one of a small number of suppliers in the markets for two currently-marketed generic carbamazepine products, with the likely result that prices would increase above current levels. For extended-release generic carbamazepine, the consolidation would result in a merger to monopoly, with the likely result that prices would be higher than they would be without the transaction and both companies had entered independently.

The competitive concerns can be characterized as both unilateral and coordinated in nature. The homogenous nature of the products involved, the minimal incentives to deviate, and the

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relatively predictable prospects of gaining new business all indicate that the firms in the market will find it profitable to coordinate their pricing. The impact that a reduction in the number of firms would have on pricing can also be explained in terms of unilateral effects, as the likelihood that the merging parties would be the first and second choices in a significant number of bidding situations is enhanced where the number of firms participating in the market decreases substantially.

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, Sun is required to divest all of its rights and assets related to the Products to a Commission-approved acquirer no later than the earlier of ten (10) days after the acquisition occurs or ten (10) days after the Commission's Order becomes final. Specifically, the proposed Consent Agreement requires that Sun divest its assets in the Products to Torrent Pharmaceutical Limited ("Torrent").

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. A proposed acquirer of divested assets must not itself present competitive problems.

Torrent, a growing generic manufacturer, headquartered in India, is particularly well-positioned to manufacture and market its acquired products and compete effectively in those markets. Currently, Torrent sells generic pharmaceuticals in the United States but none of the relevant products, and therefore its acquisition of the relevant products would not raise independent competitive concerns. Torrent has numerous Abbreviated New Drug Applications (ANDAs") pending approval at the FDA, and has the resources, capabilities, reputation, and experience in

Analysis to Aid Public Comment

marketing generic products, as well as a central focus on rapidly growing its U.S. generic drugs business, necessary to expeditiously replicate the competition that would be lost with the proposed acquisition.

If the Commission determines that Torrent is not an acceptable acquirer of the assets to be divested, or that the manner of the divestitures to Torrent is not acceptable, Sun 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 Products.

The proposed remedy contains several provisions to ensure that the divestitures are successful. The Order requires Sun to provide transitional services to enable the Commission-approved acquirer 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 Sun.

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

**CARLYLE PARTNERS IV, L.P.,
PQ CORPORATION,
INEOS GROUP LIMITED,
AND
JAMES RATCLIFFE**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-4233; File No. 071 0203**Complaint, September 18, 2008 – Decision, September 18, 2008*

This consent order addresses the proposed acquisition of the world-wide sodium silicate and silicas business from INEOS Group Limited by Carlyle Partners IV, L.P. Carlyle participates in the sodium silicate market world-wide through PQ Corporation, which it owns. The acquisition may substantially lessen competition in the market for sodium silicate in the Midwest United States. The order requires Carlyle to divest PQ's sodium silicate plant and business, located in Utica, Illinois, to Oak Hill Acquisition Company, LLC, or another Commission-approved buyer. The respondents are required to make available to Oak Hill or other purchaser, at no greater than direct cost, such personnel, assistance, and training as is necessary to enable the purchaser to operate the Utica plant in substantially the same manner as PQ operated the plant, for a period of two years after divestiture. The respondents are also required to enter into an employee services agreement covering certain union employees at the Utica plant to facilitate their continued employment at the plant under the new ownership. The Commission may appoint an Interim Monitor to assure that the respondents expeditiously comply with all of their obligations and responsibilities; the Commission may also appoint a Divestiture Trustee should PQ fail to fully comply with its obligations. The order requires the respondents to submit to the Commission periodic reports until they have fully achieved the divestiture. The respondents are also required to notify the Commission of any change in their corporate structure that may affect compliance obligations arising out of the order.

Complaint

Participants

For the *Commission*: *Roberta S. Baruch, Morris Bloom, Linda D. Cunningham, Geary Gessler, Catharine M. Moscatelli, Danica R. Noble, Aaron Siskind, Christopher T. Taylor, Robert Tovsky, Casey Triggs, Steven L. Wilensky, and Christian H. Woolley.*

For the *Respondents*: *Robin C. Landis, Cravath, Swaine & Moore L.L.P.*; and *Kyra K. Bromley and Gary W. Kubek, Debevoise & Plimpton L.L.P.*

COMPLAINT

The Federal Trade Commission (“Commission”), having reason to believe that Carlyle Partners IV, L.P., has entered into an agreement to acquire certain assets of INEOS Group Limited, and that the acquisition, if consummated, would result in a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 15 U.S.C. § 18, 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:

A. THE RESPONDENTS

1. Respondent Carlyle Partners IV, L.P., a limited partnership established under Delaware law, is an investment fund organized and managed by the Carlyle Group, a private investment firm based in the United States which originates, structures, and acts as the lead equity investor in management buyouts, strategic minority equity investments, equity private placements, consolidations and other strategic investments. Carlyle Group has its principal place of business and offices located at 1001 Pennsylvania Avenue, N.W., Washington, D.C., 20004-2505.

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2. Respondent PQ Corporation is a corporation organized, existing and doing business under and by virtue of the laws of Pennsylvania, with its office and principal place of business located at P.O. Box 840, Valley Forge, Pennsylvania, 19482-0840. Carlyle acquired PQ on July 30, 2007, for approximately \$1.5 billion. PQ manufactures sodium silicate and sodium silicate derivatives worldwide. PQ owns ten sodium silicate manufacturing facilities in the United States.

3. Respondent INEOS Group Limited is a company organized, existing and doing business under and by virtue of the laws of England and Wales, with its office and principal place of business located at Hawkslease, Chapel Lane, Lyndhurst, Hampshire, S043 7FG, United Kingdom. INEOS Group Limited is a global manufacturer of specialty and intermediate chemicals. INEOS Silicas, a wholly owned business of INEOS Group Limited, manufactures sodium silicate and sodium silicate derivatives worldwide. INEOS Silicas operates one sodium silicate manufacturing facility in the United States, located at Joliet, Illinois.

4. Respondent James Ratcliffe is an individual, with an office and principal place of business located at Hawkslease, Chapel Lane, Lyndhurst, Hampshire, S043 7FG, United Kingdom. James Ratcliffe is the controlling shareholder of INEOS Group Limited.

5. At all times relevant herein, Respondents Carlyle, PQ and INEOS have been and are now engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, 15 U.S.C. § 12, and are corporations or partnerships whose business is in or affecting commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

B. THE PROPOSED ACQUISITIONS

6. On October 11, 2007, Carlyle and INEOS entered into an agreement whereby Carlyle will acquire the U.S. silicas assets of

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INEOS and certain INEOS foreign silicas assets for \$292 million in cash, of which \$60 million will be allocated to the purchase of the U.S. silicas assets. As partial consideration for the sale, Ratcliffe will also acquire 1,928,295 newly-issued shares of Class B common stock of the combined company, valued at \$192.8 million. After the transaction, the new entity will be operated as a joint venture. Carlyle and INEOS will own about 54% and 36% of the combined entity, respectively, with the remaining 10% owned by joint venture management.

C. RELEVANT MARKET

7. The relevant line of commerce in which to analyze the effects of PQ's proposed acquisition of INEOS is the manufacture, marketing and sale of sodium silicate.

8. Sodium silicate is a stable, organic, environmentally friendly compound characterized by large surface area and variable pore sizes. Sodium silicate has a variety of direct uses and is also consumed in the production of downstream silicate derivatives, also referred to as silicas. The two largest direct end uses for sodium silicate are detergents and the pulp and paper industry. Detergents also represent the largest market for downstream sodium silicate derivatives, where sodium silicate is a key raw material in detergent zeolites production.

9. At prevailing relative prices, there is no close substitute for sodium silicate in any of its significant uses. As a result, a small but significant and non-transitory increase in the price of sodium silicate would not lead to a significant reduction in consumption of sodium silicate in any of its significant uses.

10. The relevant geographic market in which to analyze the effects of Carlyle's acquisition of PQ is the Midwest United States. Sodium silicate, which is almost always sold in the United States in aqueous solution form that is about 65% water, exhibits strong regional markets because of high transportation costs relative to the value of the product. The effective shipping radius

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from any given plant is about 300 miles. There are virtually no shipments of sodium silicate into the Midwest United States from outside of that region.

D. MARKET STRUCTURE

11. The Midwest U.S. market for sodium silicate is highly concentrated, with only four competitors. The competitors are PQ Corporation, Occidental Chemical Corporation, INEOS Group Limited, and W.R. Grace & Company. The acquisition would reduce the number of competitors from four to three, and would combine the largest competitor PQ with the third largest competitor INEOS, with 50% and 12% market shares as measured by plant capacity, respectively. The Herfindahl-Hirschman Index in this market would increase by 1181, to 4674.

12. INEOS has one U.S. sodium silicate plant located in Joliet, Illinois.

13. PQ has four U.S. sodium silicate plants within a 300 mile radius of INEOS' Joliet, Illinois, plant, located respectively in Gurnee, Illinois; St. Louis, Missouri; Utica, Illinois; and Jeffersonville, Indiana.

14. Occidental Chemical Corporation has two sodium silicate plants within a 300 mile radius of INEOS' Joliet, Illinois, plant, located respectively in Cincinnati, Ohio, and Chicago, Illinois.

15. W.R. Grace & Company has one sodium silicate plant within a 300 miles radius of INEOS' Joliet plant, located in East Chicago, Indiana.

E. CONDITIONS OF ENTRY

16. *De novo* entry or fringe expansion into the relevant market would require a substantial sunk investment and a significant

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period of time, such that new entry would be neither timely, likely, nor sufficient.

17. The minimum viable scale for a sodium silicate production facility using prevailing technology is high relative to market size. Construction of such a facility requires a large expenditure. A facility built to produce sodium silicate has no other potential use, and therefore the substantial expenditure required to build the facility would be lost if the entrant subsequently exited the market. Because of the preceding conditions, entry would be unlikely to deter or defeat anticompetitive behavior. In any case, entry would take longer than two years.

**F. MARKET CHARACTERISTICS THAT
FACILITATE COORDINATED INTERACTION**

18. The characteristics of the market for sodium silicate facilitate coordinated interaction among producers, to the detriment of the purchasers of this product. Among such characteristics are:

- a. The Midwest U.S. market for sodium silicate is highly concentrated;
- b. Sodium silicate is a homogeneous product that is purchased primarily on the basis of price;
- c. Reliable pricing information is available from customers, and from PQ, the market leader, due to PQ's practice of publicly announcing price increases; and
- d. There is a high level of mutual interdependence among producers.

G. EFFECTS OF THE PROPOSED ACQUISITION

19. The effect of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the

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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, in the following ways, among others:

- a. It will substantially increase concentration in the market for sodium silicate;
- b. It will significantly enhance the likelihood of coordinated interaction in the relevant market among the competitors in the manufacture and sale of sodium silicate;
- c. It will increase the likelihood that purchasers of sodium silicate in the relevant geographic market will pay higher prices.

H. VIOLATIONS CHARGED

20. The acquisition agreements between Carlyle and INEOS, as described in paragraph 5, violate Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

21. The acquisition of INEOS by Carlyle, if consummated, would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighteenth day of September, 2008, 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 acquisition by Respondent Carlyle Partners IV, L.P. (“CPIV”), the parent of Respondent PQ Corporation (“PQ”), of US Silicas and certain foreign silicas assets of INEOS Silicas, a specialty inorganic chemical division of Respondent INEOS Group Ltd., the controlling interest of which is owned by Respondent James Ratcliffe, an individual (“collectively “INEOS”), and Respondents having been furnished thereafter with a copy of the 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 a Consent Agreement, an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of the 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 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

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following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent CPIV is a limited partnership organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 1001 Pennsylvania Avenue, N.W., Suite 220 South, Washington, DC 20004-2505.

2. Respondent PQ is a corporation organized, existing and doing business under and by virtue of the laws of Pennsylvania, with its office and principal place of business located at 300 Lindenwood Drive, Valleybrooke Corporate Center, Malvern, PA 19355-1740.

3. Respondent INEOS, the controlling interest of which is owned by James Ratcliffe, is a corporation organized, existing, and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at Hawkslease, Chapel Lane, Lyndhurst, Hampshire SO43 7FG United Kingdom.

4. Respondent James Ratcliffe is an individual with his office and principal place of business located at Hawkslease, Chapel Lane, Lyndhurst, Hampshire SO43 7FG United Kingdom.

5. 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 HEREBY ORDERED that, as used in this Order, the following definitions shall apply:

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- A. “CPIV” means Carlyle Partners IV, L.P., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Carlyle Partners IV, L.P., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “PQ” means PQ Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by PQ Corporation and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “INEOS” means INEOS Group Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by INEOS Group Ltd., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “Commission” means the Federal Trade Commission.
- E. “Respondents” means CPIV, PQ, and INEOS, and James Ratcliffe individually and collectively.
- F. “Acquisition” means the October 11, 2007, proposed acquisition by CPIV for which a filing was made pursuant to the Hart-Scott-Rodino Antitrust Improvements Act on November 15, 2007, by CPIV.
- G. “Asset Purchase Agreement” means “Asset Purchase Agreement by and Between Oak Hill Acquisition Company, LLC and PQ Corporation” dated as of May 26, 2008, and amendments, exhibits, attachments, agreements, and schedules thereto, related to the Sodium Silicate Assets to be divested, that have been approved by the Commission to accomplish the requirements of this Order.

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The Asset Purchase Agreement is attached to this Order as non-public Appendix I.

- H. “Closing Date” means the date on which Respondents (or a Divestiture Trustee) and a Commission-approved Acquirer consummate a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets pursuant to this Order.
- I. “Commission-approved 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 approved by 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.
- J. “Confidential Business Information” means all information owned by, or in the possession or control of, Respondents that is not in the public domain related to the production, marketing, commercialization, distribution, importation, exportation, cost, pricing, supply, sales, sales support, or use of Product at the Utica Sodium Silicate Plant.
- K. “Day(s)” means the period of time prescribed under this Order as computed pursuant to 16 C.F.R. § 4.3 (a).
- L. “Direct Cost” means the cost of direct labor and direct material used to provide the relevant assistance or service.

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- M. “Divestiture Trustee” means a trustee appointed by the Commission pursuant to the relevant provisions of this Order.
- N. “Effective Date” means the date on which the Acquisition occurs.
- O. “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.
- P. “Interim Monitor” means any monitor appointed pursuant to the relevant provisions of this Order or of the related Order to Maintain Assets.
- Q. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Governmental Entity having the effect of law.
- R. “Oak Hill Acquisition Company, LLC “ means Oak Hill Acquisition Company, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Oak Hill Acquisition Company, LLC and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- S. “Patents” means all patents, patent applications, and statutory invention registrations, in each case existing as of the Effective 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

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thereto in the world, used in the production of Product at the Utica Sodium Silicate Plant as of the Closing Date.

- T. “Product” means sodium silicate.
- U. “Product Licensed Intellectual Property” means the following:
1. Patents;
 2. trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, and other information, and all rights in any jurisdiction to limit the use or disclosure thereof, that are related to Product and that have been routinely used in the production of Product at the Utica Sodium Silicate Plant as of the Closing Date.
- V. “Product Marketing Materials” means all marketing materials related to Product produced at the Utica Sodium Silicate Plant as of the Closing 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; reimbursement 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; and advertising and display materials; promotional and marketing materials, and other similar materials related to Product produced at the Utica Sodium Silicate Plant; *provided, however*, that “Product Marketing Materials” does not include any such material with a PQ trademark or label.

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- W. “Remedial Agreement” means the following: (1) any agreement between Respondent(s) and a Commission-approved Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets 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; and/or (2) any agreement between the Respondent(s) 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, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets 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.
- X. “Services Agreement” means the Services Agreement attached as Exhibit I to the Asset Purchase Agreement, or an agreement between Respondents and the Commission-approved Acquirer pursuant to which Respondents shall provide Services and Utilities to the Commission-approved Acquirer at the Utica Facility.
- Y. “Services and Utilities” means:
1. maintenance of certain easements, including but not limited to, vehicular and pedestrian access, rail access, Sewers, Etc. easements;
 2. provision of certain services, including but not limited to, utility services, information technology services, and office space; and

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3. provision of certain commodities, including but not limited to steam, potable water, water that is softened by means of water softener equipment, electrical power, natural gas, fuel oil, and water generated as a result of the production activities at the Utica Facility that are not related to the Utica Sodium Silicate Plant.
- Z. “Sewers, Etc.” means all sanitary and/or non-sanitary sewers, conduits, water lines, gas lines, rainfall run-off, or any other utility pipe, line or conduit.
- AA. “Sodium Silicate Assets” means Respondents’ rights, titles, and interests in and to all assets, properties, business and goodwill, tangible or intangible, used in the production of Product at the Utica Sodium Silicate Plant as of the Closing Date, including, but not limited to:
1. a ninety-nine year ground lease on all related real property (together with appurtenances, licenses and permits) owned, leased or otherwise held by Respondents, including, at the option of the Commission-approved Acquirer, an option for additional space for expansion, with the term of such option to be co-terminus with that of the prime lease, and also including, at, the option of the Commission-approved Acquirer, an easement or easements for Sewers, Etc.;
 2. all personal property owned, leased or otherwise held by Respondents CPIV and PQ;
 3. a non-exclusive license to use and practice all Product Licensed Intellectual Property owned by or licensed to Respondents CPIV and PQ, including but not limited to, trademarks, Patents, mask works, copyrights, trade secrets, research materials, technical information, management information systems, software,

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inventions, test data, technological know-how, licenses, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, and formulas, such license to be royalty free at the Utica Sodium Silicate Plant and, should the Commission-approved Acquirer determine to produce Product at a location other than the Utica Facility, to be at a reasonable market-based royalty negotiated by the Commission-approved Acquirer and Respondents;

4. all rights of Respondents CPIV and PQ under any contract related to Product entered into with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, and joint venture partners;
5. a list of all targeted customers for Product and the planned or proposed pricing of Product for such customers;
6. all Product Marketing Materials;
7. all governmental approvals, consents, licenses, permits, waivers, or other authorizations relating to Product held by Respondents CPIV and PQ;
8. all rights of Respondents CPIV and PQ under any warranty and guarantee, express or implied, relating to Product;
9. all books, records, and files;
10. the Utica Sodium Silicate Plant, including, but not limited to:

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- a. all plant facilities, machinery, equipment, furniture, fixtures, tools, vehicles, transportation and storage facilities, and supplies;
- b. all rights in and to inventories of products, raw materials, supplies and parts, including work-in-process and finished goods;
- c. all customer and vendor lists, catalogs, sales promotion literature, and advertising materials; and

11. Services and Utilities as provided in a Services Agreement;

BB. "Utica Facility" means Respondent PQ's facility containing plants for the production of various products including metasilicate, epsom salts, and Product, situated at 340 East Grove Street, Utica, Illinois 61373-0410.

CC. "Utica Sodium Silicate Plant" means the plant for the production of Product located at the Utica Facility.

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

- A. Not later than five (5) Days after the Effective Date, Respondents shall divest the Sodium Silicate Assets, absolutely and in good faith, to Oak Hill Acquisition Company, LLC ("Oak Hill") pursuant to and in accordance with the Asset Purchase Agreement (which 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 Oak Hill or to reduce any obligations of the Respondents under such agreement), and such agreement, if it becomes the Remedial

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Agreement related to the Sodium Silicate Assets, is incorporated by reference into this Order and made a part hereof. If Respondents do not divest the Sodium Silicate Assets to Oak Hill within five (5) Days after the Effective Date, the Commission may appoint a Divestiture Trustee to divest the Sodium Silicate Assets;

provided, however, that if Respondents have divested the Sodium Silicate Assets to Oak Hill after the Commission has accepted this Order for public comment but 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 Oak Hill is not an acceptable purchaser of the Sodium Silicate Assets, then Respondents shall immediately rescind the transaction with Oak Hill and shall divest the Sodium Silicate Assets within six (6) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to a Commission-approved Acquirer and only in a manner that receives the prior approval of the Commission;

provided further that if the Respondents have divested the Sodium Silicate Assets to Oak Hill after the Commission has accepted this Order for public comment but 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 Sodium Silicate Assets to Oak Hill (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. Respondents shall comply with all terms of the Remedial Agreement which shall be incorporated by reference and

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made a part of this Order. Failure by Respondents to perform under or comply with the Remedial Agreement shall also constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Remedial Agreement, Respondents shall not, without the prior approval of the Commission, modify any term of the Remedial Agreement or fail to satisfy each condition to the Commission-approved Acquirer's obligation to acquire the Sodium Silicate Assets (whether or not waived). The terms of the Remedial Agreement shall not be construed to vary from or contradict the terms of this Order.

C. Respondents shall:

1. submit to the Commission-approved Acquirer, at Respondents' expense, all Confidential Business Information;
2. deliver such Confidential Business Information as follows: (1) in good faith; (2) as soon as practicable, avoiding any delays in transmission of the respective information; and (3) 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 Commission-approved Acquirer, provide the Commission-approved 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 related to Product at the Utica Facility that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;

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4. not use, directly or indirectly, any such Confidential Business Information, other than as necessary to comply with the following: (1) the requirements of this Order; (2) the Respondents' obligations to the Commission-approved Acquirer under the terms of any Remedial Agreement related to the Sodium Silicate Assets; or (3) applicable Law; *provided, however,* that Respondents may use Confidential Business Information which does not relate solely to the Utica Sodium Silicate Plant; and
 5. not disclose or convey any such Confidential Business Information, directly or indirectly, to any person except the Commission-approved Acquirer.
- D. For a period of up to two (2) years from the Closing Date, upon reasonable notice and request by the Commission-approved Acquirer, Respondents shall make available to the Commission-approved Acquirer, at no greater than Direct Cost, such personnel, assistance and training to enable the Commission-approved Acquirer to operate the Sodium Silicate Assets in substantially the same manner as Respondents operated the Sodium Silicate Assets immediately prior to the Closing Date.
- E. Respondents shall, as of the Closing Date, enter into an employee services agreement, which, if the Asset Purchase Agreement is the Remedial Agreement shall be the Employee Services Agreement at Exhibit C thereof, with the Commission-approved Acquirer for the provision of employee services for the job classifications set forth in the collective bargaining agreement between Respondent PQ and employees at the Utica Sodium Silicate Plant ("Utica Sodium Silicate Plant Employees"), and for the services of such other employees and individuals as the Respondents and the Commission-approved Acquirer may agree:

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1. no later than ten (10) days before the Closing Date, Respondents shall (i) provide to the Commission-approved Acquirer a list of all Utica Sodium Silicate Plant Employees, (ii) allow the Commission-approved Acquirer an opportunity to interview any Utica Sodium Silicate Plant Employees, and (iii) allow the Commission-approved Acquirer to inspect the personnel files and other documentation relating to such Utica Sodium Silicate Plant Employees, to the extent permissible under applicable laws;
2. Respondents shall (i) not offer any incentive to any Utica Sodium Silicate Plant Employee to decline providing employee services to the Commission-approved Acquirer, (ii) remove any contractual impediments with Respondents, excluding Respondent PQ's collective bargaining agreement with such Utica Sodium Silicate Plant Employees, that may deter any Utica Sodium Plant Employee from providing employee services to the Commission-approved Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect the ability of the Utica Sodium Silicate Plant Employees to provide employee services to the Commission-approved Acquirer, and (iii) not interfere with any Utica Sodium Silicate Plant Employee providing employee services to the Commission-approved Acquirer;
3. for a period of one year from the date this Order becomes final, Respondents shall not, directly or indirectly, enter into any arrangement, excluding collective bargaining arrangements conducted in the ordinary course of business, for the services of any Utica Sodium Silicate Plant Employee providing employee services to the Commission-approved

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Acquirer, unless the Utica Sodium Silicate Plant Employee's services have been terminated by the Commission-approved Acquirer without the Utica Sodium Silicate Plant Employee's consent; and

4. provide written notification of the restrictions on the use of the Confidential Business Information to all Respondents' employees who are involved in the manufacturing, distribution, sale, or marketing of Product at the Utica Facility or who may have Confidential Business Information ["Designated Employees"]; and Respondents shall require each Designated Employee to execute an acknowledgment of his or her obligation regarding the Confidential Business Information. Respondents shall provide a copy of such notification to the Commission-approved Acquirer. Respondents shall maintain complete records at the Utica Facility regarding the provision of notification to Designated Employees and shall provide an officer's certification to the Commission stating that such notification program has been implemented and is being complied with. Respondents shall provide the Commission-approved Acquirer with copies of all certifications, notifications and reminders sent to Designated Employees.
- F. At such time that the Commission-approved Acquirer initiates collective bargaining with Utica Sodium Silicate Plant Employees, Respondents shall:
1. not offer any incentive to any Utica Sodium Silicate Plant Employee to decline to enter into a collective bargaining agreement with the Commission-approved Acquirer;
 2. remove any contractual impediments with Respondents that may deter any Utica Sodium Plant Employee from entering into a collective bargaining

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agreement with the Commission-approved Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect the ability of the Utica Sodium Silicate Plant Employees to enter into a collective bargaining agreement and to be employed by the Commission-approved Acquirer; and

3. not interfere with the employment by the Commission-approved Acquirer of any Utica Sodium Silicate Plant Employee.
- G. Respondents shall include in any Remedial Agreement the following provisions:
1. Respondents shall make representations and warranties to the Commission-approved Acquirer that Respondents shall hold harmless and indemnify the Commission-approved Acquirer for any liabilities or loss of profits resulting from the failure by Respondents to perform its obligations pursuant to the Services Agreement in a timely manner as required by the Remedial Agreement unless the Respondents can demonstrate that their failure was entirely beyond the control of the Respondents and in no part the result of negligence or willful misconduct by Respondents; *provided, however*, if the Asset Purchase Agreement is the Remedial Agreement, then the terms of the Asset Purchase Agreement, including the Services Agreement at Exhibit I thereto shall apply;
 2. upon reasonable notice and request from the Commission-approved 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 the

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Commission-approved Acquirer to defend against, respond to, or otherwise participate in any litigation related to Product Intellectual Property; and

3. Respondents shall covenant to the Commission-approved Acquirer that Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against the Commission-approved Acquirer under any Patents licensed to the Commission-approved Acquirer pursuant to the Remedial Agreement, if such suit would have the potential to interfere with the Commission-approved Acquirer's freedom to practice in the production, use, import, export, distribution or sale of Product; *provided, however*, if the Asset Purchase Agreement is the Remedial Agreement then the terms of the Asset Purchase Agreement, including the Technology License Agreement at Exhibit K thereto shall apply.
- H. Any Remedial Agreement related to the Sodium Silicate Assets shall be deemed incorporated into this Order, and any failure by Respondents to comply with any term of such Remedial Agreement related to the Sodium Silicate Assets shall constitute a failure to comply with this Order.
 - I. Pending divestiture of the Sodium Silicate Assets, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Sodium Silicate Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Sodium Silicate Assets, except for ordinary wear and tear.
 - J. The purpose of the divestiture of the Sodium Silicate Assets is to ensure the continued use of the assets in the same business in which the Sodium Silicate Assets were engaged at the time of the announcement of the proposed Acquisition by Respondents and to remedy the lessening of competition alleged in the Commission's complaint.

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

- A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint one or more Interim Monitors 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 Agreement.
- B. The Commission shall select the Interim 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 Interim Monitor within ten (10) Days after notice by the staff of the Commission to Respondents 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 purpose of the Order.
- D. If one or more Interim Monitors are appointed pursuant to this Paragraph, 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

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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 completion by Respondents of the divestiture of the Sodium Silicate Assets required to be divested pursuant to the Decision and Order in a manner that fully satisfies the requirements of the Order and notification by the Commission-approved Acquirer to the Interim Monitor that it is fully capable of producing Product pursuant to a Remedial Agreement independently of Respondents; *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 shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Order;

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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 the 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;
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 Commission-approved Acquirer with respect to the performance of Respondents' obligations under the Order 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; and

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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 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 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 Divestiture

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Trustee(s) 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 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

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Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by the 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 Commission. If, however, at the end of the twelve-month 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; *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

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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 best efforts to negotiate the most favorable price and terms available in the 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; *provided further* 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

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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 and, in the case of a court-appointed Divestiture Trustee, by the court, 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 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 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. In the event that the Divestiture Trustee determines that he or she is unable to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed in a manner that preserves their marketability, viability and competitiveness and ensures their continued use in the production, distribution, marketing, promotion,

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sale, or after-sales support of the relevant Product, the Divestiture Trustee may assign, grant, license, divest, transfer, deliver or otherwise convey such additional assets of Respondents and effect such arrangements as are necessary to satisfy the requirements of this Order.

8. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed by this Order.
 9. 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.
 10. 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

- G. 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.

V.**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, 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 Paragraph II, including a description of all substantive contacts or negotiations related to the divestiture of the relevant assets and the identity of all parties contacted. Respondents shall include in their reports copies of all written communications to and from such parties, 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, Respondents shall file a verified written report with the Commission setting forth in detail

Decision and Order

the manner and form in which they have complied and are complying with this Order.

VI.

IT IS FURTHER ORDERED that Respondents shall provide a copy of this Order to each of Respondent's officers, employees, or agents having managerial responsibility for any of Respondent's obligations under Paragraphs II through V of this Order, no later than ten days from the date this Order becomes final.

VII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) Days prior to any proposed (1) dissolution of the Respondents, (2) acquisition, merger, or consolidation of Respondents, or (3) other change in the Respondents that may affect compliance obligations arising out of the order, including, but not limited to, assignment, the creation or dissolution of subsidiaries, or any other change in Respondents.

VIII.

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 made to their principal United States offices, 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; and

Decision and Order

- 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.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on September 18, 2018.

By the Commission.

**NON-PUBLIC
APPENDIX I
TO THE DECISION AND ORDER
ASSET PURCHASE AGREEMENT
[Redacted From the Public Record
But Incorporated By Reference]**

Concurring and Dissenting Statement

**STATEMENT OF COMMISSIONER JON LEIBOWITZ
CONCURRING IN PART AND DISSENTING IN PART**

Commission staff has done an excellent job to try to correct the effects of an anticompetitive merger between the largest competitor in this market and the third largest- a deal that would create one firm with over 60 percent of the market and that would reduce the number of competitors from four to three. I concur with nearly all aspects of the Commission's decision to adopt staff's recommendations, and I dissent on only one point: we should require PQ Corporation *to notify* the Commission before it makes any attempt to undo the principal remedial provision of this order - the divestiture of PQ's plant in Utica, Illinois.

Prior to the Commission's 1995 Prior Approval and Prior Notice Provision Policy Statement,¹ Commission orders routinely included such notice requirements. Our orders also often required that we give prior approval to any reacquisition. That changed with the Policy Statement, which made clear that prior notice and approval was no longer necessary under most circumstances in light of the Hart-Scott-Rodino (HSR) Act. However, the Policy Statement also acknowledged that a prior notification provision "may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order engage in an otherwise unreportable anticompetitive merger."² The need for such a provision would depend on a number of factors "such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants and other relevant factors."³

¹ 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13, 241.

² *Id.*, at 39746.

³ *Id.*

Concurring and Dissenting Statement

In this case, PQ could reacquire the Utica plant from the Oak Hill Acquisition Company (the buyer of the plant) without triggering the HSR filing requirements, as the acquisition price for the plant is very likely to be below the HSR threshold. The issue is whether there is a “credible risk” that they would do so. Presumably, there is little likelihood that such a deal would occur immediately - otherwise the Commission would not have accepted Oak Hill as the buyer of the plant in the first place. But that doesn’t protect consumers from an anticompetitive reacquisition somewhere down the road.

To my mind, such a “credible risk” clearly exists. Given the ongoing relationships between Oak Hill and PQ even after the divestiture; the benefits to PQ of eliminating a potential maverick in the Midwest sodium silicate market; the apparent lack of competition between PQ and Occidental Chemicals (the only other major merchant producer of sodium silicate); and the fact that Oak Hill is not buying the plant to fit into a larger overall business plan, but rather intends to operate the plant as a stand-alone business, the order ought to ensure that we be notified if the parties consider such a transaction.⁴ Moreover, the requirement would not be onerous to either party since the notice provision would only be triggered if PQ attempted to buy the plant back.

⁴ Of course it is possible that, some time after the transaction, someone may complain about it to the Commission. Unfortunately, given the ability of firms to “scramble the eggs”- that is, to make it difficult for the Commission to break up the previously separate companies after the merger - there is some danger that such a complaint would not happen in time for the Commission to be able to design a remedy that is as effective at restoring competition as preventing the deal in the first place. *See, e.g., Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc.*, Docket No. 9315, Opinion of the Commission (8/6/2007) at 89-91, *available at* http://www.ftc.gov/os/adjpro/d9315/080428commopinionon_remedy.pdf (A lapse between the merger and Commission enforcement “does not preclude the Commission from ordering divestiture, but it would make a divestiture much more difficult, with a greater risk of unforeseen costs and failure.”).

Analysis to Aid Public Comment

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT****I. Introduction**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order from Carlyle Partners IV, L.P. (“Respondent”). The Consent Agreement is intended to resolve anticompetitive effects stemming from Carlyle’s proposed acquisition of the world-wide sodium silicate and silicas business from INEOS Group Limited (“INEOS”). Carlyle participates in the sodium silicate market world-wide through PQ Corporation, which it owns. PQ is the largest producer of sodium silicate in the United States. The Consent Agreement includes a proposed Decision and Order which requires Respondent to divest PQ’s sodium silicate plant and business located in Utica, Illinois. The proposed Decision and Order also requires the licensing of all intellectual property related to the production of sodium silicate at the Utica plant.

The Decision and Order calls for divestiture of PQ’s Utica, Illinois plant to Oak Hill Acquisition Company, LLC (“Oak Hill”), or another Commission-approved buyer in the event that Oak Hill is determined not to be acceptable. The Consent Agreement, if finally accepted by the Commission, would settle charges that the proposed acquisition may substantially lessen competition in the market for sodium silicate in the Midwest United States. The Commission has reason to believe that Respondent’s proposed acquisition 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.

II. The Proposed Complaint

According to the Commission’s proposed complaint, the relevant product market in which to analyze the effects of INEOS’ sale of assets to Carlyle is the market for the sale and manufacture

Analysis to Aid Public Comment

of sodium silicate. Sodium silicate has a variety of direct uses and is also consumed in the production of downstream silicate derivatives, also referred to as silicas. According to the Commission's complaint, sodium silicate does not, in its various end-uses, have close substitutes that constrain its pricing. The relevant geographic market is the Midwest United States. Sodium silicate, which is generally sold in an aqueous solution form that is 65% water, exhibits strong regional markets because of high transportation costs relative to the value of the product.

The proposed complaint alleges that the market for sodium silicate is highly concentrated and that the acquisition reduces the number of competitors in the Midwest United States market from four to three. According to the proposed complaint, the acquisition combines PQ, the largest competitor, with INEOS, the third largest competitor, which hold 50% and 12% market shares as measured by plant capacity, respectively. The HHI in this market would increase by 1181, to 4674.

The proposed complaint alleges that the proposed acquisition would reduce competition by eliminating direct competition between these two companies. The proposed complaint further states that the market for sodium silicate is conducive to coordination due to several structural features, including the facts that sodium silicate is a homogenous product and pricing information is readily available. Furthermore, evidence suggests that competitors behave as if the market were essentially a duopoly in which the top two producers, PQ and Occidental, operate with a high level of mutual interdependence. Based on the level of concentration and the competitive conditions, the Commission's complaint alleges that the acquisition would make coordinated interaction more likely, leading to higher prices for sodium silicate. The proposed complaint further alleges that entry into the relevant market would not be timely, likely, or sufficient to deter or offset the proposed acquisition's adverse competitive effects.

Analysis to Aid Public Comment

III. Terms of the Proposed Order

Under the proposed Decision and Order, Carlyle will divest its Utica, Illinois sodium silicate business to Oak Hill within five (5) days of the INEOS acquisition. Oak Hill is a new entity that has been created for the purpose of acquiring the Utica plant. The principal owner of Oak Hill has been involved in entrepreneurial investments in a number of industries over the past twenty five years, including in the chemicals, software, telecommunications, construction, real estate, and energy industries.

The consent order has several major operative provisions. Section II.A. of the Order requires PQ to divest the Utica plant to an up-front purchaser, Oak Hill Acquisition Company, LLC, in accordance with the provisions of the Asset Purchase Agreement, within five days of consummating the acquisition of INEOS. Section II.A. also gives the Commission the authority to require PQ to divest the Utica plant to another purchaser, should the Commission deem Oak Hill not to be acceptable; and to direct PQ to accept any remedial provisions it may add to the Order after initial acceptance. Section II.D. requires Respondents to make available to Oak Hill or other purchaser, at no greater than direct cost, such personnel, assistance and training as is necessary to enable the purchaser to operate the Utica plant in substantially the same manner as PQ operated plant, for a period of two years after divestiture. Section II.E. requires Respondents to enter into an employee services agreement covering certain union employees at the Utica plant to facilitate their continued employment at that the plant under the new ownership. Section III.A. allows the Commission to appoint an Interim Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities. Section IV.A. allows the Commission to appoint a Divestiture Trustee should PQ fail to fully comply with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey assets required by the Order. Section V.B. requires Respondents to submit to the Commission a verified written report setting forth in detail the manner and form

Analysis to Aid Public Comment

in which they intend to comply, are complying, and have complied with the Order, on a regular basis until Respondents have fully achieved the divestiture. Section VII requires Respondents to notify the Commission of any change in their corporate structure that may affect compliance obligations arising out of the Order. Pursuant to Section IX, the Order has a ten year term.

IV. Opportunity for Public Comment

The proposed Decision and Order has been placed on the public record for thirty (30) days to receive comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the Consent Agreement and comments received and decide whether to withdraw its agreement or make final the Consent Agreement's proposed Order.

The purpose of this analysis is to facilitate public comment on the proposed Decision and Order. This analysis is not intended to constitute an official interpretation of the Consent Agreement and the proposed Decision and Order.

Complaint

IN THE MATTER OF

NEGOTIATED DATA SOLUTIONS LLCCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket No. C-4234; FTC File No. 051 0094
Complaint, Sept 22, 2008 – Decision, Sept 22, 2008*

This consent order addresses Negotiated Data Solutions LLC's collection of royalties in connection with a number of patents relating to the Ethernet standard for local area networks. The complaint alleges that N-Data refused to honor the agreements made by Vertical Networks, its predecessor in interest, a company formed by the employees of National Semiconductor. The complaint further alleges that N-Data threatened and opened legal actions against companies that refused its demands for royalties far in excess of those originally agreed upon. The consent order prohibits N-Data from enforcing the relevant patents except insofar as they are licensed in accordance with the terms promised by National Semiconductor in its letter of June 7, 1994, to the IEEE.

Participants

For the *Commission*: Kent E. Cox, Maria DiMoscato, P. Abbott McCartney, and Christopher Renner.

For the *Respondents*: Jerry L. Beane and Scott M. Kline, Andrews Kurth; S. Calvin Capshaw, Brown McCarroll LLP; John M. Clark III; M. Sean Royall and Jon G. Shepherd, Gibson, Dunn & Crutcher LLP; Brad Blanche and Frank Ubell, Greenberg Traurig; David T. Conrad and Mark N. Reiter, Jones Day; Alan Loudermilk, Loudermilk & Associates; Nancy Ludgus; David S. Elkins, Nathan Lane, III, Jose Martin, and Barry A. Pupkin, Squire, Sanders & Dempsey, LLP; Gregory S. Bishop, William J. Bohler and Thomas F. Fitzpatrick, Townsend, Townsend & Crew, LLP; and Andrew J. Ewalt and A. Douglas Melamed, Wilmer Cutler Pickering Hale & Dorr LLP.

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 Negotiated Data Solutions LLC (hereinafter referred to as “Respondent”) has 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 as follows:

NATURE OF THE CASE

1. Through this action, the Commission challenges a course of conduct whereby Respondent, and its predecessor in interest, Vertical Networks, Inc. (“Vertical”), engaged in unfair acts or practices and unfair methods of competition through which it sought to break a licensing commitment that its predecessor, National Semiconductor (“National”), made to the Institute of Electrical and Electronics Engineers (“IEEE”), a standard setting organization, in 1994. The relevant standard, which included the technology subject to the licensing commitment, was subsequently adopted by the industry.

2. The conduct at issue in this action has caused or threatened to cause substantial harm to competition and to consumers, and will in the future cause or threaten to cause further substantial injury to competition and to consumers, absent the issuance of appropriate relief in the manner set forth below.

RESPONDENT

3. Respondent is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business

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located at 1550 N. Lake Shore Drive, No. L6C, Chicago, Illinois 60610.

4. Respondent is engaged in the business of licensing patents that it has acquired. Respondent does not produce or manufacture tangible products.

5. Respondent is, and at all relevant times has been, a person, partnership, or corporation within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and at all times relevant herein, Respondent has been, and is now, engaged in commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

THE DEVELOPMENT OF THE FAST ETHERNET STANDARD

6. In or about 1983, the IEEE published the first 802.3 standard, the Ethernet standard, which allowed computer equipment attached to a local area network (“LAN”) to transmit data across a copper wire at a rate of 10 megabits per second (“Mbps”). Computer equipment manufacturers subsequently adopted the Ethernet standard which ensured that their equipment would be interoperable.

7. In or about 1993, the IEEE authorized the 802.3 Working Group to develop a new standard based on the Ethernet standard to meet the demand for higher data transmission rates. Employees of National were members of and active participants in the 802.3 Working Group.

8. The new standard, commonly referred to as “Fast Ethernet,” would allow equipment attached to a LAN to transmit data across a copper wire at 100 Mbps.

9. The 802.3 Working Group wanted Fast Ethernet equipment to be compatible, to the extent possible, with then-

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existing LANs based on the original Ethernet standard, which operated at substantially slower data transmission rates. The terms “autodetection” and “autonegotiation” were used to refer to technology that would permit such compatibility by enabling two devices at opposing ends of a network link to exchange information and automatically configure themselves to optimize their communication.

10. In 1994, National proposed that the 802.3 Working Group incorporate an autonegotiation technology developed by National, and referred to as “NWay,” into the Fast Ethernet standard. National had filed a patent application for that technology, Ser. No. 07/971,018, in 1992.

11. The 802.3 Working Group considered several alternative technologies to National’s “NWay” technology prior to the adoption of the Fast Ethernet standard. It also considered adopting a Fast Ethernet standard without an autonegotiation feature.

12. At IEEE meetings to determine which autodetection technology to include in the 802.3 standard, one or more representatives of National publicly announced that if NWay technology were chosen, National would license NWay to any requesting party for a one-time fee of one thousand dollars (\$1,000). National made that assurance fully knowing that, as a result, it could be forgoing significant licensing revenues.

13. In a subsequent letter dated June 7, 1994, and addressed to the Chair of the 802.3 Working Group of IEEE, National wrote:

National Semiconductor Corporation (“National”) is pleased to be a contributing member of the IEEE 802.3 Working Group responsible for developing an autodetection standard based upon National’s architecture informally known as “NWay.” To further demonstrate its support for this effort,

Complaint

National would like to make clear its position with respect to prospective licensing of National's intellectual property rights in its NWay technology.

In the event that the IEEE adopts an autodetection standard based upon National's NWay technology, National will offer to license its NWay technology to any requesting party for the purpose of making and selling products which implement the IEEE standard. Such a license will be made available on a nondiscriminatory basis and will be paid-up and royalty-free after payment of a one-time fee of one thousand dollars (\$1,000.00).

14. The IEEE adopted a Fast Ethernet standard with an autodetection feature based upon the NWay technology after National made its licensing commitment. National's one thousand dollar licensing commitment was a significant factor contributing to the incorporation of NWay technology into the 802.3 standard. For example, various IEEE members were aware of and relied upon National's one thousand dollar licensing commitment when they voted to include NWay as the autodetection technology in the 802.3 standard.

15. National benefited financially from its licensing assurance. The assurance accelerated sales of National products that conformed to the Fast Ethernet standard by (a) speeding completion of the standard by allaying concerns about the future costs of autonegotiation, and (b) increasing the demand for Fast Ethernet products by making them backward compatible with Ethernet equipment already installed on existing LANs.

Complaint

INDUSTRY ADOPTION OF THE FAST ETHERNET STANDARD

16. IEEE published the Fast Ethernet standard with National's NWay autonegotiation technology in 1995. By that time, Ethernet was the dominant standard for wired LANs and there were millions of Ethernet ports installed in the United States.

17. Inclusion of autonegotiation technology in the Fast Ethernet standard enabled owners of existing Ethernet-based LANs to purchase and install multi-speed, Fast Ethernet-capable equipment on a piecemeal basis without having to upgrade the entire LAN at once or buy extra bridging equipment.

18. Since 1995, dozens of manufacturers, including many of whom did not participate in the standard setting process, incorporated the Fast Ethernet standard with the NWay technology into hundreds of millions of computer devices such as personal computers, switches, routers, DSL and cable modems, wireless LAN access points, IP phones, and other equipment. Several of these firms were aware of National's commitment to license NWay technology for a one-time fee of one thousand dollars. Standardizing on a single autonegotiation technology allowed Fast Ethernet devices made by different manufacturers to work with one another and with legacy Ethernet equipment.

19. By 2001, there were no commercially viable alternative autonegotiation technologies for Ethernet. The inclusion of NWay in the Fast Ethernet standard and the subsequent adoption of that standard by the industry eliminated viable autonegotiation technology alternatives from the marketplace.

20. The Fast Ethernet standard with the NWay technology became the industry standard after its publication. The standard and the technology have been integrated into hundreds of millions of computer devices and equipment. NWay is the only autonegotiation technology that works with this installed base of

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wired Ethernet and Fast Ethernet equipment. As a result the industry has been locked into using NWay technology since at least 2001.

21. The inclusion of NWay technology into the Fast Ethernet standard and the subsequent adoption of that standard by the industry conferred monopoly power which otherwise would not have existed.

ASSIGNMENT OF THE PATENTS TO VERTICAL NETWORKS

22. National was issued U.S. Patent No. 5,617,418 (“the ‘418 Patent”) on April 1, 1997, and U.S. Patent No. 5,687,174 (“the ‘174 Patent”) on November 11, 1997. Both patents arose from a common parent application, Ser. No. 07/971,018, which National had filed on November 2, 1992. National later received equivalent counterpart patents issued by certain foreign governments. Hereinafter, the ‘174, the ‘418, and the equivalent counterpart foreign patents are collectively referred to as “the Patents.” The ‘174 and ‘418 Patents expire in 2014.

23. On or about June 30, 1998, National assigned to Vertical all rights, titles and interests in nine U.S. patents and their foreign counterparts. The Patents were included in that assignment.

24. Prior to the assignment of the Patents, National gave Vertical a copy of the June 7, 1994 letter. Vertical acknowledged at the time that it had been informed “that several of the patents may be ‘encumbered’ by whatever actions [National] may have taken in the past with respect to the IEEE standards.” The final agreement between Vertical and National stated that the assignment is “subject to any existing licenses and other encumbrances that [National] may have granted.” It further provided, “Existing licenses shall include. . . [p]atents that may be encumbered under standards such as an IEEE standard.”

Complaint

BREACH OF THE LICENSING COMMITMENT

25. Vertical was struggling financially by late 2001 in the wake of the “dot com” bust and the shakeout of the telecommunications industry. Vertical sought to generate new revenue streams by licensing its patents and enforcing its rights against third parties it believed might infringe those patents.

26. In Spring 2002, Vertical also sought to alter the terms of National’s licensing commitment to the IEEE in an effort to increase the prices it could charge those companies that implemented the Fast Ethernet standard and NWay.

27. In a March 27, 2002 letter to the IEEE, Vertical asserted that one or more of the Patents “may be applicable to portions and/or amendments of” IEEE standard 802.3. In that same letter, Vertical promised to make available to any party a non-exclusive license under the Patents “on a non-discriminatory basis and on reasonable terms and conditions including its then current royalty rates.” The March 27, 2002 letter referred to the June 7, 1994 letter, although it did not describe the terms of that letter. In particular, Vertical did not mention that National had committed to license NWay for a one-time fee of one thousand dollars. The 2002 letter concluded by claiming that “the assurances provided in this letter supersede any assurances provided by National Semiconductor Corporation relevant to the above-identified patents.”

28. At or around the same time it sent the letter to the IEEE, Vertical identified approximately sixty-four “Target Companies.” Vertical subsequently sent letters to many of the “Target Companies” demanding licensing fees on a per unit basis for “802.3-compliant auto-negotiating products.” Those demands represent a substantial increase over National’s commitment to license the NWay technology for a one-time fee of one thousand dollars.

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29. Vertical made a “conservative estimate” that the Patents cover at least seventy percent of Ethernet port shipments worldwide. Based on market data, Vertical projected that the Patents would generate more than \$20 million a year in licensing revenue.

30. Several companies sought to accept the original licensing offer and tendered \$1,000 in accordance with the June 7, 1994 letter. Vertical rejected those acceptances.

31. Vertical threatened or initiated legal actions against companies that refused to pay the royalties it demanded. As a result of that effort, several companies entered into licensing agreements that have produced licensing fees for the Patents far in excess of \$1,000 per company.

32. Companies are locked into using NWay given the installed base of Ethernet and Fast Ethernet computer equipment, the incompatibility of NWay with alternative autonegotiation technologies, and the significant costs associated with a decision to abandon autonegotiation altogether.

33. On or about November 14, 2003, Vertical assigned the Patents to Respondent. Subsequently, Vertical sold its remaining business assets and ceased operations.

34. Respondent possessed a copy of, and was familiar with the June 7, 1994 letter of assurance when it received assignment of the Patents from Vertical. A principal of Respondent had represented Vertical in the negotiations in 1998 that led to National’s agreement assigning the Patents to Vertical.

35. Respondent has asserted and continues to assert that making, using, selling, offering for sale, or importing things that employ NWay autonegotiation technology infringes the Patents.

Complaint

HARM TO COMPETITION & CONSUMERS

36. The acts and practices of Respondent, as herein alleged, were and are to the prejudice and injury of consumers, are continuing and will continue in the absence of the relief herein requested. The injury to consumers of NWay technology include, but are not limited to, the following:

- a. increased royalties (or other payments) associated with the manufacture, sale, use or importation of products that implement an IEEE standard enabling autonegotiation by or with 802.3 compliant products; and
- b. increases in price and/or reductions in the use or output of products that implement an IEEE standard enabling autonegotiation by or with 802.3 compliant products.

37. The threatened or actual anticompetitive effects of Respondent's conduct include, but are not limited to, the following:

- a. increased royalties (or other payments) associated with the manufacture, sale, use or importation of products that implement an IEEE standard enabling autonegotiation by or with 802.3 compliant products;
- b. increases in price and/or reductions in the use or output of products that implement an IEEE standard enabling autonegotiation by or with 802.3 compliant products;
- c. decreased incentives on the part of semiconductor chip and LAN equipment manufacturers to produce products that implement IEEE standards enabling autonegotiation by or with 802.3 compliant products;

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d. decreased incentives on the part of semiconductor chip and LAN equipment manufacturers and others to participate in IEEE or other standard setting activities; and

e. both within and outside the semiconductor chip and LAN equipment industries decreased reliance, or willingness to rely, on standards established by industry standard setting organizations.

VIOLATIONS ALLEGED

38. The acts and practices of Respondent, as described in Paragraphs 1-38 above, incorporated herein by reference, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

39. Respondent's course of conduct has caused and is likely to continue to cause substantial injury to consumers of NWay technology that could not reasonably be avoided and is not outweighed by countervailing benefits to consumers or competition. Therefore, Respondent's conduct, as described in paragraphs 1-37 above, incorporated herein by reference, constitute unfair acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-second day of September, 2008, issues its complaint against Respondent.

By the Commission, Chairman Kovacic dissenting.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of Negotiated Data Solutions LLC, hereafter referred to as “Respondent N-Data,” and Respondent N-Data 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 N-Data with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent N-Data, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondent N-Data 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 N-Data 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 N-Data has violated the 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 makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

Decision and Order

1. Respondent Negotiated Data Solutions LLC is a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Illinois with its office and principal place of business located at 1550 N. Lake Shore Drive, No. 16C, Chicago, Illinois 60610.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent N-Data, 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” means Negotiated Data Solutions LLC; its directors, officers, employees, agents, and representatives, when acting in such capacities; its successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Negotiated Data Solutions LLC and the respective directors, officers, employees, agents and representatives of each, when acting in such capacities; and their successors and assigns.
- B. “Commission” means the Federal Trade Commission.
- C. “1994 Letter” means the letter dated June 7, 1994, from Mark Grant, the Director of Intellectual Property for National Semiconductor Corp., to Geoffrey Thompson, Chair of IEEE’s 802.3 Working Group. (A copy of the 1994 Letter is attached to the Appendix C Patent License Agreement as Attachment A.)
- D. “Action” means any proceeding whether legal, equitable, or administrative, as well as any arbitration, mediation, or

Decision and Order

any other form of public or private dispute resolution in the United States or anywhere else in the world.

- E. “Appendix A Offer” means the form of offer attached as Appendix A to this Order, including the Appendix C Patent License Agreement, which shall be attached to, and made part of, the offer.
- F. “Appendix B Offer” means the form of offer attached as Appendix B to this Order, including the Appendix C Patent License Agreement, which shall be attached to, and made part of, the offer.
- G. “Appendix C Patent License Agreement” means the form of agreement attached as Appendix C to this Order.
- H. “Appendix D Letter” means the form of letter attached as Appendix D to this Order.
- I. “Filing” means any document filed in an Action, including, but not limited to, a complaint, an answer, or a pleading.
- J. “Held” and “Holding” mean, with respect to intellectual property:
 - 1. to be the assignee of,
 - 2. to own, or
 - 3. to otherwise have sufficient control over such intellectual property so as to be able to license it to others.
- K. “Person” means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.

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L. “Relevant U.S. Patents” means:

1. U.S. Patent Nos. 5,617,418 ; 5,687,174; US RE39,405 E; and US RE39,116 E;
2. all continuations, continuations-in part, divisionals, reissues, re-examinations of and extensions or additions to U.S. Patent Nos. 5,617,418; 5,687,174; US RE39,405 E; and US RE39,116 E;
3. all current or future United States patents that share a common parent application with or that claim a priority from an application for U.S. Patent Nos. 5,617,418; 5,687,174; US RE39,405 E; and US RE39,116 E; and
4. all current or future United States patents that share a common parent application with, or that claim a priority from, the following U.S. Patent Applications, Nos.: 971,018 (filed on November 2, 1992); 146,729 (filed on November 1, 1993); or 430,143 (filed on April 26, 1995).

M. “Relevant Foreign Patents” means all current and future patents issued by a foreign government, including but not limited to certificates and registrations, that are equivalents or counterparts to any Relevant U.S. Patent or that claim priority from any application for a Relevant U.S. Patent; and all child applications of any of the aforesaid patents, including but not limited to continuations, continuations-in-part, divisionals, reissues and re-examinations thereof. The “Relevant Foreign Patents” include, but are not limited to:

1. Korean Patent No. 286791, Taiwanese Patent No. 098359, Japanese Patent No. 3705610; and

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2. all patents arising from the following patent applications: European Patent Applications SN 93308568.0 (DE, FR, GB, IT, NL); Japanese Patent Applications SN H5-274147; Korean Patent Applications SN 22995/93; or Taiwanese Patent Applications SN 83104531.
- N. “Relevant Patents” means all Relevant U.S. Patents and all Relevant Foreign Patents.
- O. “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, promotion or monitoring of product or process standards for the electronics industry, or any segment thereof anywhere in the world.
- P. “Subsidiaries” means Persons controlled directly or indirectly through ownership interests of 50% or more. For example, if A owns 50% of B and if B owns 50% of C, then C is a Subsidiary of both A and B. The Subsidiaries of an entity would consist of all Persons for which the entity would be the Ultimate Parent Entity if the entity were not controlled by any other entity. For purposes of this definition only, the terms “Ultimate Parent Entity,” “controlled,” and “entity” have the same meaning they have under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, and the rules promulgated thereunder, 16 C.F.R. § 801 et seq.

II.

IT IS FURTHER ORDERED that, as to any intellectual property Held by Respondent, Respondent shall honor all promises or assurances made by Respondent, or by any other

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Person while Holding such intellectual property, where:

- A. such promises or assurances concern the terms on which such intellectual property would be offered if a proposed standard of a Standard Setting Organization were adopted, and
- B. such standard is subsequently adopted.

Provided, however, that for purposes of this Order only, Respondent's compliance with Paragraphs III and IV of this Order shall be deemed compliance with the promises and assurances made in the 1994 Letter.

III.

IT IS FURTHER ORDERED that:

- A. Immediately upon the date this Order becomes final, Respondent shall cease and desist from any and all efforts, and shall not undertake any new efforts, by any means, 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:
 - 1. to initiate or continue any Action against any Person with respect to the enforcement of any of the Relevant Patents,
 - 2. to assert or enforce, or to threaten to enforce, against any Person, any of the Relevant Patents, or
 - 3. except as specified in this Paragraph III of the Order, to propose, offer, or agree to license any of the Relevant Patents to any Person.

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Provided, however, that, if Respondent has offered to enter into an Appendix C Patent License Agreement with such Person, in accordance with Paragraph III.B. of this Order, then Respondent may:

- (i) initiate or continue any Action against such Person with respect to any of the Relevant Patents;
- (ii) assert or enforce, or threaten to enforce, any of the Relevant Patents against such Person; or
- (iii) propose, offer, or agree to license any of the Relevant Patents to such Person.

Provided, however, that Respondent may continue, for twenty (20) days after the date that Respondent signs the Agreement Containing Consent Order in this matter, any preexisting Action with respect to any of the Relevant Patents.

Provided, further, however, that nothing in this Order shall be construed to limit, expand, supersede, or in any way alter (i) the scope, effect, or meaning of the 1994 Letter, or (ii) any legal or equitable rights arising under the 1994 Letter.

Provided, further, however, that a Person's acceptance of, or failure to accept, an Appendix A Offer shall not prejudice, and shall not be construed to limit, such Person's legal or equitable rights, including but not limited to:

- (i) any right to dispute the validity, infringement, or enforceability of any of the Relevant Patents, and
- (ii) any right to defend against a claim of infringement of the Relevant Patents on the grounds that the 1994

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Letter gives such Person a right to a license to the Relevant Patents and that such license would protect such Person against such claim of infringement.

- B. An offer to a Person (the “Offeree”) will be in compliance with the first proviso to Paragraph III.A. of this Order only if:
1. Respondent delivers an Appendix A Offer:
 - a. to each counsel of record for the Offeree in any existing Action between the Offeree and Respondent, at the addresses for service of Filings on such counsel in such Action, or, if no such Action between the Offeree and Respondent exists, then:
 - b. if the Offeree is a natural person, to the primary business address of the Offeree, or, if the Offeree is not a natural person, then:
 - c. to one of the following:
 - (1) a patent counsel employed (in-house) by the Offeree, at the primary business address of such patent counsel,
 - (2) the general counsel of the Offeree, at the primary business address of such general counsel,
 - (3) the chief executive officer of the Offeree, at the primary business address of such chief executive officer,
 - (4) the chairman of the Offeree, at the primary business address of such chairman,

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- (5) the president of the Offeree, at the primary business address of the such president, or
- (6) the highest-ranking manager of the Offeree, at the primary business address of such highest-ranking manager, or
- (7) the registered agent for service of process of the Offeree in the state of the Offeree's incorporation (or, if the Offeree is not a corporation, in the state of the Offeree's primary place of business),

or if none of the Persons listed in this Paragraph III.B.1.c. exists, then:

- d. to the natural person with the largest ownership interest in the Offeree, at the primary business address of that natural person;
2. Respondent moves, within twenty (20) days of making such Appendix A Offer, to make that Appendix A Offer a part of the record of any existing Action to which both Respondent and the Offeree are parties; and
 3. Respondent obtains and retains a receipt signed by the addressee(s), or by an agent or agents of the addressee(s), for delivery of the Appendix A Offer to the Offeree pursuant to Paragraph III.B.1. of this Order.
- C. If Respondent receives a written request to enter into an Appendix C Patent License Agreement from any Person who has not received an Appendix A Offer made in accordance with Paragraph III.B. of this Order, then

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Respondent shall, within sixty (60) days of receiving such request:

1. offer such Person, in accordance with Paragraph III.B. of this Order, an Appendix A Offer, and
 2. deliver, in accordance with III.B.3. of this Order, a copy of such Appendix A Offer to the natural person who requested the offer.
- D. For purposes of Paragraph III of the Order, an Appendix A Offer is effective only as to the Person to which it is made and as to the Subsidiaries of such Person. An Appendix A Offer made to a Subsidiary of a Person is not effective as to such Person nor as to any other parents of the Subsidiary. Nor is an Appendix A Offer effective as to predecessors of, and successors to, the Person to which the offer is made.

Provided, however, that an Appendix A Offer made to a Person is effective as to Subsidiaries of such Person only for such time as they continue to be Subsidiaries. If and when they cease to be Subsidiaries of such Person, then Appendix A Offers made to such Person are no longer effective against such former Subsidiaries.

IV.

IT IS FURTHER ORDERED that:

- A. If and when Respondent enters into an Action with any Person with respect to any of the Relevant Patents, then:
 1. if Respondent has not previously made an Appendix A Offer to such Person in accordance with Paragraph III of the Order, then Respondent shall, within ten (10) days of entering into such Action with such Person,

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make an Appendix A Offer to such Person in accordance with Paragraph III of the Order; or

2. if Respondent has previously made an Appendix A Offer to such Person in accordance with Paragraph III of the Order, then Respondent shall make an Appendix B Offer to such Person as follows:
 - a. at the time that Respondent makes its first Filing in such Action, Respondent shall enclose an Appendix B Offer with a copy of such first Filing, and deliver the offer and the filing to each counsel of record for such Person in such Action at the addresses for service of Filings on such counsel in such Action,
 - b. Respondent shall obtain and retain a receipt for each such delivery signed by each such counsel of record, or by each agent of each such counsel of record; and
 - c. at the time that Respondent makes such first Filing in such Action, Respondent shall move to make such Appendix B Offer a part of the record of such Action.

Provided, however, that Respondent shall not be required to comply with Paragraph IV.A. of this Order if:

- (i) Respondent previously delivered, in accordance with Paragraph III.B.1.a. of this Order, an Appendix A Offer to each of such Person's counsels of record in an Action then existing between Respondent and such Person; and such Appendix A Offer was made a part of the record of such previous Action following Respondent's

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- compliance with Paragraph III.B.2. of this Order;
- (ii) Respondent previously made an Appendix B Offer to such Person in accordance with Paragraph IV.A.2. of this Order; and such Appendix B Offer was made a part of the record of such previous Action following Respondent's compliance with Paragraph IV.A.2.c. of this Order; or
 - (iii) Respondent previously entered into an Appendix C Patent License Agreement with such Person.

Provided, further, however, that a Person's acceptance of, or failure to accept, an Appendix B Offer shall not prejudice, and shall not be construed to limit, such Person's legal or equitable rights, including but not limited to:

- (i) any right to dispute the validity, infringement, or enforceability of any of the Relevant Patents, and
 - (ii) any right to defend against a claim of infringement of the Relevant Patents on the grounds that the 1994 Letter gives such Person a right to a license to the Relevant Patents and that such license would protect such Person against such claim of infringement.
- B. For purposes of Paragraph IV of the Order, an Appendix A Offer or an Appendix B Offer is effective only as to the Person to which it is made and as to the Subsidiaries of such Person. An Appendix A Offer or an Appendix B Offer made to a Subsidiary of a Person is not effective as to such Person nor as to any other parents of the Subsidiary. Nor is an Appendix A Offer or an Appendix B Offer effective as to predecessors of, and successors to, the Person to which the offer is made.

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Provided, however, that an Appendix A Offer or an Appendix B Offer made to a Person is effective as to Subsidiaries of such Person only for such time as they continue to be Subsidiaries. If and when they cease to be Subsidiaries of such Person, then Appendix A Offers and Appendix B Offers made to such Person are no longer effective against such former Subsidiaries.

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

- A. Within thirty (30) days after the date this Order becomes final, Respondent shall send by certified mail an executed copy of the Appendix D Letter, a copy of this Order, and a copy of the complaint in this matter (“Complaint”) to each of the following:
 1. Secretary, IEEE-SA Standards Board, and PatCom Administrator
Institute of Electrical and Electronics Engineers
445 Hoes Lane
Piscataway, NJ 08855
 2. Steve M. Mills, Chair, IEEE-SA Standards Board
IEEE Standards Association
445 Hoes Lane
Piscataway, NJ 08855
 3. Bob Grow, Chair, IEEE 802.3 Working Group
IEEE 802.3 Working Group
Institute of Electrical and Electronics Engineers
445 Hoes Lane
Piscataway, NJ 08855
- B. Within ninety (90) days after the date this Order becomes final, Respondent shall distribute copies of the Complaint

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and Order in this matter to all Persons with which Respondent has previously communicated with respect to any of the Relevant Patents or the licensing thereof.

- C. Within thirty (30) days after the date this Order becomes final, Respondent shall distribute copies of this Order and the Complaint to every officer, director, employee or agent of Respondent.
- D. For a period of five (5) years after the date this Order becomes final, Respondent shall furnish a copy of this Order and the Complaint to each new officer, director, employee or agent of Respondent. Such copies shall be furnished within thirty (30) days after each such Person assumes his or her position as officer, director, employee, or agent.
- E. In any Action to which Respondent is a party and in which infringement of any of the Relevant Patents is alleged, Respondent shall:
 - 1. attach copies of this Order and the Complaint to the first Filing Respondent makes after this Order becomes final, and
 - 2. deliver a copy of that Filing (with the attached copies of this Order and the Complaint) to all parties to the Action and to any judge, arbitrator, or other official presiding over such Action.

VI.

IT IS FURTHER ORDERED that Respondent shall not sell, assign, grant exclusive licenses to, or otherwise transfer any of the Relevant Patents to any other Person prior to the termination of this Order.

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Provided, however, that Respondent may sell, assign, grant exclusive licenses to, or otherwise transfer all of the Relevant Patents to a single Person if:

- (i) in an executed agreement providing for such sale, assignment, exclusive license, or other transfer of the Relevant Patents, such Person acknowledges it is, and agrees to be, a successor bound by all the terms of this Order and by all terms and conditions of all Appendix C Patent License Agreements formed pursuant to this Order; and
- (ii) Respondent files such agreement with the Commission at least thirty (30) days prior to such sale, assignment, exclusive license, or other transfer.

VII.

IT IS FURTHER ORDERED that:

- A. Sixty (60) days after the date this Order becomes final, 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.
- 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 5 years, Respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which it is complying and has complied with this Order.

VIII.

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

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- A. any proposed dissolution of Respondent;
- B. any proposed acquisition, merger or consolidation of Respondent; or
- C. any other change in 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.

IX.

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, 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 thirty (30) 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.

X.

IT IS FURTHER ORDERED that this Order shall terminate on September 22, 2028.

By the Commission, Chairman Kovacic dissenting.

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Appendix A

Appendix A

**APPENDIX A
PATENT LICENSE OFFER**

1. This Patent License Offer ("Offer") is made by Negotiated Data Solutions LLC ("N-Data"), an Illinois limited liability company having a mailing address of 1550 N. Lake Shore Drive, Suite 16C, Chicago, Illinois 60610. This Offer provides an opportunity for you to obtain a license for certain patents assigned to, or owned or controlled by, N-Data.
2. The terms and conditions under which N-Data is licensing patents pursuant to this Offer are set forth in the agreement that is attached hereto ("Patent License Agreement").
3. This Offer will remain available and open for 120 calendar days after receipt. If, prior to the expiration of those 120 days, you file a declaratory judgment action in court against N-Data disputing the validity, infringement, or enforceability of any of the Relevant Patents (as that term is defined in the attached Patent License Agreement), the time for your acceptance of this Offer will be extended until 60 days after the conclusion of any appeal, or expiration of time to appeal, from entry of final judgment in, or dismissal of, such declaratory judgment action.
4. You may accept this Offer only by sending to N-Data at 1550 N. Lake Shore Drive, Suite 16C, Chicago, Illinois 60610:
 - a. your name, address, and telephone number,
 - b. one thousand dollars (\$1,000) in the form of either a cashier's check payable to N-Data or a wire transfer to N-Data, and
 - c. a copy of the Patent License Agreement executed by you.
5. Immediately upon N-Data's receipt of such acceptance, your Patent License Agreement with N-Data will become effective ("Effective Date").
6. Within ten (10) days after the Effective Date of the Patent License Agreement, N-Data will mail to you a copy of the Patent License Agreement executed by an officer of N-Data.
7. Your acceptance of, or your failure to accept, this Offer shall not prejudice, and shall not be construed to limit, any of your legal or equitable rights, including but not limited to:
 - a. any right to dispute the validity, infringement, or enforceability of any of the Relevant Patents, and

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Appendix A

- b. any right to defend against a claim of infringement of the Relevant Patents on the grounds that the letter dated June 7, 1994, from Mark Grant to Geoffrey Thompson (a copy of which is Attachment A to the Patent License Agreement) gives you a right to a license to the Relevant Patents and that such license would protect you against such claim of infringement.
8. This Offer is made in accordance with a Decision and Order issued by the Federal Trade Commission, a United States Government agency, and the text of this Offer and of the Patent License Agreement is a part thereof. A copy of that Decision and Order, as well as a copy of the related Complaint of the Federal Trade Commission, can be found at [Web links].¹

¹ The final sentence of Paragraph 8 should be inserted only in Appendix A Offers delivered after the Complaint and the Decision and Order are public, i.e. after the Commission has accepted for public comment the Consent Agreement Containing Consent Order in this matter.

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Appendix B

Appendix B

**APPENDIX B
PATENT LICENSE OFFER**

1. This Patent License Offer ("Offer") is made by Negotiated Data Solutions LLC ("N-Data"), an Illinois limited liability company having a mailing address of 1550 N. Lake Shore Drive, Suite 16C, Chicago, Illinois 60610. This Offer provides an opportunity for you to obtain a license for certain patents assigned to, or owned or controlled by, N-Data.
2. The terms and conditions under which N-Data is licensing patents pursuant to this Offer are set forth in the agreement that is attached hereto ("Patent License Agreement").
3. *Expiration of Offer.* Enclosed with this Offer is either a complaint or some other legal document ("Complaint") filed by N-Data in federal court litigation or in some other legal proceeding ("Litigation"). The Complaint names you as a party to the Litigation.
 - a. You may accept this Offer up until the time designated, under the rules of the Litigation, for your filing of an answer or other response to the Complaint; and, thereafter, this Offer is void.
 - b. If, under the rules of the Litigation, there is no time designated for your filing of an answer or other response to the Complaint, then you may accept this Offer up until 45 days after receiving it; and, thereafter, this Offer is void.
4. You may accept this Offer only by sending to N-Data at 1550 N. Lake Shore Drive, Suite 16C, Chicago, Illinois 60610:
 - a. your name, address, and telephone number,
 - b. thirty-five thousand dollars (\$35,000) in the form of either a cashier's check payable to N-Data or a wire transfer to N-Data, and
 - c. a copy of the attached Patent License Agreement executed by you.
5. Immediately upon N-Data's receipt of such acceptance, your Patent License Agreement with N-Data will become effective ("Effective Date").
6. Within ten (10) days after the Effective Date of the Patent License Agreement, N-Data will mail to you a copy of the Patent License Agreement executed by an officer of N-Data.
7. Your acceptance of, or your failure to accept, this Offer shall not prejudice, and shall not be construed to limit, any of your legal or equitable rights, including but not limited to:

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- a. any right to dispute the validity, infringement, or enforceability of any of the Relevant Patents, and
 - b. any right to defend against a claim of infringement of the Relevant Patents on the grounds that the letter dated June 7, 1994, from Mark Grant to Geoffrey Thompson (a copy of which is Attachment A to the Patent License Agreement) gives you a right to a license to the Relevant Patents and that such license would protect you against such claim of infringement.
8. This Offer is made in accordance with a Decision and Order issued by the Federal Trade Commission, a United States Government agency, and the text of this Offer and of the Patent License Agreement is a part thereof. A copy of that Decision and Order, as well as a copy of the related Complaint of the Federal Trade Commission, can be found at [Web links].¹

¹ The final sentence of Paragraph 8 should be inserted only in Appendix B Offers delivered after the Complaint and the Decision and Order are public, i.e. after the Commission has accepted for public comment the Consent Agreement Containing Consent Order in this matter.

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Appendix CAppendix C
Page i**Patent License Agreement**

This PATENT LICENSE AGREEMENT between Negotiated Data Solutions LLC (the "Licensor"), an Illinois limited liability company having a place of business at 1550 N. Lake Shore Drive, No. 16C, Chicago, Illinois 60610, and _____ (the "Licensee") having principal offices at _____, is effective as of _____ ("the Effective Date").

WHEREAS, the Federal Trade Commission ("Commission") having initiated an investigation of the Licensor and having thereafter considered the matter and, having determined that it had reason to believe that Licensor had violated the Federal Trade Commission Act, issued a Complaint stating its charges in the matter of *Negotiated Data Solutions LLC*, Docket No. C-###.¹

WHEREAS, the Licensor disputed said charges, but agreed to settle the charges in order to avoid the expense of litigation.²

¹ Until the Decision and Order has become final, the following paragraph should be substituted for this paragraph:

WHEREAS, the Federal Trade Commission ("Commission") has initiated an investigation of the Licensor in the matter of *Negotiated Data Solutions LLC*, Matter No. 051 0094.

² Until the Decision and Order has become final, the following paragraph should be substituted for this paragraph:

WHEREAS, the Licensor believes that it has not engaged in any unlawful conduct, but agreed to settle this matter in order to avoid the expense of litigation.

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WHEREAS, in order to settle said charges, Licensor entered to an Agreement Containing Consent Order pursuant to which the Commission has issued a Decision and Order in the matter of *Negotiated Data Solutions LLC*, Docket No. C-####, requiring, in part, that, under certain circumstances, Licensor enter into this Patent License Agreement.³

WHEREAS, Licensee wishes to obtain a license to practice the Licensed Patents within the Licensed Field of Use.

NOW, therefore, the parties agree as follows:

1. *Definitions.*

1.1. *1994 Letter.* "1994 Letter" means the letter dated June 7, 1994, from Mark Grant, the Director of Intellectual Property for National Semiconductor Corp., to Geoffrey Thompson, Chair of IEEE's 802.3 Working Group. (A copy of the 1994 Letter is attached to this Patent License Agreement as Attachment A.)

1.2. "Held" means, with respect to intellectual property:

1.2.1. to be the assignee of,

1.2.2. to own, or

1.2.3. to otherwise have sufficient control over such intellectual property so as to be able to license it to others.

1.3. *IEEE.* "IEEE" means the Institute of Electrical and Electronics Engineers, Inc. and the Institute of Electrical and Electronics Engineers Standards Association; and their committees and subcommittees.

1.4. *IEEE Standards.* "IEEE Standards" means:

³ Until the Decision and Order has become final, the following paragraph should be substituted for this paragraph:

WHEREAS, the Licensor entered to an Agreement Containing Consent Order in the matter of *Negotiated Data Solutions LLC*, Matter No. 051 0094, requiring, in part, that, under certain circumstances, Licensor enter into this Patent License Agreement.

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- 1.4.1. any and all standards of the IEEE, including past, current, and future standards, and including all supplemental or letter standards of the IEEE; and
- 1.4.2. any and all standards of the American National Standards Institute (ANSI) or the International Standards Organization (ISO), that incorporate or replicate any standard specified in Paragraph 1.4.1. of this Patent License Agreement.
- 1.5. *Importing*. "Importing" means to import into the United States.
- 1.6. *Licensed Entities*. "Licensed Entities" means the Licensee and all Subsidiaries of the Licensee, including, but not limited to:
- 1.6.1. Subsidiaries subsequently acquired by the Licensee, and
- 1.6.2. Subsidiaries of the Licensee that have previously failed to accept, or have rejected, the Licensor's offer, pursuant to the Decision and Order of the Federal Trade Commission in the matter of *Negotiated Data Solutions LLC*, Docket No. C-####,⁴ of a license to the Licensed Patents.
- Provided, however*, that Subsidiaries of the Licensee that become Licensed Entities pursuant to the terms of this Patent License Agreement shall lose their status as Licensed Entities if and when they cease to be Subsidiaries of the Licensee.
- 1.7. *Licensed Field of Use*. "Licensed Field of Use" means the use of NWay Technology in Products to implement an IEEE Standard. In addition, "Licensed Field of Use" includes optimization or enhancement features that are consistent with the use of NWay Technology to implement the IEEE Standard.
- 1.8. *Licensed Foreign Patents*. "Licensed Foreign Patents" means all current and future patents issued by a foreign government, including but not limited to certificates and registrations, that are equivalents or counterparts to any Licensed U.S. Patent or that claim priority from any application for a Licensed U.S. Patent; and all child applications of any of the aforesaid patents, including but not limited to continuations, continuations-in-part, divisionals, reissues and re-examinations thereof. The "Licensed Foreign Patents" include, but are not limited to:

⁴ Until the Decision and Order has become final, and a docket number has been assigned to this matter, the words "Matter No. 051 0094" should be substituted for the words "Docket No. C-####."

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- 1.8.1. Korean Patent No. 286791, Taiwanese Patent No. 098359, Japanese Patent No. 3705610;
 - 1.8.2. all patents arising from the following patent applications: European Patent Applications SN 93308568.0 (DE, FR, GB, IT, NL); Japanese Patent Applications SN H5-274147; Korean Patent Applications SN 2299593; or Taiwanese Patent Applications SN 83104531; and
 - 1.8.3. any other current or future patent that was issued by a foreign government, that:
 - 1.8.3.1. is Held by Respondent now or in the future,
 - 1.8.3.2. was previously Held (or shares a common parent application with, or claims a priority from, a patent previously Held) by National Semiconductor Corporation, and
 - 1.8.3.3. has a claim that Respondent, at any time, asserts is infringed by the use of NWay Technology.
- 1.9. *Licensed Patents.* "Licensed Patents" shall mean all Licensed U.S. Patents and all Licensed Foreign Patents.
- 1.10. *Licensed U.S. Patents.* "Licensed U.S. Patents" means:
- 1.10.1. U.S. Patent Nos. 5,617,418 ; 5,687,174; US RE39,405 E; and US RE39,116 E;
 - 1.10.2. all continuations, continuations-in part, divisionals, reissues, re-examinations of and extensions or additions to U.S. Patent Nos. 5,617,418; 5,687,174; US RE39,405 E; and US RE39,116 E;
 - 1.10.3. all current or future United States patents that share a common parent application with or that claim a priority from an application for U.S. Patent Nos. 5,617,418; 5,687,174; US RE39,405 E; and US RE39,116 E;
 - 1.10.4. all current or future United States patents that share a common parent application with, or that claim a priority from, the following U.S. Patent Applications, Nos.: 971,018 (filed on November 2, 1992); 146,729 (filed on November 1, 1993); or 430,143 (filed on April 26, 1995); and
 - 1.10.5. any other current or future United States patent that
 - 1.10.5.1. is Held by Respondent now or in the future,

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- 1.10.5.2. was previously Held (or shares a common parent application with, or claims a priority from, a patent previously Held) by National Semiconductor Corporation, and
 - 1.10.5.3. has a claim that Respondent, at any time, asserts is infringed by the use of NWay Technology.
- 1.11. *NWay Technology*. “NWay Technology” is defined by reference to the 1994 Letter and shall have the same meaning that the term “NWay technology” has in that letter.
- 1.11.1. In determining the meaning of the term “NWay Technology,” the following documents, *inter alia*, can be consulted:
 - 1.11.1.1. “IEEE Link Task Force Autodetect; Specification for NWay Autodetect,” Version 1.0, Copyright National Semiconductor, 1994, having principal sponsors AMD, Ascom Timplex, AT&T – Bell Labs, David Systems Inc., Hitachi Cable, Luxcom, Microlinear, National Semiconductor, Olympic Technology Group, Seeq, SMC, variously dated April 10, 1994, April 15, 1994, April 18, 1994 and May 2, 1994 [Web link]; and
 - 1.11.1.2. Bill Bunch, “An Introduction to Auto-Negotiation,” (February 1995) [Web link].
 - 1.11.2. Some examples of the use of “NWay Technology,” within the meaning of this Patent License Agreement, are described in the various versions of Clause 28 (and Annexes thereto, such as Annexes 28A, 28B, 28C, and 28D) published in the following standards:
 - 1.11.2.1. IEEE Std 802.3an-2006 (Amendment to IEEE Std 802.3-2005), IEEE Standard for Information technology – Telecommunications and information exchange between systems – Local and metropolitan area networks – Specific requirements – Part 3: Carrier Sense Multiple Access with Collision Detection (CSMA/CD) Access Method and Physical Layer Specifications – Amendment 1: Physical Layer and Management Parameters for 10 Gb/s Operation, Type 10GBASE-T;
 - 1.11.2.2. IEEE Std 802.3-2005, IEEE Standard for Information technology – Telecommunications and information exchange between systems – Local and metropolitan area networks – Specific requirements–

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- Part 3: Carrier sense multiple access with collision detection (CSMA/CD) access method and physical layer specifications;
- 1.11.2.3. IEEE Std 802.3aj-2003 (Amendment to IEEE Std 802.3-2002), IEEE Standard for Information technology – Telecommunications and information exchange between systems – Local and metropolitan area networks – Specific requirements – Part 3: Carrier Sense Multiple Access with Collision Detection (CSMA/CD) Access Method and Physical Layer Specifications – Amendment: Maintenance 7;
- 1.11.2.4. IEEE Std 802.3-2002, IEEE Standard for Information technology – Telecommunications and information exchange between systems – Local and metropolitan area networks – Specific requirements – Part 3: Carrier sense multiple access with collision detection (CSMA/CD) access method and physical layer specifications;
- 1.11.2.5. IEEE Std 802.3, 2000 Edition, Information technology – Telecommunications and information exchange between systems – Local and metropolitan area networks – Specific requirements – Part 3: Carrier sense multiple access with collision detection (CSMA/CD) access method and physical layer specifications;
- 1.11.2.6. IEEE Std 802.3ab-1999 (Supplement to IEEE Std 802.3,1998 Edition), Information technology – Telecommunications and information exchange between systems – Local and metropolitan area networks – Specific requirements – Supplement to Carrier Sense Multiple Access with Collision Detection (CSMA/CD) Access Method and Physical Layer Specifications – Physical Layer Parameters and Specifications for 1000 Mb/s Operation Over 4-Pair of Category 5 Balanced Copper Cabling, Type 1000BASE-T;
- 1.11.2.7. IEEE Std 802.3, 1998 Edition, Information technology – Telecommunications and information exchange between systems – Local and metropolitan area networks – Specific requirements – Part 3: Carrier sense multiple access with collision detection (CSMA/CD) access method and physical layer specifications;
- 1.11.2.8. IEEE Std 802.3x-1997 and IEEE Std 802.3y-1997 (Supplements to ISO/IEC 8802-3: 1996 [ANSI/IEEE Std 802.3, 1996 Edition]), IEEE Standards for Local and Metropolitan Area Networks: Supplements to Carrier Sense Multiple Access with Collision

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Detection (CSMA/CD) Access Method and Physical Layer Specifications – Specification for 802.3 Full Duplex Operation and Physical Layer Specification for 100 Mb/s Operation on Two Pairs of Category 3 or Better Balanced Twisted Pair Cable (100BASE-T2); and

- 1.11.2.9. IEEE Std 802.3u-1995, (Supplement to ISO/IEC 8802-3: 1993 [ANSI/IEEE Std 802.3, 1993 Edition]), IEEE Standards for Local and Metropolitan Area Networks: Supplement to Carrier Sense Multiple Access with Collision Detection (CSMA/CD) Access Method and Physical Layer Specifications – Media Access Control (MAC) Parameters, Physical Layer, Medium Attachment Units, and Repeater for 100 Mb/s Operation, Type 100BASE-T (Clauses 21-30).

- 1.12. *Person*. “Person” means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.
- 1.13. *Product*. “Product” means any thing, tangible or intangible, including, but not limited to:
- 1.13.1. any apparatus, device, system, combination, design, process, or method, and
- 1.13.2. anything that can infringe, in any way, any claim of any Licensed Patent.
- 1.14. *Subsidiaries*. “Subsidiaries” means Persons controlled directly or indirectly through ownership interests of 50% or more. For example, if A owns 50% of B and if B owns 50% of C, then C is a Subsidiary of both A and B. The Subsidiaries of a Licensee would consist of all Persons for which the Licensee would be the Ultimate Parent Entity if the Licensee were not controlled by any entity. For purposes of this definition only, the terms “Ultimate Parent Entity,” “controlled,” and “entity” have the same meaning they have under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, and the rules promulgated thereunder, 16 C.F.R. § 801 et seq.
- 1.15. *Supply Chain Person*. “Supply Chain Person” means any Person in the Licensed Entities’ downstream chain of manufacture or distribution. The term “Supply Chain Person” includes, but is not limited to, any system integrators, resellers, purchasers and end users of the Licensed Entities’ Products.
2. *License Grant and Release*. Licensor hereby grants to each of the Licensed Entities, under any and all claims of the Licensed Patents, a license to NWay Technology, to make, use, sell, offer for sale, or Import any Product, in the Licensed Field of Use. Such license is fully paid-up,

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perpetual, irrevocable, worldwide, non-exclusive, non-transferable, and non-sublicensable. As to Licensed Patents that issued prior to the Effective Date, such license shall be given retroactive effect from the moment the Licensed Patents issued. Each of the Licensed Entities is hereby released from any and all claims of infringement – including but not limited to direct infringement, literal infringement, infringement under the doctrine of equivalents, inducement of infringement, and contributory infringement – of the Licensed Patents in the Licensed Field of Use – including claims that the Licensed Entities infringed any of the Licensed Patents in the Licensed Field of Use prior to the Effective Date, on the Effective Date, or after the Effective Date.

3. *Exhaustion and Release.* The license granted herein to the Licensed Entities shall cover, for Products of the Licensed Entities within the Licensed Field of Use, all Supply Chain Persons. Licensor declares and agrees that, as to any Supply Chain Person, all the Licensor's rights with respect to the Licensed Patents are hereby exhausted with respect to Products of the Licensed Entities in the Licensed Field of Use. Each such Supply Chain Person is hereby released from any and all claims of infringement of the Licensed Patents in the Licensed Field of Use, including claims that such Person infringed any of the Licensed Patents in the Licensed Field of Use prior to the Effective Date, on the Effective Date, or after the Effective Date. With respect to any portion of a Product of the Licensed Entities that would, absent the license provided in Section 2 of this Patent License Agreement, infringe any claim of any of the Licensed Patents, such portion will be treated under this Patent License Agreement, for the purposes of applying the "first sale doctrine" or principles of "patent exhaustion," as if it infringed all claims of all of the Licensed Patents. Therefore, as to any portion of a Product of the Licensed Entities that, absent the license as provided in Section 2 of this Patent License Agreement, would infringe one or more claims of the Licensed Patents, Licensor's patent rights for all claims of the Licensed Patents are completely exhausted.
4. *Consideration.* Licensee has provided good and sufficient consideration for the rights provided herein.
5. *No Warranty.* Nothing herein shall be construed as a warranty, admission or representation by Licensor or any of the Licensed Entities as to the validity, enforceability or scope of any Licensed Patent claim, or a warranty, admission or representation by Licensor that any manufacture, sale, offer for sale, use, importation into the United States or other disposition of any Product by any of the Licensed Entities or any third party will be free from infringement of patents other than the Licensed Patents.
6. *Licensee's Retention of Rights.* This agreement shall not prejudice, and shall not be construed to limit, any of the Licensee's legal or equitable rights, including but not limited to:
 - 6.1. the Licensee's right to dispute the validity, infringement, or enforceability of the Licensed Patents, and

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6.2. the Licensee's right to defend against a claim of infringement of the Licensed Patents on the grounds that the 1994 Letter gives the Licensee a right to a license to the Licensed Patents and that such license would protect the Licensee against such claim of infringement; and the Licensee's right to argue that the meaning of "NWay Technology" in the 1994 Letter is broader than the definition of "NWay Technology" in Paragraph 1.11. of this Patent License Agreement. Nothing in this Patent License Agreement shall limit, supersede, or in any way alter the scope, effect, or meaning of the 1994 Letter.

7. *Governing Law.* This Agreement shall be construed and controlled by the laws of the State of Illinois.

8. *Public Identification as Licensee.* Licensee, Licensor, and each of the Licensed Entities may publicly disclose or announce that Licensee has entered into this Patent License Agreement with Licensor.

In witness whereof this Patent License Agreement is in effect.

LICENSOR:

LICENSEE:

Negotiated Data Solutions LLC

By: _____
(Signature)

By: _____
(Signature)

Name: _____
(Printed)

Name: _____
(Printed)

Title: _____
(Printed)

Title: _____
(Printed)

Date: _____

Date: _____

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Attachment A to Appendix C



2900 Semiconductor Drive
P.O. Box 58090
Santa Clara, California 95052-80
(408) 721-5000

June 7, 1994

Mr. Geoffrey Thompson
Chair, 802.3 Working Group, IEEE
c/o SynOptics Communications, Inc.
4401 Great America Pkwy.
P.O. Box 58185
Santa Clara, CA 95052-8185

Dear Mr. Thompson:

National Semiconductor Corporation ("National") is pleased to be a contributing member of the IEEE 802.3 Working Group responsible for developing an autodetection standard based upon National's architecture informally known as "NWay". To further demonstrate its support for this effort, National would like to make clear its position with respect to prospective licensing of National's intellectual property rights in its NWay technology.


In the event that the IEEE adopts an autodetection standard based upon National's NWay technology, National will offer to license its NWay technology to any requesting party for the purpose of making and selling products which implement the IEEE standard. Such a license will be made available on a nondiscriminatory basis and will be paid-up and royalty-free after payment of a one-time fee of one thousand dollars (\$1,000.00).

With respect to the "NWay" mark, following adoption by the IEEE of an autodetection standard based upon National's NWay technology, National will offer to relinquish any claims it may have in such mark in favor of the IEEE.

Should there be any questions or concerns about any of the foregoing matters, please feel free to call Paul Ahrens to discuss them. He can be contacted at (408) 721-4251.

Best regards,

National Semiconductor Corp.


Mark Grant
Director of Intellectual Property

cc: Paul Ahrens

Decision and Order

Appendix D
Letter to IEEE

Appendix D

[Return Address]

[Date]

[Name]
[Address]

Re: Patent Assurance; 802.3

To whom this may concern:

This is to notify you, pursuant to the enclosed Decision and Order ("Order") issued by the Federal Trade Commission, that Negotiated Data Solutions LLC ("N-Data") is offering to any requesting party a non-exclusive license to certain patents originally assigned to National Semiconductor Corporation. (A copy of the Order can also be found at [Web link].)

A copy of this offer is incorporated into the enclosed Order as Appendix A. As specified in the offer, N-Data will grant this license, which is paid-up and royalty-free, in exchange for a one-time fee of one thousand dollars (\$1,000.00).

A copy of the license agreement is incorporated into the enclosed Order as Appendix C. The license will cover, within the licensed field of use, the patents specified in Paragraphs 1.8. and 1.10. of the license agreement.

N-Data also notes that IEEE has included on its website a reference, made in connection with IEEE Standard 802.3, to the letter of March 27, 2002, from Scott Pickett, Chief Technical Officer and Executive Vice President of Vertical Networks, Inc., to the IEEE-SA Standards Board Patent Committee. The licensing terms and conditions described in that letter do not apply to NWay Technology. (As the current assignee of the patents identified in that letter, N-Data is now the successor in interest to Vertical Networks, Inc.)

Sincerely,

Alan Loudermilk
Manager and Member
Negotiated Data Solutions LLC

Enclosure

Statement of the Commission

STATEMENT OF THE FEDERAL TRADE COMMISSION

The Federal Trade Commission (“Commission”) has voted to issue a Complaint against Negotiated Data Solutions LLC (“N-Data”) and to accept the proposed consent agreement settling it.¹ The Complaint in this matter alleges that N-Data reneged on a prior licensing commitment to a standard-setting body and thereby was able to increase the price of an Ethernet technology used by almost every American consumer who owns a computer. Based on the facts developed by staff during the investigation, we find reason to believe that this conduct violated Section 5 of the FTC Act.²

The impact of Respondent’s alleged actions, if not stopped, could be enormously harmful to standard-setting.³ Standard-setting organization participants have long worried about the impact of firms failing to disclose their intellectual property until after industry lock-in. Many standard-setting organizations have begun to develop policies to deal with that problem. But if N-Data’s conduct became the accepted way of doing business, even the most diligent standard-setting organizations would not be able to rely on the good faith assurances of respected companies. The possibility exists that those companies would exit the business, and that their patent portfolios would make their way to others who are less interested in honoring commitments than in

¹ Commissioners Harbour, Leibowitz, and Rosch support the issuance of the Complaint and proposed consent agreement and join in this statement.

² Section 5 of the FTC Act prohibits “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.” 15 USC § 45(a)(1).

³ One dissent recites a different set of facts than those alleged in the Complaint. We do not agree with that version of the facts. Rather, we believe that staff’s investigation, as described in the Analysis to Aid Public Comment, accurately depicts the facts in this case.

Statement of the Commission

exploiting industry lock-in.⁴ Congress created the Commission precisely to challenge just this sort of conduct.

To prohibit such unacceptable behavior, the Commission today accepts a proposed consent agreement premised on a Complaint that identifies two separate violations. First, we find that N-Data's alleged conduct is an unfair method of competition. Second, we find that this conduct is also an unfair act or practice.

There is little doubt that N-Data's conduct constitutes an unfair method of competition.⁵ The legislative history from the

⁴ See generally Fed. Trade Comm'n, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* ch. 2 at 31, n. 220; ch. 3 at 38-41, available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf> (2003) (conduct by "non-producing entities" – sometimes referred to as 'patent trolls' – may harm consumers when such firms force manufacturers to agree to licenses after the manufacturers have sunk substantial investments into technologies).

⁵ See, e.g., *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984) ("*Ethyl*"); *Official Airline Guides v. FTC*, 630 F.2d 920 (2d Cir. 1980). The conduct falls squarely within the parameters of cases like *Ethyl*. One dissent quotes a passage from the *Ethyl* decision; even that excerpt makes clear that a Section 5 violation can be found when there are "some indicia of oppressiveness" such as "coercive...conduct." For the reasons stated in the Analysis to Aid Public Comment, we find reason to believe that Respondent engaged in conduct that was both oppressive and coercive when it engaged in efforts to exploit licensees that were locked into a technology by the adoption of a standard. We believe the Analysis to Aid Public comment adequately describes the limiting principles applicable here. See generally Statement of Commissioner J. Thomas Rosch, *Perspectives on Three Recent Votes: the Closing of the Adelpia Communications Investigation, the Issuance of the Valassis Complaint & the Weyerhaeuser Amicus Brief*, before the National Economic Research Associates 2006 Antitrust & Trade Regulation Seminar, Santa Fe, New Mexico (July 6, 2006) at 5-12, available at <http://www.ftc.gov/speeches/rosch/Rosch-NERA-Speech-July6-2006.pdf>; Concurring Opinion of Commissioner Jon Leibowitz, *In re Rambus, Inc.*, Docket No. 9302, available at <http://www.ftc.gov/os/adjpro/d9302/060802rambusconcurringopinionofcommissionerleibowitz.pdf>.

One dissent cites the Areeda and Hovenkamp antitrust treatise as well as several other sources to mistakenly suggest that there is a "scholarly consensus" that an unfair method of competition cannot be found under Section 5 unless there is liability under the antitrust laws. Most of the sources cited by

Statement of the Commission

debate regarding the creation of the Commission is replete with references to the types of conduct that Congress intended the Commission to challenge. *See, e.g.*, 51 Cong. Rec. 12,153 (1914) (statement of Sen. Robinson) (“unjust, inequitable or dishonest competition”), 51 Cong. Rec. 12,154 (1914) (statement of Sen. Newlands) (conduct that is “contrary to good morals”). The Supreme Court apparently agrees as it has found that the standard for “unfairness” under the FTC Act is “by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons.” *F.T.C. v. Ind. Fed’n of Dentists*, 476 U.S. 477, 454 (1986); *see also F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 242 (1972) (FTC has authority to constrain, among other things “deception, bad faith, fraud or oppression”).

We also have no doubt that the type of behavior engaged in by N-Data harms consumers. The process of establishing a standard displaces competition; therefore, bad faith or deceptive behavior

the dissent, however, actually support the Analysis to Aid Public Comment, which notes that, although Section 5 extends beyond the antitrust laws, there are limitations on its reach. Indeed, Professor Hovenkamp has explicitly acknowledged that there is a *lack* of consensus on the scope and application of Section 5. *See* HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* at 596-97 (3d ed. 2005). Professor Hovenkamp states that “[t]here are two views about the wisdom of the FTC’s use of Section 5” and goes on to discuss “[A]n alternative view, perfectly consistent with the proposition that the FTC’s antitrust concern should be limited to identifying practices that are economically anticompetitive.” Under that alternative view, it is appropriate to apply “the FTC Act to practices that do not violate the other antitrust laws . . . when (1) the practice seems anticompetitive but is not technically covered by the antitrust laws; and (2) the social cost of an error seems to be relatively small.” The social cost of an error here is small given the nature of the remedy and the low likelihood that a Commission consent order will be followed by a valid antitrust-based class action suit. *See id.* (“Findings of violations of the FTC Act that are not also antitrust violations will not support subsequent private actions for treble damages”). We nevertheless recognize Commissioner Kovacic’s concern that FTC “unfair methods” cases may support private actions based on state law, and join him in encouraging comment on that issue.

Statement of the Commission

that undermines the process may also undermine competition in an entire industry, raise prices to consumers, and reduce choices.⁶ We have previously noted that “[i]ndustry standards are widely acknowledged to be one of the engines driving the modern economy.”⁷ Conduct like N-Data’s – which undermines standard-setting – threatens to stall that engine to the detriment of all consumers.

N-Data’s conduct is also an unfair act or practice under Section 5(n) of the FTC Act and *Orkin Exterminating Co.*, 108 F.T.C. 263 (1986), *aff’d*, 849 F.2d 1354 (11th Cir. 1988). This Commission – *unanimously* – has often found an unfair act or practice proscribed by Section 5 in conduct that victimizes businesses (as well as individuals) who are consumers. The dissent would distinguish those cases on the ground that the businesses here are all “large, sophisticated computer manufacturers” who are able to protect themselves. There is no basis for that distinction in Section 5. In any event, moreover, there is no basis in the record of this investigation for describing all of the “locked in” licensees that way. Similarly, as discussed in detail in the Analysis to Aid Public Comment, no meaningful distinction can be drawn between the circumstances in *Orkin*, where the respondent sought to exploit consumers who were “locked into” long term contracts, and the unique circumstances of this case, where licensees are “locked into” the standard containing technology controlled by this Respondent.

⁶ *See* *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1989); *Am. Soc’y of Mech. Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982); *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 41 (1912). *See generally* *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 310-314 (3d Cir. 2007).

⁷ U.S. Dep’t of Justice & Fed. Trade Comm’n, *Antitrust Enforcement And Intellectual Property Rights: Promoting Innovation And Competition* 33, available at <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf> (2007).

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We recognize that some may criticize the Commission for broadly (but appropriately) applying our unfairness authority to stop the conduct alleged in this Complaint. But the cost of ignoring this particularly pernicious problem is too high. Using our statutory authority to its fullest extent is not only consistent with the Commission's obligations, but also essential to preserving a free and dynamic marketplace.

DISSENTING STATEMENT OF CHAIRMAN MAJORAS

I respectfully dissent from the decision to lodge a Complaint in this matter and to accept the settlement described in the majority's *Analysis of Proposed Consent Order to Aid Public Comment* ("Analysis"). The facts do not support a determination of antitrust liability. The preconditions for use of stand-alone Section 5 authority to find an "unfair method of competition" are not present. And the novel use of our consumer protection authority to protect large corporate members of a standard-setting organization ("SSO") is insupportable.

This case presents issues that appear on first inspection to resemble those in our line of standard-setting "hold up" challenges, including *Unocal*,¹ *Dell*,² and *Rambus*.³ As we and the Justice Department have explained jointly, "multiple

¹ *In re Union Oil Company of California*, 2004 FTC LEXIS 115 (FTC 2004) ("Unocal"), available at <http://www.ftc.gov/os/adjpro/d9305/040706commissionopinion.pdf>.

² *In re Dell*, 121 F.T.C. 616 (1996).

³ *In re Rambus*, FTC Dkt. No. 9302 (Liability Opinion, July 31, 2006), appeal pending, Docket Nos. 07-1086, 07-1124 (D.C. Cir. 2007).

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technologies may compete to be incorporated into the standard under consideration”⁴ by an SSO. Once a technology has been selected and the standard that incorporates the technology has been specified, however, the standard’s adopters often will face significant relative costs in switching to an alternative standard. “[T]he chosen technology may lack effective substitutes precisely because the SSO chose it as the standard. Thus, . . . the owner of a patented technology necessary to implement the standard may have the power to extract higher royalties or other licensing terms that reflect the absence of competitive alternatives. Consumers of the products using the standard would be harmed if those higher royalties were passed on in the form of higher prices.”⁵ In an effort to avoid the hold-up problem, some SSOs take measures to protect their members, such as imposing patent disclosure rules or securing agreement on licensing terms.⁶

This case departs materially from the prior line, however, in that there is no allegation that National engaged in improper or exclusionary conduct to induce IEEE to specify its NWay technology in the 802.3u standard. No one contends that National deceived SSO members at the time of its initial licensing offer in 1994. Further, from the time National submitted its letter of assurance in 1994 and at least until 2002, some patent holders changed or clarified the terms of their letters of assurance – even after the relevant standard was approved. And although a new IEEE bylaw, passed in January 2002, purported to make patent

⁴ U.S. Department of Justice and Federal Trade Commission, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (April 2007) at 35-36 [hereinafter “DOJ/FTC Intellectual Property Report”], available at <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf>.

⁵ *Id.* at 36. See also Chairman Deborah Platt Majoras, *Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting*, Remarks before the Stanford University Conference on Standardization and the Law: Developing the Golden Mean for Global Trade (September 2005), available at <http://www.ftc.gov/speeches/majoras/050923stanford.pdf>.

⁶ DOJ/FTC Intellectual Property Report, *supra* note 4, at 36.

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letters irrevocable, it did not address whether it was to apply retroactively. When Vertical submitted its 2002 proposal under which it would offer its entire patent portfolio that originated with National for license on reasonable and nondiscriminatory terms, the IEEE's Patent Administrator did not object to the departure from the \$1,000 commitment, even while requesting and securing specific changes to Vertical's proposal. The IEEE then appeared to have accepted the revised proposal by posting Vertical's letter on its web site along with National's June 7, 1994 letter.

There is also a substantial question as to whether N-Data enjoyed measurable market power, even with the adoption of the IEEE standard. Under the terms of the standard, the NWay technology was an optional technique. Although National in 1994 had offered to grant a paid-up, royalty-free license to the technology for \$1,000 to anyone seeking to practice the standard, no company had sought to accept the offer until after publication of the 2002 revision on the IEEE web site. And despite ongoing licensing efforts by National's successors, Vertical and N-Data, only one company paid materially more than the originally-quoted \$1,000 for rights to the NWay technology.⁷ Most users evidently have preferred to infringe, running the risk of presumably minimal patent damages that they might face at the outcome of litigation.

Thus, the facts do not support antitrust liability here.

The majority evidently agrees that respondent's conduct does not amount to improper acquisition or maintenance of monopoly

⁷ Paragraph 31 of the Complaint alleges that "several companies" entered into license agreements that have produced fees "far in excess" of \$1,000 per company. In fact, three companies entered into license agreements (with Vertical) for the patents. N-Data has never received royalties or fees from those agreements, nor, as I understand it, has it collected any royalties for the relevant patents on terms inconsistent with those offered in the 1994 letter. N-Data itself has initiated suit against one company, with which it had a dispute involving numerous patents other than those at issue in this case.

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power so as to fall within the ambit of Section 2 of the Sherman Act. Instead, the majority seeks to find liability purely under Section 5 of the FTC Act. This is not advisable as a matter of policy or prosecutorial discretion.

The majority's first theory is that N-Data engaged in an unfair method of competition. Although Section 5 enables the Commission to reach conduct that is not actionable under the Sherman or Clayton Acts, we have largely limited ourselves to matters in which respondents took actions short of a fully consummated Section 1 violation (but with clear potential to harm competition), such as invitations to collude.⁸ This limitation is partly self-imposed, reflecting the Commission's recognition of the scholarly consensus that finds the Sherman and Clayton Acts, as currently interpreted, to be sufficiently encompassing to address nearly all matters that properly warrant competition policy enforcement.⁹ But the limitation also reflects the insistence

⁸ See, e.g., *In re Valassis Communications, Inc.*, Docket No. C-4160, FTC File No. 051 008 (Complaint), available at <http://www.ftc.gov/os/caselist/0510008/0510008c4160ValassisComplaint.pdf>. In its *Analysis*, the Commission explained that competition would not be adequately protected if antitrust enforcement were directed only at consummated cartel agreements. The Commission further explicated the several legal (including precedent) and economic justifications that support the imposition of liability upon firms that communicate an invitation to collude where acceptance cannot be proven. Prior to the *Valassis* case, the Commission entered into consent agreements in several cases alleging that an invitation to collude – though unaccepted by the competitor – violated Section 5 of the FTC Act. *MacDermid, Inc.*, Docket No. C-3911, FTC File No. 991 0167 (Decision & Order), available at <http://www.ftc.gov/os/2000/02/macdermid.do.htm>; *Stone Container Corp.*, 125 F.T.C. 853 (1998); *Precision Moulding Co.*, 122 F.T.C. 104 (1996); *YKK (USA) Inc.*, 116 F.T.C. 628 (1993); *A.E. Clevite, Inc.*, 116 F.T.C. 389 (1993); *Quality Trailer Products Corp.*, 115 F.T.C. 944 (1992).

⁹ See, e.g., 5 JULIAN O. VON KALINOWSKI, PETER SULLIVAN & MAUREEN MCGUIRL, *ANTITRUST LAWS AND TRADE REGULATION*, § 77.02 at 77-3 (2007) (“the prevailing view is that there are limitations on Section 5’s applicability to conduct which stretches beyond the letter of [the Sherman or Clayton Acts].”); 2 PHILIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 302(h) (2006) (“Apart from possible historical anachronisms in the

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of the appellate courts that the Commission's discretion is bounded and must adhere to limiting principles. In *E.I. du Pont de Nemours & Co. v. FTC*, for example, the Second Circuit stated: “[w]hen a business practice is challenged by the Commission, even though, as here, it does not violate the antitrust or other laws and is not collusive, coercive, predatory or exclusionary in character, standards for determining whether it is 'unfair' within the meaning of § 5 must be formulated to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable.”¹⁰ Writing in the context of a challenge to parallel conduct that did not arise from an agreement but that facilitated oligopolistic coordination, the Second Circuit adopted this test:

In our view, before business conduct in an oligopolistic industry may be labelled “unfair” within the meaning of § 5 a minimum standard demands that, absent a tacit agreement, at least some indicia of oppressiveness must exist such as

application of those statutes, the Sherman and Clayton Acts are broad enough to cover any anti-competitive agreement or monopolistic situation that ought to be attacked whether 'completely full blown or not.'”); Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 ANTITRUST L.J. 761, 766 (2005) (“It used to be thought that 'unfair methods of competition' swept further than the practices forbidden by the Sherman and Clayton Acts, and you find this point repeated occasionally even today, but it is no longer tenable. The Sherman and Clayton Acts have been interpreted so broadly that they no longer contain gaps that a broad interpretation of Section 5 of the FTC Act might be needed to fill.”); John F. Graybeal, *Unfair Trade Practices, Antitrust And Consumer Welfare In North Carolina*, 80 N.C. L. REV. 1927, 1949 (2002) (“Undoubtedly, the FTC today will proceed with great caution under section 5 to claim as an unfair method of competition any conduct that does not violate the Sherman or Clayton Acts.”). See also ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS (6th ed. 2007) (“FTC decisions have been overturned despite proof of anticompetitive effect where the courts have concluded that the agency's legal standard did not draw a sound distinction between conduct that should be proscribed and conduct that should not.”).

¹⁰ 729 F.2d 128, 138 (2d Cir. 1984).

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(1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct. . . . In short, in the absence of proof of a violation of the antitrust laws or evidence of collusive, coercive, predatory, or exclusionary conduct, business practices are not “unfair” in violation of § 5 unless those practices either have an anticompetitive purpose or cannot be supported by an independent legitimate reason.¹¹

In its *Analysis*, the majority extends the *du Pont* formulation to the monopolization family, asserting that respondent’s conduct was “coercive” and “oppressive” and had an “adverse impact on prices for autonegotiation technology[.]”¹² These assertions are impossible to prove on the evidence we have. N-Data asserts that its renegotiation of its licensing terms was motivated by nothing other than an independent, business reason – that is, the aim of collecting royalties for a new bundle of intellectual property rights on reasonable and non-discriminatory terms. Even if N-Data were motivated by a desire to strike a better bargain than National made several years earlier, that alone should not be considered a competition-related offense. If the majority’s theory is that the evasion of contractual price constraints triggers liability under Section 5 without a concurrent determination that the conduct violates the Sherman Act, then we are headed down a slippery slope, and I take no comfort from the majority’s representation to the contrary. Parties often enter into contractual commitments involving asset-specific investments, creating the potential for opportunism. The majority has not identified a meaningful limiting principle that indicates when an action – taken in the standard-setting context or otherwise – will be considered an “unfair method of competition.”

¹¹ *Id.* at 139-140.

¹² *Analysis* at 5.

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Pursuing a second theory, the majority invokes consumer protection doctrine to find that respondent has engaged in an “unfair act or practice” in violation of Sections 5(a) and (n) of the FTC Act.¹³ Section 5(n) provides a clear limitation of the Commission’s authority: “[t]he Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”¹⁴ The evidence simply does not support the requisite findings.

In particular, finding “substantial consumer injury” here requires the majority to treat large, sophisticated computer manufacturers as “consumers.” I do not agree with such a characterization, and I have serious policy concerns about using our consumer protection authority to intervene in a commercial transaction to protect the alleged “victims” here. The *Analysis* accurately states that the FTC has used its authority under Section 5 to protect small businesses against unfair acts and practices. We have taken care to exercise this authority judiciously, however, to protect small businesses, non-profits, churches, and “mom and pop” operations¹⁵ that lack the resources and, in some cases, the

¹³ In *Rambus*, the Commission drew upon its experience with the law regarding deceptive acts or practices, which has been developed largely in consumer protection contexts, to inform our analysis of deception before an SSO as part of an exclusionary course of conduct. *Rambus*, *supra* note 3, at 29-30. We did so, however, within a framework based on Sherman Act jurisprudence, recognizing, *inter alia*, the need to examine competitive effects. *Id.* at 28-31. The majority’s extension of our authority over unfair acts or practices, which Congress has specifically limited in Section 5(n), raises altogether different issues.

¹⁴ 15 U.S.C. § 45(n) (2000). *See also International Harvester Co.*, 104 F.T.C. 949, 1061 (1984).

¹⁵ *See, e.g., FTC v. Websource Media, LLC*, No. H-06-1980 (S.D. Tex. filed June 12, 2006) (unfair practice of “cramming” unauthorized charges onto the telephone bills of small businesses); *FTC v. Certified Merchant Services*,

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experience or understanding to defend themselves adequately against fraud. Indeed, certain of these small business owners, non-profit volunteers, and clergy had personally guaranteed the contracts at issue. There is a clear qualitative difference between these entities and the computer manufacturers that the majority treats as injured consumers in this matter.¹⁶

As I stated above, I am not convinced that any party was injured. And certainly the evidence does not support the finding that the alleged injury here was “not reasonably avoidable” (assuming, of course, that injury can be made out at all). The membership of IEEE includes computer networking equipment manufacturers and telecommunications companies. IEEE knew that its members sometimes made or attempted to make changes in patent commitment letters, and it could have acted sooner to protect its members from potentially adverse changes to commitment letters. IEEE also could have objected to Vertical’s

Ltd., No. 4:02CV44 (E.D. Tex. filed February 11, 2002) (unfair practice of unilaterally inserting additional pages that describe substantial, undisclosed charges into credit card processing contracts with small business merchants); *FTC v. IFC Credit Corp.*, No. 07C3155 (N.D. Ill. filed June 6, 2007) (unfair practice of accepting and collecting on invalid, fraudulently induced equipment contracts with small businesses and religious and other nonprofit organizations). The majority cites to the Franchise Rule as another example of the Commission using its Section 5 consumer protection authority to protect small businesses from deceptive practices. While the Franchise Rule, which requires certain disclosures prior to the sale of a franchise, sometimes protects businesses, it typically protects individual consumers that are purchasing franchises rather than sophisticated corporations. In adopting amendments to the Franchise Rule earlier this year, the Commission exempted from the Rule’s coverage several categories of sophisticated investors. 16 C.F.R. § 436.8(a).

¹⁶ Some may argue that the Commission has already made the policy decision to treat businesses as consumers, and that there is no rational distinction between the companies we have protected and large corporations. I disagree. Although it is important to draw lines, there is such a vast difference between sophisticated corporations, on the one hand, and storefront shops, on the other, that we do not need to draw a bright line to distinguish this matter from previous cases the Commission has brought to protect small businesses.

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revisions, but instead it accepted and published them without objection. Moreover, any individual company could have entered into a binding agreement with National, but none sought timely to accept the 1994 royalty offer.

In re Orkin Exterminating Co., Inc.,¹⁷ on which the majority relies, is fundamentally different from the instant matter. Orkin unilaterally increased its fees for more than 200,000 consumers, all of whom had signed written contracts that could readily be understood to be binding and that committed to a lifetime fee structure that would not increase.¹⁸ If consumers paid the amount specified in their contracts, Orkin's policy was to return the payments. Thus, unlike the situation here, *Orkin* involved both (a) large numbers of individual consumers, and (b) widespread injury that the consumers could not reasonably avoid.

For all of these reasons, I respectfully dissent.

¹⁷ 108 F.T.C. 263 (1986), *aff'd*, *FTC v. Orkin*, 849 F.2d 1354 (11th Cir. 1988).

¹⁸ Orkin pamphlets echoed this commitment, promising that the annual fee would "never increase." 108 F.T.C. at 356.

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**DISSENTING STATEMENT OF COMMISSIONER
WILLIAM E. KOVACIC**

I oppose the Commission's decision to accept for comment the settlement described in the Analysis to Aid Public Comment ("Analysis"). Like Chairman Majoras,¹ I would not find that the Respondent engaged in an unfair method of competition or an unfair act or practice within the meaning of Section 5 of the Federal Trade Commission Act. Below I discuss two of the considerations that have influenced my thinking about this matter. These can serve as focal points for public comment before the Commission votes on whether to make the provisional settlement final.

Effect on Private Rights of Action

The Commission concludes that the respondent did not violate the Sherman Act or the Clayton Act. The Commission finds that the respondent violated Section 5 of the Federal Trade Commission Act because its conduct constituted both an unfair method of competition and an unfair act or deceptive practice. One reason the Commission gives for basing liability on Section 5 alone is that, unlike liability theories premised on infringements of the Sherman or Clayton Acts, private parties cannot use FTC intervention premised on Section 5 alone to support claims for treble damages in subsequent federal antitrust suits. The Commission's assumption that a pure Section 5 theory will have no spillover effects seems to be important to the result it reaches. Footnote 8 of the Analysis says:

It is worth noting that, because the proposed complaint alleges stand-alone violations of Section 5 rather than violations of Section 5 that are premised on violations of the Sherman Act, this

¹ Dissenting Statement of Chairman Majoras, In the Matter of Negotiated Data Solutions LLC, File No. 0510094.

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action is not likely to lead to well-founded treble damage antitrust claims in federal court.

If the absence of spillover effects in private litigation is important to the Commission's decision, then the proposed settlement must account for the impact of FTC decisions upon the prosecution of claims based on state, as well as federal, causes of action.

The Commission overlooks how the proposed settlement could affect the application of state statutes that are modeled on the FTC Act and prohibit unfair methods of competition ("UMC") or unfair acts or practices ("UAP"). The federal and state UMC and UAP systems do not operate in watertight compartments. As commentators have documented, the federal and state regimes are interdependent. See, e.g., Dee Pridgen, *Consumer Protection and the Law* 214-22 (2007 Edition) (discussing use of FTC precedent to interpret state consumer protection statutes); Lawrence Fullerton et al., *Reliance on FTC Consumer Protection Law Precedents in Other Legal Forums* (American Bar Association, Section of Antitrust Law, Working Paper No. 1, July 1988) (describing how FTC consumer protection actions inform application of state law). By statute or judicial decision, courts in many states interpret the state UMC and UDP laws in light of FTC decisions, including orders. As a consequence, such states might incorporate the theories of liability in the settlement and order proposed here into their own UMC or UAP jurisprudence. A number of states that employ this incorporation principle have authorized private parties to enforce their UMC and UAP statutes in suits that permit the court to impose treble damages for infringements.

If the Commission desires to deny the reasoning of its approach to private treble damage litigants, the proposed settlement does not necessarily do so. If the Commission's assumption of no spillover effects is important to its decision, a

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rethink of the proposed settlement and order seems unavoidable.

The Basis of Liability

The proposed settlement treats the Respondent's conduct as both an unfair method of competition and an unfair act or practice. When a public agency pleads alternative theories of liability, especially in a settlement with a party that appears to lack the means to threaten credibly to litigate, it should specify the distinctive contributions of each theory to the prosecution of the matter. Suppose that an agency comfortably could premise its allegation of infringement upon theory A. If the agency decides to premise liability upon theory B as well as theory A, it is good practice for the agency to explain what theory B adds to the mix.

The Analysis here does not discuss why the Commission endorses separate UMC and UAP claims. The Analysis does not integrate the two theories of liability. A fuller effort to explain the relationship between the theories of liability in the Analysis would have led the Commission to confront anomalies in its exposition of the decision to prosecute. For example, the framework that the Analysis presents for analyzing the challenged conduct as an unfair act or practice would appear to encompass all behavior that could be called a UMC or a violation of the Sherman or Clayton Acts. The Commission's discussion of the UAP liability standard accepts the view that all business enterprises – including large companies – fall within the class of consumers whose injury is a worthy subject of unfairness scrutiny. If UAP coverage extends to the full range of business-to-business transactions, it would seem that the three-factor test prescribed for UAP analysis would capture all actionable conduct within the UMC prohibition and the proscriptions of the Sherman and Clayton Acts. Well-conceived antitrust cases (or UMC cases) typically address instances of substantial actual or likely harm to consumers. The FTC ordinarily would not prosecute behavior whose adverse effects could readily be avoided by the potential victims – either business entities or natural persons. And the balancing of harm against

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legitimate business justifications would encompass the assessment of procompetitive rationales that is a core element of a rule of reason analysis in cases arising under competition law.

The prospect of a settlement can lead one to relax the analytical standards that ordinarily would discipline the decision to prosecute if the litigation of asserted claims was certain or likely. This is particularly the case when, as in this matter, the respondent has indicated during negotiations that, for various reasons, it will not litigate and will accept a settlement. If the Commission had in mind specific analytical grounds for including both theories of liability (for example, because each theory standing alone contained weaknesses as foundations for the settlement), the Analysis omits them. In the logic of the Analysis, the UAP theory subsumes the UMC standard and makes the UMC provision superfluous. If the UAP concept is so broad, it is not evident what reasoning in this case supports the parallel inclusion of the UMC claim. More generally, it seems that the Commission's view of unfairness would permit the FTC in the future to plead all of what would have been seen as competition-related infringements as constituting unfair acts or practices.

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Agreement") with Negotiated Data Solutions LLC ("N-Data"), a limited liability company whose sole activity is to collect royalties in connection with a number of patents. The Agreement settles allegations that N-Data has violated Section 5 of the

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Federal Trade Commission Act, 15 U.S.C. § 45, by engaging in unfair methods of competition and unfair acts or practices relating to the Ethernet standard for local area networks. Pursuant to the Agreement, N-Data has agreed to be bound by a proposed consent order (“Proposed Consent Order”).

The Proposed Consent Order has been placed on the public record for thirty (30) days for 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 Consent Order.

The purpose of this analysis is to facilitate comment on the Proposed Consent Order. This analysis does not constitute an official interpretation of the Proposed Consent Order, and does not modify its terms in any way. The Agreement has been entered into for settlement purposes only, and does not constitute an admission by N-Data that the law has been violated as alleged or that the facts alleged, other than jurisdictional facts, are true.

Background

The Institute of Electrical and Electronics Engineers (“IEEE”) is a standard-setting organization active in a number of different industries. IEEE standards often enhance the interoperability of communications products. One important example, which is at issue here, is the 802 series of networking standards. Many of the standards in the 802 series allow users to reliably access and share information over communications systems by interconnecting many compatible products manufactured by different producers.

The IEEE 802.3 standard, first published in 1983, and commonly referred to as “Ethernet,” applies to local area networks (“LANs”) built on copper, and more recently fiber optic, cables. That standard initially accommodated a maximum data

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transmission rate of 10 megabits per second (10 Mbps) between networked devices. By 1994, the 802.3 Working Group was developing a new 802.3 standard for “Fast Ethernet,” which would transmit data across a copper wire at 100 Mbps. The Working Group determined that it would be desirable for Fast Ethernet equipment to be compatible, to the extent possible, with existing LAN equipment and with future generations of equipment. A technology, variously known as “autodetection” and “autonegotiation,” was developed that would permit such compatibility.

Employees of National Semiconductor Corporation (“National”) were members and active participants in the 802.3 Working Group. In 1994, National proposed that the 802.3 Working Group adopt its autonegotiation technology, referred to as “NWay,” into the Fast Ethernet standard. At the time, National disclosed to the Working Group that it had already filed for patent protection for the technology. Several other participants also had developed competing technologies and the Working Group considered several alternatives, each having advantages and disadvantages compared to NWay. The 802.3 Working Group also considered adopting the Fast Ethernet standard without any autonegotiation feature.

At IEEE meetings to determine which autonegotiation technology to include in 802.3, one or more representatives of National publicly announced that if NWay technology were chosen, National would license NWay to any requesting party for a one-time fee of \$1,000. In a subsequent letter dated June 7, 1994, and addressed to the Chair of the 802.3 Working Group of IEEE, National wrote:

In the event that the IEEE adopts an autodetection standard based upon National’s NWay technology, National will offer to license its NWay technology to any requesting party for the purpose of making

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and selling products which implement the IEEE standard. Such a license will be made available on a nondiscriminatory basis and will be paid-up and royalty-free after payment of a one-time fee of one thousand dollars (\$1,000).

Based on National's licensing assurance, and following its normal balloting and voting procedures, IEEE incorporated NWay technology into the Fast Ethernet standard, which IEEE published in final form in July 1995. To maintain compatibility with the installed base of Ethernet and Fast Ethernet equipment, subsequent revisions of the 802.3 standard also have incorporated NWay autonegotiation technology. The "Fast Ethernet" standard became the dominant standard for LANs, and users are now locked in to using NWay technology due to network effects and high switching costs. Therefore, today, autonegotiation technologies other than NWay are not attractive alternatives to NWay for manufacturers who want to include inter-generational compatibility in their Ethernet products.

NWay contributed to the success of Fast Ethernet technology in the marketplace. An installed base of millions of Ethernet ports operating at 10 Mbps already existed when IEEE published the Fast Ethernet standard. The autonegotiation technology in the Fast Ethernet standard allowed owners of existing Ethernet-based LANs to purchase and install multi-speed, Fast Ethernet-capable equipment on a piecemeal basis without having to upgrade the entire LAN at once or buy extra equipment to ensure compatibility.

National benefitted financially from its licensing assurance. The assurance accelerated sales of National products that conformed to the Fast Ethernet standard by first, allaying concerns about the future costs of autonegotiation, and so speeding completion of the standard, and second, making Fast Ethernet-compatible products backward compatible with Ethernet

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equipment already installed on existing LANs, increasing the demand for Fast Ethernet products by those with existing systems.

In 1997, the United States Patent and Trademark Office issued U.S. Patent Nos. 5,617,418 and 5,687,174 (the '418 and '174 Patents) to National. Both patents arose from the patent application that National disclosed to the IEEE in 1994. National later received equivalent patents in other countries.

In 1998, National assigned a number of patents, including the '418 and the '174 Patents, to Vertical Networks ("Vertical"), a telecommunications start-up company founded by former National employees. Before the assignment, National gave Vertical a copy of the June 7, 1994 letter to the 802.3 Working Group. Vertical's outside patent counsel, Mr. Alan Loudermilk, acknowledged in writing that National had informed him "that several of the patents may be 'encumbered'" by actions National had taken with respect to the IEEE standards. The final agreement between Vertical and National stated that the assignment was "subject to any existing licenses that [National] may have granted." It further provided, "Existing licenses shall include ... [p]atents that may be encumbered under standards such as an IEEE standard"

In 2001, Vertical turned to its intellectual property portfolio in an effort to generate new revenues by licensing its technology to third parties. One aspect of this strategy was Vertical's effort to repudiate the \$1,000 licensing term contained in National's 1994 letter of assurance to the IEEE. On March 27, 2002, Vertical sent a letter to the IEEE that purported to "supersede" any previous licensing assurances provided by National. Vertical identified nine U.S. patents assigned to it by National, including the '174 and '418 patents, and promised to make available to any party a non-exclusive license "on a non-discriminatory basis and on reasonable terms and conditions including its then current royalty rates."

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In the Spring of 2002, Vertical developed a list of “target companies” that practiced the IEEE 802.3 standard and which it believed infringed on the ‘174 and ‘418 patents. Vertical sought to enforce the new licensing terms on these companies. These companies, which included many large computer hardware manufacturers, represented a substantial majority of all producers of 802.3 ports. Vertical’s patent counsel, Mr. Loudermilk, sent letters to most of these companies between 2002 and 2004 offering a license for patents covering aspects of “the auto-negotiation functionality” in networking products, including products compliant with IEEE 802.3. Vertical also filed suit against a number of companies alleging that “switches, hubs, routers, print servers, network adapters and networking kits” having autonegotiating compatibility, infringed its ‘174 and ‘418 patents. Vertical entered into several licensing agreements producing licensing fees far in excess of \$1,000 from each licensed company.

In late 2003, Vertical assigned some of its patent portfolio, including the ‘174 and ‘418 patents, to N-Data, a company owned and operated by Mr. Loudermilk.¹ N-Data was aware of National’s June 7, 1994 letter of assurance to the IEEE when Vertical assigned those patents to N-Data. Yet it rejected requests from companies to license NWay technology for a one-time fee of \$1,000. Instead, N-Data threatened to initiate, and in some cases prosecuted, legal actions against companies refusing to pay its royalty demands, which are far in excess of that amount.

The Proposed Complaint

Vertical and N-Data sought to exploit the fact that NWay had been incorporated into the 802.3 standard, and had been adopted by the industry for a number of years, by renegeing on a known

¹ Vertical subsequently sold its remaining business assets and ceased operations.

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commitment made by their predecessor in interest. Even if their actions do not constitute a violation of the Sherman Act, they threatened to raise prices for an entire industry and to subvert the IEEE decisional process in a manner that could cast doubt on the viability of developing standards at the IEEE and elsewhere. The threatened or actual effects of N-Data's conduct have been to increase the cost of practicing the IEEE standards, and potentially to reduce output of products incorporating the standards.² N-Data's conduct also threatens to reduce the incentive for firms to participate in IEEE and in other standard-setting activities, and to rely on standards established by standard-setting organizations.

The Proposed Complaint alleges that this conduct violates Section 5 of the FTC Act in two ways: first, N-Data engaged in an unfair method of competition; and second, N-Data engaged in an unfair act or practice.

1. Unfair Method of Competition

N-Data's conduct constitutes an unfair method of competition. The Supreme Court in *FTC v. Sperry & Hutchinson Co.* endorsed an expansive reading of the "unfair method of competition" prong of Section 5, stating that the Commission is empowered to "define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or spirit of the antitrust laws" and to "proscribe practices as unfair ... in their effect on competition."³ That description of the scope of Section 5 accords with the legislative history of Section 5.⁴

² The conduct by Vertical and N-Data has led to, or threatened to lead to, increased prices in the markets for autonegotiation technology (1) used in 802.3 compliant products and (2) used in products that implement an IEEE standard enabling autonegotiation with 802.3 compliant products.

³ *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972); see also *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986). See generally Concurring Opinion of Commissioner Jon Leibowitz, *In re Rambus, Inc.*, Docket No. 9302, available at <http://www.ftc.gov/os/adjpro/d9302/>

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Notwithstanding that broad description, the unfair method of competition prong of Section 5 is subject to limiting principles. The first relates to the nature of the conduct. In *OAG*, the Second Circuit held that such a violation could not be found where the respondent “does not act coercively.”⁵ Similarly, in *Ethyl* the Second Circuit held that “at least some indicia of oppressiveness must exist”⁶ This requirement is met here, given N-Data’s efforts to exploit the power it enjoys over those practicing the Fast Ethernet standard and lacking any practical alternatives. This form of patent hold-up is inherently “coercive” and “oppressive” with respect to firms that are, as a practical matter, locked into a standard.

The second limiting principle relates to the effects of the conduct. Although the Supreme Court has made it clear that the respondent’s conduct need not violate the letter (or even the spirit) of the antitrust laws to fall under Section 5, that does not mean that conduct can be considered an unfair method of competition if it has no adverse effect at all on competition. That requirement, however, is also satisfied here, given the conduct’s adverse impact

[060802rambusconcurringopinionofcommissionerleibowitz.pdf](http://www.ftc.gov/speeches/rosch/Rosch-NERA-Speech-July6-2006.pdf); Statement of Commissioner J. Thomas Rosch, “Perspectives on Three Recent Votes: the Closing of the Adelphia Communications Investigation, the Issuance of the Valassis Complaint & the Weyerhaeuser Amicus Brief,” before the National Economic Research Associates 2006 Antitrust & Trade Regulation Seminar, Santa Fe, New Mexico (July 6, 2006) at 5-12, available at <http://www.ftc.gov/speeches/rosch/Rosch-NERA-Speech-July6-2006.pdf>.

⁴ See, e.g., Cong. Rec. 12,153 (1914) (statement of Sen. Robinson) (“unjust, inequitable or dishonest competition” proscribed), 51 Cong. Rec. 12,154 (1914) (statement of Sen. Newlands) (conduct that is “contrary to good morals” proscribed).

⁵ *Official Airline Guides v. FTC*, 630 F.2d 920, 927 (2d Cir. 1980) (“*OAG*”).

⁶ *E.I. Du Pont v. de Nemours & Co. v. FTC*, 729 F.2d 128, 139-40 (2d Cir. 1984) (“*Ethyl*”).

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on prices for autonegotiation technology and the threat that such conduct poses to standard-setting at IEEE and elsewhere.

Respondent's conduct here is particularly appropriate for Section 5 review. IEEE's determination to include National's technology in its standard rested on National's commitment to limit royalties to \$1,000. That commitment had substantial competitive significance because it extended not to a single firm, but rather to an industry-wide standard-setting organization. Indeed, in the standard-setting context – with numerous, injured third parties who lack privity with patentees and with the mixed incentives generated when members may be positioned to pass on royalties that raise costs market-wide – contract remedies may prove ineffective, and Section 5 intervention may serve an unusually important role.

N-Data's conduct, if allowed, would reduce the value of standard-setting by raising the possibility of opportunistic lawsuits or threats arising from the incorporation of patented technologies into the standard after a commitment by the patent holder. As a result, firms may be less likely to rely on standards, even standards that already exist. In the creation of new standards, standard-setting organizations may seek to avoid intellectual property entirely, potentially reducing the technical merit of those standards as well as their ultimate value to consumers.

A mere departure from a previous licensing commitment is unlikely to constitute an unfair method of competition under Section 5. The commitment here was in the context of standard-setting. The Supreme Court repeatedly has recognized the procompetitive potential of standard-setting activities. However, because a standard may displace the normal give and take of competition, the Court has not hesitated to impose antitrust liability on conduct that threatens to undermine the standard-

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setting process or to render it anticompetitive.⁷ The conduct of N-Data (and Vertical) at issue here clearly has that potential.⁸

2. Unfair Act or Practice

N-Data's efforts to unilaterally change the terms of the licensing commitment also constitute unfair acts or practices under Section 5 of the FTC Act. The FTC Act states that "unfair or deceptive acts or practices in or affecting commerce[] are . . . unlawful." An unfairness claim under this part of Section 5 must meet the following statutory criteria:

The Commission shall have no authority . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.⁹

The Commission may consider established public policies as evidence to be considered with all other evidence, though not as a primary basis for a determination of unfairness.¹⁰ As the Eleventh

⁷ See *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 41 (1912); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1989); *Am. Soc'y of Mech. Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982).

⁸ It is worth noting that, because the proposed complaint alleges stand-alone violations of Section 5 rather than violations of Section 5 that are premised on violations of the Sherman Act, this action is not likely to lead to well-founded treble damage antitrust claims in federal court. See Herbert Hovenkamp, *Federal Antitrust Policy* at 588 (2d ed. 1999).

⁹ 15 U.S.C. § 45(n) (1992).

¹⁰ *Id.*

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Circuit emphasized in *Orkin Exterminating Co. v. FTC*,¹¹ the Commission has applied limiting principles requiring a showing that (1) the conduct caused “substantial consumer injury,” (2) that injury is “not . . . outweighed by any countervailing benefits to consumers or competition that the practice produces,” and (3) it is an injury that “consumers themselves could not reasonably have avoided.”¹²

This Section 5 claim against the efforts of Vertical and N-Data to unilaterally increase the price for the relevant technology by knowingly renegeing on National’s commitment meets these statutory criteria, and thus constitutes a violation of Section 5’s prohibition of unfair acts and practices. NWay was chosen for the standard on the basis of the assurances made by National to the IEEE 802.3 Working Group. Further, the industry relied, at least indirectly, on National’s assurances regarding pricing, and made substantial and potentially irreversible investments premised on those representations. After the standard became successful, and it became difficult, if not impossible, for the industry to switch away from the standard, Vertical and then N-Data took advantage of the investments made by these firms by renegeing on National’s commitment. Because it is now no longer feasible for the industry to remove the technologies, the value that N-Data was able to extract from market participants was due to the opportunistic nature of its conduct rather than the value of the patents.¹³

¹¹ *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1364 (11th Cir. 1988).

¹² See Letter from Federal Trade Commission to Senators Ford and Danforth (Dec. 17, 1980), reprinted in H.R. Rep. No. 156, Pt. 1, 98th Cong., 1st Sess. 33-40 (1983) *available at* <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>, appended to the Commission’s decision in *International Harvester*, 104 F.T.C. at 949, 1061 (1984), and subsequently codified by Congress at 15 U.S.C. § 45(n).

¹³ The IEEE designed its rules to avoid just such a result. IEEE’s stated purpose for requesting letters of assurance was to avoid giving “undue

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Accordingly, an action against this conduct meets the criteria set forth in the statute and in *Orkin*. First, N-Data's reneging on its pricing commitments here involved "substantial consumer injury." The increase in royalties demanded by Vertical Networks and later N-Data could result in millions of dollars in excess payments from those practicing the standard, not to mention the legal fees those firms might spend defending lawsuits.¹⁴ In addition, often in market-wide standard-setting contexts, the licensees have an incentive to pass along higher costs to the ultimate consumers who purchase the products.¹⁵ Thus, these end consumers who purchase products using N-Data's technology may face increased prices due to the higher royalties. Further, those demands also have no apparent "countervailing benefit" – to those upon whom demands have been made, ultimate consumers, or to competition – so the second requirement is also met. With respect to the third requirement, both the Commission and the Eleventh Circuit in *Orkin* stated that consumers "may act to avoid injury before it occurs if they have reason to anticipate the impending harm and the means to avoid it, or they may seek to mitigate the damage afterward if they are aware of potential

preferred status to a company" and to ensure that the adoption of a technology would not be "prohibitively costly or noncompetitive to a substantial part of the industry." 1994 *IEEE Standards Operations Manual* §6.3.

¹⁴ The Commission has a "longstanding position that the statutory prohibition against 'unfair or deceptive acts or practices' includes practices that victimize businesspersons as well as those who purchase products for their own personal or household use," given that businesses "clearly do consume goods and services that may be marketed by means of deception and unfairness." Brief of Federal Trade Commission as Amicus Curiae at 3-4, 8-9, *Vermont v. International Collection Service, Inc.*, 594 A.2d 426 (Vt. 1991) (citing cases); see also, e.g., 16 C.F.R. § 436.1 (FTC rule protecting franchisees); *United States Retail Credit Ass'n v. FTC*, 300 F.2d 212 (4th Cir. 1962) (deception involving business clients); *United States Ass'n of Credit Bureaus, Inc. v. FTC*, 299 F.2d 220 (4th Cir. 1962) (same).

¹⁵ Susan A. Creighton, *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 994 (2005).

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avenues to that end.”¹⁶ Here, those who created the standard had no way to anticipate the repudiation of the price commitment before it occurred and, apart from expensive litigation, those locked into the standard had no way to avoid the threatened injury posed by the demands that they faced. Thus, those practicing the standard were locked in to even a greater extent than the consumers in *Orkin*. Put simply, this is a form of what has been described as “patent hold-up.”

The facts alleged in the complaint here are similar to those found in the Commission’s decision in *Orkin*, which was affirmed by the Eleventh Circuit.¹⁷ In that case, the respondent signed contracts with consumers to supply lifetime extermination services at a fixed annual renewal fee. Years later, the respondent unilaterally increased these fees. Consumers needing extermination services had no reason to anticipate Orkin’s unilateral price increase and there was no evidence that they could contract with Orkin’s competitors on terms similar to Orkin’s initial terms. The Commission held, and the Eleventh Circuit agreed, that Orkin’s unilateral price increase was an unfair act or practice under Section 5. Similarly, National made non-expiring royalty commitments that Vertical and N-Data later repudiated with unilateral increases, which the industry could not have reasonably anticipated before the market wide adoption of the standard and which consumers had no chance of avoiding due to network effects and lock-in.

Clearly, merely breaching a prior commitment is not enough to constitute an unfair act or practice under Section 5. The standard-setting context in which National made its commitment is critical to the legal analysis. As described above, the lock-in

¹⁶ *Orkin*, 849 F.2d at 1365.

¹⁷ *In re Orkin Exterminating Co.*, 108 F.T.C. 263 (1986), *aff’d*, 849 F.2d 1354 (11th Cir. 1988).

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effect resulting from adoption of the NWay patent in the standard and its widespread use are important factors in this case. In addition, the established public policy of supporting efficient standard-setting activities is an important consideration in this case.¹⁸ Similarly, it must be stressed that not all breaches of commitments made by owners of intellectual property during a standard-setting process will constitute an unfair act or practice under Section 5. For example, if the commitment were immaterial to the adoption of the standard or if those practicing the standard could exercise countermeasures to avoid injury from the breach, the statutory requirements most likely would not be met. Finally, it needs to be emphasized that not all departures from those commitments will be treated as a breach. The *Orkin* court suggested that there might be a distinction between an open-ended commitment and a contract having a fixed duration.¹⁹ That distinction does not apply here because the context of the commitment made it plain that it was for the duration of National's patents. However, most such commitments, including the one here, are simply to offer the terms specified. Indeed, those principles are reflected in the remedy set forth in the consent decree.

The Proposed Consent Order

The Proposed Consent Order prohibits N-Data from enforcing the Relevant Patents, defined in the order, unless it has first offered to license them on terms specified by the order. The terms of that license follow from those promised by National Semiconductor in its letter of June 7, 1994, to the IEEE. Specifically, N-Data must offer a paid-up, royalty-free license to the Relevant Patents in the Licensed Field of Use in exchange for

¹⁸ See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500-01 (1998) (regarding the potential procompetitive advantages of private associations promulgating safety standards).

¹⁹ *Orkin*, 849 F.2d at 1361.

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a one-time fee of \$1,000. The form of this license is attached as Appendix C to the order. The Licensed Field of Use is defined in the license as the “use of NWay Technology to implement an IEEE Standard,” and this includes “optimization and enhancement features” that are consistent with such use. NWay Technology is defined in the license to have the same meaning as it did in the June 7, 1994 letter, and the license gives examples of documents describing the use of NWay Technology.

The Commission recognizes that some firms may inadvertently allow the \$1,000 offer from N-Data to languish. Therefore, if an offeree has failed to accept such an offer within 120 days, the Proposed Consent Order allows N-Data to sue to enforce the Relevant Patents. At the time N-Data files suit, however, it must make a second offer. This second offer provides a prospective licensee with an opportunity to accept the patent license specified by the order in return for a payment of thirty-five thousand dollars (\$35,000). The requirement that the second offer be delivered in the context of litigation gives N-Data an incentive to pursue patent enforcement only against companies over which it has a reasonable likelihood of prevailing in court. It will also ensure that the second offer will receive the full attention of knowledgeable counsel for the offeree. A \$35,000 license fee will offset some of N-Data’s costs of litigation, and it will discourage recipients of an initial offer from simply waiting to be sued, and *then* accepting the first offer. The offeree’s time to accept the second offer expires with the time to file a responsive pleading to the filing that accompanies the second offer. After that, the amount that N-Data can collect from an accused infringer is not limited by the order.

The Proposed Consent Order requires N-Data to distribute copies of the complaint and the Proposed Consent Order to specified persons. It also prohibits N-Data from transferring any of the Relevant Patents, except to a single person who has agreed to be bound by the Proposed Consent Order and by the patent

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licenses formed thereunder. The Proposed Consent Order also contains standard reporting, notification and access provisions designed to allow the Commission to monitor compliance. It terminates twenty (20) years after the date it becomes final.

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IN THE MATTER OF

PERNOD RICARD S.A.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-4224; File No. 081 0119
Complaint, July 17, 2008 – Decision, October 14, 2008*

This consent order addresses the proposed acquisition by Pernod Ricard S.A. of V&S Vin & Sprit AB (publ). The companies are direct and significant competitors in the super-premium vodka market. In addition, after the acquisition, Pernod Ricard would become a joint venture partner with Beam Global Spirits & Wine, Inc., and share in the management of Future Brands LLC, which distributes Beam Global products. As a joint venture partner, Pernod Ricard would have access to competitively sensitive information about Beam Global brands that compete with Pernod Ricard brands. In regard to the vodka market, the order requires that Pernod Ricard divest its interest in distributing Stolichnaya Vodka back to the brand owner, Spirits International BV. If Pernod Ricard fails to complete the required divestiture within 6 months, the Commission may appoint a divestiture trustee to sell V&S's Absolut Vodka assets and business to a Commission-approved acquirer. An exception may be made because of ongoing litigation between Spirits International and others regarding ownership of the Stolichnaya trademark and related rights to sell vodka under that label. If Pernod Ricard is prohibited by court order from divesting its distribution rights to Stolichnaya Vodka, instead of divesting the Absolut Vodka assets, it would have the option of divesting the income stream from its sales of Absolut Vodka. The order requires that Pernod Ricard help ensure that the acquirer of the Stolichnaya Vodka business is able to continue operations in a fully competitive manner, including providing key employees with financial incentives to remain with Pernod Ricard (in order that those employees might then be available for hire by the acquirer); providing lists of key employees to the acquirer; temporarily providing technical assistance and training at the acquirer's request; and temporarily providing back-office procedures to the acquirer. In regard to the Future Brands joint venture, the order prohibits Pernod Ricard from acquiring any business information on Beam Global brands through certain firewall procedures: the Pernod Ricard designees to the Future Brands Board of Managers cannot be officers or directors of Pernod Ricard; Pernod will recommend to the Future Brands board that it implement database protocols limiting Pernod designated

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board member access to information about Beam Global brands; and Pernod will allow an interim monitor to supervise all of the firewall-related protections and requirements.

Participants

For the Commission: *Sonia Ballard, Joseph Brownman, Leslie Farber, Jennifer Lee, Jeanne Liu, Matthew J. Reilly, W. Stephen Sockwell, and Laura Sullivan.*

For the Respondents: *Gary Kubek, Debevoise & Plimpton; and Ken Logan, Simpson Thatcher.*

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, having reason to believe that Respondent Pernod Ricard, S. A. (“Pernod Ricard”) entered into an agreement with V&S Vin & Sprit AB (publ), (“V&S”) in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that the terms of such agreement, were they to be satisfied, would result in a violation of Section 7 of the Clayton Act, 15 U.S.C. §18, and Section 5 of the Federal Trade Commission Act, 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 Pernod Ricard, S.A.

1. Respondent Pernod Ricard is a société anonyme, or corporation, organized, existing and doing business under and by virtue of the laws of The French Republic, with its office and principal place of business located at 12, place des Etats-Unis, 75783 Paris Cedex 16, France.

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2. In the United States, Pernod Ricard operates through a wholly-owned subsidiary corporation, Pernod Ricard USA, Inc., whose offices are located at 100 Manhattanville Road, Purchase, New York 10577.

3. Among other things, Pernod Ricard produces distilled spirits that it distributes, markets, and sells in the United States. Some of those brand lines of distilled spirits are Martell Cognac, Seagram's Gin, Hiram Walker Cordials, and Kahlua Coffee Liqueur. Pernod Ricard also produces, markets, distributes, and sells, Chivas Regal, Ballantine's, The Glenlivet Scotches, Jameson Irish whiskey, Beefeater Gin, and the line of Wild Turkey Bourbons. Pernod Ricard also markets, distributes, and sells, but does not produce, the line of Stolichnaya Vodka.

4. Pernod Ricard had total revenues, from all products, of about E6.4 billion in the year ended June 30, 2007. Pernod Ricard's United States sales of all distilled spirits products in the year ended June 30, 2007, totaled about \$1.4 billion.

5. Pernod Ricard is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

II. Third Party V&S Vin & Sprit AB (publ)

6. V&S is an aktiebolag, or corporation, wholly-owned by The Kingdom of Sweden. V&S is organized, existing and doing business under and by virtue of the laws of The Kingdom of Sweden, with its office and principal place of business located at Årstängsvägen 19 ASE-117 97, Stockholm, Sweden.

7. Among other things, V&S produces and sells distilled spirits products from facilities that it owns and operates. The V&S brands of distilled spirits sold in the United States include the

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lines of Absolut Vodka, Level Vodka, Plymouth Gin, and Cruzan Rum.

8. In the United States, V&S operates its distilled spirits business through a wholly-owned subsidiary corporation, The Absolut Spirits Company, Incorporated (“ASCI”). ASCI is a Delaware corporation with its offices and principal place of business located at 401 Park Avenue South, New York, New York 10016.

9. V&S had total revenues, from all products, of about SEK (Swedish krona) 10 billion in 2007. V&S’s United States revenues from all distilled spirits products in 2007 were about SEK 4 billion.

10. V&S is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

III. Third Party Future Brands

11. Future Brands LLC (“Future Brands”) is a marketing, sales, and distribution joint venture corporation of ASCI and Beam Global Spirits & Wine, Inc. (“Beam Global”), a division of Fortune Brands, Inc. (“Fortune Brands”). Future Brands is organized, existing and doing business under and by virtue of the laws of Delaware with its office and principal place of business located in the offices of Fortune Brands at 300 Tower Parkway, Lincolnshire, Illinois 60069.

12. Future Brands was created in 2001 by agreement of Beam Global and ASCI. Under the terms of that agreement, the Future Brands joint venture is scheduled to end in 2012.

13. Future Brands markets, sells, and distributes all of the distilled spirits brands of both Beam Global and ASCI that are

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available for sale in the United States. The brands of Beam Global include the lines of Courvoisier Cognac; DeKuyper Cordials; Starbucks Coffee Liqueur; Jim Beam, Knob Creek, Bakers, Basil Hayden, and Booker's Bourbon; Laphroaig and Teacher's Scotch; and Gilbey's Gin. The brands of ASCI include the lines of Absolut Vodka, Level Vodka, Plymouth Gin, and Cruzan Rum. Future Brands had total revenues, in 2007, of about \$1.48 billion.

14. Beam Global and ASCI sell distilled spirits that fall into different marketing and price point segments of various distilled spirits product categories and are not substantial and direct competitors of one another. Because ASCI sells no distilled spirits products other than through Future Brands, ASCI and Future Brands are not substantial or direct competitors of one another either.

15. The principal economic benefit to Beam Global and ASCI of the Future Brands joint venture is their cost savings or efficiencies from the joint marketing, selling, and distribution of their products. Neither ASCI nor Beam Global receives direct or significant financial or economic benefit or profits from, or is financially burdened by, activities associated with any profit or loss from the sale of any of the products in the Future Brands joint venture. The economic benefit from the actual sale of the products in the joint venture are maintained by the brand owners.

16. Before its acquisition of V&S, Pernod Ricard had no business relationship with Future Brands. As a marketer, seller, and distributor of distilled spirits products similar to distilled spirits products marketed, sold, and distributed by Future Brands, Pernod Ricard had been a direct and substantial competitor of Future Brands.

17. After its acquisition of V&S, Pernod Ricard will replace ASCI as a joint venture partner of Beam Global, and Beam Global and Pernod Ricard will share in the management of Future

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Brands. Upon becoming the joint venture partner of Beam Global, Pernod Ricard will necessarily acquire access to competitively sensitive information about all Beam Global products, including products with which Pernod Ricard is in direct and substantial competition.

IV. The Proposed Acquisition and Transaction

18. On or about March 30, 2008, Pernod Ricard and The Kingdom of Sweden entered into their Share Purchase Agreement Regarding the Shares in V&S Vin & Sprit AB (publ) (“the acquisition agreement”).

19. Under the terms of the acquisition agreement, Pernod Ricard will acquire all of the shares of V&S (“the proposed acquisition”) for a sum equal to a combination of euros, dollars, and interest payments totaling approximately \$9 billion.

V. Nature of Trade and Commerce

A. Relevant Product Markets

a. Not larger than premium-priced vodkas

20. A relevant product market to assess the competitive effects of the proposed acquisition is a market no larger than all premium-priced vodkas.

21. Vodka is a clear alcoholic beverage distilled from a starch source, most commonly potatoes, wheat, or rye, but sometimes also from corn, sugar beets, grapes, or citrus fruit. Flavored vodkas are common, and vodka may be flavored by the addition of flavor-containing ingredients and by allowing it to sit for sufficient time for the flavors to infuse the vodka.

22. Vodka sold in the United States ranges from value priced products to high end brands, differentiated from the value priced

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bands by a combination of attributes associated with a brand name and associated cache, which include bottle characteristics, country of origin, number of times distilled, taste, and the nature and extent of associated advertising and promotion. High end vodka brands are all premium priced over the value brands. Industry participants generally divide the high end vodka products into three segments: (a) premium vodka, (b) super premium vodka, and (c) ultra premium vodka.

23. The most popular premium vodka product in the United States is Smirnoff Red Label Vodka. The two most popular super premium vodka brands sold in the United States are Absolut Vodka (a V&S product distributed by Future Brands), the largest selling super premium vodka, and Stolichnaya Vodka (distributed by Pernod Ricard), the second largest selling super premium vodka. The most popular ultra premium vodka sold in the United States is Grey Goose Vodka.

24. Total United States sales in 2007 of all premium priced vodkas were about 28 million 9-liter equivalent cases, which represents about \$5 billion in retail sales. Total United States sales in 2007 of all vodkas in the super premium segment were about nine million 9-liter equivalent cases, which represents about \$1.9 billion in retail sales.

b. Cognac

25. A second relevant product market to assess the competitive effects of the proposed acquisition is Cognac.

26. Cognac is a type of brandy, or distilled wine, which may be produced and bottled only in the Charente region of France. Two popular Cognac brands sold in the United States are Martell (a Pernod Ricard product), and Courvoisier (a Beam Global and Future Brands product). Total sales of Cognac in the United States

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in 2007 were about four million 9-liter equivalent cases, which represent about \$1.5 billion in retail sales.

c. Domestic cordials

27. A third relevant product market to assess the competitive effects of the proposed acquisition is domestic cordials.

28. Cordials (sometimes referred to as liqueurs) are sweet distilled spirits flavor drinks, with sugar added. Domestic cordials normally are identified by a specific flavor or main ingredient, whereas imported cordials (or liqueurs) are generally higher priced than domestic cordials, are blends of herbs, flavors, and spices, and are identified primarily by brand. Domestic cordials are used primarily in cocktail recipes with a base alcohol, most commonly vodka. The two most popular lines of domestic cordials sold in the United States are Hiram Walker, (a Pernod Ricard product), and DeKuyper, (a Beam Global and Future Brands product). Total sales of domestic cordials in the United States in 2007 were about 4.5 million 9-liter equivalent cases, which represent about \$500 million in retail sales.

d. Coffee liqueurs

29. A fourth relevant product market to assess the competitive effects of the proposed acquisition is all coffee liqueurs.

30. Coffee liqueurs are spirit based, usually from rum or vodka, and sweetened with added sugar and flavored with coffee. The two most popular product lines of coffee liqueurs sold in the United States are Kahlua, (a Pernod Ricard product), the largest selling brand, and Starbucks, (a Beam Global and Future Brands product), the second largest selling brand. Total sales of coffee liqueurs in the United States in 2007 were about two million 9-liter equivalent cases, which represent about \$350 million in retail sales.

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e. Popular gin

31. A fifth relevant product market to assess the competitive effects of the proposed acquisition is popular gin.

32. Gin is a distilled spirit made from grain, primarily wheat or rye, that is flavored with juniper berries and other herbs and spices, which are normally referred to as botanicals. Popular gin is gin that is principally made and bottled in North America, is generally advertised, promoted, and available throughout the United States, and sold at retail at prices that are lower than the premium gins, which are imported from the United Kingdom, but higher than the gins that are not widely advertised and promoted. Two brands of popular gin sold in the United States are Seagram's (a Pernod Ricard product), the largest selling product, and Gilbey's, (a Beam Global and Future Brands product), the third largest selling product. Total sales of popular gin in the United States in 2007 were about 4.5 million 9-liter equivalent cases, which represent about \$500 million in retail sales.

B. Relevant Geographic Markets

33. The relevant geographic markets in which to assess the effects of the proposed acquisition are: (a) the United States, and (b) individual states and territories of the United States.

C. Market Structure

34. The relevant markets are (a) highly concentrated, whether measured by the Herfindahl-Hirschman Index ("HHI") or by two-firm and four-firm concentration ratios, or (b) structured so that the products of Pernod Ricard and V&S are the first and second choices for a substantial number of the customers of these products.

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D. Conditions of Entry

35. Entry into each of the relevant markets would not be timely, likely, or sufficient to prevent any of the following anticompetitive effects from occurring.

VI. Effects of the Acquisition

36. Pernod Ricard, with its line of Stolichnaya Vodka, is a direct and substantial competitor of ASCI in connection with the marketing, sale, and distribution of ASCI's line of Absolut Vodka.

37. Pernod Ricard, with its line of Martell Cognac, is a direct and substantial competitor of Beam Global and the Future Brands joint venture in connection with the production, marketing, sale, or distribution of their line of Courvoisier Cognac.

38. Pernod Ricard, with its line of Hiram Walker cordials, is a direct and substantial competitor of Beam Global and the Future Brands joint venture in connection with the production, marketing, sale, or distribution of their line of DeKuyper cordials.

39. Pernod Ricard, with its line of Kahlua Coffee Liqueur, is a direct and substantial competitor of Beam Global and the Future Brands joint venture in connection with the production, marketing, sale, and distribution of their line of Starbucks Coffee Liqueur.

40. Pernod Ricard, with its line of Seagram's gins, is a direct and substantial competitor of Beam Global and Future Brands joint venture in connection with the production, marketing, sale, or distribution of their line of Gilbey's Gin.

41. The proposed acquisition may substantially lessen competition in each relevant market in some or all of the following ways, among others:

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(a) by eliminating actual direct and substantial competition between Pernod Ricard and V&S, Beam Global, or Future Brands;

(b) by increasing the likelihood that Pernod Ricard will unilaterally exercise market power; and

(c) by increasing the likelihood of, or facilitating, overt collusion, tacit collusion, or coordinated interaction;

each of which may result in higher prices to consumers.

VII. Violations Charged

42. The agreement described in Paragraphs 18 and 19 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and 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.

43. The acquisition constitutes a 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 seventeenth day of July, 2008, issues its Complaint against Respondent Pernod Ricard.

By the Commission.

Order to Maintain Assets

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Pernod Ricard S.A. (“Pernod” or “Respondent”) of V&S Vin & Sprit AB (publ) (“V&S”) from The Kingdom of Sweden, and Respondent 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 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 attorneys, 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 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 Hold Separate and Maintain Assets (“Hold Separate Order”):

1. Respondent Pernod is a société anonyme, organized, existing and doing business under and by virtue of the laws of The

Order to Maintain Assets

French Republic, with its office and principal place of business located at 12, place des Etats-Unis, 75783 Paris Cedex 16, France. Pernod's principal subsidiary in the United States is Pernod Ricard USA, Inc. ("Pernod Ricard USA"), headquartered at 100 Manhattanville Road, Purchase, NY 10577.

2. V&S Vin & Sprit AB (publ) is an aktiebolag organized, existing, and doing business under and by virtue of the laws of The Kingdom of Sweden, with its office and principal place of business located at Årstängsvägen 19A SE-117 97 Stockholm, Sweden. V&S's principal subsidiary in the United States is the Absolut Spirits Company, Inc. ("ASCI"), headquartered at 401 Park Avenue South, New York, NY 10016.

3. The Commission has jurisdiction of 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 to Hold Separate and 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), which are incorporated herein by reference and made a part hereof, shall apply:

- A. "Pernod" or "Respondent" means Pernod Ricard S.A., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Pernod (including, but not limited to, Pernod Ricard USA and Allied Domecq), and the respective directors, officers, employees, agents, representatives,

Order to Maintain Assets

successors, and assigns of each. After the Acquisition, Pernod shall include V&S.

- B. “V&S” means V&S Vin & Sprit AB (publ), its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by V&S (including, but not limited to, the Absolut Spirits Company, Incorporated, “ASCI”), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Commission” means the Federal Trade Commission.
- D. “Decision and Order” means the:
 - 1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance 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.
- E. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order to Hold Separate and Maintain Assets.
- F. “Orders” means the Decision and Order and this Order to Hold Separate and Maintain Assets.
- G. “Stolichnaya Held Separate Business” means the Stolichnaya Brand Organisation and all of the operations and businesses related to the research, development, production, marketing, advertising, promotion, distribution, sale or after-sales support for Stolichnaya Vodka related thereto.

Order to Maintain Assets

II.

IT IS FURTHER ORDERED that from the date this Hold Separate Order becomes final:

- A. Respondent shall take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Stolichnaya Held Separate Business, and shall prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer, or impairment of the Stolichnaya Held Separate Business or assets related thereto except for ordinary wear and tear.
- B. Until such time as Respondent either: (1) ceases and desists from marketing, selling, or distributing Stolichnaya Vodka in the United States, or (2) ceases to have any Ownership Interest in the Absolute Vodka Assets:
 - 1. Respondent shall hold the Stolichnaya Held Separate Business separate, apart, and independent from Respondent Pernod, and vest the Stolichnaya Held Separate Business with all rights, powers, and authority necessary to conduct its business; and
 - 2. Respondent shall not exercise direction or control over, or influence directly or indirectly, the Stolichnaya Held Separate Business or any of its operations, *except* to the extent that Respondent Pernod must exercise direction or control over the Stolichnaya Held Separate Business as is necessary to assure compliance with the Stolichnaya Distribution Agreement, the Stolichnaya Transition Agreement, this Hold Separate Order, the Decision and Order, and all applicable laws.

Order to Maintain Assets

- C. Respondent shall maintain the operations of the Stolichnaya Held Separate Business in the regular and ordinary course of business and in accordance with its past practice (including regular repair and maintenance of the assets of such businesses) and shall use its best efforts to preserve the existing relationships with the following: suppliers; vendors and distributors; customers; employees; and others having business relationships with the Stolichnaya Held Separate Business. Respondent's responsibilities shall include, but are not limited to, the following:
1. Respondent shall provide the Stolichnaya Held Separate Business with sufficient capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the Stolichnaya Held Separate Business;
 2. Respondent shall continue, at least at their scheduled pace, any additional expenditures for the Stolichnaya Held Separate Business authorized prior to the date Respondent signed the Consent Agreement including, but not limited to, all research, development, manufacture, distribution, marketing, and sales expenditures;
 3. Respondent shall provide such resources as may be necessary to respond to competition against the Stolichnaya Held Separate Business and/or prevent any diminution of sales of Stolichnaya Vodka prior to the termination of Respondent's marketing, sale and/or distribution of Stolichnaya Vodka;
 4. Respondent shall provide such resources as may be necessary to maintain the competitive strength and

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positioning of Stolichnaya Vodka at major customer accounts;

5. Respondent shall make available for use by the Stolichnaya Held Separate Business funds sufficient to perform all routine maintenance of the Stolichnaya Held Separate Business;
 6. Respondent shall provide the Stolichnaya Held Separate Business with such funds as are necessary to maintain the viability, marketability, and competitiveness of Stolichnaya Vodka;
 7. Respondent shall provide such support services to the Stolichnaya Held Separate Business as were being provided to this business by Respondent as of the date Respondent signed the Consent Agreement; and
 8. Respondent shall cooperate with the Interim Monitor in the performance of his or her obligations under Paragraph III. of this Hold Separate Order.
- D. Until such time as Respondent either: (1) ceases and desists from marketing, selling, or distributing Stolichnaya Vodka in the United States, or (2) ceases to have any Ownership Interest in the Absolute Vodka Assets:
1. Respondent shall not use, directly or indirectly, any Stolichnaya Confidential Business Information other than to comply with (1) the requirements of this Hold Separate Order and the Decision and Order, (2) Respondent's obligations under the Stolichnaya Distribution Agreement and the Stolichnaya Transition Agreement, or (3) applicable law;

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2. Respondent shall not disclose or convey any Stolichnaya Confidential Business Information, directly or indirectly, to any person *except* SPI or its designee(s);
 3. Respondent shall not provide, disclose or otherwise make available, directly or indirectly, any Stolichnaya Confidential Business Information to the Absolut Vodka Firewalled Employees; and
 4. immediately after Respondent signs the Consent Agreement, Respondent shall, as soon as practicable and without delay, develop and implement procedures to ensure that the Stolichnaya Employees do not:
 - a. provide, disclose or otherwise make available, directly or indirectly, any Stolichnaya Confidential Business Information in contravention of this Hold Separate Order; and/or
 - b. solicit, access or use any Absolut Vodka Confidential Business Information that they are prohibited under this Hold Separate Order from receiving for any reason or purpose.
- E. Not later than ten (10) days after the Acquisition Date, with respect to all Stolichnaya Employees:
1. Respondent shall provide written notification that each employee shall be required to maintain all Stolichnaya Confidential Business Information (including, without limitation, all field experience) strictly confidential, including the non-disclosure of such information to all Absolut Vodka Firewalled Employee and any officer, director, or manager (at the brand management level or higher), of Pernod. Such agreement shall provide for the following:

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- a. restrictions on the use of Stolichnaya Confidential Business Information;
 - b. appropriate conduct relating to information that could be used to the detriment of Stolichnaya Vodka; and
 - c. sanctions for violation of the terms of the agreement;
2. Respondent shall obtain an executed non-disclosure agreement from each such Stolichnaya Employee pursuant to which each such individual agrees to comply with the terms of this paragraph; and
 3. Respondent shall maintain complete records of all such agreements at the corporate headquarters of Pernod Ricard USA, and provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied with. Respondent shall provide SPI with copies of all certifications, notifications, and reminders sent its personnel;

provided however, this paragraph shall not preclude any officer, director, or senior-level executive of Pernod who is charged with the direct responsibility to oversee the Stolichnaya Distribution Agreement and the Stolichnaya Transition Agreement from receiving aggregated sales data on Stolichnaya Vodka.

- F. Respondent shall staff the Stolichnaya Held Separate Business with employees sufficient to maintain the viability, marketability, and competitiveness of the Stolichnaya Held Separate Business including, but not limited to, the Stolichnaya Employees.

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- G. Respondent shall provide the Stolichnaya Employees with continued financial compensation and employment benefits, including providing them with the same employee benefits, regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law) until the termination of Pernod's distribution of Stolichnaya Vodka;
- H. Respondent shall also provide the financial incentives set forth in the employee retention bonus program issued pursuant to the Stolichnaya Transition Agreement to the Stolichnaya Employees to continue in their employment positions until the Stolichnaya Termination Date.
- I. At any time after the Acquisition Date, and within ten (10) days of Respondent's receipt of a request from SPI:
1. Respondent shall provide SPI or its designee(s) with a complete list of the Stolichnaya Employees and each employee's related Employee Information; and
 2. Respondent shall provide SPI or its designee(s) with an opportunity to inspect the personnel files and other documentation relating to the Stolichnaya Employees;
- provided, however, that in cases in which applicable law restricts access to the information required to be provided to SPI or its designee(s) pursuant to this paragraph, Respondent shall use best efforts to ensure that such information is provided to SPI or its designee(s) consistent with applicable law.*
- J. For a period ending no earlier than six (6) months after the Stolichnaya Termination Date, Respondent shall provide SPI or its designee(s) with an opportunity to enter into employment contracts with the Stolichnaya Employees, which may be contingent upon the Respondent's

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termination of Respondent's marketing, sale, and distribution of Stolichnaya Vodka. Respondent shall not interfere with the employment by SPI or its designee(s) of any Stolichnaya Employee, shall not offer any incentive to such employees to decline employment with SPI or its designee(s) or to accept other employment with Respondent, and shall remove any impediments that may deter such employees from accepting employment with SPI or its designee(s), including, but not limited to, any confidentiality provisions relating to Stolichnaya Vodka or any non-compete or confidentiality provisions of employment or other contracts with Respondent that would affect the ability of those individuals to be employed by SPI or its designee(s). In addition, Respondent shall not make any counteroffer to such a Stolichnaya Employee who has received a written offer of employment from the SPI or its designee(s);

provided, however, that nothing in this Hold Separate Order requires or shall be construed to require Respondent to terminate the employment of any employee or prevents Respondent from continuing the employment of the Stolichnaya Employees (other than the requirements that employees maintain certain information confidential as prescribed in this Hold Separate Order).

- K. The purpose of this Hold Separate Order is to maintain the full economic viability, marketability, and competitiveness of the Stolichnaya Held Separate Business, to minimize any risk of loss of competitive potential for Stolichnaya Vodka, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Stolichnaya Held Separate Business except for ordinary wear and tear.

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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 Hold Separate Order, the Decision and Order, the Stolichnaya Transition Agreement and any Divestiture Agreement.
- 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 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 the Orders in a manner consistent with the purposes of the Orders.
- D. If an Interim Monitor is appointed, Respondent shall consent to the following terms and conditions regarding the powers, duties, authority, and responsibilities of the Interim Monitor:

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1. The Interim Monitor shall have the power and authority to monitor Respondent's compliance with: the divestiture, hold separate, and asset maintenance obligations of the Orders; the restrictions on the use, conveyance, provision, or disclosure of the identified confidential business information under the Orders; and, the related requirements of the Orders. The Interim Monitor 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 earlier of:
 - a. the expiration of the Future Joint Venture;
 - b. the date Respondent ceases and desists from participating, directly or indirectly, in the Future Joint Venture; or
 - c. the day six (6) months from the Absolut Vodka Closing Date.

provided, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders;

4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such

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other relevant information as the Interim Monitor may reasonably request, related to Respondent's compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Respondent shall cooperate with all reasonable requests 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 the Orders.

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 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 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 Hold Separate Order and/or as otherwise provided in any agreement approved by the Commission. The Interim

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Monitor shall evaluate the reports submitted to the Interim Monitor by Respondent, and any reports submitted by the Acquirer, Fortune Brands and/or SPI with respect to the performance of Respondent's obligations under the Orders, the Stolichnaya Transition Agreement or any Divestiture Agreement(s). 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 the Orders.

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

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orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

- H. The Interim Monitor appointed pursuant to this Hold Separate Order may be the same person appointed as a Divestiture Trustee pursuant to Paragraph V. of the Decision and Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Hold Separate Order becomes final, and every sixty (60) days thereafter until Respondent has fully complied with Paragraphs II. and III. of the Decision and Order, 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 Order and the Decision and Order; *provided, however*, that, after the Decision and Order in this matter becomes final, the reports due under this Hold Separate Order may be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondent pursuant to Paragraph VII. of the Decision and Order.

V.

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

- A. any proposed dissolution of Respondent;
- B. any proposed acquisition, merger or consolidation of Respondent; or
- C. any other change in Respondent 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 Hold Separate Order.

VI.

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 any Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during business office hours of such 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 such Respondent related to compliance with this Hold Separate Order, which copying services shall be provided by such Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and
- B. to interview officers, directors, or employees of such Respondent, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Hold Separate Order shall terminate on the earlier of:

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- 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 day Respondent either:
 - 1. ceases and desists from marketing, selling, or distributing Stolichnaya Vodka in the United States, or
 - 2. ceases to have any Ownership Interest in the Absolute Vodka Assets.

By the Commission.

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The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Pernod Ricard S.A. (“Pernod” or “Respondent”) of V&S Vin & Sprit AB (publ) (“V&S”) from The Kingdom of Sweden and Respondent having been furnished thereafter with a copy of a draft Complaint (“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 attorneys, 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

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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 thereupon issued its Complaint and an Order to Hold Separate and 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, and having modified the Decision and Order in certain respects, 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 Pernod is a société anonyme, organized, existing and doing business under and by virtue of the laws of The French Republic, with its office and principal place of business located at 12, place des Etats-Unis, 75783 Paris Cedex 16, France. Pernod's principal subsidiary in the United States is Pernod Ricard USA, Inc. ("Pernod Ricard USA"), headquartered at 100 Manhattanville Road, Purchase, NY 10577.

2. V&S Vin & Sprit AB (publ) is an aktiebolag organized, existing, and doing business under and by virtue of the laws of The Kingdom of Sweden, with its office and principal place of business located at Årstängsvägen 19A SE-117 97 Stockholm, Sweden. V&S's principal subsidiary in the United States is the Absolut Spirits Company, Inc. ("ASCI"), headquartered at 401 Park Avenue South, New York, NY 10016.

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3. The Commission has jurisdiction of 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 the Order, the following definitions shall apply:

- A. “Pernod” or “Respondent” means Pernod Ricard S.A., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Pernod (including, but not limited to, Pernod Ricard USA and Allied Domecq), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Pernod shall include V&S.
- B. “V&S” means V&S Vin & Sprit AB (publ), its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by V&S (including, but not limited to, ASCI), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Commission” means the Federal Trade Commission.
- D. “Absolut Vodka” means any brand or product that uses the trade name or Trademark “Absolut”, including, without limitation, all such products that are vodka or vodka based beverages.

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- E. “Absolut Vodka Assets” means all of Respondent’s rights, title and interest, worldwide, as of the Absolut Vodka Closing Date, in and to all assets, tangible and intangible, of the Absolut Vodka Business, including, without limitation, such rights, titles, and interests, in the following:
1. Absolut Vodka Intellectual Property;
 2. Absolut Vodka Confidential Business Information;
 3. Absolut Vodka Sales and Marketing Materials;
 4. assets relating to the research, development, production, distribution, marketing, promotion, sale, or after-sales support of Absolut Vodka;
 5. copies of all vendor lists, and all names of manufacturers and suppliers under contract with Respondent who or that produce for, or supply to, Respondent in connection with the sale of Absolut Vodka;
 6. at the Acquirer’s option, all rights, title and interest in and to inventories of products, raw materials, supplies and parts, including work-in-process and finished goods, packaging and point of sale materials related to Absolut Vodka;
 7. at the Acquirer’s option, and to the extent transferable, divisible or assignable, all rights, title and interest in and to agreements (except contracts of employment), express or implied, relating to research, design, development, production, distribution, marketing, promotion, sale or after-sales support of Absolut Vodka, regardless of whether such agreements relate

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exclusively to such purposes, including, but not limited to, warranties, guarantees, and contracts with customers (together with associated bid and performance bonds, if any), other vodka distillers, joint venture partners, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, and consignees;

8. all unfilled customer orders for Absolut Vodka as of the Absolut Vodka Closing Date (a list of such orders to be provided to the Acquirer within twenty (20) days after the Absolut Vodka Closing Date);
9. all rights under warranties and guarantees, express or implied, relating to Absolut Vodka;
10. all books, records, and files relating to Absolut Vodka;
11. at the Acquirer's option, all rights under the Absolut Vodka Input Supply Agreements to the extent legally transferable to the Acquirer; and
12. at the Acquirer's option, the Absolut Vodka Manufacturing Facilities.

provided, however, that the Absolut Vodka Assets shall not include:

- a. any right to use Respondent's general business strategies or practices relating to product information formulation or market research activities or methods or methodologies that Respondent uses on a company-wide basis for the purposes of formulating, marketing, promoting, managing, or selling its various brands, *except* that, to the extent that documents or other materials

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relating to such business strategies or practices contain the results of product formulation or marketing research activities relating to Absolut Vodka, Respondent shall divest those results to the Acquirer and the Acquirer shall be entitled to use such product formulation or marketing research results;

- b. any right, title and interest in or to any owned or leased real property and improvements, office space, office equipment and furniture, management information systems, software, and personal property used by Respondent, other than such assets that comprise the Absolut Vodka Manufacturing Facilities;
- c. any interest in any wholesale distributor of beverage alcohol;
- d. any payables or receivables related to transactions that are fully performed on or prior to the Absolut Vodka Closing Date;
- e. any contract for the procurement or receipt of goods or services for Respondent on a company-wide or portfolio-wide basis; and
- f. that portion of any document or other material containing information relating solely to a brand or business other than Absolut Vodka;

provided further, however, in cases in which documents or other materials included in the Absolut Vodka Assets contain information that relates both to Absolut Vodka and other brands or businesses of Respondent, Respondent shall be required to provide only copies of the documents

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and materials containing this information. If such information can be segregated in a manner that preserves the usefulness of the information as it relates to Absolut Vodka, then the copies provided to the Acquirer may be redacted to delete information that relates to brands and businesses of Respondent other than Absolut Vodka, and the copies or originals retained by Respondent shall be redacted to delete information that relates to Absolut Vodka. The purpose of this proviso is to ensure that Respondent provides the Acquirer with the above-described information without requiring Respondent completely to divest itself of information which, in content, relates also to brands and businesses other than Absolut Vodka.

- F. “Absolut Vodka Business” means all of the operations and business related to the research, development, production, marketing, advertising, promotion, distribution, sale or after-sales support for Absolut Vodka.
- G. “Absolut Vodka Closing Date” means the date on which Respondent (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey Absolut Vodka Assets to an Acquirer.
- H. “Absolut Vodka Confidential Business Information” means all information that is not in the public domain relating to the Absolut Vodka Business, including the research, development, production, marketing, advertising, promotion, distribution, sales or after-sales support of Absolut Vodka.
- I. “Absolut Vodka Employee(s)” means:
 - 1. all persons employed by V&S with responsibility for, or who directly participated in (irrespective of the portion of working time involved), the research,

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development, production, marketing, advertising, promotion, distribution, sale or after-sales support of Absolut Vodka within an eighteen (18) month period prior to the Acquisition Date; and

2. all persons employed by Pernod with responsibility for, or who directly participate in (irrespective of the portion of working time involved), the research, development, production, marketing, advertising, promotion, distribution, sale or after-sales support of Absolut Vodka in the United States at any time after the Acquisition Date and prior to the Absolut Vodka Closing Date.
- J. “Absolut Vodka Firewalled Employee(s)” means the Absolut Vodka Future Board Members, the Absolut Vodka Senior Managers, and the Absolut Vodka Employees.
- K. “Absolut Vodka Future Board Member(s)” means any person(s) appointed or designated by Respondent to the Future Joint Venture Board of Managers.
- L. “Absolut Vodka Income Stream” means either:
1. all sales revenues realized from the sales of Absolut Vodka within the United States net of Supply Cost and continuing at least until such time as Respondent either: (1) ceases and desists from marketing, selling, or distributing Stolichnaya Vodka in the United States, or (2) ceases to have any Ownership Interest in the Absolut Vodka Assets; or
 2. a stipulated amount equal to at least twenty (20) percent of gross sales revenue realized from the sales of Absolut Vodka within the United States and

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continuing at least until such time as Respondent either: (1) ceases and desists from marketing, selling, or distributing Stolichnaya Vodka in the United States, or (2) ceases to have any Ownership Interest in the Absolut Vodka Assets.

M. “Absolut Vodka Input Supply Agreements” means any agreement with a Third Party to supply an ingredient(s) or input(s) used in the production of Absolut Vodka.

N. “Absolut Vodka Intellectual Property” means all intellectual property throughout the world related to Absolut Vodka including, without limitation, the following:

1. Trademarks;
2. Trade Dress;
3. Copyrights;
4. trade secrets, know-how 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;
5. Patents;
6. Production Technology; and
7. all research materials, technical information, and data contained in software;

provided, however, that where such intellectual property also relates to other brands or businesses of Respondent, Respondent shall grant the Acquirer rights to use such

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intellectual property on a non-exclusive basis in connection with the Absolut Vodka Business.

- O. “Absolut Vodka Manufacturing Facilities” means the following facilities that have been used in the production, blending, bottling or packaging of Absolut Vodka or other distilled spirits:
1. the distillery located at Ugerupsvägen 50, Kristianstad, Sweden;
 2. the bottling plant located at Köpmannagatan 29, Åhus, Sweden; and
 3. all the real estate, equipment, machinery, fixtures, vehicles, furniture, tools, supplies and other personal property associated with the preceding facilities.
- P. “Absolut Vodka Sales and Marketing Materials” means all marketing and promotional materials used anywhere in the world related to Absolut Vodka or the Absolut Vodka Assets as of the Absolut Vodka Closing Date, including, without limitation: all advertising materials; customer lists; contribution statements; Website(s) and Domain Name(s); product data; profit and loss statements; price lists; mailing lists; sales materials; marketing information (*e.g.*, customer sales and competitor data); catalogs, sales promotion literature and other promotional materials; spend records related to advertising, marketing or promotion; training and other materials associated with the Absolut Vodka Assets; and all copyrights in and to the Absolut Vodka Sales and Marketing Materials.
- Q. “Absolut Vodka Senior Manager(s)” means all persons designated as, or otherwise functioning as, brand managers for Absolut Vodka. The Absolut Vodka Senior Manager(s)

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include, without limitation, those individuals identified in Appendix III. attached to this Order.

- R. “Acquirer” means a Person approved by the Commission to acquire particular assets or rights that Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.
- S. “Acquisition” means the acquisition contemplated by the Share Purchase Agreement Regarding the Shares in V&S dated March 30, 2008, by and among The Kingdom of Sweden and Pernod Ricard S.A., and all amendments, exhibits, attachments, agreements, and schedules thereto.
- T. “Acquisition Date” means the date Respondent closes on the Acquisition.
- U. “Allied Domecq” means Allied Domecq International Holdings BV, a corporation organized, existing, and doing business under and by virtue of the laws of The Netherlands, with its office and principal place of business located at The Pavilions, Bridgwater Road, Bedminster Down, Bristol, BS138AR, United Kingdom; and its subsidiaries and affiliates, including without limitation Allied Domecq Spirits & Wine USA, LLC, a limited liability corporation organized, existing, and doing business under and by virtue of the laws of Michigan, with its office and principal place of business located at 355 Riverside Avenue, Westport, CT 06880.
- V. “ASCI Brands” means all V&S distilled spirits marketed, sold or distributed by the Future Joint Venture including, but not limited to, Absolut Vodka, Level Vodka, Cruzan Rum, and Plymouth Gin.
- W. “Beam Brands” means all Beam Global distilled spirits marketed, sold, or distributed by the Future Joint Venture including, without limitation, Jim Beam Bourbon, Knob

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Creek Bourbon, Bakers Bourbon, Basil Hayden Bourbon, Booker's Bourbon, Laphroaig Scotch, Ardmore Scotch, Teacher's Highland Cream Scotch, Courvoisier VS Cognac, DeKuyper Cordials, Starbucks Liqueurs, and Gilbey's Gin.

- X. "Beam Brands Confidential Business Information" means all information that is not in the public domain relating to the Beam Brands, including the research, development, production, marketing, advertising, promotion, distribution, sales or after-sales support of the Beam Brands.
- Y. "Beam Global" means Beam Global Spirits & Wine, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its headquarters address located at 510 Lake Cook Road, Deerfield, Illinois 60015; and its subsidiaries and affiliates, including without limitation Jim Beam Brands Co. and Fortune Brands, Inc.
- Z. "Cease and Desist Date" means the day exactly six (6) months after the Acquisition Date.
- AA. "Copyrights" means rights to all original works of authorship of any kind related to Absolut Vodka and any registrations and applications for registrations thereof, 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 Absolut Vodka or of any materials used in the research, development, manufacture, marketing or sale of Absolut Vodka, including all raw data relating to quality trials of the Absolut Vodka, customer information, promotional and marketing materials, the Absolut Vodka sales

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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 Absolut Vodka.

- BB. “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. “Direct Cost” to SPI or its designee(s) for its use of any of Respondent’s employees’ labor shall not exceed the average hourly wage rate for such employee.
- CC. “Divestiture Agreement” means any agreement between Respondent 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 have been approved by the Commission to accomplish the requirements of this Order.
- DD. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to Paragraph V. of this Order.
- EE. “Domain Name” means the domain names (universe resource locators), and registrations thereof, issued by any Person that issues and maintains the domain name registration; *provided, however*, this term shall not include

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any Trademark or service mark right to such domain names other than the rights to the Trademarks or service marks required to be divested.

FF. “Employee Information” means the following, for each employee, and to the extent permitted by the law:

1. A complete and accurate list of the names of all employees (including former employees who were employed by Respondent within ninety (90) days of the execution of any Divestiture 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 relevant products; *provided, however*, in lieu of this description, Respondent may provide the employee’s most recent performance appraisal;
 - d. the base salary and current wage;
 - 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, on leave, on disability, and whether full or part time); and
 - g. any other material terms and conditions of employment that are not otherwise generally available to similarly situated employees; and

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3. at the Acquirer's or SPI's option (as is relevant), copies of all employee benefit plans and summary plan descriptions.

GG. "Fortune Brands" means Fortune Brands, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its headquarters address located at 510 Lake Cook Road, Deerfield, Illinois 60015-5611.

HH. "Future Employees" means employees of the Future Joint Venture.

II. "Future Joint Venture" means Future Brands, LLC, a limited liability company organized, existing, and doing business as a limited liability company under and by virtue of the laws of Delaware, with its headquarters office located at 510 Lake Cook Road, Deerfield, Illinois 60015. The Future Joint Venture operates as a joint venture between ASCI and Beam Global for the marketing and distribution of ASCI Brands and Beam Brands as contemplated by the Master Transaction Agreement dated March 20, 2001, by and among V&S Vin & Sprit AB, the Absolut Spirits Company, Inc., Jim Beam Brands Worldwide, Inc., Jim Beam Brands Co., and Fortune Brands, Inc., and all amendments, exhibits, attachments, agreements, and schedules thereto.

JJ. "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.

KK. "Interim Monitor" means a monitor appointed pursuant to Paragraph IV. of this Order or Paragraph III. of the Order to Hold Separate and Maintain Assets.

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- LL. “Non-Competing Firm” means any Person *excluding*: (1) the Respondent; and (2) any Person that engages in the business of manufacturing, marketing, distributing or selling brands of vodka other than Absolut Vodka.
- MM. “Orders” means the Order to Hold Separate and Maintain Assets and this Decision and Order.
- NN. “Ownership Interest” means any and all rights, title, and interest, present or contingent, of the Respondent to hold any voting or nonvoting stock, share capital, equity, assets or other interests or beneficial ownership in a specified entity or specified asset(s).
- OO. “Patents” means all patents, patent applications, including provisional patent applications, and statutory invention registrations, in each case existing as of the Absolut Vodka Closing Date, 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 world, related to Absolut Vodka.
- PP. “Pernod Brands” means Wild Turkey Bourbon, Russell’s Reserve Bourbon, The Glenlivet Scotch, Aberlour Scotch, Scapa Scotch, Ballantine’s Scotch, Martell VS Cognac, Hiram Walker Cordials, Kahlua Liqueurs, Tia Maria Coffee Liqueur, and Seagram’s Gin.
- QQ. “Pernod Brands Confidential Business Information” means all information that is not in the public domain relating to the Pernod Brands, including the research, development, production, marketing, advertising, promotion, distribution, sales or after-sales support of the Pernod Brands.

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- RR. “Pernod Employees” means all employees of Pernod *excluding* the Absolut Vodka Firewalled Employees.
- SS. “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.
- TT. “Production Technology” means all recipes, formulas, blend specifications, technology, trade secrets, know-how, and proprietary information, anywhere in the world, relating to the production and bottling of Absolut Vodka.
- UU. “SPI” means Spirits International BV, a corporation organized, existing, and doing business under and by virtue of the laws of The Netherlands, with its office and principal place of business located at Chemin Louis-Dunant 17, 1202 Geneva; and its subsidiaries and affiliates, including without limitation SPI Spirits (Cyprus) Limited, a corporation organized, existing, and doing business under and by virtue of the laws of Cypress, with its office and principal place of business located at 249, 28th October Street, 3035 Limassol, Cyprus.
- VV. “Stolichnaya Brand Organisation” means The Stolichnaya Brand Organisation Limited, a company organized, existing, and doing business under and by virtue of the laws of Scotland, with registered office located at 111-113 Renfrew Road, Paisley, PA3 4DY, United Kingdom, and its principal place of business headquartered at 40 Conduit Street, London, W1S 2YQ, United Kingdom.
- WW. “Stolichnaya Vodka” means any brand or product that uses the trade name or Trademark “Stolichnaya”,

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including, without limitation, all such products that are vodka or vodka based beverages.

XX. “Stolichnaya Held Separate Business” means the Stolichnaya Brand Organisation and all of the operations and businesses related to the research, development, production, marketing, advertising, promotion, distribution, sale or after-sales support for Stolichnaya Vodka related thereto.

YY. “Stolichnaya Confidential Business Information” means all information that is not in the public domain relating to Stolichnaya Vodka, including the research, development, production, marketing, advertising, promotion, distribution, sales or after-sales support of Stolichnaya Vodka.

ZZ. “Stolichnaya Employee(s)” means, within an eighteen (18) month period prior to the Acquisition Date:

1. all persons employed by the Stolichnaya Brand Organisation; and
2. any other Pernod employee with primary responsibilities related to the research, development, production, marketing, advertising, promotion, distribution, sale or after-sales support of Stolichnaya Vodka in the United States.

AAA. “Stolichnaya Distribution Agreement” means the Trademark, Supply and Distribution Agreement dated November 15, 2000, by and among Allied Domecq International Holdings BV, Allied Domecq Spirits & Wine USA, Inc. d/b/a Allied Domecq Spirits, SPA, SPI International NV, and SPI Spirits (Cyprus) Limited, and all amendments, exhibits, attachments, agreements, and

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schedules thereto. The Stolichnaya Distribution Agreement is contained in non-public Appendix I, attached to this Order.

BBB. “Stolichnaya Termination Date” means the date Respondent ceases and desists from the marketing, sale, and/or distribution of Stolichnaya Vodka in the United States.

CCC. “Stolichnaya Transition Agreement” means the Transition Agreement dated March 13, 2008, by and among Spirits International BV, SPI Spirits (Cyprus) Limited., Allied Domecq International Holdings BV, Allied Domecq Spirits & Wine USA LLC, Allied Domecq Spirits and Wine Limited, and Pernod Ricard S.A., and all amendments, exhibits, attachments, agreements, and schedules thereto, and includes the employee retention bonus program dated as of May 20, 2008. The Stolichnaya Transition Agreement is contained in non-public Appendix II, attached to this Order.

DDD. “Supply Cost” means a cost calculated not to exceed the manufacturer’s average direct per unit cost to manufacture the particular units of Absolut Vodka products for the twelve (12) month period immediately preceding the accrual of the relevant sales revenue. “Supply Cost” shall expressly exclude any intracompany business transfer profit.

EEE. “Third Party” means any Person other than the Respondent.

FFF. “Trade Dress” means all current and past trade dresses related to Absolut Vodka, including without limitation, product packaging, ornamentations, and designs, and the lettering of the product trade name or brand name.

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GGG. “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 associated goodwill.

HHH. “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 Respondent; *provided, however*, this term shall not include the following: (1) content owned by Third Parties and other intellectual property not owned by Respondent that is incorporated in such Website(s), such as stock photographs, *except* to the extent that Respondent can convey any rights to that intellectual property; or (2) content unrelated to Absolut Vodka.

II.

IT IS FURTHER ORDERED that:

A. Not later than the Cease and Desist Date either:

1. Respondent shall cease and desist, directly or indirectly, from marketing, selling or distributing Stolichnaya Vodka in the United States, or
2. Respondent shall divest the Absolut Vodka Assets pursuant to Paragraph II.D. of this Order, *unless*, on or before the Cease and Desist Date, Respondent submits to the Commission a court order demonstrating that the conditions for divestiture of the Absolut Vodka Income Stream as described in Paragraph II.C. of this Order have been met, in which case Respondent may divest the Absolut Vodka Income Stream pursuant to

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Paragraph II.C. of the Order *in lieu* of a divestiture of the Absolut Vodka Assets.

- B. Until Respondent ceases to market, sell, and/or distribute Stolichnaya Vodka in the United States, Respondent shall comply and continue to comply with the terms of the Stolichnaya Transition Agreement (which 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 SPI or to reduce any obligations of Respondent under such agreement) whereby Respondent terminates its rights and interest in the Stolichnaya Distribution Agreement;

provided, however, that if Respondent has terminated its rights held under the Stolichnaya Distribution Agreement prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that the manner in which the termination was accomplished is not acceptable, the Commission may direct Respondent, or appoint a Divestiture Trustee, to effect such modifications to the Stolichnaya Transition Agreement (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 Respondent may not modify or amend the Stolichnaya Transition Agreement without receiving the prior approval of the Commission.

The Stolichnaya Transition Agreement shall be deemed incorporated into this Order, and any failure by Respondent to comply with any term of the Stolichnaya Transition Agreement shall constitute a failure to comply with this Order.

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- C. If a court enjoins or prohibits Respondent from terminating the Stolichnaya Distribution Agreement or requires Respondent to continue the marketing, sale or distribution of Stolichnaya Vodka in the United States for a period of time extending beyond the Cease and Desist Date then, not later than six (6) months after the Cease and Desist Date, Respondent shall either:
1. divest the Absolut Vodka Income Stream, absolutely and in good faith, at no minimum price, to a Non-Competing Firm that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission; *provided, however*, that the agreement to divest the Absolut Vodka Income Stream is not required to extend beyond the time period that Respondent both: (1) retains an Ownership Interest in the Absolut Vodka Assets, and (2) markets, sells, or distributes Stolichnaya Vodka in the United States; *provided further, however*, that, once the Commission approves an agreement to divest the Absolut Vodka Income Stream, Respondent may not modify or amend such agreement without receiving the prior approval of the Commission; or
 2. divest the Absolut Vodka Assets, absolutely and in good faith, at no minimum price, to an Acquirer in a manner that receives the prior approval of the Commission.
- D. If Respondent continues to market, sell or distribute Stolichnaya Vodka in the United States, directly or indirectly, beyond the Cease and Desist Date for any reason other than: (1) by order of a court as described in Paragraph II.C. of this Order; or (2) due to circumstances wholly beyond Respondent's control and which

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circumstances Respondent could not have prevented by its exercise of prudence, diligence, and care and for which the Commission determines, in its sole discretion, that Respondent has made a satisfactory showing of such circumstances, then, not later than six (6) months after the Cease and Desist Date:

1. Respondent shall divest the Absolut Vodka Assets, absolutely and in good faith, at no minimum price, to an Acquirer in a manner that receives the prior approval of the Commission;
2. Respondent shall use its best efforts to assist the Acquirer in securing supply contracts with all input suppliers used in the production of Absolut Vodka, including, without limitation, any suppliers of flavorings or other ingredients for Absolut Vodka;
3. Respondent shall provide the Absolut Vodka Employees with continued financial compensation and employment benefits, including providing them with the same employee benefits, regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law) until the Absolut Vodka Closing Date;
4. Respondent shall provide the following financial incentives to the Absolut Vodka Future Board Members and the Absolut Vodka Senior Managers to continue in their employment positions pending such divestiture to the Acquirer:
 - a. a retention incentive equal to at least ten (10) percent of the employee's annual salary (including any bonuses) as of the date the Order to Hold Separate and Maintain Assets is issued by the Commission, to be paid to those Absolut Vodka

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Future Board Members and Absolut Vodka Senior Manager who continue their employment with Respondent until the Absolut Vodka Closing Date;

5. Respondent shall provide the Absolut Vodka Future Board Members and Absolut Vodka Senior Managers who accept employment with the Acquirer following the divestiture of the Absolut Vodka Assets, an additional incentive equal to at least twenty (20) percent of such employee's annual salary under the following terms:
 - a. ten (10) percent to be paid at the beginning of the employee's employment with the Acquirer; and
 - b. a severance payment if, less than twelve (12) months after the date such employee commences employment with the Acquirer, the Acquirer terminates the employment of such employee for reasons other than cause. The amount of such severance payment shall be equal to the payment that such employee would have received had he or she remained in the employ of Respondent and been terminated at such time, less any severance payment actually paid by the Acquirer;
6. not later than the earlier of the following dates: (1) ten (10) Days after notice by staff of the Commission to the Respondent to provide the Employee Information; or (2) ten (10) days after the Absolut Vodka Closing Date Respondent shall provide the Acquirer with a complete list of the Absolut Vodka Employees and each employee's related Employee Information;
7. Respondent shall provide the Acquirer with an opportunity to inspect the personnel files and other

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documentation relating to the Absolut Vodka Employees, at the request of the Acquirer;

8. for a period ending no earlier than six (6) months after the Absolut Vodka Closing Date, Respondent shall provide the Acquirer with an opportunity to enter into employment contracts with the Absolut Vodka Employees. Respondent shall not interfere with the employment by the Acquirer of any Absolut Vodka Employee, shall not offer any incentive to such employees to decline employment with the Acquirer or to accept other employment with Respondent, and shall remove any impediments that may deter such employees from accepting employment with the Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondent that would affect the ability of those individuals to be employed by the Acquirer. In addition, Respondent shall not make any counteroffer to such an Absolut Vodka Employee who has received a written offer of employment from the Acquirer;
9. for a period of one (1) year following the Absolut Vodka Closing Date, Respondent shall not, directly or indirectly, solicit or otherwise attempt to induce any employee of the Acquirer with any responsibility relating to Absolut Vodka who is a former employee of Respondent to terminate any employment relationship with the Acquirer;

provided, however, it shall not be deemed a violation of this provision if: (1) Respondent advertises for employees in newspapers, trade publications or other media not targeted specifically at the employees of the Acquirer; (2) Respondent hires employees who apply for employment with Respondent, as long as such

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employees were not specifically solicited by Respondent; or (3) the Acquirer has terminated the individual's employment or has otherwise granted a release to the individual to permit the individual to be employed by Respondent;

10. Respondent shall require, as a condition of continued employment after the Absolut Vodka Closing Date, that each Absolut Vodka Employee and other Pernod Employees within the United States who possess Absolut Vodka Confidential Business Information sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Absolut Vodka Confidential Business Information (including, without limitation, all field experience) strictly confidential, including the non-disclosure of such information to all Stolichnaya Employees and any officer, director, or manager (at the brand management level or higher), of Pernod. Such agreement shall provide for the following:
 - a. restrictions on the use of Absolut Vodka Confidential Business Information;
 - b. appropriate conduct relating to information that could be used to the detriment of Absolut Vodka; and
 - c. sanctions for violation of the terms of such agreement;

Respondent shall send such agreement by e-mail with return receipt requested or similar transmission, and keep on file such return receipts for one (1) year after the Absolut Vodka Closing Date. Respondent shall provide a copy of such agreement to the Acquirer, and

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also maintain complete records of all such agreements at the corporate headquarters of Pernod Ricard USA. Respondent shall also provide an officer's certificate to the Commission, stating that such acknowledgment program has been implemented in compliance with the terms of this Paragraph. Respondent shall make available copies of all certifications, notifications and reminders sent to Respondent's employees, at the request of the Acquirer; and

11. Respondent shall provide the back office services related to the distribution of Absolut Vodka for a period of up to six (6) months after the Absolut Vodka Closing Date. Respondent shall provide the services required by this paragraph in a non-discriminatory fashion to the Acquirer with service levels comparable to those Respondent provided to the Absolut Vodka Business prior to the Absolut Vodka Closing Date.
- E. Any Divestiture Agreement related to the Absolute Vodka Assets or the Absolut Vodka Income Stream shall be deemed incorporated into this Order, and any failure by Respondent to comply with any term of the Divestiture Agreement shall constitute a failure to comply with this Order. Respondent shall include in any Divestiture Agreement a specific reference to this Order and the remedial purpose thereof.
- F. Until the Stolichnaya Termination Date, Respondent shall provide the Stolichnaya Employees with continued financial compensation and employment benefits, including providing them with the same employee benefits, regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law). Respondent shall also provide the financial incentives set forth in the employee retention bonus program issued pursuant to the Stolichnaya Transition Agreement to the

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Stolichnaya Employees to continue in their employment positions until the Stolichnaya Termination Date.

G. At any time after the Acquisition Date, and within ten (10) days of Respondent's receipt of a request from SPI:

1. Respondent shall provide SPI or its designee(s) with a complete list of the Stolichnaya Employees and each employee's related Employee Information; and
2. Respondent shall provide SPI or its designee(s) with an opportunity to inspect the personnel files and other documentation relating to the Stolichnaya Employees;

provided, however, that in cases in which applicable law restricts access to the information required to be provided to SPI or its designee(s) pursuant to this paragraph, Respondent shall use best efforts to ensure that such information is provided to SPI or its designee(s) consistent with applicable law.

H. For a period ending no earlier than six (6) months after the Stolichnaya Termination Date, Respondent shall provide SPI or its designee(s) with an opportunity to enter into employment contracts with the Stolichnaya Employees, which may be contingent upon the Respondent's termination of Respondent's marketing, sale, and distribution of Stolichnaya Vodka. Respondent shall not interfere with the employment by SPI or its designee(s) of any Stolichnaya Employee, shall not offer any incentive to such employees to decline employment with SPI or its designee(s) or to accept other employment with Respondent, and shall remove any impediments that may deter such employees from accepting employment with SPI or its designee(s), including, but not limited to, any confidentiality provisions relating to Stolichnaya Vodka or

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any non-compete or confidentiality provisions of employment or other contracts with Respondent that would affect the ability of those individuals to be employed by SPI or its designee(s). In addition, Respondent shall not make any counteroffer to such a Stolichnaya Employee who has received a written offer of employment from the SPI or its designee(s).

- I. For a period of ending no earlier than one (1) year after the Stolichnaya Termination Date, Respondent shall not, directly or indirectly, solicit or otherwise attempt to induce any employee of SPI or its designee(s) with any responsibility relating to Stolichnaya Vodka who is a former employee of Respondent to terminate their employment relationship with SPI or its designee(s);

provided, however, it shall not be deemed a violation of this provision if: (1) Respondent advertises for employees in newspapers, trade publications or other media not targeted specifically at the employees of SPI or its designee(s); (2) Respondent hires employees who apply for employment with Respondent, as long as such employees were not specifically solicited by Respondent; or (3) SPI or its designee(s) has terminated the individual's employment or has otherwise granted a release to the individual to permit the individual to be employed by Respondent.

- J. Respondent shall require, as a condition of continued employment after the Stolichnaya Termination Date, that each Stolichnaya Employee and other Pernod Employees within the United States who possess Stolichnaya Confidential Business Information sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Stolichnaya Confidential Business Information (including, without limitation, all field experience) strictly confidential, including the non-

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disclosure of such information to all Absolut Vodka Firewalled Employee and any officer, director, or manager (at the brand management level or higher), of Pernod. Such agreement shall provide for the following:

1. Restrictions on the use Stolichnaya Confidential Business Information;
2. Appropriate conduct relating to information that could be used to the detriment of Stolichnaya Vodka; and
3. Sanctions for violation of the terms of the agreement.

Respondent shall send such agreement by e-mail with return receipt requested or similar transmission, and keep on file such return receipts for one (1) year after the Stolichnaya Termination Date. Respondent shall provide a copy of such agreement to SPI or its designee(s), and also maintain complete records of all such agreements at the corporate headquarters of Pernod Ricard USA. Respondent shall also provide an officer's certificate to the Commission, stating that such acknowledgment program has been implemented in compliance with the terms of this Paragraph. Respondent shall make available copies of all certifications, notifications and reminders sent to Respondent's employees at the request of SPI or its designee(s);

provided however, this paragraph shall not preclude any officer, director, or senior-level executive of Pernod who is charged with the direct responsibility to oversee the Stolichnaya Distribution Agreement and the Stolichnaya Transition Agreement from receiving aggregated sales data on Stolichnaya Vodka.

- K. Respondent shall institute procedures and requirements to ensure that all Pernod Employees do not:

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1. disclose or make available, directly or indirectly, any Absolut Vodka Confidential Business Information to any Stolichnaya Employee or any other Pernod Employee who directly participates in the marketing, advertising, promotion, distribution, sale or after-sales support of Stolichnaya Vodka in the United States; or
2. disclose or make available, directly or indirectly, any Stolichnaya Confidential Business Information to the Absolut Vodka Business or to any Absolut Vodka Firewalled Employee.

Respondent shall obtain an executed non-disclosure agreement from each of the individuals that fall within the following categories pursuant to which each such individual agrees to comply with the terms of this paragraph: (1) all salaried Pernod Employees located in the United States *except* production-line workers or manufacturing-line workers; (2) all salaried Stolichnaya Employees; and, (3) any individual so designated by the Interim Monitor.

- L. Respondent shall, at the request of SPI or its designee(s), for a period of up to six (6) months following the Stolichnaya Termination Date and at its Direct Cost to SPI or its designee(s), provide such technical assistance and training, and make available such personnel, as are reasonably necessary to enable SPI or its designee(s) to market, sell and distribute Stolichnaya Vodka in substantially the same manner and quality as that achieved by Respondent.
- M. At the request of SPI or its designee(s), Respondent shall provide the back office services related to the distribution of Stolichnaya Vodka for a period of up to six (6) months after the Acquisition Date. Respondent shall provide the

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services required by this Paragraph in a non-discriminatory fashion to SPI or its designee(s) with service levels comparable to those Respondent provided to the Stolichnaya Held Separate Business prior to the Acquisition.

N. Until the earlier to occur of: (1) the Stolichnaya Termination Date or (2) the Absolut Vodka Closing Date, Respondent shall take such actions as are necessary to maintain the full economic viability and marketability of the Absolut Vodka Business and the Stolichnaya Held Separate Business, respectively, and the assets associated with such businesses, to minimize any risk of loss of competitive potential for such businesses, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of such assets. Respondent 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. The purpose of Paragraph II. is:

1. to ensure the continued use of the assets associated with Stolichnaya Held Separate Business in the research, development, manufacture, distribution, sale and marketing of Stolichnaya Vodka;
2. to ensure the continued use of the Absolut Vodka Assets in the research, development, manufacture, distribution, sale and marketing of Absolut Vodka;
3. to create a viable and effective competitor in the relevant market alleged in the Complaint who is independent of Respondent; and,

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4. to remedy the lessening of competition resulting from the Acquisition as alleged in the Complaint in a timely and sufficient manner.

III.

IT IS FURTHER ORDERED that:

- A. For the remaining term of the Future Joint Venture:
 1. Respondent shall not appoint or designate any individuals who are officers or directors of Respondent to serve as Absolut Vodka Future Board Members and such individuals shall not serve on the Future Joint Venture Board of Managers;
 2. Respondent shall participate in the management of the Future Joint Venture operations using reasonable business practices in a manner similar to the operation of the Future Joint Venture prior to the Acquisition;
 3. Respondent shall notify Commission staff of any dispute between Respondent and Fortune Brands regarding the management of the Future Joint Venture or that implicates the requirements of this Order that the parties have not been able to resolve in a timely manner;
 4. Respondent shall ensure that no Absolut Vodka Future Board Member accesses, uses, or discloses any Beam Brands Confidential Business Information *unless*:
 - a. Respondent receives the prior approval of Fortune Brands for the Absolut Vodka Future Board Member to access, use, or disclose the particular

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Beam Brands Confidential Business Information in question; or

- b. the Absolut Vodka Future Board Member's access to or use of such information is reasonably necessary for that individual to carry out his or her fiduciary responsibilities to the Future Joint Venture;
5. Respondent shall ensure that no Absolut Vodka Future Board Member discloses any Beam Brands Confidential Business Information to any other Person(s) outside the Future Joint Venture that is not specifically authorized by Fortune Brands to receive the particular information;
6. Respondent shall ensure that no Absolut Vodka Senior Manager and/or Absolut Vodka Employee discloses any Beam Brands Confidential Business Information to any Absolut Vodka Future Board Member or Pernod Employee;
7. Respondent shall notify each Future Employee of the restrictions contained in this Order regarding the use, conveyance, provision, or disclosure of the Beam Brands Confidential Business Information; and
8. Respondent shall send the above-described notification by e-mail with return receipt requested or similar transmission, and keep on file such return receipts for (1) year after the such notification is sent. Respondent shall maintain complete records of all such notifications at the corporate headquarters of Pernod Ricard USA, and provide an officer's certificate to the Commission stating that such notification program has

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been implemented in compliance with the terms of this paragraph;

provided, however, Respondent shall not be deemed in violation of the notification provisions contained in this paragraph if Fortune Brands unreasonably withholds its consent to such notification program.

- B. As soon as practicable, and in any event no later than ninety (90) days after the Acquisition Date, Respondent shall, with the assistance of Fortune Brands, the Future Joint Venture and/or the Interim Monitor (if appointed), identify select database items containing Beam Brands Confidential Business Information as to which it is feasible to implement a protocol within the Future Joint Venture that limits the Absolut Vodka Firewalled Employees from having access to such information relating to the Beam Brands and implement such protocol. With respect to other Beam Brands Confidential Business Information, Respondent shall, with the assistance of Fortune Brands, the Future Joint Venture and/or the Interim Monitor (if appointed), take such actions as are reasonably practicable to limit the Absolut Vodka Firewalled Employees from having access to such information relating to the Beam Brands;

provided, however, Respondent shall not be deemed in violation of this Paragraph if Fortune Brands unreasonably withholds its consent to such database protocol;

provided further, however, Respondent's obligations under this paragraph shall terminate on the date that Respondent ceases and desists from participating, directly or indirectly, in the Future Joint Venture.

- C. For a period of one (1) year after the Acquisition Date:

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1. Respondent shall not hire a Future Employee who worked on any of the Beam Brands, irrespective of working time;

provided, however, it shall not be deemed a violation of this provision if: (1) Respondent advertises for employees in newspapers, trade publications or other media not targeted specifically at the Future Employees; (2) Respondent hires employees who apply for employment with Respondent, as long as such employees were not specifically solicited by Respondent; or (3) the Future Joint Venture has terminated the individual's employment or has otherwise granted a release to the individual to permit the individual to be employed by Respondent;

provided further, however, Respondent shall require, as a condition of employment, that each Future Employee sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Beam Confidential Business Information (including, without limitation, all field experience) strictly confidential, including the non-disclosure of such information to all Pernod Employees and Absolut Vodka Firewalled Employee;

2. Respondent shall not transfer a Stolichnaya Employee to any position in the Future Joint Venture; and
3. Respondent shall not appoint or designate any Absolut Vodka Future Board Member to a senior management position for Respondent regarding any of Respondent's brands which compete with Beam Brands in the domestic cordials, cognac, coffee liqueur or popular gin categories.

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- D. The purpose of this Paragraph III is to prevent Respondent from using the Beam Brands Confidential Business Information to the detriment of the marketing, sales, or distribution of the Beam Brands; to the benefit of the Pernod Brands or any other brand(s) subsequently acquired by the Respondent; or from otherwise using such information in an anticompetitive manner or in any unfair method of competition.

IV.

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, the Order to Hold Separate and Maintain Assets, the Stolichnaya Transition Agreement and any Divestiture Agreement.
- 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 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

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Respondent's compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.

- D. If an Interim Monitor is appointed, Respondent shall consent to the following terms and conditions regarding the powers, duties, authority, and responsibilities of the Interim Monitor:
1. The Interim Monitor shall have the power and authority to monitor Respondent's compliance with: the divestiture, hold separate, and asset maintenance obligations of the Orders; the restrictions on the use, conveyance, provision, or disclosure of the identified confidential business information under the Orders; and, the related requirements of the Orders. The Interim Monitor 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 date Respondent ceases and desists from participating, directly or indirectly, in the Future Joint Venture; or
 - b. the Stolichnaya Termination Date (or, if the Absolut Vodka Assets are divested, the Absolut Vodka Closing Date);

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

4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent's 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 Respondent's compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Respondent shall cooperate with all reasonable requests 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 the Orders.
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 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,

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except to the extent that such losses, claims, damages, liabilities, or expenses result from 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 Acquirer, Fortune Brands and/or SPI with respect to the performance of Respondent's obligations under the Orders, the Stolichnaya Transition Agreement or any Divestiture Agreement(s). 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 the Orders.
 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.

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- 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 Orders.
- H. The Interim Monitor appointed pursuant to this Order may be the same person appointed as a Divestiture Trustee pursuant to Paragraph V. of this Order.

V.

IT IS FURTHER ORDERED that:

- A. If Respondent has not ceased and desisted from marketing, selling and/or distributing Stolichnaya Vodka in the United States on or before the Cease and Desist Date, 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 Paragraph II. 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 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

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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 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 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 assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required

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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. 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

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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 Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondent from among those approved by the Commission; and, *provided further, however*, that Respondent shall select such Person 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 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;

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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 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 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 Hold Separate and Maintain Assets in this matter;
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; and
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.

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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:

With respect to the Absolut Vodka Confidential Business Information, in any instance wherein Respondent's counsel (including in-house counsel under appropriate confidentiality arrangements) either retain unredacted copies of documents or other materials provided to an Acquirer or access original documents (under circumstances where copies of documents are insufficient or otherwise unavailable) provided to an Acquirer, Respondent shall assure that Respondent's counsel do so only in order to do the following:

- A. Comply with the Divestiture Agreement(s), 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 of the Absolut Vodka Assets or the Absolut Vodka Income Stream (as is

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relevant), or the businesses associated with the Absolut Vodka products;

provided, however, that Respondent 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 VI., Respondent shall: (1) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Acquirer (but shall not be deemed to have violated this requirement if the 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.

VII.

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. of this Order, Respondent shall:
 1. 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 Orders;
 2. at the same time, submit a copy of its verified report concerning compliance with the Orders to the Interim Monitor, if any Interim Monitor has been appointed; and

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3. in its verified reports, include, among other things, a full description of the efforts being made to comply with the relevant Paragraphs of the Orders, 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.
- 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, Respondent shall file a verified written report with the Commission that includes information regarding any modifications or amendments to any Divestiture Agreement(s) that Respondent 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 Orders.

VIII.

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

- A. any proposed dissolution of Respondent;
- B. any proposed acquisition, merger or consolidation of Respondent; or
- C. any other change in Respondent 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.

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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 any Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during business office hours of such 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 such Respondent related to compliance with this Order, which copying services shall be provided by such Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and
- B. to interview officers, directors, or employees of such Respondent, who may have counsel present, regarding such matters.

X.

IT IS FURTHER ORDERED that this Order shall terminate on October 14, 2018.

By the Commission.

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NON-PUBLIC APPENDIX I

**THE STOLICHNAYA DISTRIBUTION AGREEMENT
[Redacted From the Public Record, But Incorporated By
Reference]**

NON-PUBLIC APPENDIX II.

**THE STOLICHNAYA TRANSITION AGREEMENT
[Redacted From the Public Record, But Incorporated By
Reference]**

NON-PUBLIC APPENDIX III.

**THE ABSOLUT VODKA SENIOR MANAGERS
[Redacted From the Public Record, But Incorporated By
Reference]**

Analysis to Aid Public Comment

ANALYSIS OF 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 Respondent Pernod Ricard S.A. (“Pernod Ricard”) in connection with its proposed acquisition of V&S Vin & Sprit AB (Publ) (“V&S”) from The Kingdom of Sweden. Among other things, the consent agreement requires that Pernod Ricard, currently the distributor of Stolichnaya Vodka, as a condition to acquiring V&S and its Absolut Vodka brand, cease distributing Stolichnaya Vodka. Pernod Ricard obtained the rights to distribute the Stolichnaya Vodka brand from its owner, Spirits International BV (“SPI”), a corporation headquartered in Geneva, Switzerland, and organized and doing business under the laws of The Netherlands. Absolut Vodka and Stolichnaya Vodka are “super premium” vodkas and, for a substantial number of consumers, they are close price substitutes. Total annual United States retail sales of these two brands are about \$1.9 billion.

The Commission and Respondent Pernod Ricard also have agreed to entry of an Order To Hold Separate and Maintain Assets (“Hold Separate Order”). The Hold Separate Order requires Pernod Ricard to maintain the competitive viability of assets relating to the distribution of Stolichnaya Vodka during the six-month period that the consent agreement permits it to own Absolut Vodka while also distributing Stolichnaya. The Hold Separate Order further requires that Pernod Ricard refrain from exercising direction or control over the Stolichnaya Vodka distribution business. Pernod Ricard must nevertheless maintain all Stolichnaya Vodka operations in the regular and ordinary course in accordance with past practices. Compliance with the terms of the Hold Separate Order will be supervised by an interim monitor.

Analysis to Aid Public Comment

The proposed consent agreement will also remedy information exchange concerns in four additional distilled spirits markets: Cognac, domestic cordials, coffee liqueur, and popular gin. The Commission's concerns in these four markets arise because of an ongoing joint venture between V&S and Beam Global Spirits & Wine, Inc. ("Beam Global"), a Fortune Brands, Inc., subsidiary, for the joint management of all of their distilled spirits distribution businesses. After the acquisition, Pernod Ricard will assume the management function role held by V&S for the joint venture brands and have access to competitively sensitive information about Beam Global brands which compete with Pernod Ricard brands that are not in the joint venture. The consent agreement requires Pernod Ricard to set up strict procedures that limit the flow of information to its employees, both within the joint venture as well as within Pernod Ricard itself. Because neither party to the joint venture profits from actions by the joint venture in connection with the sale of products, the Commission does not believe that a structural remedy in the form of a required divestiture of Pernod Ricard's brands that compete with the Beam Global brands in the joint venture is necessary. Total annual United States retail sales in the four markets combined are about \$2.4 billion.

II. Respondent Pernod Ricard

Respondent Pernod Ricard is a corporation organized, existing and doing business under and by virtue of the laws of the French Republic, with its office and principal place of business located at 12, place des Etats-Unis, 75783 Paris Cedex 16, France. In the United States, Pernod Ricard operates through a wholly-owned subsidiary corporation, Pernod Ricard USA, Inc., with offices located at 100 Manhattanville Road, Purchase, New York 10577. Pernod Ricard's United States revenues from all distilled spirits products in the year ending June 30, 2007, totaled about \$2.5 billion.

Analysis to Aid Public Comment

Pernod Ricard produces distilled spirits that it distributes, markets, and sells in the United States. Some of its more popular brand lines of distilled spirits are Martell Cognac, Hiram Walker Cordials, and Kahlua Coffee Liqueur. Pernod Ricard also produces, markets, distributes, and sells, Chivas Regal, Ballantine's, The Glenlivet Scotches, Jameson Irish Whiskey, Beefeater Gin, and the line of Wild Turkey Bourbons. Pernod Ricard also markets, distributes, and sells, but does not produce or own, the line of Stolichnaya Vodkas.

III. V&S (the acquired company)

V&S is a corporation wholly-owned by The Kingdom of Sweden, and is organized, existing and doing business under and by virtue of the laws of The Kingdom of Sweden. Its office and principal place of business is located at Formansvagen 19, S-100 74, Stockholm, Sweden. In the United States, V&S operates its distilled spirits business through a wholly-owned subsidiary, The Absolut Spirits Company, Incorporated ("ASCI"). ASCI is a Delaware corporation with its office and principal place of business located at 401 Park Avenue South, New York, New York 10016. V&S produces and sells distilled spirits products from facilities that it owns and operates. The brands of V&S include the lines of Absolut Vodka, Level Vodka, Plymouth Gin, and Cruzan Rum. V&S's United States revenues from all distilled spirits products in 2007 were about \$800 million.

IV. The Future Brands Joint Venture

Future Brands LLC ("Future Brands") is the joint venture corporation of ASCI and Beam Global. Future Brands is a Delaware corporation with its office and principal place of business located in the offices of Fortune Brands at 300 Tower Parkway, Lincolnshire, Illinois 60069. Future Brands distributes all of the distilled spirits products of ASCI and Beam Global in the United States. The Future Brands joint venture corporation was created in 2001 and under the terms of that agreement, is

Analysis to Aid Public Comment

scheduled to end in 2012. Future Brands had total revenues, in 2007, of about \$1.48 billion.

The brands of Beam Global include: the lines of Courvoisier Cognac; DeKuyper Cordials; Starbucks Coffee Liqueur; Jim Beam, Knob Creek, Bakers, Basil Hayden, and Booker's Bourbon; Laphroig and Teacher's Scotch; and Gilbey's Gin. Beam Global and ASCI sell distilled spirits that fall into different marketing and price point segments.

The principal economic benefit to Beam Global and ASCI of their Future Brands joint venture is cost savings or efficiencies from the joint marketing, selling, and distribution of their products. The economic benefit from the actual sale of the products that are distributed by the Future Brands joint venture are maintained by Beam Global and ASCI, as brand owners, and not by Future Brands.

V. The Transaction

On March 30, 2008, Respondent Pernod Ricard and The Kingdom of Sweden entered into their Share Purchase Agreement Regarding the Shares in V&S. Under the terms of the acquisition agreement, Pernod Ricard will acquire all of the shares of V&S for a sum equal to a combination of euros, dollars, and interest payments totaling approximately \$9 billion.

VI. The Complaint and Competitive Effects

A. The Stolichnaya - Absolut Overlap in the "Super Premium" Vodka Segment

The Commission also made public a Complaint that it intends to issue. According to that Complaint, Pernod Ricard, with Stolichnaya Vodka, and V&S, with Absolut Vodka, are direct and significant competitors in the super-premium vodka segment. The

Analysis to Aid Public Comment

Complaint further alleges that Stolichnaya Vodka and Absolut Vodka are vodka brands that are close substitutes for a substantial number of customers of these brands.

The proposed acquisition raises competitive concerns because it would eliminate substantial competition between Pernod Ricard and V&S in connection with the distribution, marketing, and sale of Stolichnaya Vodka and Absolut Vodka. If Pernod Ricard owns Absolut Vodka while also being the distributor of Stolichnaya Vodka, it could profitably raise the price of either Absolut Vodka or Stolichnaya Vodka. Many consumers who would be unwilling to pay a higher price for the brand whose price was increased would switch to the other brand. In its Complaint, the Commission stated it has reason to believe that the proposed transaction would have anticompetitive effects and violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

**B. The Pernod Ricard-Beam Global Brand Overlaps
and the Future Brands Joint Venture**

The Complaint also alleges that the proposed acquisition by Respondent Pernod Ricard of V&S may substantially lessen competition in four additional distilled spirits markets. In these markets – Cognac, domestic cordials, coffee liqueur, and popular gin – Pernod Ricard has brands that compete with the Beam Global brands that are distributed by Future Brands. Before its acquisition of V&S, Pernod Ricard had no business relationship with Future Brands. As a marketer, seller, and distributor of distilled spirits products similar to distilled spirits products, marketed, sold, and distributed by Beam Global and Future Brands, Pernod Ricard had been a direct and substantial competitor of Beam Global and Future Brands.

After its acquisition of V&S, Pernod Ricard will step into the competitive shoes of V&S (and ASCI) and replace ASCI as a joint venture partner of Beam Global. Pernod Ricard, as a joint

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venture partner, will have access to competitively sensitive information about Beam Global brands that compete with Pernod Ricard brands that are not in the joint venture, as shown in the following chart:

Market	Pernod Ricard Brands	Beam Global Brands
Cognac	Martell	Courvoisier
Domestic Cordials	Hiram Walker	DeKuyper
Coffee Liqueur	Kahlua and Tia Maria	Starbucks
Popular Gin	Seagram's	Gilbey's

Each of these markets is highly concentrated and difficult to enter. Pernod Ricard and Beam Global are among the two largest suppliers of these spirits in the United States. These companies have spent significant sums of money to create and maintain distinct brand equities.

Beam Global and Pernod Ricard, upon becoming joint venture partners after the acquisition, will share in the management of Future Brands. Under the terms of the joint venture agreement, Pernod Ricard will be required to designate three of its seven member Board of Managers. This will mean that Pernod Ricard employees, in connection with their responsibilities as managers of Future Brands, will have access to competitively sensitive information about all the Beam Global products in the joint venture. These are brands with which Pernod Ricard is now, and after the acquisition will be, in direct and substantial competition. The Commission in its Complaint stated it has reason to believe

Analysis to Aid Public Comment

that if Pernod Ricard obtains competitively sensitive information about the Beam Global brands listed in the table above, the proposed transaction would have anticompetitive effects and would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The principal anticompetitive effect is likely to be the ability of competitors in each of the four markets, including but not limited to Beam Global and Pernod Ricard, to raise prices by facilitating future potential coordinated interaction.

VII. The Consent Agreement**A. The Stolichnaya - Absolut Overlap in the “Super Premium” Vodka Segment**

Under the terms of the consent agreement, to remedy the competitive concerns associated with the Stolichnaya Vodka overlap, Pernod Ricard will not be permitted to have an ownership interest in Absolut Vodka and also keep its rights to distribute Stolichnaya Vodka. Pernod Ricard will therefore be required to divest its interest in distributing Stolichnaya Vodka within six (6) months from the date it acquires V&S. That divestiture will revert back to brand owner SPI.

In the event that Pernod Ricard fails to complete the required divestiture within six (6) months, the Commission may appoint a divestiture trustee to sell the Absolut Vodka assets and business to a Commission-approved acquirer. The principal purpose of this alternative Absolut Vodka divestiture requirement is to give Pernod Ricard significant incentives to comply with the Stolichnaya Vodka divestiture requirements of the consent agreement.

There is one exception to the requirement that Pernod Ricard divest the Absolut Vodka assets and business in the event it fails to comply with the Commission-ordered divestiture relating to Stolichnaya Vodka. If Pernod Ricard by court order is prohibited

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from divesting its distribution rights to Stolichnaya Vodka, instead of divesting the Absolut Vodka assets, Pernod Ricard would have the option of divesting either (a) the future anticipated income stream from its sales of Absolut Vodka, or (b) a stipulated amount of at least 20% of the gross sales revenue of Absolut Vodka. The reason for this exception relates to the ongoing litigation between SPI and others regarding ownership of the Stolichnaya trademark and related rights to sell vodka under that label. That litigation, which upon agreement with the parties pending their settlement discussions, has been stayed by court order. The Commission has no view on the merits of this private litigation but is concerned that a court possibly may require that the competitive status quo of the distribution of Stolichnaya Vodka be maintained beyond the six (6) month period that the consent order would allow Pernod Ricard to own Absolut Vodka and distribute Stolichnaya Vodka. The income stream divestiture option (or the stipulated 20% or more of gross sales revenue) will be for the time period commencing twelve (12) months after Pernod Ricard will have acquired V&S and continue until Pernod Ricard divests its rights to distribute Stolichnaya Vodka. The purpose of the income stream divestiture requirement is to remove potential incentives on the part of Pernod Ricard to impair the marketability of Stolichnaya Vodka, which because of its closeness to Absolut Vodka, will benefit sales of Absolut Vodka. Because a court order preventing Pernod Ricard from divesting its rights to distribute Stolichnaya Vodka would not have caused willful noncompliance with the divestiture requirements of the consent order, the purpose of the alternative divestiture requirements of the order was to prevent interim competitive harm, rather than incentives to divest Stolichnaya Vodka distribution rights. The Commission believes that the sale of the future income stream of Absolut Vodka under the circumstances of a court order preventing Pernod Ricard from divesting Stolichnaya Vodka distribution rights would eliminate significant incentives on the part of Pernod Ricard from impairing the marketability of Stolichnaya Vodka because Pernod Ricard would

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not benefit from any *increase* in the Absolut Vodka income stream during the period of its joint ownership of Absolut Vodka and distribution of Stolichnaya Vodka, having already sold (at a predetermined price) the future value of *all* income stream benefits.

The consent agreement also requires that Pernod Ricard undertake certain activities to help ensure that the acquirer of the Stolichnaya Vodka assets and distribution business will be able to continue operations in a fully competitive manner. Those requirements include: (a) providing key Stolichnaya Vodka business employees with financial incentives to remain with Pernod Ricard (in order that those employees might then be available for hire by the acquirer); (b) providing lists of key employees to the acquirer; (c) for up to six (6) months, providing such reasonable technical assistance and training as the acquirer may request for the continued distribution of Stolichnaya Vodka; and (d) for up to six (6) months, providing the kinds of back office procedures to the acquirer that Pernod Ricard had already been undertaking for its own purposes.

**B. The Pernod Ricard - Fortune Brands Overlaps
and the Future Brands Joint Venture**

Under the terms of the consent agreement, Pernod Ricard will be prohibited from acquiring any business information of the Future Brands joint venture. To ensure that this will not occur, Pernod Ricard has agreed to the following firewall procedures: (a) the Pernod Ricard designees to the Future Brands Board of Managers cannot be officers or directors of Pernod Ricard; (b) Pernod shall recommend to the Future Brands board that it implement database protocols limiting Pernod designated board member access to information about Beam Global brands; and (c) Pernod will allow an interim monitor to supervise all of the firewall-related protections and requirements.

Analysis to Aid Public Comment

C. The Hold Separate Order

Accompanying the consent agreement is a Hold Separate Order. The purpose of this order, the terms of which Pernod Ricard has also agreed to undertake, is to prevent competitive harm pending the required divestiture of the Stolichnaya distribution agreement, and to ensure that the Stolichnaya Vodka assets required to be divested by Pernod Ricard will remain a competitively viable business. Under the terms of this agreement, Pernod Ricard will be required to (a) hold the Stolichnaya Vodka business separate and apart from all other Pernod Ricard business activities; (b) exercise no direction or control over the Stolichnaya Vodka business; (c) maintain operations of the Stolichnaya Vodka business, including preserving business relationships, in accordance with past practice; and (d) provide the Stolichnaya Vodka business with capital and other funds to operate at current levels and maintain the competitiveness of the business. The agreement also provides for the appointment of an interim monitor. Among other things, the monitor will be empowered to ensure that during the period of time that Pernod Ricard will own the Absolut Vodka line and also distribute Stolichnaya Vodka, that the Stolichnaya Vodka business will be separately managed from the other Pernod Ricard businesses.

VIII. The Opportunity for Public Comment

The Consent Agreement has been placed on the public record for thirty (30) days for receipt of comments from 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 consent agreement or make final the Decision and Order.

By accepting the consent agreement subject to final approval, the Commission anticipates that the competitive problems alleged

Analysis to Aid Public Comment

in the Complaint will be resolved. The purpose of this analysis is to invite and facilitate public comment concerning the consent agreement. It is not intended to constitute an official interpretation of the consent agreement, nor is it intended to modify the terms of the orders in any way.

Complaint

IN THE MATTER OF

**FRESENIUS MEDICAL CARE AG & CO. KGaA,
AND
DAIICHI SANKYO COMPANY, LTD.**

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-4236; File No. 081 0146

Complaint, October 20, 2008 – Decision, October 20, 2008

This consent order relates to a proposed agreement between subsidiaries of Fresenius Medical Care and Daiichi Sankyo to grant an exclusive license to Fresenius subsidiary FMC USA Manufacturing to manufacture, distribute, and sell Venofer, a preparation used to treat dialysis patients, to independent outpatient dialysis clinics in the United States. Luitpold Pharmaceuticals, a subsidiary of Daiichi Sankyo, retains the right to sell Venofer in the United States to any other customer, including doctor's offices, hospitals and hospital-based dialysis clinics. The transaction may enable Fresenius to increase prices it charges its own clinics, which, in turn, would raise reimbursement rates that the Centers for Medicare & Medicaid Services pays for Venofer. Under the order, Fresenius is restricted from reporting an intra-company transfer price higher than the level set forth in the order, which is derived from current market prices. The order further provides that if a generic Venofer product receives final approval by the U.S. Food and Drug Administration, Fresenius would be required to report its intra-company transfer price at either the level set forth in the order or the lowest price at which Fresenius sells Venofer to any customer, whichever is lowest, until December 31, 2011. On January 1, 2012, the order removes the lowest-priced-customer restriction, while the level set forth in the order remains in place. The order also provides that if Medicare & Medicaid Services implements regulations that eliminate the potential anticompetitive harm of this transaction, those regulations will supersede the order. The order prohibits Luitpold and Fresenius from sharing confidential business information relating to the manufacture, sale, or distribution of Venofer, and requires the parties to provide notice to the Commission prior to modifying the license agreement. Finally, the order provides that the Commission may appoint a Monitor Trustee if necessary.

Complaint

Participants

For the *Commission*: *Sylvia M. Brooks, Lisa De Marchi Sleigh, Daniel P. Ducore, David A. Garcia, Michael R. Moiseyev, Christina R. Perez, James E. Southworth, and Steven Tenn.*

For the *Respondents*: *Larri A. Short, Arent Fox LLP; Robert L. Magielnicki, Sheppard, Mullin, Richter & Hampton LLP; and Susan S. DeSanti and Katherine Funk, Sonnenschein Nath & Rosenthal LLP.*

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, having reason to believe that Fresenius Medical Care AG & Co. KGaA (“Fresenius”) and Daiichi Sankyo Company, Ltd. (“Daiichi”), have violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and, in addition, violated Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, 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:

I. DEFINITIONS

1. “IV Iron” means second-generation intravenous iron therapy products, including Venofer (iron sucrose) and Ferrlecit (sodium ferric gluconate).
2. “Independent Outpatient Dialysis Clinics” means facilities that provide dialysis services and that are not hospital-based facilities and do not meet all of the criteria set forth in 42 C.F.R. §413.174(c) (and any successor or amended regulations).
3. “Medicare Part B” means Section 1847A(b); 42 U.S.C. § 1395w-3a(c).

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4. Manufacturers' Average Sales Price has the same meaning as that in 42 U.S.C. § 1395w-3a(c).

5. "CMS" means Centers for Medicare & Medicaid Services of the United States Department of Health & Human Services.

6. "Respondents" means Fresenius and Daiichi, individually and collectively.

7. "Medicare Improvements for Patients and Providers Act of 2008" or "MIPPA," means Public Law No. 110-275.

8. "Bundled Payment System" means the system created under Section 153(b) of the MIPPA whereby, among other things, reimbursement to providers of dialysis services for IV Iron administered to dialysis patients will be included in a single payment, and no longer billed separately, by January 1, 2015.

II. RESPONDENTS

9. Fresenius Medical Care AG & Co. KGaA is a partnership limited by shares organized, existing and doing business under and by virtue of the laws of the Federal Republic of Germany, with its offices and principal place of business located at Else-Kröner-Straße 1, 61352 Bad Homburg, Germany. Fresenius Medical Care AG & Co. KGaA is the parent of Fresenius Medical Care Holdings, Inc., a New York corporation, d/b/a Fresenius Medical Care North America ("FMCNA") with its office and principal place of business located at 920 Winter St., Waltham, MA 023451-1457. Renal Therapies Group ("RTG"), a division of FMCNA, manufactures, sells and distributes equipment, supplies and pharmaceuticals to dialysis providers. RTG is the parent entity of FMC USA Manufacturing ("FMCUSA"), which is the Fresenius signatory to the Proposed Transaction.

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10. Daiichi Sankyo Company, Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of Japan, with its office and principal place of business located at 3-5-1, Nihonbashi Honcho, Chuo-Ku, Tokyo 103-8426, Japan. Daiichi Sankyo, Inc. (“DSI”), a wholly owned subsidiary of Daiichi Sankyo Company, Ltd., 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 Two Hilton Court, Parsippany, New Jersey 07054. Luitpold Pharmaceuticals, Inc., a wholly owned subsidiary of DSI, is a corporation organized, existing and doing business under and by virtue of the laws of New York, with its office and principal place of business located at One Luitpold Drive, Shirley, New York 11967. American Regent, Inc., a wholly owned subsidiary of Luitpold Pharmaceuticals, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of New York, with its office and principal place of business located at One Luitpold Drive, Shirley, New York. 11967. Luitpold licences Venofer from Vifor (International) Inc. (“Vifor”), the Swiss pharmaceutical company that developed the product. Luitpold’s subsidiary, American Regent, Inc. (“American Regent”), markets and distributes all of Luitpold’s injectable products, including Venofer, to customers around the United States.

11. 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.

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III. THE PROPOSED TRANSACTION

12. Pursuant to a License, Distribution, Manufacturing and Supply Agreement dated July 8, 2008, Luitpold and Vifor agreed to grant FMCUSA an exclusive sublicense to distribute, manufacture and sell Venofer to Independent Outpatient Dialysis Clinics in the United States for a term of ten years with an option to extend the agreement for an additional ten years (hereinafter “Proposed Transaction”). Luitpold retains the right to sell Venofer in the United States to any other customer, including doctor’s offices, hospitals and hospital-based dialysis clinics.

IV. THE RELEVANT MARKET

13. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Proposed Transaction is the manufacture, distribution and sale of IV Iron. IV Iron is critical for the effective treatment of dialysis patients, the vast majority of whom suffer from chronic anemia.

14. For the purposes of this Complaint, the United States is the relevant geographic area in which to analyze the effects of the Proposed Transaction in the relevant line of commerce.

V. THE STRUCTURE OF THE MARKET

15. The U.S. market for IV Iron is highly concentrated. Luitpold and Watson Pharmaceuticals (“Watson”) are the only two suppliers of IV Iron in the United States. Luitpold manufactures, distributes and sells Venofer, and Watson manufactures, distributes and sells Ferrlecit.

16. CMS reimburses Independent Outpatient Dialysis Clinics for the vast majority of the IV Iron used in the United States. Currently, CMS’s reimbursement rate for Venofer is one hundred and six percent of the Manufacturers’ Average Sales Price to all

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purchasers. Each calendar quarter, pursuant to Medicare Part B, drug manufacturers are required to submit the Manufacturers' Average Sales Price to CMS and that information is used to calculate the CMS reimbursement rate for each IV Iron product.

VI. ENTRY CONDITIONS

17. Entry into the relevant line of commerce described in Paragraphs 13 and 14 would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract the anticompetitive effects of the Proposed Transaction.

VII. EFFECTS OF THE PROPOSED TRANSACTION

18. The effects of the Proposed Transaction, if consummated, may be substantially to lessen competition and to tend 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, among others, enabling Fresenius to report higher prices for Venofer used in its own clinics to CMS thereby increasing the Manufacturer's Average Sales Price and, therefore, the reimbursement rate for Venofer. By increasing the reimbursement rate for Venofer, CMS would be forced to pay higher prices for Venofer administered to dialysis patients covered by Medicare.

19. The effects described in Paragraph 18 would persist until the Bundled Payment System is fully implemented.

VIII. VIOLATIONS CHARGED

20. The Proposed Transaction described in Paragraph 12 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

21. The Proposed Transaction described in Paragraph 12, if consummated, would constitute a violation of Section 7 of the

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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 twentieth day of October, 2008, issues its Complaint against said Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed exclusive sublicense and manufacturing and supply agreement for Venofer, an intravenous iron drug used for the treatment of anemia, to free-standing outpatient dialysis clinics, between Fresenius Medical Care AG & Co. KGaA, a German partnership limited by shares, and including entities and divisions controlled by Fresenius Medical Care AG & Co. KGaA, including (1) Fresenius Medical Care Holdings, Inc., a New York corporation wholly owned by Fresenius Medical Care AG & Co. KGaA, d/b/a Fresenius Medical Care North America, (2) Fresenius Medical Services, which operates dialysis clinics throughout North America, (3) Renal Therapies Group, which manufactures, sells and distributes equipment, supplies and pharmaceuticals to dialysis providers, and (4) Renal Research Institute, which engages in dialysis research and development (hereafter collectively referred to as “Respondent Fresenius”) and Daiichi Sankyo Company, Ltd., a Japanese pharmaceutical company, and entities controlled by Daiichi Sankyo Company, Ltd., including (1) Daiichi Sankyo, Inc., a Delaware corporation, wholly owned by Daiichi Sankyo Company, Ltd., (2) Luitpold

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Pharmaceuticals, Inc., a New York corporation, wholly owned by Daiichi Sankyo, Inc., and (3) American Regent, Inc., a New York corporation, wholly owned by Luitpold Pharmaceuticals, Inc. (hereafter collectively referred to as “Respondent Daiichi”) (collectively referred to as “Respondents”); 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 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 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 makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Fresenius Medical Care AG & Co. KGaA is a partnership limited by shares organized, existing and doing business under and by virtue of the laws of the Federal Republic

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of Germany, with its office and principal place of business located at Else-Kröner-Straße 1, 61352 Bad Homburg, Germany. Fresenius Medical Care AG & Co. KGaA is the parent of Fresenius Medical Care Holdings, Inc., a New York corporation, d/b/a Fresenius Medical Care North America (“FMCNA”) with its office and principal place of business located at 920 Winter St., Waltham, MA 023451-1457. Within FMCNA there are three main operating units: (1) Fresenius Medical Services, which provides dialysis services; (2) Renal Therapies Group, which manufactures, sells and distributes equipment, supplies and pharmaceuticals used primarily in the treatment of hemodialysis, and (3) Renal Research Institute, which engages in dialysis research and development.

2. Respondent Daiichi Sankyo Company, Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of Japan, with its office and principal place of business located at 3-5-1, Nihonbashi Honcho, Chuo-Ku, Tokyo 103-8426, Japan. Daiichi Sankyo, Inc. (“DSI”), a wholly owned subsidiary of Daiichi Sankyo Company, Ltd., 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 Two Hilton Court, Parsippany, New Jersey 07054. Luitpold Pharmaceuticals, Inc., a wholly owned subsidiary of DSI, is a corporation organized, existing and doing business under and by virtue of the laws of New York, with its office and principal place of business located at One Luitpold Drive, Shirley, New York 11967. American Regent, Inc., a wholly owned subsidiary of Luitpold Pharmaceuticals, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of New York, with its office and principal place of business located at One Luitpold Drive, Shirley, New York 11967.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

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ORDER**I.**

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

- A. “Fresenius” means Fresenius Medical Care AG & Co. KGaA, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries (including Fresenius Medical Care Holdings, Inc.), divisions, groups, and affiliates controlled by Fresenius Medical Care AG & Co. KGaA, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Daiichi” means Daiichi Sankyo Company, Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries (including Daiichi Sankyo, Inc., Luitpold Pharmaceuticals, Inc., and American Regent, Inc.), divisions, groups and affiliates controlled by Daiichi Sankyo Company, Ltd., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Luitpold” means Luitpold Pharmaceuticals, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries (including American Regent, Inc.), divisions, groups and affiliates controlled by Luitpold Pharmaceuticals, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “Commission” means the Federal Trade Commission.

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- E. “ANDA” means Abbreviated New Drug Application filed with the United States Food and Drug Administration pursuant to 21 C.F.R. Part 314.
- F. “Clinic” means a facility that provides hemodialysis or peritoneal dialysis services to patients suffering from end stage renal disease. For purposes of this Order, “Clinic” does not include in-hospital-based dialysis units for acute kidney events or hospital-based clinics managed by Respondent Fresenius.
- G. “CMS” means the Centers for Medicare & Medicaid Services.
- H. “Fresenius Clinic” means a Clinic that is wholly owned, managed, or controlled by Respondent Fresenius or is a joint venture between Respondent Fresenius and another Person.
- I. “HHS” means the United States Department of Health & Human Services including all of its agencies and offices including, but not limited to, CMS.
- J. “HHS-CMS Requirement” means:
 - 1. any statute or regulation, including, but not limited to, 42 U.S.C. § 1395w-3a, and 42 C.F.R. Part 414, Subparts J and K;
 - 2. any HHS review or study of Manufacturer’s Average Sales Price and other prices, comparisons of such prices, or modifications of payment amounts for drug products, including, but not limited to 42 U.S.C. § 1395w-3a(d); and
 - 3. any HHS or CMS guidance, ruling, statement of policy, or agreement Relating To or affecting the

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average sales price payment methodology as set forth in 42 U.S.C. § 1395w-3a, including, but not limited to the valuation of intra-company transfer prices for the purposes of calculating, or determining payment of, the Manufacturer's Average Sales Price for Venofer.

- K. "License Agreement" means the "License, Distribution, Manufacturing and Supply Agreement by and between Luitpold Pharmaceuticals, Inc., American Regent, Inc. and Fresenius USA Manufacturing, Inc. July 8, 2008," attached as Confidential Exhibit A to this Order. For purposes of this Order, the License Agreement includes sales and distribution contracts between Respondent Daiichi and its Venofer customers that have or will be assumed and serviced by Respondent Fresenius.
- L. "Manufacturer's Average Sales Price" has the same meaning as that in 42 U.S.C. § 1395w-3a(c), including any supplements, modifications, amendments, or changes, thereto, and any HHS or CMS guidance, ruling, statement of policy, or agreement relating thereto.
- M. "Material Confidential Information" means competitively sensitive, proprietary, and all other information that is not in the public domain owned by or pertaining to a Person or a Person's business, and includes, but is not limited to, all customer lists, price lists, contracts, cost information, marketing methods, patents, technologies, processes, or other trade secrets.
- N. "Person" means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, division, or department, including HHS and CMS, or other business or legal entity.

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- O. “Relating To” means pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to.
- P. “Venofer” means a drug product covered by NDA 21-135, in all dosage forms, formulations, line extensions and package configurations and comprising iron sucrose as an active ingredient, used for the treatment of anemia in end stage renal disease kidney dialysis patients, and any improvements to such formulations or dosages as hereafter may be developed and marketed, and including any next generation parenteral iron product, including VIT-45 (ferric carboxymaltose) that may be developed and marketed in the United States.

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

- A. Respondent Fresenius shall:
 - 1. For purposes of reporting the Manufacturer’s Average Sales Price for Venofer to CMS as required under the provisions of 42 U.S.C. § 1395w-3a, include the value of all intra-company transfers of Venofer to Fresenius Clinics; and
 - 2. For purposes of calculating the Manufacturer’s Average Sales Price for Venofer, report the price of each such intra-company transfer described in Paragraph II.A.1. at no greater than the lesser of:
 - a. the lowest per unit (as established by the Secretary of HHS under 42 U.S.C. § 1395w-3a(b)(2)(B)) price of Venofer sold by Luitpold to a purchaser (excluding sales exempted in 42 U.S.C. § 1395w-

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3a(c)(2)) in the United States, attached as Confidential Exhibit B, as of the date the Agreement Containing Consent Order was signed by Respondent Fresenius, or

- b. the lowest per unit (as established by the Secretary of HHS under 42 U.S.C. § 1395w-3a(b)(2)(B)) price of Venofer sold by Respondent Fresenius to any purchaser (excluding sales exempted in 42 U.S.C. § 1395w-3a(c)(2)) in the United States. *Provided, however*, Respondent Fresenius:
 - (1) shall not be required to comply with this Paragraph II.A.2.b. unless and until the date that the United States Food and Drug Administration has issued its final approval of a generic Venofer ANDA; and
 - (2) the provisions of this Paragraph II.A.2.b. shall expire on December 31, 2011, after which date Respondent Fresenius shall comply with Paragraph II.A.2.a.
3. If any change or modification to an HHS-CMS Requirement is implemented that changes or modifies Respondent Fresenius' obligations pursuant to Paragraph II.A. of this Order ("Change"), such that Paragraph II.A. conflicts or interferes with Respondent Fresenius' ability to comply with, or CMS's ability to enforce, such Change, then the Change shall terminate Respondent Fresenius' obligations pursuant to Paragraph II.A. of this Order. *Provided, however*, CMS, in its sole authority, shall determine whether Paragraph II.A. conflicts or interferes with Respondent Fresenius' ability to comply with, or CMS's ability to enforce, such Change. *Provided, further, however*, that before Respondent Fresenius' obligations under

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Paragraph II.A. terminate, Respondent Fresenius (1) shall receive a statement from CMS notifying Respondent Fresenius that the Change now regulates Respondent Fresenius' calculation of the value of intra-company transfers of Venofer to Fresenius Clinics for purposes of reporting the Manufacturer's Average Sales Price for Venofer to CMS, and (2) shall have complied with the reporting requirements of Paragraph VII.

- B. Respondent Fresenius shall not, directly or indirectly, discuss with, or provide, disclose or otherwise make available to, Respondent Daiichi, or any person working on behalf of Respondent Daiichi, any Material Confidential Information Relating To Respondent Fresenius' pricing of Venofer or Respondent Fresenius' costs of manufacture, sale, or distribution of Venofer, unless specifically provided for in the License Agreement.
- C. The purpose of Paragraph II of this Order is to ensure the continuation of the supply and competitive pricing of Venofer in the same manner as existed at the time of the announcement of the License Agreement, and to remedy the lessening of competition alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that Respondent Daiichi shall not, directly or indirectly, discuss with, or provide, disclose or otherwise make available to, Respondent Fresenius, or any Person working on behalf of Respondent Fresenius, any Material Confidential Information Relating To Respondent Daiichi's pricing of Venofer or Respondent Daiichi's costs of manufacture, sale, or distribution of Venofer, unless specifically provided for in the License Agreement.

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

- A. Nothing in this Order shall prevent Respondent Fresenius from complying with any HHS-CMS Requirement; and
- B. Nothing in this Order shall release Respondent Fresenius from any potential civil or administrative claim the United States has or may have under the False Claims Act, 31 U.S.C. §§ 3729-33; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-12; the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a; the exclusion statute, 42 U.S.C. § 1320a-7(b)(7); or any common law theories of fraud, unjust enrichment, payment by mistake, breach of contract, or disgorgement, in connection with its calculation and reporting of the Manufacturer's Average Sales Price.

V.

IT IS FURTHER ORDERED that, for the term of this Order, Respondents shall not, without providing advance written notification to the Commission in the manner described in this paragraph, directly or indirectly modify, change or amend the License Agreement. Said advance written notification shall contain (i) a detailed description of the proposed modification, change, or amendment to such agreements, and (ii) documents discussing the reasons for the proposed modification, change, or amendment (hereinafter referred to as "the 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 only with the Secretary of the Commission and need not be submitted to the United States Department of Justice. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to instituting the modifications, changes, or amendments (hereinafter referred to as the "first

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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), Respondents shall not institute changes to the agreements 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.

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

- A. The Commission may, at any time after the Order becomes final, appoint a Monitor to assure that Respondent Fresenius expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order.
- B. Not later than ten (10) days after appointment of a Monitor, Respondent Fresenius shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent Fresenius’ compliance with the terms of this Order in a manner consistent with the purposes of this Order.
- C. No later than one (1) day after the Monitor is appointed pursuant to this Paragraph, Respondent Fresenius shall, pursuant to the Monitor Agreement and to this Order, transfer to the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform his or her duties and responsibilities in a manner consistent with the purposes of this Order.

Decision and Order

- D. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Respondent Fresenius, which consent shall not be unreasonably withheld. If Respondent Fresenius has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent Fresenius of the identity of any proposed Monitor, Respondent Fresenius shall be deemed to have consented to the selection of the proposed Monitor. Respondent Fresenius shall comply with the terms of Paragraph VI.B. and VI.C. after the appointment of the substitute Monitor.
- E. Respondent Fresenius shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
1. The Monitor shall have the power and authority to monitor Respondent Fresenius' compliance with the terms of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the 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 Respondent Fresenius expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order; and
 - b. Assuring that Material Confidential Information is not received or used by Respondent Fresenius, except as allowed in this Order.
 2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.

Decision and Order

3. The Monitor shall serve for such time as is necessary to monitor Respondent Fresenius' compliance with the provisions of this Order.
4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent Fresenius' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondent Fresenius' compliance with its obligations under this Order. Respondent Fresenius shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent Fresenius' compliance with this Order.
5. The Monitor shall serve, without bond or other security, at the expense of Respondent Fresenius on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent Fresenius, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
6. Respondent Fresenius shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with

Decision and Order

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 gross negligence, willful or wanton acts, or bad faith by the Monitor.

7. Respondent Fresenius shall report to the Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by Respondent Fresenius, with respect to the performance of Respondent Fresenius' obligations under this Order.
 8. Within one (1) month from the date the Monitor is appointed pursuant to this paragraph, every sixty (60) days thereafter, and otherwise as requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by Respondent Fresenius of its obligations under this Order.
 9. Respondent Fresenius may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Monitor from providing any information to the Commission.
- F. The Commission may, among other things, require the Monitor and each of the 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 Monitor's duties.

Decision and Order

- G. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph VI.
- H. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

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

- A. Beginning thirty (30) days after the date this Order becomes final, 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.
- B. Within thirty (30) days after Respondent Fresenius terminates its reporting of the Manufacturer's Average Sale Price of Venofer to CMS, Respondent Fresenius shall submit to the Commission a written report detailing the circumstances of such termination. Respondent Fresenius shall include in such report a written statement from CMS documenting the termination of its reporting of the Manufacturer's Average Sale Price for Venofer to CMS.
- C. Within ten (10) days after the United States Food and Drug Administration has approved a generic Venofer ANDA, Respondent Fresenius shall submit to the Commission and CMS a report stating that the ANDA was approved.

Decision and Order

D. Within ten (10) days after Respondent Fresenius sells Venofer to a purchaser at a price pursuant to Paragraph II.A.2.b., Respondent Fresenius shall submit to the Commission and CMS a report stating:

1. the price it is charging for Venofer to a purchaser pursuant to Paragraph II.A.2.b., and
2. when it began selling Venofer at that price.

The reporting requirements of this Paragraph VII.C. shall apply every time Respondent Fresenius changes the price it is selling Venofer to a purchaser pursuant to Paragraph II.A.2.b.

E. If, pursuant to Paragraph II.A.2.b., Respondent Fresenius changes how it reports the price of each intra-company transfer described in Paragraph II.A.1, for purposes of calculating the Manufacturer's Average Sales Price for Venofer, then by January 10, 2012, Respondent Fresenius shall submit to the Commission and CMS a report stating when and if Respondent will revert to the obligations in Paragraph II.A.2.a.

F. Within thirty (30) days after any Change as described in Paragraph II.A. of this Order and before Respondent Fresenius terminates its obligations under Paragraph II.A., Respondent Fresenius shall submit to the Commission a written report detailing the circumstances of such Change and an explanation of why such Change supercedes Respondent Fresenius' obligations pursuant to Paragraph II.A. of this Order. Such report shall include a statement from CMS notifying Respondent Fresenius that the Change now regulates Respondent Fresenius' calculation of the Manufacturer's Average Sales Price for Venofer to CMS.

Decision and Order

- G. Beginning twelve (12) months after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order becomes final, until the Order terminates, each Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which the Respondent is complying and has complied with this Order. Respondent Fresenius shall submit at the same time a copy of these reports to the Monitor, if any Monitor has been appointed.

VIII.

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

- A. Any proposed dissolution of that Respondent;
- B. Any proposed acquisition, merger, or consolidation of that Respondent; or
- C. Any other change in that 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.

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 each Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, each Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission to:

Decision and Order

- A. access, during business 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 such Respondent related to compliance with this Order, which copying services shall be provided by such Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and
- B. interview officers, directors, or employees of such Respondent, who may have counsel present, regarding such matters.

X.

IT IS FURTHER ORDERED that this Order shall terminate the earlier of:

- A. Ninety (90) days after CMS ceases to require Respondent Fresenius to report the Manufacturer's Average Sales Price for Venofer to CMS; or
- B. On October 20, 2018.

By the Commission.

CONFIDENTIAL EXHIBIT A
[Redacted From Public Record But Incorporated By Reference]

Analysis to Aid Public Comment

CONFIDENTIAL EXHIBIT B
[Redacted From Public Record But Incorporated By
Reference]

**ANALYSIS OF 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 Fresenius Medical Care Ag & Co. KGaA (“Fresenius”) and Daiichi Sankyo Company, Ltd. (“Daiichi”), which is designed to remedy the effects that would otherwise result from Fresenius’s proposed acquisition of an exclusive sublicense from Daiichi’s wholly owned subsidiary Luitpold Pharmaceuticals, Inc. (“Luitpold”) to manufacture and supply Venofer in the United States (hereinafter “License Agreement”). Venofer is an intravenously-administered preparation of iron sucrose that is used primarily to treat iron deficiency anemia in patients with chronic kidney disease undergoing dialysis treatment.

Pursuant to a License, Distribution, Manufacturing and Supply Agreement dated July 8, 2008, Luitpold and Vifor (International) Inc. agreed to grant Fresenius an exclusive sublicense to distribute, manufacture and sell Venofer to independent outpatient dialysis clinics in the United States for a term of ten years with an option to extend the agreement for an additional ten years. Luitpold retains the right to sell Venofer in the United States to any other customer, including hospitals, doctor’s offices, and

Analysis to Aid Public Comment

hospital-based dialysis clinics. The transaction is purely vertical since Fresenius does not sell products that compete with Venofer.

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 enabling Fresenius to increase prices it charges its own clinics, which, in turn, would raise reimbursement rates that the Centers for Medicare & Medicaid Services ("CMS") pays for Venofer. The proposed Consent Agreement would remedy the alleged violations by limiting Fresenius's ability to inflate the intra-company transfer price it reports to CMS for Venofer as a mechanism to increase reimbursement rates.

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.

II. The Parties

Fresenius is the world's largest provider of dialysis products and services to patients suffering from chronic kidney disease, a condition that affects 1.6 million people worldwide. Fresenius is already vertically integrated in that it provides dialysis services through its approximately 1,650 owned or managed dialysis clinics and supplies its own and other clinics with a broad range of dialysis-related products, such as hemodialysis machines, dialyzers and related disposable products.

Daiichi, through its wholly owned subsidiary Luitpold, licenses Venofer from Vifor (International) Inc., a Swiss

Analysis to Aid Public Comment

pharmaceutical company that developed the product. Luitpold's subsidiary, American Regent, Inc., markets and distributes all of Luitpold's injectable products, including Venofer, to customers in the United States.

III. Intravenous Iron

Intravenous ("IV") iron is critical for the effective treatment of dialysis patients, the vast majority of whom suffer from chronic anemia. Without IV iron treatments, dialysis patients would suffer significantly higher mortality rates and a lower quality of life. In the United States, Luitpold's Venofer and Ferrlecit, which is manufactured by Watson Pharmaceutical Inc. ("Watson"), are the two IV iron products used most commonly to treat iron deficiency anemia in patients undergoing chronic hemodialysis. These second-generation IV iron drugs do not induce the side effects associated with first-generation IV iron products. Because of these side effects, sales of first generation IV irons in the United States are minimal.

The U.S. market for second-generation IV iron is highly concentrated. Luitpold and Watson are the only two suppliers of these drugs in the United States. In addition, entry into this market would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract the effects of the proposed transaction.

IV. Reimbursement for Intravenous Iron

Approximately 80 percent of outpatient dialysis services, for patients of all ages, are reimbursed under the Medicare Part B end-stage renal disease ("ESRD") program, at an annual cost of \$7.9 billion, of which \$2.9 billion was for separately billable drugs, with IV iron payments accounting for \$400 million. Medicare reimburses dialysis clinics based on the drug manufacturer's Average Sales Price ("ASP") plus six percent.

Analysis to Aid Public Comment

ASP is calculated by averaging the prices paid by all customers, including any discounts or rebates. A clinic's profit depends not just on how much it pays for the product but the difference between the clinic's acquisition price and the average sale price. An independent clinic, one not vertically integrated with the sale of the product, prefers, all other things equal, an acquisition price that maximizes the difference between its acquisition cost and the average selling price.

The reimbursement system will change, beginning as early as 2011 and completely by 2014. On July 15, 2008, Congress enacted the Medicare Improvements for Patients and Providers Act of 2008 ("MIPPA"), which will make substantial changes to the Medicare program relating to dialysis services and, once fully implemented, would eliminate the regulations that give rise to the concerns created by the proposed transaction. MIPPA mandates that CMS start a process of shifting from a system in which it pays separately for physician-administered drugs for dialysis patients to a system in which all the costs of providing care to dialysis patients would be bundled together into a single capitated payment, beginning on January 1, 2011 and phased in until full implementation is achieved on January 1, 2014. Once the change from a separately-billed, ASP-based payment for Venofer to a universal bundled payment for dialysis services is in effect, the adverse effects of the proposed transaction on reimbursement rates will disappear.

IV. Competitive Effects

Unremedied, the proposed transaction would give Fresenius, the largest provider of ESRD dialysis services in the United States, the ability to increase Medicare reimbursement payments for Venofer. After the transaction, the competitive market will no longer determine the price that Fresenius's clinics will pay for IV iron. Instead, the price Fresenius's clinics pay will become an internal transfer price, and that internal transfer price could become the price that Fresenius reports as the price it charges its

Analysis to Aid Public Comment

own clinics for the product. Increasing the internal transfer price would, in turn, increase ASP and, hence, reimbursement to clinics, including Fresenius, for their use of Venofer. Unlike a “real” price increase, it would be costless for Fresenius to inflate its internal transfer price to CMS because it would not impact Fresenius’s actual cost of providing Venofer to its patients, nor would it adversely affect demand. In fact, artificially raising ASP would increase the demand for Venofer among other dialysis clinics because it would cause reimbursement levels to go up.

V. The Consent Agreement

The proposed order reduces Fresenius’s ability to report inflated intra-company transfer prices to CMS for Venofer. Under the proposed order, Fresenius would be restricted from reporting an intra-company transfer price higher than the level set forth in the order. That level is derived from current market prices. The order further provides that if a generic Venofer product receives final approval by the United States Food and Drug Administration, Fresenius would be required to report its intra-company transfer price at either (1) the level set forth in the order or (2) the lowest price at which Fresenius sells Venofer to any customer, whichever is lowest, until December 31, 2011. On January 1, 2012, the order removes the lowest-priced-customer restriction, while the level set forth in the order remains in place. By 2012, at least 50 percent of ESRD dialysis services will be covered under the capitated reimbursement system implemented by MIPPA. The order also provides that if CMS implements regulations that eliminate the potential anticompetitive harm of this transaction, those regulations will supersede the order.

The order accomplishes two goals. First, it prevents the acquisition from driving up ASP and reimbursement rates by requiring Fresenius to report its transfer price in line with current market conditions. Second, it is designed to capture potential near-term changes in the market caused by generic entry, should it

Analysis to Aid Public Comment

occur, and to ensure that the price Fresenius reports to CMS reflects the competitive impact of such future generic competition. When fully implemented, the reimbursement methodology of the new bundled pricing system will eliminate the concerns raised by the transaction. Therefore, the price-adjustment provision expires as the reimbursement mechanism changes.¹

The order also prohibits Luitpold and Fresenius from sharing confidential business information relating to the manufacture, sale, or distribution of Venofer, as Luitpold will continue to sell Venofer to non-dialysis clinics, and requires the parties to provide notice to the Commission prior to modifying the License Agreement. Finally, to enable the Commission to ensure compliance with the order, the proposed order provides that the Commission may appoint a Monitor Trustee. The Commission has not determined to appoint a monitor at this time, however, because currently it does not appear that compliance with the order would be time consuming or require particular expertise. Nevertheless, should it become necessary or appropriate, the proposed order requires Fresenius and Daiichi to execute an agreement conferring upon the Interim Monitor all of the rights and powers necessary to permit the monitor to satisfy his responsibilities.

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.

¹ The Commission is grateful to CMS staff for assisting the Commission as it considered the competitive implications of the proposed transaction and crafted an appropriate remedy.

Complaint

IN THE MATTER OF

**BIOQUE TECHNOLOGIES, INC.,
VITTORIO A. BONOMO,
AND
CHRISTINE A. GUILMAN**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket No. C-4237; File No. 082 3095
Complaint, October 22, 2008 – Decision, October 22, 2008*

This consent order addresses advertising for Serum GV, represented by the respondents to be an effective treatment for skin cancer. The order requires the respondents to have competent and reliable scientific evidence substantiating any claims that a covered product or service is an effective treatment for skin cancer, including melanoma; prevents melanoma; is recognized by the medical profession as an effective treatment for skin cancer; or is clinically proven to prevent or treat melanoma. The order further requires that such claims be true and non-misleading. The order requires the respondents to possess competent and reliable scientific evidence for any claims about the absolute or comparative benefits, performance, efficacy, safety, or side effects of any covered product or service. The claims also must be true and non-misleading. The order prohibits the respondents from making misrepresentations about the existence, contents, validity, results, conclusions, or interpretations of any test or study. The order does not prohibit the respondents from making representations for any drug that are permitted by the Food and Drug Administration. The order requires the respondents to send to the consumers identified in the order a notification letter drafted by the FTC to inform them about the consent agreement. The order provides for the payment of \$9,035.85, the full amount of sales of the product, to the Commission. Additional provisions require the 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 respondent) and changes in employment (for the individual respondents) that might affect compliance obligations under the order; and to file compliance reports with the Commission.

Complaint

Participants

For the *Commission*: *Richard L. Cleland, Mary K. Engle, Diana Finegold, Karen Mandel, and Rosemary Rosso.*

For the *Respondents*: *Not represented by counsel.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Bioque Technologies, Inc., a corporation, and Vittorio A. Bonomo, individually and as a director of the corporation, and Christine A. Guilman, individually and as an officer of the corporation (“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 Bioque Technologies, Inc. (“Bioque”) is a Virginia corporation with its principal office or place of business at 200 Country Club Drive SW, Blacksburg, Virginia 24060.

2. Respondent Vittorio A. Bonomo is a director of Bioque. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of Bioque, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of the corporation.

3. Respondent Christine A. Guilman is an officer of Bioque. Individually or in concert with others, she formulates, directs, controls, or participates in the policies, acts, or practices of Bioque, including the acts and practices alleged in this complaint. Her principal office or place of business is the same as that of the corporation.

4. Respondents have labeled, advertised, offered for sale, sold, and distributed Serum GV, a purported cancer treatment, to

Complaint

the public. Serum GV is a topical serum containing *annona muricata* as the purported active ingredient. *Annona muricata*, also known as graviola, is an extract from the soursop or guanabana tropical fruit tree. Serum GV is a “drug” within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

5. 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.

6. Respondents have disseminated or have caused to be disseminated advertisements for Serum GV, including but not necessarily limited to the attached Exhibit A. These advertisements contain the following statements:

a. **SERUM GV**

Extraordinarily effective topical skin cancer treatment
*Clinically proven and professionally endorsed
formulation—active ingredient prevents and helps
correct melanoma*

Stamp of approval—The medical profession has recognized Serum GV as the only available and effective topical treatment for skin cancer.

Keep the doctor away—Clinical trials and research studies have demonstrated that Serum GV’s active ingredient—a glycol isolate of *annona muricata*—prevents development of melanoma; it has a natural affinity to cancer cells in their earliest stages and destroys them by cutting off their energy supply. Serves as an excellent non-surgical alternative for abnormal skin conditions—such as moles, lumps and warts.

Complaint

Support System—In cases where cancer has already appeared in the skin tissue, Serum GV boosts the body's own defense system to destroy the cancer cells.

* * *

Gently massage a small amount of Serum GV into and around targeted areas of abnormality — such as moles, lumps, and warts. Apply at least once daily; applying twice will speed up results.

[Exhibit A, Page 1 (bold and italics in original).]

7. Through the means described in Paragraph 6, Respondents have represented, expressly or by implications, that Serum GV:

- a. is an effective treatment for skin cancer, including melanoma; and
- b. prevents melanoma.

8. Through the means described in Paragraph 6, Respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 7, at the time the representations were made.

9. In truth and in fact, Respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 7, at the time the representations were made. Therefore, the representation set forth in Paragraph 8 was, and is, false and misleading.

10. Through the means described in Paragraph 6, Respondents have represented, expressly or by implication, that Serum GV:

- a. is recognized by the medical profession as an effective treatment for skin cancer; and

Complaint

b. is clinically proven to prevent or treat melanoma.

11. In truth and in fact, Serum GV is not recognized by the medical profession as an effective treatment for skin cancer and is not clinically proven to prevent or treat melanoma. Therefore, the representations set forth in Paragraph 10 were, and are, false and misleading.

12. 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.

THEREFORE, the Federal Trade Commission this twenty-second day of October, 2008, has issued this complaint against Respondents.

By the Commission.

Complaint

EXHIBIT A

11:31:52 AM 12/21/2007

Bioque Scientific Skincare That Works

HOME NOBEL PRIZE PRODUCTS FAQS WORLD FANS PRESS SHOP CONTACT

PRIZE-WINNING PRODUCTS

SERUM GV
Extraordinarily effective topical skin cancer treatment
Clinically proven and professionally endorsed formulation—active ingredient prevents and helps correct melanoma

Stamp of approval—The medical profession has recognized Serum GV as the only available and effective topical treatment for skin cancer

Keep the doctor away—Clinical trials and research studies have demonstrated that Serum GV's active ingredient—a glycol borate of amino acid lactate—prevents development of melanoma; it has a natural affinity to cancer cells in their earliest stages and destroys them by cutting off their energy supply. Serum GV is an excellent non-surgical alternative to abnormal skin conditions—such as moles, lumps and warts.

Support Systems—In cases where cancer has already appeared in the skin tissue, Serum GV boosts the body's own defense systems to destroy the cancer cells.

Directions for use*
Cleanse and dry skin. If using Serum XL and/or Serum Rejuvenate, apply first and wait for thorough absorption. Gently massage a small amount of Serum GV into and around targeted areas of abnormality—such as moles, lumps and warts. Apply at least once daily; applying twice will speed up results. Allow for full absorption before applying creams, moisturizers, foundations and/or makeup.

***IMPORTANT**—Although Serum GV requires no prescription, consult your doctor if you feel your medical history suggests Serum GV for any condition may not be right for you. As with all Bioque products, you need only apply a small amount. Improper application is wasteful and may cause unnecessary irritation. Avoid contact with eyes or mucous membranes. Not to be taken internally and, as with all cosmetics, keep out of the reach of children.

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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

The Respondents 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 of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the 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, 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 Bioque Technologies, Inc. (“Bioque”) is a Virginia corporation with its principal office or place of business at 200 Country Club Drive SW, Blacksburg, Virginia 24060.

Decision and Order

2. Respondent Vittorio A. Bonomo is a director of Bioque. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of Bioque, including the acts and practices alleged in the complaint. His principal office or place of business is the same as that of the corporation.

3. Respondent Christine A. Guilman is an officer of Bioque. Individually or in concert with others, she formulates, directs, controls, or participates in the policies, acts, or practices of Bioque, including the acts and practices alleged in the complaint. Her principal office or place of business is the same as that of the corporation.

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” shall mean:
 - A. Bioque Technologies, Inc. (“Bioque”), a corporation, its successors and assigns and its officers;
 - B. Vittorio A. Bonomo (“Bonomo”), individually, and as a director of Bioque;
 - C. Christine A. Guilman (“Guilman”), individually, and as an officer of Bioque;

Decision and Order

and each of the above's agents, representatives, and employees.

2. "Serum GV" shall mean Serum GV and any other product containing *annona muricata*, soursop, guanabana, or graviola.
3. "Commerce" shall mean as defined in Section 4 of the FTC 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 health-related service or program; or any food, dietary supplement, device, or drug, including, but not limited to, Serum GV.
6. "Endorsement" shall mean as defined in 16 C.F.R. § 255.0(b).
7. "Food," "drug," and "device" shall mean as defined in Section 15 of the FTC Act, 15 U.S.C. § 55.
8. The term "including" shall mean "without limitation."
9. The terms "and" and "or" shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.

Decision and Order

I.

IT IS ORDERED that Respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, or sale of Serum GV 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, that such product or service:

- A. is an effective treatment for skin cancer, including melanoma;
- B. prevents melanoma;
- C. is recognized by the medical profession as an effective treatment for skin cancer; or
- D. is clinically proven to prevent or treat melanoma,

unless the representation is true, non-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 Respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, or sale of any covered product or service, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a product name or endorsement, about the absolute or comparative benefits, performance, efficacy, safety, or side effects of such covered product or service, unless the representation is true, non-misleading, and, at the time it is

Decision and Order

made, Respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

IT IS FURTHER ORDERED that Respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, or sale of any covered product or service, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, including through the use of a product name or endorsement, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

IV.

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 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 specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the National Labeling and Education Act of 1990.

Decision and Order

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

- A. Respondents shall, within seven (7) days after the date of entry of this Order, deliver to the Commission a list, in the form of a sworn affidavit, of all consumers who purchased Serum GV, on or after January 1, 2003 through the date of entry of this Order, to the extent they have such information in their possession or control. Such list shall include each consumer's name and address, the product(s) purchased, the total amount of moneys paid less any amount credited for returns or refunds, and, if available, the consumer's telephone number and email address; and
- B. Except as provided in this Order, Respondents, and their officers, agents, servants, employees, and attorneys and all other persons or entities who receive actual notice of this Order by personal service or otherwise, are permanently restrained and enjoined from selling, renting, leasing, transferring, or otherwise disclosing the name, address, telephone number, credit card number, bank account number, email address, or other identifying information of any person who paid any money to any Respondent, at any time prior to entry of this Order, in connection with the purchase of Serum GV. *Provided, however,* that Respondents may disclose such identifying information as required in Subparagraph A above, or to any law enforcement agency, or as required by any law, regulation, or court order.

VI.

IT IS FURTHER ORDERED that within forty-five (45) days after the date of entry of this Order, Respondents shall send by first class mail, postage prepaid, an exact copy of the notice

Decision and Order

attached as Attachment A to all persons identified in Part V(A). The mailing shall not include any other documents.

VII.

IT IS FURTHER ORDERED that Respondents shall pay to the Federal Trade Commission the sum of nine thousand, thirty-five dollars and eighty-five cents (\$9,035.85). 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(a), 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 Serum GV 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 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

Decision and Order

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 the 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.

VIII.

IT IS FURTHER ORDERED that Respondent Bioque, and its successors and assigns, and Respondents Bonomo and Guilman 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.

IX.

Decision and Order

IT IS FURTHER ORDERED that Respondent Bioque, and its successors and assigns, and Respondents Bonomo and Guilman 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.

X.

IT IS FURTHER ORDERED that Respondent Bioque, 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, 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 corporation about which Respondents learn less than thirty (30) days prior to the date of 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.

XI.

Decision and Order

IT IS FURTHER ORDERED that Respondents Bonomo and Guilman, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of their individual current business or employment, or of their individual affiliation with any new business or employment. The notice shall include the Respondent's new business address and telephone number and a description of the nature of the business or employment and their 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.

XII.

IT IS FURTHER ORDERED that Respondent Bioque, and its successors and assigns, and Respondents Bonomo and Guilman 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 a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XIII.

This order will terminate on October 22, 2028, 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

Decision and Order

- 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

ATTACHMENT A

ATTACHMENT A
LETTER TO BE SENT BY FIRST CLASS MAIL
[on letterhead of Bioque Technologies, Inc.]

[Name and address of recipient]

[Date]

Dear [recipient's name]:

Our records show that you bought Serum GV from our website, www.bioque.com. We are writing to tell you that the Federal Trade Commission ("FTC") has alleged that our advertising claims for Serum GV were false or unsubstantiated. To resolve these charges, we have entered into a settlement with the FTC that prohibits us from making misleading claims about Serum GV or any other health-related product. The settlement with the FTC does not constitute an admission that we have violated the law. As part of the settlement, however, we agreed to send you the following information about the scientific evidence on Serum GV.

Very little scientific research has been done concerning Serum GV or any other product that contains *annona muricata* for the prevention, treatment, or cure of skin cancer, including melanoma, in humans. The scientific studies that have been done do not demonstrate that Serum GV or *annona muricata* effectively prevent or treat melanoma or other forms of skin cancer.

It is very important that you talk to your doctor or health care provider before using *any* alternative or herbal product, including Serum GV or any other product that contains *annona muricata*. Speaking with your doctor is important to make sure that all aspects of your medical treatment work together. Things that seem safe, such as certain foods, herbs, or pills, may interfere or affect your cancer or other medical treatment, or other medicines you might be taking. Some herbs or other complementary or alternative treatments may keep your medicines from doing what they are supposed to do, or could be harmful when taken with other medicines or in high doses. It also is very important that you talk to your doctor or health care provider before you decide to take any alternative or herbal product, including Serum GV or any other product that contains *annona muricata*, instead of taking conventional cancer treatments that have been scientifically proven to be safe and effective in humans.

If you would like further information about complementary and alternative treatments for cancer, the following Internet web sites may be helpful:

- 10. The National Cancer Institute: www.cancer.gov/cancertopics/pdq; or
- 11. The National Center for Complementary and Alternative Medicines: www.nccam.nih.gov.

You also can contact the National Cancer Institute's Cancer Information Service at 1-800-4-CANCER or 1-800-422-6237.

Sincerely,

Christine Guilman, President
Bioque Technologies, Inc.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Bioque Technologies, Inc., Vittorio A. Bonomo, and Christine A. Guilman (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 Serum GV, a topical serum that, according to its label, contains, among other ingredients, extract of *annona muricata*, also known as graviola, derived from the soursop or guanabana tree. According to the FTC complaint, Respondents represented that Serum GV is an effective treatment for skin cancer, including melanoma, and that it prevents melanoma. The complaint alleges that Respondents failed to have substantiation for these claims. Also according to the FTC complaint, Respondents represented that Serum GV is recognized by the medical profession as an effective treatment for skin cancer and that it is clinically proven to prevent or treat melanoma. The complaint alleges that these claims are false and misleading because Serum GV is not recognized by the medical profession as an effective treatment for skin cancer and is not clinically proven to prevent or treat melanoma. The proposed consent order contains provisions designed to prevent Respondents from engaging in similar acts and practices in the future.

Analysis to Aid Public Comment

Part I of the proposed order requires Respondents to have competent and reliable scientific evidence substantiating any claims that a covered product or service is an effective treatment for skin cancer, including melanoma; prevents melanoma; is recognized by the medical profession as an effective treatment for skin cancer; or is clinically proven to prevent or treat melanoma. The provision further requires that such claims be true and non-misleading. A “covered product or service” is defined in the order as “any health-related service or program; or any food, dietary supplement, device, or drug, including, but not limited to, Serum GV.”

Part II of the proposed order requires the Proposed Respondents to possess competent and reliable scientific evidence for any claims about the absolute or comparative benefits, performance, efficacy, safety, or side effects of any covered product or service. The claims also must be truthful and non-misleading.

Part III of the proposed order prohibits Respondents from making future misrepresentations about the existence, contents, validity, results, conclusions, or interpretations of any test or study.

Part IV 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 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 V of the proposed order requires Respondents to provide the FTC with a list of all consumers that they know purchased Serum GV and prohibits Respondents from using or disclosing the

Analysis to Aid Public Comment

consumer information, except to a law enforcement agency or as required by law.

Part VI of the proposed order requires Respondents to send to the consumers identified in Part V a notification letter drafted by the FTC to inform them about the consent agreement.

Part VII of the proposed order provides for the payment of \$9,035.85, the full amount of sales of the product, to the Commission.

Parts VIII through XII of the proposed order 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 respondent) and changes in employment (for the individual respondents) that might affect compliance obligations under the order; and to file compliance reports with the Commission. Part XIII 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

**HOLLY A. BACON,
D/B/A CLEANSING TIME PRO**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket No. C-4238; File No. 082 3119
Complaint, October 22, 2008 – Decision, October 22, 2008*

This consent order relates to claims made by Holly A. Bacon, doing business as Cleansing Time Pro, that Cleansing Time Pro Black Salve & Tablets were effective to treat, prevent, or cure numerous forms of cancer and various viral infections. The order requires the respondent to have competent and reliable scientific evidence substantiating any claim that Cleansing Time Pro Black Salve & Tablets, or any other covered product or service, is effective in the prevention, treatment, or cure of cancer, hepatitis, HIV, SARS, West Nile Virus, or Avian Bird Flu. The order requires that any future claim about the absolute or comparative benefits, performance, efficacy, safety or side effects of any covered product or service be truthful and supported by competent and reliable scientific evidence. The order also addresses the charge of deceptive endorsement by requiring that respondent disclose any material connection between an endorser and respondent, if such a connection exists. The order does not prohibit the respondent from making representations for any drug that are permitted by the Food and Drug Administration. The order requires the respondent to compile a list of all consumers who purchased Cleansing Time Pro Black Salve & Tablets since July 1, 2005, and to mail a letter to each purchaser describing the scientific evidence related to these products. The respondent is prohibited from providing any identifying information about her purchasers to anyone other than the Commission, another law enforcement agency, or as required by law. Additional provisions require the respondent to keep copies of relevant advertisements and materials that substantiate claims made in the advertisements; to provide copies of the order to certain of her employees; to notify the Commission of her affiliation with any new health-related business or employment; and to file compliance reports with the Commission.

Participants

For the *Commission*: *Kenneth Abbe and Matthew D. Gold.*

Complaint

For the *Respondent*: Marie C. Mirch, Mirch & Mirch.

COMPLAINT

The Federal Trade Commission, having reason to believe that Holly A. Bacon, doing business as Cleansing Time Pro (“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 the sole proprietor of Cleansing Time Pro, a Nevada company with its principal office or place of business at 9732 State Rt. 445, #114, Sparks, Nevada 89436.

2. Respondent has advertised, labeled, offered for sale, sold, and distributed herbal products to the public, including Cleansing Time Pro Black Salve & Tablets. Respondent offers these products through her website, www.cleansingtimepro.com. Cleansing Time Pro Black Salve & Tablets are “foods” and/or “drugs” within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

3. According to respondent’s promotional materials, Cleansing Time Pro Black Salve & Tablets contain “blood root, galangal & zinc chloride in a base of blended synergistic herbs (+ calcium in the tablets).” Cleansing Time Pro Black Salve is an ointment that respondent recommends for external use. Alternatively, respondent recommends that consumers take the product internally by purchasing Black Salve Tablets or by placing an amount of the Black Salve ointment into a gelatin capsule.

4. Respondent promotes her Cleansing Time Pro Black Salve Tablets and Gelatin Capsules as an internal treatment or cure for many kinds of cancer including stomach, colon, prostate, testicular, bladder, throat, thyroid, mouth, cervical, uterine,

Complaint

ovarian, pancreatic, breast, lung, liver, kidney, brain, and bone cancers, as well as lymphoma. Respondent also promotes these products as an internal treatment for various viral infections, including hepatitis, HIV, SARS, West Nile Virus, and Avian Bird Flu. Respondent promotes her Cleansing Time Pro Black Salve as an external treatment for carcinoma, melanoma, and other skin cancers. Excluding shipping and handling fees, respondent charges \$49.95 for a one-ounce jar of Cleansing Time Pro Black Salve, and \$34.95 for a 15-day supply of Cleansing Time Pro Black Salve Tablets (60 tablets).

5. 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.

6. Respondent has disseminated or caused to be disseminated advertisements for Cleansing Time Pro Black Salve & Tablets, including but not necessarily limited to the attached Exhibits A and B. These advertisements contain the following statements:

Internet Advertising (respondent’s website, www.cleansingtimepro.com)

A. “Cleansing Time Pro

CANCER, VIRUS & HEART DISEASE PRODUCTS
NATURAL - EASY TO USE
USE IN THE COMFORT OF YOUR OWN HOME
NO HEALTH INSURANCE REQUIRED

We have many testimonials to support our products from people who have used them to avoid major operations, radiation, chemotherapy & other drugs! We invite you to read this entire page & click on the buttons to the left to learn more about these wonderful products.

Complaint

Cleansing Time_{TM} Pro Black Salve & Tablets:

All natural herbal cancer & virus treatment & preventative that is **the** 'ORIGINAL FORMULA' and is the **Grandfather** of black salve used for over 116 years! This product has been used successfully on humans, pets & animals to prevent cancer, treat & overcome a wide range of internal & external cancers, viruses and other illnesses. It starts working in 5 seconds!

Known Uses for Cleansing Time_{TM} Pro Black Salve & Tablets

- Used in place of radiation therapy treatments & chemotherapy treatments
- Used to attack all known forms of cancer in & on the human & animal
- Used to eliminate fluid build up around tumors & shink [sic] them
- Used to normalize a-typical cells with the capability of becoming a cancer
- Used **internally** to treat & overcome a variety of cancers, malignancies & tumors. Used for stomach cancer, colon cancer, prostate cancer, testicular cancer, bladder cancer, throat cancer, thyroid cancer, mouth cancer, cervical cancer, uterine cancer, ovarian cancer, pancreatic cancer, breast cancer, lung cancer, liver cancer, kidney cancer, brain cancer & brain tumors, lymphoma, blood diseases, bone cancer & all types of viruses
- Used **externally** as a skin cancer treatment, treating carcinoma, melanoma, warts, moles & as a drawing salve
- People with in-operable cancers sent home to die have used black salve with astonishing results

Complaint

- ...
- Used to treat all types of hepatitis viruses, HIV, SARS & West Nile Virus
- ...

Testimonials and classic examples:

Unfortunately there is not enough room on this site to cover all the testimonials from people who have used these products to treat minor conditions to very serious conditions by both humans and their pets & animals. You are always welcome to use the products first hand to discern their value and/or pass the information along to those who may benefit.

I had lymphoma B cancer & used this herbal **Black Salve** internally & **Black Salve Tablets** instead of a doctors prescribed 68 radiation treatments with excellent results! I avoided all the unwanted long term side effects of radiation by using black salve. I have chosen to share my experience with others so that they may benefit from it as I have. My cancer is gone and as an added bonus I have a lot more energy. My oncologist told me near the middle of my black salve treatment I had 'the blood of a child' but he didn't know why. I had serious reservations about having radiation because of all I've heard & seen from people who have had it. After all these years of humans being subjected to radiation and all the testing they've done with it, people are still dying from it! In my opinion, black salve is the safest and most effective alternative to radiation. Holly B.

I have been plagued for 20 years with malignant basil cell carcinoma. [sic] My face & forehead have seven scars from the doctor's knife. Recently my daughter, who used black salve for her horse's melanoma, gave

Complaint

me a little dab of black salve. I used it on what I was sure was another malignant cancer. I made 1 application & about 10 days [sic] the tumor came off in the bandaid. There was a hole about 1/8 of an inch deep. It has now filled in & I don't believe there will be much of a scar, if any. I have the salve on another & hopefully the last, cancer & it's working just like the first. To me this is a miracle salve. Bill P., TX.

...

About Cleansing Time Pro

Cleansing Time Pro was established to meet the concerns and problems faced by cancer, virus, heart & vascular diseased victims who are seeking treatment for their conditions.

We began on the frontiers and over 116 years later are on the cutting edge of protecting people from such deadly diseases as the Bird Flu, SARS and the West Nile Virus worldwide! It was only months ago we first heard of these and they spread quickly to the U.S. It is common knowledge there is little that can be done once infected, according to health professionals. Medical facilities have even tried to hide the number of people infected! This is because they are not knowledgeable about and did not use our herbal treatment that is effective against viruses but instead relied on traditional medical paths. They soon discovered they were faced with full blown epidemics and most recently of SARS and the West Nile Virus. Cleansing Time Pro is all about revealing the facts. With Cleansing Time Pro's Black Salve Tablets, why not protect or treat yourself? It starts working within 5 seconds!

...

Complaint

While traditional medical paths have helped many they have also made many, many people sick. In contrast, Cleansing Time Pro is here to make people aware there is an alternative & there is something you can do right now even if you have no insurance! Our alternative treatment products have over 116 years of history behind them with many, many testimonials to prove their weight for treating & overcoming a long list of conditions unrelated & related to viruses & cancer in & on the human body as well as most pets & animals. Do you have heart or vascular problems? We have helped thousands with that too!

We believe our products are key to treatment of cancer, viruses, heart & vascular disease and prevention can be attained here in the U.S. as well as abroad.

...”

[Exhibit A, respondent’s website *www.cleansingtimepro.com*, as accessed on February 6, 2008]

Print Advertising (respondent’s Black Salve & Tablet Information & Instruction Package)

B. “**DIRECTIONS FOR HUMAN USE:**

...

Black Salve - Used Externally (Read carefully - starts working within 5 seconds)

Black Salve has been used to draw out all kinds of foreign material from the body such as glass, wood, shrapnel as well as cancer tumors and abnormal cells and tissue.

...

Complaint

The medical approach is successful in some peoples lives. However, some people who use Black Salve do not have medical operations, chemotherapy or radiation treatments with reported results. Some people have had all operations, chemotherapy and radiation either in whole or in part and have taken Black Salve with reported results. Some people with inoperable cancer/tumors have taken Black Salve with reported results. So it doesn't matter where you are in your treatment, just that you are doing something, because time is of the essence. Most people like the fact that Black Salve, a natural holistic folk remedy, can be taken in the comfort of their own home without insurance.

...

IMPORTANT WARNING NOTES:

...

Black salve can cause swelling. Because of this, people with brain tumors should not take black salve. However, if treating a brain tumor(s) with black salve you may need a qualified surgeon to insert a small hole(s) in the skull [sic] to relieve pressure. Do not think this is odd in any way. Many brain tumors are inoperable. However, a small hole is far superior to the sort of treatment one would receive from the full blown standard medical procedures.

...

Known Uses For Cleansing time™ Pro Black Salve & Tablets:

- Used in place of radiation therapy treatments & chemotherapy treatments
- Used to attack all known forms of cancer in & on the human & animal bodies

Complaint

- Used to eliminate fluid build up around tumors & shrink them
 - Used to normalize a-typical cells with the capability of becoming a cancer
 - Used internally to prevent & treat a variety of cancers, malignancies & tumors such as in the stomach, colon, prostate, testicles, bladder, throat, thyroid, mouth, cervix, uterus, ovaries, pancreas, breasts, lungs, liver, kidney, skin, lymph nodes, extremities, blood, brain & bone & terminal cancer
 - Used internally to prevent & treat all types of viruses & virus infections such as colds, flu, strep throat, mouth & gum diseases, yeast infections, all types of herpes & hepatitis viruses, shingles and even things such as prevention & treatment of HIV, SARS, West Nile Virus & Avian Bird Flu
 - Used externally to treat skin cancer, carcinoma, melanoma, warts, moles & as a drawing salve
- ...
- Used to purify blood & induce oxygen into the system inhibiting carcinogen growth
- ...

Ingredients & Formula:

Blood root, galangal & zinc chloride in a base of blended synergistic herbs (+ calcium in the tablets). Extensive research into herbal and plant life properties has indicated substantial disease prevention and healing qualities in each as well as having a multiplying effect when combined together.

Cleansing Time Pro's products have a natural chemical which enhances an enzyme known to neutralize carcinogens prior to their stimulating tumor growth. This works directly on the immune system

Complaint

and, quite naturally, acts as a preventative in that capacity. Reference: National Academy of Science.

Several case histories have revealed that formulating the proper portions of various herbal, as well as mineral ingredients results in a wide variety of healing abilities. Improper portions of the ingredients will not result in a favorable outcome. Therefore, duplication of 'Original Formula' Cleansing Time Pro Black Salve should not & can not be achieved.

History of Black Salve:

In 1890 Tom McCreary was diagnosed as having incurable, cancerous tumors on his neck, by physicians. They refused to operate, not wanting to risk his jugular vein. Tom said he paid attention to a repeated dream that came to him about how to make a remedy to cure himself. He obtained the elements and herbs for the remedy from some gypsies traveling through Texas at the time. He mixed up a black salve and applied it to his tumors. In less than a month Tom was healed and went on to live another 70 years. Over his lifetime, he was a preacher, rancher, doctor, farmer and sheriff under Judge Parker. He lived with a strength that became legendary. Tom kept the formula for the black salve to himself except for sharing it with an old friend. After Tom's long life, his son Howard and grandson Mickey, sought out the old friend who taught them how to make the black salve. Howard McCreary, attempting to make the black salve available to everyone, started a company in the '60's. The company had some tests done in the early '70's at the University of Colorado to discover more about it. The Veterinarian College at Fort Collins tested it on all viruses known at the time. They discovered that it

Complaint

killed those known viruses on contact. They discovered that with one application, sarcoids on horses (similar to skin cancer) had an 80% cure. With two applications, they achieved 100% cure. For many years it had been used to cure cancer in cows, save herds of calves from early viral diseases and treat abnormal tissue growths in all kinds of pets. By word of mouth, ranchers, homesteaders and folks on the rodeo circuits used it on external cancers, tumors and growths on themselves. Some successfully treated gangrene and even leprosy, in situations far from towns and doctors. Tom's son, Howard McCreary, was the first to use it internally. He had been diagnosed as having stomach cancer in the '60's. After he checked himself in the hospital for surgery the night before, as they did in those days, he took the first dose in a capsule without telling his doctors. The next morning they postponed his surgery because he was running a fever which continued for several days. On the 5th day, Howard said he passed a large quantity of black, vile smelling feces - apparently the growth itself. When the doctors took x-rays, they discovered that the cancerous growth was gone. Howard went on to live another 25 years without recurring stomach cancer. . . ."

[Exhibit B, respondent's Black Salve & Tablet Information & Instruction Package]

**Deceptive Representations Regarding the
Efficacy of Cleansing Time Pro Black Salve & Tablets**

7. Through the means described in Paragraph 6, respondent has represented, expressly or by implication, that Cleansing Time Pro Black Salve & Tablets:

Complaint

A. are effective in preventing, treating and/or curing all cancers, malignancies and tumors, including, but not limited to, stomach cancer, colon cancer, prostate cancer, testicular cancer, bladder cancer, throat cancer, thyroid cancer, mouth cancer, cervical cancer, uterine cancer, ovarian cancer, pancreatic cancer, breast cancer, lung cancer, liver cancer, kidney cancer, brain cancer and brain tumors, lymphoma, blood diseases, and bone cancer;

B. are effective in treating inoperable cancers;

C. are effective in treating skin cancer, including melanoma;

D. are effective in reducing the size of, or eliminating, cancerous tumors;

E. are safer and more effective in the treatment of cancer than are conventional cancer therapies, such as surgery, radiation, chemotherapy, and other drug treatments; and

F. are effective in preventing, treating, and/or curing numerous viral infections, including hepatitis, HIV, SARS, West Nile Virus, and Avian Bird Flu.

8. Through the means described in Paragraph 6, respondent has represented, expressly or by implication, that she possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 7, at the time the representations were made.

9. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 7, at the time the representations were made. Therefore, the representation set forth in Paragraph 8 was, and is, false or misleading.

Complaint

**Deceptive Representation Regarding
Endorser of Cleansing Time Pro Black Salve & Tablets**

10. Through the means described in Paragraph 6, respondent has disseminated testimonials for Cleansing Time Pro Black Salve & Tablets from consumers who purportedly were treated or cured of cancer in the ordinary course of using the product. Respondent has failed to disclose adequately that one of the endorsers had a material connection with Cleansing Time Pro. Specifically, at the time of providing her endorsement, one of the consumers was Holly A. Bacon, the sole owner of Cleansing Time Pro. This fact would materially affect the weight and credibility given by consumers to the endorsement and would be material to consumers in their purchase or use of the products. Therefore, the failure to adequately disclose this fact, in light of the representation made, was, and is, a deceptive practice.

11. The acts and practices of respondent 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.

THEREFORE, the Federal Trade Commission this twenty-second day of October, 2008, has issued this complaint against respondent.

By the Commission.

Complaint

EXHIBIT A

Black Salve & Wings Heartdrops



- Cleansing Time Pro
- Testimonials
- View Catalog
- About Us
- Feel Good Tips
- Contact Us
- FAQ's
- History
- Privacy Policy
- Useful Links
- View Cart / Checkout

Cleansing Time Pro

**CANCER, VIRUS & HEART DISEASE PRODUCTS
NATURAL - EASY TO USE**

**USE IN THE COMFORT OF YOUR OWN HOME
NO HEALTH INSURANCE REQUIRED**

We have many testimonials to support our products from people who have used them to avoid major operations, radiation, chemotherapy & other drugs! We invite you to read this entire page & click on the buttons to the left to learn more about these wonderful products.

Cleansing Time™ Pro Black Salve & Tablets:

All natural herbal cancer & virus treatment & preventative that is **the**

" ORIGINAL FORMULA " and
is the **Grandfather** of black salve used for
over **116 years!** This product has been used
successfully on **humans** , **pets** &
animals to prevent cancer, treat & overcome a wide
range of internal & external cancers, viruses and other illnesses. It starts
working in 5 seconds!

Known Uses for Cleansing Time™ Pro Black Salve & Tablets

- Used in place of radiation therapy treatments & chemotherapy treatments
- Used to attack all known forms of cancer in & on the human & animal
- Used to eliminate fluid build up around tumors & shrink them
- Used to normalize a-typical cells with the capability of becoming a cancer
- Used **internally** to treat & overcome a variety of cancers, malignancies & tumors. Used for stomach cancer, colon cancer, prostate cancer, testicular cancer, bladder cancer, throat cancer, thyroid cancer, mouth cancer, cervical cancer, uterine cancer, ovarian

EXHIBIT A-1

Complaint

Black Salve & Wings Heartdrops

cancer, pancreatic cancer, breast cancer, lung cancer, liver cancer, kidney cancer, brain cancer & brain tumors, lymphoma, blood diseases, bone cancer & all types of viruses

- Used **externally** as a skin cancer treatment, treating carcinoma, melanoma, warts, moles & as a drawing salve
- People with in-operable cancers sent home to die have used black salve with astonishing results
- People with virus infections sent home without a prescription by their doctor have used black salve with excellent results.
- Viruses have been repeatedly overcome such as colds, flu, strep throat, mouth diseases, herpes & yeast infections
- Used to treat all types of hepatitis viruses, HIV, SARS & West Nile Virus
- Used to repair & boost the immune system
- Highest of antioxidants
- Used to treat pets & animals with Parvo, Corona Virus, colds & flu
- Used to prevent cat cancer & dog cancer & treat bone cancer in large breed dogs

Ambrosia Skin & Scar Nectar

Massage Ambrosia emollient onto the skin to prevent & reduce the appearance of scars & sun spots - soothes & protects

Wings Heartdrops:

A Certified herbal formula used to treat & prevent heart disease, heart attacks, congestive heart failure & vascular plaque build up!

Known uses for Wings Heartdrops:

- Used to remove plaque build up in the heart & arteries
- Used to regulate the heart beat
- Used to relieve angina pain
- Used to normalize high blood pressure
- Used to lower cholesterol
- Used as a powerful anti-bacterial agent
- Used to boost the immune system

EXHIBIT A-2

Complaint

Black Salve & Wings Heartdrops

Russian Gold:

Anti-aging formula from Russia once classified and held top-secret.
It's youthening and energy capabilities are rewarding!

Known uses for Russian Gold:

- Used to increase mental function
- Used to increase energy
- Used to improve physical performance
- Used as a powerful anti-aging elixer

NOTE: This is not a scientific report or study. The above are what users have reported. These products are not endorsed by the FDA. No claims or guarantees are made & Cleansing Time Pro assumes no liability for the use of these products. This is a personal choice made solely by you. Pregnant women & people who have stomach ulcers should not use black salve or black salve tablets. Do not touch metal to black salve as it will render it useless - only use plastic or wooden utensils for application.



HOW TO PLACE YOUR ORDER: After clicking "catalog" button on the top left of the site or by clicking items found at the bottom of the site, make your selections by adding items to the shopping cart then click on the "view cart/checkout" button to add up and/or finalize your purchase.

SHIPPING: Most orders are only \$4.05 but your order will be adjusted to actual at time of transaction.

Priority Mail - Shipping Chart

Weight not over	USA 1-3 days	Int'l 4 -7 days
1 pound	4.05	6.00 - 15.00
2 pounds	4.05 - 6.00	9.00 - 19.00
3 pounds	6.00 - 8.10	12.00 - 26.00
4 pounds	8.10 Flat Rate	16.00 - 31.00

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Complaint

Black Salve & Wags Heartdrops

Featured Products:









	<u>Ambrosia Skin & Scar Nectar - Emollient used to prevent & reduce the appearance of scars & sun spots</u> - 24.95 50 ml jar
	<u>Black Salve & Tablet Information & Instruction Package - For internal & external use & history of the product</u> - 3.00 Included FREE with a Salve or Tablet purchase!
	<u>Black Salve - Used externally or internally to prevent & treat cancer & viruses in & on the human & animal bodies</u> - 49.95 1 Oz Jar
	<u>Black Salve Pet & Animal Formula - Used internally to prevent & treat cancer & viruses - for small breed animals under 50 lbs.</u> - 22.00 30 Capsules
	<u>Black Salve Tablets-Used internally to prevent & treat cancer & viruses in the human, pet & animal body in a convenient tablet</u> - 34.95 60 Tablets
	<u>Empty Gelatin Capsules - Pkq of 100 - Required for internal use of black salve</u> - 4.00 Empty Gelatin Capsules
	<u>Heartdrops - 2 Fluid Oz - Certified herbal formula used to prevent & treat heart & vascular diseases</u> - 34.95 2 Fluid Oz
	<u>Heartdrops - 4 Fluid Oz - Certified herbal formula used to prevent & treat heart & vascular diseases</u> - 59.95 4 Fluid Oz
	<u>Russian Gold - Adaptogens used for deep immune support, anti-aging, energy & vitality</u> - 39.95 2 fl. oz. bottle

EXHIBIT A-4

Complaint

Testimonials on Black Salve & Wings Heartdrops


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Testimonials and classic examples:

Unfortunately there is not enough room on this site to cover all the testimonials from people who have used these products to treat minor conditions to very serious conditions by both humans and their pets & animals. You are always welcome to use the products first hand to discern their value and/or pass the information along to those who may benefit.

I had lymphoma B cancer & used this herbal **Black Salve** internally & **Black Salve Tablets** instead of a doctors prescribed **68 radiation treatments** with excellent results! I avoided all the unwanted long term side effects of radiation by using black salve. I have chosen to share my experience with others so that they may benefit from it as I have. My cancer is gone and as an added bonus I have a lot more energy. My oncologist told me near the middle of my black salve treatment I had "the blood of a child" but he didn't know why. I had serious reservations about having radiation because of all I've heard & seen from people who have had it. After all these years of humans being subjected to radiation and all the testing they've done with it, people are still dying from it! In my opinion, black salve is the safest and most effective alternative to radiation. Holly B.

I have been plagued for 20 years with malignant basil cell carcinoma. My face & forehead have seven scars from the doctor's knife. Recently my daughter, who used black salve for her horse's melanoma, gave me a little dab of black salve. I used it on what I was sure was another malignant cancer. I made 1 application & about 10 days the tumor came off in the bandaid. There was a hole about 1/8 of an inch deep. It has now filled in & I don't believe there will be much of a scar, if any. I have the salve on another & hopefully the last, cancer & it's working just like the first. To me this is a miracle salve. Bill P., TX

On January 1, 2001 my litter of 8 Rottweiler pups was vomiting & defacating with blood in the stools at 11pm. By 4:00 a.m. all were so ill that I called my daughter in St. Louis because she has worked extensively in veterinary care & is currently working at the university there in the Dept. of Research. She told me it sounded like **Parvo or Corona**, both of which can be fatal. I put all the pups on **Cleansing Time (black salve products)** & within 72 hours they were all drinking & eating on their own & all the above symptoms were over! Karen C.

My friend used **Wings Heart Drops** so he would not have to undergo **surgery for heart disease** that caused his heart to beat irregular & for high blood pressure. He didn't have insurance & was affaid he might not come out of the operation. I gave him a bottle of Wings & less than a week later he told me I was an 'angel' but I only supplied him with 'Wings'. He looked & felt great! Lin Gardnerville, NV

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EXHIBIT A-5

Complaint

Treatments on Black Salve & Wingo Herbs/Herbs

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<http://www.cleansingtimepro.com/black>?pageid=6&catref=0&printstr=0 (2 of 2) [2/8/2008 10:38:55 AM]

Complaint

Catalog for Black Salve & Wings Heartdrops products



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About Cleansing Time Pro



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About Cleansing Time Pro

Cleansing Time Pro was established to meet the concerns and problems faced by cancer, virus, heart & vascular diseased victims who are seeking treatment for their conditions.

We began on the frontiers and over 116 years later are on the cutting edge of protecting people from such deadly diseases as the Bird Flu, SARS and the West Nile Virus worldwide! It was only months ago we first heard of these and they spread quickly to the U.S. It is common knowledge there is little that can be done once infected, according to health professionals. Medical facilities have even tried to hide the number of people infected! This is because they are not knowledgeable about and did not use our herbal treatment that is effective against viruses but instead relied on traditional medical paths. They soon discovered they were faced with full blown epidemics and most recently of SARS and the West Nile Virus. Cleansing Time Pro is all about revealing the facts. With Cleansing Time Pro's Black Salve Tablets, why not protect or treat yourself? It starts working within 5 seconds!

We stand firm in our knowledge & belief that the traditional medical based treatments are doing little to relieve pain their patients feel while undergoing invasive operations, chemotherapy and other drug treatments along with radiation treatments that has proven harmful by the United States government. Feel free to take a look at what the National Council for Radiation Protection (NCRP) has to say at www.ncrponline.org. And see what virtually every site advocating radiation has to say about their side effects. Yet hundreds of thousands of cancer victims are being directed by medical professionals to have radiation treatments. Again, Cleansing Time Pro is all about revealing the facts. We are knowledgeable on the effects of radiation on humans and hope that you also take a serious look into this subject.

While traditional medical paths have helped many they have also made many, many people sick. In contrast, Cleansing Time Pro is here to make people aware there is an alternative & there is something you can do right now even if you have no insurance! Our alternative treatment products have over 116 years of history behind them with many, many testimonials to prove their weight for treating & overcoming a long list of conditions unrelated & related to viruses & cancer in & on the human body as well as most pets & animals. Do you have heart or vascular problems? We have helped thousands with that too!

We believe our products are key to treatment of cancer, viruses, heart & vascular disease and prevention can be attained here in the U.S. as well as abroad.

Focus Group:

Meets to discuss & categorize individual cancer, virus, heart & vascular conditions & documents individual progress & testimonials.

EXHIBIT A-8

Complaint

About Cleansing Time Pro

Great News:

Our own Ms. Holly Bacon attended the American Cancer Society's Relay For Life - Hunters for the cure (Southwest division), a 2 day & night team event to help fight cancer and remember those who lost the battle. She along with hundreds of other cancer survivors and other participants ran & walked several miles around a track, lit candles and placed donated quarters along the track. She helped raise money for the American Cancer Society by making & selling Smores (yum), sunglasses & other items. She participated in a Pajama Parade at midnight & won 1st place! She was honored with a tiara, sash & wand then made one last trip around the track in her PJ's! Way to go Holly!

Special Thanks:

Thanks go to Cleansing Time Pro Advisory Board Committee members including Research & Cleansing Consultants who so generously volunteer their time for a very good cause! Good Job!

CLEANSING TIME™ PRO**YOUR ALTERNATIVE FOR LIFE**

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Hours of Operation
24 Hours Online !

Payment Methods
Visa
MasterCard
American Express
Discover Card
Checks & money orders by mail

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Feel Good Tips from Cleansing Time Pro



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Here at Cleansing Time Pro we are committed to those who suffer from cancer, heart & vascular related illnesses. We want you to feel good! We hope these tips can help. Please feel free to share any others with us!

Feel Good Tips:

If you are undergoing ct (cat) scans and the thick white contrast/dye you are asked to drink does not agree with you or makes you sick then ask them to let you drink the lemonade drink instead. It's just like drinking lemonade and has a watery consistency.

Most people lose their hair with chemotherapy drugs and this is a trauma all by itself. However, with Black Salve products you will not lose your hair.

Most people with cancer have become 'dis'-eased due to some personal trauma or tragedy, over work, over stress and not eating right. They tend to further compound the issue with negative thinking. Therefore, it is of utmost importance that you try to think positive and 'ease' yourself! Please, let your condition just leave your mind for a minute and focus instead on all the positive things in your life right now. Do this on a regular basis several times per day & feel what a difference this makes The body often follows what the mind is thinking. Remember, you are special so be kind to yourself! Also, treat yourself to something special as often as possible.

Cancer, viruses, infections - "let's just throw the bums out!" So says Dr. Susan Lark, Founder of the Menopause & PMS Self Help Center & graduate of N.W. University School of Medicine & 3 time winner Am. Med. Asso. Dr.'s Recognition award. From cervical cancer to sniffles, from chronic fatigue to a flattened immune system she tells us she wants us to "tune in" to our body.

While undergoing any of your treatment mostly try to stay away from spicy foods.

It's important that you get your vitamins & minerals daily to strengthen your immune system. One way to do this is to get some good tasting chewable vitamins. You probably don't need mega vitamins because your system won't absorb them unless you're taking Cleansing Time Pro's "Original" formula black salve or black salve Tablets. But with the chewable vitamins you will be able to keep them on your person & take them whenever you remember even if you don't have water. Come on, you can do it. Just think of them as breath fresheners!

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Feel Good Tips from Cleansing Time Pro

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Cleansing Time Pro answers your questions about Black Salve & Wings Heartdrops



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Contacting Cleansing Time Pro

Our Address

Cleansing Time Pro
9732 State Rt. 445, #114
Sparks, NV 89436
USA

Phone Contact Information:

Call Toll Free! : (866) 330-3667
:

Internet Contact Information:

Customer Service: cleansingtimepro@msn.com
Website Address: www.CleansingTimePro.com

Contact Us

Name:
Company:
Email Address:
Phone:

Comments

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FAQ's about Black Salve & Wings Heartdrops



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FAQ's about Black Salve & Wings Heartdrops

If Cleansing Time Pro's products work on cancer, viruses, heart & vascular diseases, why don't most traditional medical doctors use them?

Because the products are herbal in nature & grown out of the ground they are not endorsed by the American Medical Association. It is soon discovered that medical facilities do not make much money with these types of "remedies" due to their effectiveness & the fact that people can & do use them in their own homes. Doctors will always use the scientific (drug) approach. Drug companies will always be advertising through the medical journals & to doctors. Please read our 'History' page to learn more about why the American Medical Association does not recognize herbal treatments.

Are there any side effects from these products?

Black salve products taken internally should be taken with food and on a full stomach to avoid an upset stomach. Side effects are usually mild & go away during or after treatment. This may include loose stools, sinus headache, stiffness in joints or fever. Black salve used externally as a poultice could cause a burning sensation and/or pain that will go away during or after treatment & may cause some degree of scarring. However, we have worked to reduce the chances of this by defining dermatological practices for your use before, during & after treatment. However, every effort should be made to let the cancerous material come to the surface of the skin naturally, leave it alone & not pick it off. Picking it off could cause unnecessary scarring & prevent the full mass from coming out. Usually this process is completed when it falls off by itself. External treatment can last days or months from start to finish depending on the severity of the condition. Wings Heartdrops will leave a garlic taste in the mouth for a few minutes after use.

Can I take these products with other medications?

It depends but there should not be any problems with most over the counter meds. The choice is ultimately solely up to you. Cleansing Time Pro is held harmless from any action you may take arising out of your condition. It is best if you either contact us or your physician or both and give it some thought about what you're trying to achieve. However, please be aware that regular physicians do not know about herbal treatments. So in most cases, if asked or told about these products it may interfere in your treatment by that physician.

EXHIBIT A-13

Complaint

FAQ's about Black Salve & Wings Heartdrops

Due to the complex human, animal & pet nature & various conditions, we will be happy to try to help you with any specific questions you may have. Simply click on the 'Contact Us' button on the left of this page & fill in the form with your question. It will be e-mailed to us at cleansingtimepro@msn.com or telephone us toll free at 1-866-330-3667.

How long will it take to get my order?

We always ship U.S. Priority mail & usually takes 2 - 3 days (United States) or 4 - 7 days (Internationally) not including holidays or weekends.

EXHIBIT A-14

<http://www.cleansingtimepro.com/faq%20about%20black%20salve%20and%20wings%20heartdrops%2017%20of%2031%2018%2010-10-04%20AM1>

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History of herbs & black salve



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A piece of history of particular interest dates back to 1825. This is an excerpt from a book authored by John S. Haller published in 1994 by the Southern Illinois University Press called Medical Protestants - the eclectics in American medicine.

With the practice of French physicians using minerals (gold, silver & copper to name a few) to treat their patients came many unsuccessful attempts. But with the few people they were able to miraculously heal with the use of metals they received much attention. The news spread to America, the practice continued and they went on to form an association of physicians. Over a period of time, some physicians incorporated the use of plant life to heal people.

After many years about 50% of the doctors left the association to form a new association of medical protestants built entirely on the use of remedies made from plant life or herbs.

However, since the original mineral association was much older it received more attention from those who would finance their endeavors. So while the mineralists struggled with many disappointing setbacks in their treatments the new protestants were slowly healing people in one small town after another. They remained healing people in this fashion ever since while the old association of metalists continued to grow with the new scientific discoveries being made throughout the century and later became known as the American Medical Association.

So there you have it folks. We can send people to the moon & mars, have a lot of fancy medical machinery to peer deeper into our beings but still can't eradicate deadly diseases. The mark (herbal treatment) was missed by a long shot as explained here but Cleansing Time Pro is turning the tide on this!

The history of black salve started when Tom McCreary was diagnosed with incurable, cancerous tumors on his neck in 1890. He used black salve and went on to live another 70 years!

So please celebrate with us as Cleansing Time Pro salutes 116 years of black salve and the history of the natural healing process!

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History of births & black sabb

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<http://www.cleansingtimepro.com/bank?pageid=4&catref=0&printstr=0> (2 of 2) [2/8/2008 10:39:05 AM]

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Privacy PolicyProtecting Your Privacy

The privacy & security of personal information about our customers is important to us. Our Privacy Policy governs customer information which means personally identifiable information. The policy covers individuals who obtain products from us for personal, family or household uses.

Security & Confidentiality

We only use a state of the art SSL (secure) system on our website for the purpose of conducting a sales transaction using the buyers information. This information is not shared by us with anyone and not retained once the transaction is complete.

We do not retain, hold or share with any outside source any personally identifiable information regarding our customers.

Information Sharing

Cleansing Time Pro may retain information on the actual condition treated and the outcome of the treatment.

Cleansing Time Pro may retain the name, address and e-mail address of any customer for the purpose of questioniers, notification of any new treatments, products or promotional sales.

The above information is not shared with any outside source. However, you may opt out of Cleansing Time & Cleansing Time Pro's internal information sharing by requesting to opt out by clicking on our "contact us" button located on the left side of our website, calling toll free at 1-866-330-3667 or e-mailing us at cleansingtimepro@msn.com

Federal & State Laws

The practices stated above are in accordance with federal and state law.

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Useful Links



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[Pet Health Aromatherapy & Discount Specialist - KNN Corporation](#)
[Meet the Scala's - Your Success Is Their Business](#)
[Combat acne! A guide to the causes & various home remedies.](#)

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<http://www.cleansingtimepro.com/proddetail?prodid=1055249>



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Ambrosia Skin & Scar Nectar - Emollient used to prevent & reduce the appearance of scars & sun spots

50 ml jar Emollient used to prevent & reduce the appearance of scars & sun spots, hydrates tissues & restores elasticity

24.95

Qty:

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<http://www.cleansingtimepro.com/proddetail?prodid=1055249> [2/6/2008 10:39:20 AM]

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http://www.cleansingtimepro.com/proddetail?prodid=744149



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Black Salve & Tablet Information & Instruction Package -
For internal & external use & history of the product.

Includes instructions for internal and external use for both humans and animals and history of the product. Included FREE with a Salve or Tablet purchase.

3.00

Qty:

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http://www.cleansingtimepro.com/proddetail?prodid=744149 [2/6/2008 10:39:22 AM]

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http://www.cleansingtimepro.com/proddetail?prodid=744147



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Black Salve - Used externally or internally to prevent & treat cancer & viruses in & on the human & animal bodies

49.95

Qty:

http://www.cleansingtimepro.com/proddetail?prodid=744147 [2/6/2008 10:39:23 AM]

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http://www.cleansingtimepro.com/proddetail?prodid=1034888



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Black Salve Pet & Animal Formula - Used internally to prevent & treat cancer & viruses - for small breed animals under 50 lbs.

Powdered, beef flavored pet & animal black salve formula used internally to prevent & treat cancer & viruses. For use with smaller breed animals under 50 lbs.

22.00

Qty:

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http://www.cleansingtimepro.com/proddetail?prodid=1034888 [2/6/2008 10:39:27 AM]

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http://www.cleansingtimepro.com/proddetail?prodid=744148



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Black Salve Tablets-Used internally to prevent & treat cancer & viruses in the human, pet & animal body in a convenient tablet

34.95


Qty:

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http://www.cleansingtimepro.com/proddetail?prodid=744148 [2/6/2008 10:39:29 AM]


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<http://www.cleansingtimepro.com/proddetail?prodid=488190>



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Empty Gelatin Capsules - Pkg of 100 - Required for internal use of black salve
Used for internal ingestion of black salve

-4.00

Qty:

EXHIBIT A-25

Complaint

http://www.cleansingtimepro.com/proddetail?prodid=744855



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Heartdrops - 2 Fluid Oz - Certified herbal formula used to prevent & treat heart & vascular diseases

34.95

Qty:

EXHIBIT A-26

http://www.cleansingtimepro.com/proddetail?prodid=744855 [2/6/2008 10:39:32 AM]

Complaint

http://www.cleansingtimepro.com/proddetail?prodid=744856



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Heartdrops - 4 Fluid Oz - Certified herbal formula used to prevent & treat heart & vascular diseases

59.95

Qty:

EXHIBIT A-27

http://www.cleansingtimepro.com/proddetail?prodid=744856 [2/6/2008 10:39:33 AM]

Complaint

http://www.cleansingtimepro.com/proddetail?prodid=1055250



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Russian Gold - Adaptogens used for deep immune support, anti-aging, energy & vitality

Anti-aging herbal extract contains adaptogens used for deep immune support, to slow the aging process & increase energy, vitality & endurance.

39.95

Qty:

EXHIBIT A-28

http://www.cleansingtimepro.com/proddetail?prodid=1055250 [2/6/2008 10:39:35 AM]

Complaint

EXHIBIT B

Cleansing Time Pro
9732 State Rt. 445, #114
Sparks, NV 89441
Toll Free: 866-330-3667
www.CleansingTimePro.com
e-mail: cleansingtimepro@msn.com

Please read this informational package more than once. We are here to help. Please allow us to do so. For more information please visit us on the world wide web or e-mail us at the addresses above.

DIRECTIONS FOR HUMAN USE:**Black Salve Tablets - Used Internally**

Virus Related Disorders: After a full meal, oral ingestion of one Cleansing Time Pro Black Salve Tablet daily for four days will usually suffice. This procedure may take several more days for more severe cases and fortify the immune system - take for a period of up to 27 days - once daily for seven days, then abstain for two days, then repeat the process for two additional weeks.

Internal Growths/Cysts: After a full meal, oral ingestion of one Cleansing Time Pro Black Salve Tablet daily for seven days, then abstain for two days, then repeat the process for three additional weeks. This should produce results of non activity. Large growths with lengthy history may take longer.

Cancer Tumors: After a full meal, oral ingestion of two Cleansing Time Pro Black Salve tablets in the morning, then two more tablets after a full meal in the evening. Do this for seven days, then abstain for two days, then repeat this process for three additional weeks. At this time you may want to perform diagnostic tests to monitor progress, if any. Another 4 week process may be necessary and then follow up with tablets periodically as you see fit to maintain non activity.

Black Salve - Used Internally

Internal Tumors: After a full meal, prepare an empty small size gelatin capsule by using a plastic or wooden instrument or toothpick. Never use metal objects as it will render the product useless. Fill the gel cap with a dab of Cleansing Time Pro Black Salve the size of a small pea - size = () in the smaller portion of the gel cap, join the gel cap back together and drink down with a large glass of water. Always prepare these daily/as needed because the moisture from the salve will cause the gel cap to melt. Take for a period of up to 28 days - once daily for seven days, then abstaining for two days, then repeating the process for three additional weeks.

A beneficial option is to begin drinking a catalyst water several days ahead such as Willard Water, Colloidal Silver Water or Lifeline is best. Check your health food stores. It is used for the distribution of the active ingredients of Black Salve to the tissue and organs but it is not necessary.

Black Salve - Used Externally (Read carefully - starts working within 5 seconds)

Black Salve has been used to draw out all kinds of foreign material from the body such as glass, wood, shrapnel as well as cancer tumors and abnormal cells and tissue.

Apply a sufficient amount of Cleansing Time Pro Black Salve to cover the irritated area (usually a thin layer but still maintaining the black color). Apply Vaseline to the gauze portion of a bandage. This is very important to prevent the bandage from sticking to the affected area. Cover the treated area with the bandage for 8 to 24 hours. Then, soak a cotton ball in Hydrogen Peroxide, remove the bandage and wash the excess salve from the area applied.

Normally a red and greyish coloring will have appeared with a degree of swelling, indicating favorable penetration. If only a

Complaint

small area in the treated area is red and greyish in color you may wish to reapply an additional amount of salve for another 24 hour period, repeating the same cleaning process. Change the Vaseline coated bandage each day after cleaning the perimeter of the area with Hydrogen Peroxide to eliminate excess excretion. Usually, the more excretion that appears the better. The salve is drawing the abnormal tissue, cells and mass to the surface for elimination. This is usually accomplished without any noticeable bleeding. Often at this stage the growth will become twice or more its normal size and the area around the growth may swell. The growth may lighten in color becoming 'dead white' after the first day and may then re-darken slightly. Pus may form under and around the growth as the body pushes the growth out.

You may shower or wash the area every day. It is essential to keep it covered with new daily applications of Vaseline and clean bandages. This is based on experience.

A scab will appear and remove itself usually within ten days to three weeks. More favorable results will occur if the scab is not lifted or pried from the area. Normally, the skin will return to a smooth surface shortly after either by filling in with new tissue or scar tissue. Effects of scarring can be eliminated or minimized by taking vitamin E orally before and during use and rubbing vitamin E on the area after the scab falls off.

The salve used externally can cause a burning sensation. This should be kept in mind when applying to very large areas. The effects of this can be lessened by taking over the counter pain medication prior to and during its use. If severe pain develops only leave the salve on for 8 hours, wash the salve off the skin and apply plain Vaseline to another clean bandage and cover the affected area.

If dealing with a skin cancer, it is recommended to treat one area at a time but not more than five areas, waiting for the hole to fill in with new skin before treating the second or consecutive area(s). You may want to start in a place where you can hide the bandage easily such as just under your shirt sleeve, etc. The salve will draw from the surrounding circumference of the treated area.

These recommendations describe the absolute minimum doses that people have found to be effective. It cannot be stressed enough that Black Salve is very potent. Do not assume that if a little works, more will be better. Use the smallest doses possible and increase only if it truly seems necessary to you. Otherwise you will engender far more pain than necessary and extend the healing period.

What Everyone Needs to Know:

The tablets are all you need if you are just doing a regular detoxification. But if you're dealing with a very serious problem you should have both tablets and salve. For instance, you might want to take up to two salve capsules per day then follow up your treatment with the tablets at a later date to maintain non activity. Do not exceed 4 tablets or 2 capsules per day. If using the salve externally, you may want to take a tablet orally as well.

There is no set dosage and the amount taken will depend on each person and the way they feel after taking it. You may want to increase or decrease the dosage. Always take with a meal to avoid stomach upset.

Due to the ingredients used to hold the tablets together to form the pill it has less active ingredients than the salve. A single tablet is 1/2 the potency of a pea size portion of salve in a gelatin capsule.

You might feel 'pain', a 'pulling', 'drawing' or 'tingling' sensation as the tumor or cancer starts to break down and come away or dissolve. You may notice a lessening of the above feelings as your treatment progresses & this is a good sign!

'Original Formula' Cleansing Time Pro Black Salve products have been called 'the relentless healer' tracking down cancer cells and abnormalities throughout the body when used internally and flushing them from your system via your waste. Some people have reported loose bowels, foul breath and feces due to the elimination process. And when used externally, deposits them to the surface of the skin in varied appearances (usually the uglier the excretion the better). Pain, swelling and sometimes fever is associated during its use but in almost all reported cases, it eliminates abnormal tissue and stimulates regrowth of either healthy tissue or scar tissue.

If you are in the process of using chemotherapy, do not use Black Salve. The chemical action that occurs with the herbs could clash with the substances in chemotherapy drugs. Also, Black Salve may destroy or rid your body of the chemotherapy drugs. Waiting a sufficient amount of time after chemotherapy is your best bet.

Complaint

The medical approach is successful in some peoples lives. However, some people who use Black Salve do not have medical operations, chemotherapy or radiation treatments with reported results. Some people have had all operations, chemotherapy and radiation either in whole or in part and have taken Black Salve with reported results. Some people with inoperable cancer/tumors have taken Black Salve with reported results. So it doesn't matter where you are in your treatment, just that you are doing something, because time is of the essence. Most people like the fact that Black Salve, a natural holistic folk remedy, can be taken in the comfort of their own home without insurance.

It is particularly important to take daily vitamins & minerals and to try to eat fresh fruits & vegetables during and after treatment with Black Salve Tablets or Capsules to help fortify your immune system and give you strength and energy. Vitamin E tablets or vitamin E cream is also recommended for use.

Refuse to indulge in self doubt or in feeling like a victim. Rather, (on a daily basis as often as possible) fan in yourself the ferocious feeling of YES to the life-force, to preservation and to becoming greater than you were yesterday. This triggers the body's release of hormones and enzymes that literally instruct the body to become whole and stay well! Please understand that each of us can do anything and that miraculous change is the result of a mind and a feeling that will accept nothing less.

IMPORTANT WARNING NOTES: Pregnant women or people with stomach ulcers should not use black salve or black salve tablets. Always take black salve on a full stomach. Do not touch anything metal to black salve, use only wooden or plastic utensils. People applying salve topically should use extreme caution. People treating late stage liver cancer should use black salve or tablets sparingly. Do not take black salve if you are currently on chemotherapy, wait at least 2 weeks. Keep out of the reach of other people, children, pets & animals.

Cleansing Time Pro recommends diagnostics (blood tests, MRI's, CT scans or PET scans) be performed to gauge your condition, progress or size of your tumor, your blood levels, etc.

Black salve can cause swelling. Because of this, people with brain tumors should not take black salve. However, if treating a brain tumor(s) with black salve you may need a qualified surgeon to insert a small hole(s) in the skull to relieve pressure. Do not think this is odd in any way. Many brain tumors are inoperable. However, a small hole is far superior to the sort of treatment one would receive from the full blown standard medical procedures.

While we have had great success in treating cancer and viruses with these products, they may not be for everyone. This informational package has been prepared as a narration of what users have reported and what to be the most effective way to use Black Salve products. No claims or guarantees can be made by Cleansing Time™ Pro as to the use of Black Salve products. By virtue of its use it must be understood that the choice and process used in the various forms of application or ingestion of these products is the sole responsibility of the user and does so at their own risk and accept full responsibility for any effects. Use remains at your sole discretion and Cleansing Time Pro is held harmless from any and all claims.

Known Uses For Cleansing Time™ Pro Black Salve & Tablets:

- Used in place of radiation therapy treatments & chemotherapy treatments
- Used to attack all known forms of cancer in & on the human & animal bodies
- Used to eliminate fluid build up around tumors & shrink them
- Used to normalize atypical cells with the capability of becoming a cancer
- Used internally to prevent & treat a variety of cancers, malignancies & tumors such as in the stomach, colon, prostate, testicles, bladder, throat, thyroid, mouth, cervix, uterus, ovaries, pancreas, breasts, lungs, liver, kidney, skin, lymph nodes, extremities, blood, brain & bone & terminal cancer
- Used internally to prevent & treat all types of viruses & virus infections such as colds, flu, strep throat, mouth & gum diseases, yeast infections, all types of herpes & hepatitis viruses, shingles and even things such as prevention & treatment of HIV, SARS, West Nile Virus & Avian Bird Flu
- Used externally to treat skin cancer, carcinoma, melanoma, warts, moles & as a drawing salve
- Used to treat pets & animals with colds, flu, Parvo, Corona Virus, cancer, tumors & prevention/treatment of bone cancer in large breed dogs
- Used to purify blood & induce oxygen into the system inhibiting carcinogen growth
- Used to repair & boost the immune system & enhance overall assimilation of nutrients
- Used as the highest of antioxidants
- Used to remove plaque from teeth and disease from gums by applying a match head size portion of Cleansing Time Pro Salve to the toothpaste used once daily for 7 to 10 days

Complaint

- Used to alleviate yeast infection in human females with use of one pea size portion of salve per quart of warm water as a douche. Used to alleviate infections on male human & animal gender parts (including horses) by washing with the above douche.

DIRECTIONS FOR PET & ANIMAL USE:

Black salve works in/on animals in very much the same way as humans! Please read the animal & history sections that follow for more information.

Black Salve - external use: The same directions for salve used on humans apply to animals & can be found on page 2. Exception: Do Not use salve on areas of the animal where it can be licked off such as on the paws or legs unless a cone collar is used and the animal proves not to be able to access the treated area with the collar on. Do not remove the cone collar until the full treatment is over and the salve is washed off completely or the hole has filled in with new skin.

The doses for tablets & salve are different for animals than they are for humans. Be sure to feed the animal plenty of food before each dose and have plenty of water available. Open the jaws/mouth and slip the tablet to the back of the throat so it can be swallowed. Keep an eye on the pet for any unusual signs such as vomiting and discontinue use if necessary or cut back on the dose. The pet may have loose stools - be prepared in advance for this. Diagnostics such as x-rays, & blood tests are recommended to gauge the animals progress.

Black Salve Tablets - internal use: General illnesses - Animals 2 to 15 pounds - 1/4 of a tablet per day. Animals 15 to 30 pounds - 1/2 of a tablet per day. Animals 30+ pounds - 1 full tablet per day. Administer for 5 days then abstain for 2 days. Depending on the effectiveness of the first treatment, a second treatment may be given and follow up with subsequent treatments as you see fit. Severe illnesses - double the dose by administering once in the morning and once in the evening.

Black Salve using empty gelatin capsules - internal use: More severe illnesses or cancer - animals 50 pounds or more - prepare an empty gel cap with 1/2 of a dried pea size portion of salve. Administer for 7 days then abstain for 2 days. Repeat this process for an additional 2 weeks or up to 27 days. Animals 80 to 150 pounds (and when trying to prevent/treat bone cancer in large breed dogs) - prepare an empty gel cap with 1 dried pea size portion of salve. See found on page 1 of this informational packet. Administer for 7 days then abstain for 2 days. Repeat this process for an additional 2 weeks. A second course up to 27 days may be administered.

Horses, cattle & large animals: General illnesses: prepare 1 or 2 gel caps with a dried pea size portion of salve. Administer for 7 days then abstain for 2 days then repeating this process if needed. For more severe illnesses: prepare up to 3+ gel caps in the morning after the animal has been fed & another 3+ gel caps in the evening after its meal with a dried pea size portion of salve. Administer for 7 days, then abstain for 2 days. Repeat this process for an additional 2 weeks or up to 27 days. A second course up to 27 days may be administered. For ease in treating very large animals, the same stated portions of salve may be blended up with a liquid such as water and squirted down the throat taking care not to let the liquid splash out onto yourself, the animal or surrounding areas.

Small breed pets & animals (Under 50 lbs.) - We carry a specially designed powdered, beef flavored gelatin capsule specifically for use on small breed animals under 50 pounds. Separate directions & dosage comes printed on the product bottle. This product may be stirred in the pets food or the capsule may be inserted to the back of the pets throat.

Ingredients & Formula:

Blood root, galangal & zinc chloride in a base of blended synergistic herbs (+ calcium in the tablets). Extensive research into herbal and plant life properties has indicated substantial disease prevention and healing qualities in each as well as having a multiplying effect when combined together.

Cleansing Time Pro's products have a natural chemical which enhances an enzyme known to neutralize carcinogens prior to their stimulating tumor growth. This works directly on the immune system and, quite naturally, acts as a preventative in that capacity. Reference: National Academy of Science.

Several case histories have revealed that formulating the proper portions of various herbal, as well as mineral ingredients results in a wide variety of healing abilities. Improper portions of the ingredients will not result in a favorable outcome. Therefore, duplication of 'Original Formula' Cleansing Time Pro Black Salve should not & can not be achieved.

Complaint

History of Black Salve:

In 1890 Tom Mc Creary was diagnosed as having incurable, cancerous tumors on his neck, by physicians. They refused to operate, not wanting to risk his jugular vein. Tom said he paid attention to a repeated dream that came to him about how to make a remedy to cure himself. He obtained the elements and herbs for the remedy from some gypsies travelling through Texas at the time. He mixed up a black salve and applied it to his tumors. In less than a month Tom was healed and went on to live another 70 years. Over his lifetime, he was a preacher, rancher, doctor, farmer and sheriff under Judge Parker. He lived with a strength that became legendary. Tom kept the formula for the black salve to himself except for sharing it with an old friend. After Tom's long life, his son Howard and grandson Micky, sought out the old friend who taught them how to make the black salve. Howard Mc Creary, attempting to make the salve available to everyone, started a company in the '60's. The company had some tests done in the early '70's at the University of Colorado to discover more about it. The Veterinarian College at Fort Collins tested it on all viruses known at the time. They discovered that it killed those known viruses on contact. They discovered that with one application, sarcoids on horses (similar to skin cancer) had an 80% cure. With two applications, they achieved 100% cure. For many years it had been used to cure cancer in cows, save herds of calves from early viral diseases and treat abnormal tissue growths in all kinds of pets. By word of mouth, ranchers, homesteaders and folks on the rodeo circuits used it on external cancers, tumors and growths on themselves. Some successfully treated gangrene and even leprosy, in situations far from towns and doctors. Tom's son, Howard Mc Creary, was the first to use it internally. He had been diagnosed as having stomach cancer in the '60's. After he checked himself in the hospital for surgery the night before, as they did in those days, he took the first dose in a capsule without telling his doctors. The next morning they postponed his surgery because he was running a fever which continued for several days. On the 5th day, Howard said he passed a large quantity of black, vile smelling feces - apparently the growth itself. When the doctors took x-rays, they discovered that the cancerous growth was gone. Howard went on to live another 25 years without recurring stomach cancer.

Another piece of history of particular interest dates back to 1825 in America. This is an excerpt from a book authored by John S. Haller published in 1994 by the Southern Illinois University Press called Medical Protestants - the eclectics in American medicine. With the practice of French physicians using metals (gold, silver & copper to name a few) to treat their patients came many unsuccessful attempts. But with the few people they were able to miraculously heal with the use of metals they received much attention. The news spread to America, the practice continued and they went on to form an association of physicians. Over a period of time, some physicians incorporated the use of plant life to heal people. After many years about 50% of the doctors left the association to form a new association of medical protestants built entirely on the use of remedies made from plant life or herbs. However, since the original association was much older it received more attention from those who would finance their endeavors. So while the metalists struggled with many disappointing setbacks in their treatments the new protestants were slowly healing people in one small town after another. They remained healing people in this fashion ever since while the old association of metalists continued to grow with the new scientific discoveries being made throughout the century and later became known as the American Medical Association. So there you have it folks, the reason why we have a lot of fancy medical machinery to peer deeper into our beings but can't seem to eradicate deadly diseases.

Please celebrate with us as Cleansing Time Pro salutes 117 years of "Original Formula" Black Salve, the grandfather of cancer and virus treatment and the history of the natural prevention and healing process!

TABLETS**SALVE**

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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Holly A. Bacon is the sole proprietor of Cleansing Time Pro, a Nevada company with its principal office or place of business at 9732 State Rt. 445, #114, Sparks, Nevada 89436.

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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” means Holly A. Bacon, individually and doing business as Cleansing Time Pro, her successors and assigns, and her officers, agents, representatives and employees.
2. “Commerce” means as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
3. “Competent and reliable scientific evidence” means 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.
4. “Food” and “drug” mean “food” and “drug” as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.
5. “Covered product or service” means any food, dietary supplement, or drug, including, but not limited to, Cleansing Time Pro Black Salve & Tablets, or any other health-related product, service, or program.

Decision and Order

6. “Endorsement” means as defined in 16 C.F.R. § 255.0(b).
7. “Clearly and prominently” means 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 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.

Decision and Order

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.

8. The term “including” in this order means “without limitation.”
9. The terms “and” and “or” in this order shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase inclusive rather than exclusive.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of Cleansing Time Pro Black Salve & Tablets, 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 is effective in the prevention, treatment, or cure, or assists in the prevention, treatment, or cure, of cancer;
- B. that such product is effective in the treatment of inoperable cancers;
- C. that such product is effective in the treatment of skin cancer, including melanoma;
- D. that such product reduces the size of, or eliminates, cancerous tumors;

Decision and Order

- E. that such product is safer and more effective in the treatment of cancer than are conventional cancer therapies, such as surgery, radiation, chemotherapy, and other drug treatments; or
- F. that such product is effective in the prevention, treatment, or cure, or assists in the prevention, treatment, or cure, of hepatitis, HIV, SARS, West Nile Virus, or Avian Bird Flu,

unless the representation is true, non-misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any covered product or service, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a product name or endorsement, about the absolute or comparative benefits, performance, efficacy, safety, or side effects of such covered product or service, unless the representation is true, non-misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any covered product or service, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about any user or endorser of such product or service unless she discloses, clearly and

Decision and Order

prominently, a material connection, when one exists, between such user or endorser and the respondent or any other individual or entity manufacturing, advertising, promoting, offering for sale, selling, or distributing such product or service. For purposes of this Part, “material connection” means any relationship that materially affects the weight or credibility of the user testimonial or endorsement and that would not reasonably be expected by consumers.

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

- A. Nothing in this order shall prohibit respondent from making any representation for any drug that is permitted in labeling for such drug under any tentative 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 respondent from making any representation for any product that is 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.

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

- A. Within thirty (30) days of the date of entry of this order, respondent shall compile a list containing the full name and mailing address, the product(s) purchased, and, if available, the consumer’s telephone number and email address, of every person who has purchased Cleansing

Decision and Order

Time Pro Black Salve & Tablets from the respondent since July 1, 2005; and

- B. Within forty-five (45) days after the date of entry of this order, respondent shall send by first class mail, postage prepaid, an exact copy of the notice attached as Attachment A to all persons identified in Subparagraph A of this Paragraph. The mailing shall not include any other documents.

VI.

IT IS FURTHER ORDERED that respondent shall not sell, rent, lease, transfer, or otherwise disclose the name, address, telephone number, credit card number, bank account number, e-mail address, or other identifying information of any person who paid any money to respondent, at any time prior to entry of this order, in connection with the purchase of Cleansing Time Pro Black Salve & Tablets. *Provided, however;* that respondent shall disclose to the FTC, upon request, the list compiled pursuant to Paragraph V.A of this order; and respondent may disclose such identifying information to a law enforcement agency or as required by any law, regulation, or court order.

VII.

IT IS FURTHER ORDERED that respondent 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 and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and

Decision and Order

- C. All tests, reports, studies, surveys, demonstrations, or other evidence in her 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.

VIII.

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 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. 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. Respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying a copy of each signed statement acknowledging receipt of the order.

IX.

IT IS FURTHER ORDERED that respondent, for a period of three (3) years after the date of issuance of this order, shall notify the Commission of the discontinuance of her current business or employment, or of her affiliation with any new health-related 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 her 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, Washington, D.C. 20580.

Decision and Order

X.

IT IS FURTHER ORDERED that respondent 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 she has complied with this order.

XI.

This order will terminate on October 22, 2028, 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.

FEDERAL TRADE COMMISSION DECISIONS
VOLUME 146

Decision and Order

ATTACHMENT A**ATTACHMENT A**
LETTER TO BE SENT BY FIRST CLASS MAIL
[To be printed on letterhead of Cleansing Time Pro]

[Name and address of recipient] [Date]

Dear [Recipient]:

Our records show that you bought Cleansing Time Pro Black Salve & Tablets. These products were sold on our website www.cleansingtimepro.com. We are writing to tell you that the Federal Trade Commission ("FTC") has alleged that our advertising claims for these products were false or unsubstantiated. To resolve these charges, we have entered into a settlement with the FTC that prohibits us from making misleading claims about these products or any other health-related product. The settlement with the FTC does not constitute an admission that we have violated the law. As part of the settlement, however, we agreed to send you the following information about the scientific evidence on Cleansing Time Pro Black Salve & Tablets.

Very little scientific research has been done concerning Cleansing Time Pro Black Salve & Tablets as a treatment or cure for cancer in humans. The scientific studies that have been done do not demonstrate that Cleansing Time Pro Black Salve & Tablets, or the ingredients in these products, are effective when used as treatments for cancer. In addition, according to the American Cancer Society, there have been numerous reports of severe burns and permanent scarring from some of these salves.

It is very important that you talk to your doctor or health care provider before using *any* alternative or herbal product, including Cleansing Time Pro Black Salve & Tablets. Speaking with your doctor is important to make sure that all aspects of your medical treatment work together. Things that seem safe, such as certain foods, herbs, or pills, may interfere or affect your cancer or other medical treatment, or other medicines you might be taking. Some herbs or other complementary or alternative treatments may keep your medicines from doing what they are supposed to do, or could be harmful when taken with other medicines or in high doses. It also is very important that you talk to your doctor or health care provider before you decide to take any alternative or herbal product, including Cleansing Time Pro Black Salve & Tablets, instead of taking conventional cancer treatments that have been scientifically proven to be safe and effective in humans.

If you would like further information about complementary and alternative treatments for cancer, the following Internet web sites may be helpful:

1. The National Cancer Institute: www.cancer.gov/cancertopics/pdq; or
2. The National Center for Complementary and Alternative Medicines: www.nccam.nih.gov

You also can contact the National Cancer Institute's Cancer Information Service at 1-800-4-CANCER or 1-800-422-6237.

Sincerely,

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 Holly A. Bacon, doing business as Cleansing Time Pro (“respondent”).

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 the advertising and promotion of products known as Cleansing Time Pro Black Salve & Tablets. According to their labels, these products contain “blood root, galangal & zinc chloride in a base of blended synergistic herbs (+ calcium in the tablets).” Cleansing Time Pro Black Salve is an ointment that respondent recommends for external use. Alternatively, respondent recommends that consumers take the product internally by purchasing Black Salve Tablets or by placing an amount of the Black Salve ointment into a gelatin capsule.

The Commission’s complaint charges that respondent claimed that Cleansing Time Pro Black Salve & Tablets were effective to treat, prevent, or cure numerous forms of cancer and various viral infections, including hepatitis, HIV, SARS, West Nile Virus, and Avian Bird Flu. The complaint alleges that respondent did not have a reasonable basis for these claims. The Commission’s complaint also challenges respondent’s testimonial advertising. The complaint alleges that respondent failed to disclose adequately that one of the endorsers was respondent Holly A. Bacon herself. The complaint alleges that this was a deceptive act or practice, because the fact that one of the endorsers had a

Analysis to Aid Public Comment

material connection with Cleansing Time Pro would materially affect the weight and credibility given by consumers to the endorsement and would be material to consumers in their purchase or use of the products.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts and practices in the future. Part I requires respondent to have competent and reliable scientific evidence substantiating any claim that Cleansing Time Pro Black Salve & Tablets, or any other covered product or service, is effective in the prevention, treatment or cure of cancer, cancer, hepatitis, HIV, SARS, West Nile Virus, or Avian Bird Flu. A “covered product or service” is defined as any food, dietary supplement, or drug, including, but not limited to, Cleansing Time Pro Black Salve & Tablets, or any other health-related product, service, or program. Part II requires that any future claim about the absolute or comparative benefits, performance, efficacy, safety or side effects of any covered product or service be truthful and supported by competent and reliable scientific evidence.

Part III of the proposed order addresses the deceptive endorsement claim by requiring that respondent disclose any material connection between an endorser and respondent, if such a connection exists. “Material connection” is defined as any relationship that materially affects the weight or credibility of the user testimonial or endorsement and that would not reasonably be expected by consumers.

Part IV of the proposed order provides that the order does not prohibit respondent from making representations for any drug that are permitted in labeling for the drug under any tentative or final Food and Drug Administration (“FDA”) standard or under any new drug application approved by the FDA; and representations for any product that are specifically permitted in labeling for that

Analysis to Aid Public Comment

product by regulations issued by the FDA under the Nutrition Labeling and Education Act of 1990.

Part V of the proposed order requires respondent to compile a list of all consumers who purchased Cleansing Time Pro Black Salve & Tablets from respondent since July 1, 2005, and to mail a letter (Attached to the proposed order as Attachment A) to each purchaser describing the scientific evidence related to these products. Part VI prohibits respondent from providing any identifying information about her purchasers to anyone other than the Commission, another law enforcement agency, or as required by law.

Parts VII through X of the proposed order require respondent to keep copies of relevant advertisements and materials that substantiate claims made in the advertisements; to provide copies of the order to certain of her employees; to notify the Commission of her affiliation with any new health-related business or employment; and to file compliance reports with the Commission. Part XI 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

**DARYL C. JENKS,
D/B/A PREMIUM ESSIAC TEA 4LESS**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-4239; File No. 082 3116
Complaint, October 23, 2008 – Decision, October 23, 2008*

This consent order concerns the advertising and promotion of Premium Essiac Tea. The respondent claimed that Premium Essiac Tea was effective in treating, preventing, or curing cancer and other serious diseases, without a reasonable basis for this claim. The order requires the respondent to have competent and reliable scientific evidence substantiating any claim that any covered product or service is effective in the treatment, cure, or prevention of any disease or condition, or is superior to other similar products or services. The order requires that any future claim about the absolute or comparative benefits, performance, efficacy, safety, or side effects of any covered product or service be truthful and supported by competent and reliable scientific evidence. The order prohibits the misrepresentation of the results of any test, study, or research in connection with the advertising, promotion, or sale of any covered product or service. The order does not prohibit the respondent from making representations for any drug that are permitted by the Food and Drug Administration. The order requires the respondent to provide a list of all purchasers of Premium Essiac Tea to the Commission and to mail each purchaser a letter describing the scientific evidence related to essiac tea. The order prohibits the respondent from providing any identifying information about his purchasers to anyone other than a law enforcement agency or as required by law. Other provisions require the respondent to keep copies of relevant advertisements and materials that substantiate claims made in the advertisements; to provide copies of the order to certain of his employees; to notify the Commission of any changes in employment that might affect compliance obligations under the order; and to file compliance reports with the Commission.

Participants

For the *Commission*: *Loretta Kraus and Michael Milgrom*

Complaint

For the *Respondent*: *Josh Ard, Law Offices of Josh Ard.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Daryl C. Jenks, individually and d/b/a Premium Essiac Tea 4less (“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 Daryl C. Jenks is a resident of Michigan. His principal office or place of business is 4245 Sundance Meadows, Howell, Michigan 48843. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the business operating under the trade name “Premium Essiac Tea 4less.”

2. Respondent has labeled, advertised, offered for sale, sold, and distributed products to the public, including Premium Essiac Tea. Premium Essiac Tea is a “food” or “drug,” within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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.

4. Respondent has disseminated or has caused to be disseminated, via the Internet among other means, advertisements for Premium Essiac Tea, including but not necessarily limited to the attached Exhibits A through G. These advertisements contain the following statements and depictions:

Complaint

a. **The Powerful Benefits of this Gentle Organic Essiac Formula Can be Yours, RISK FREE!**

Your number one concern when shopping for essiac is to trust you are receiving your product from a source which is credible. The second most important aspect is the effectiveness of each individual formula sold by each individual company. We are a credible source and clinical trials have proven that the essiac sold at this website is the most effective formula available.

Brief History

Rene Caisse was introduced to doctors at the Brusck Medical Center in Cambridge, Massachusetts in 1958. Rene Caisse, under the supervision of 18 doctors, performed a series of treatments on terminally ill cancer patients. Dr Charles Brusck, John F Kennedy's personal physician, was Rene Caisse's mentor during this time. Dr Brusck took a great interest in Rene Caisse's ancient tonic as a traditional form of healing.

The eight herb formula had results consistently better than all others during these eight years of trials. The positive results from the trials included cessation of pain, an overall feeling of wellbeing, improved sleep, increased appetite and energy, a decrease of nodular masses and a prolongation of life.

Disclaimer: The statements regarding essiac tea have not been evaluated by the Food and Drug Administration. We cannot claim that this product is a cure, prevents disease or has beneficial medicinal properties. The information on this website or in emails is designed for educational purposes only. It is not intended to be a substitute for informed medical

Complaint

advice or care. You should not use this information to diagnose or treat any health problems or illnesses. Consult your physician before starting any medical treatment.

Benefits of Essiac Tea Include a Boosted Immune System and Detoxification.

People from all over the world have realized the benefits of essiac tea.

Relapse prevention for cancer patients never ends.

Possibly the relapse prevention necessary for cancer survivors.

An alternative cancer treatment used by many is essiac.

An alternative cancer treatment many patients seek. Conventional and alternative treatment together make potent partners. . . .

Excerpts from Exhibit A, advertisement on home page of *premium-essiac-tea-4less.com* [*www.premium-essiac-tea-4less.com/index.html*].

b. **Essiac Order Guide**

The first step in choosing how much essiac you need is to answer the following question:

1. Do you have, or do you suspect you have, cancer or another major health problem?

If your answer is yes, we recommend that you take the **aggressive dose** (9 oz. of tea per day). If your answer is no, we recommend that you take the **maintenance dose** (3 oz. of tea per day). Click on the appropriate

Complaint

link (aggressive or maintenance dose) above to learn more about Essiac Tea Dosage Recommendations.

Excerpt from Exhibit B, advertisement on linked web page of *premium-essiac-tea-4less.com* [*www.premium-essiac-tea-4less.com/ordering-essiac.html*].

c. Essiac Tea FAQ and Premium Essiac Tea 4less Information.

What are the benefits of using essiac?

Essiac tea's primary actions are to cleanse the body of impurities, restore energy levels, remove heavy metals and rebuild the immune system. These actions help restore the body to a level where it is able to use its own resources to defeat an illness. In other words, essiac rebuilds the immune system and improves the illness-defeating ability of the body so that the body can rid itself of the illness. For a list of possible benefits from essiac tea, please visit: **Essiac Tea Benefits**.

Is essiac able to cure cancer or other serious illnesses?

We cannot legally claim essiac is a cancer cure or a cure for any other disease. However, due to the beneficial properties of essiac tea listed above, many people who take essiac report a stronger immune system and increased health and well-being. With all of these positive improvements essiac tea causes in the body, the body becomes much better equipped to rid itself of disease. **(Essiac is not a drug and is therefore not able to be FDA approved as a proven treatment).**

Complaint

Am I able to take essiac while receiving chemotherapy and/or radiation therapy?

Yes. Essiac has a tendency to improve a person's quality of life while receiving chemotherapy and/or radiation. However, chemotherapy and radiation therapy can destroy the chemicals and compounds of essiac tea diminishing the effects of essiac tea. To accommodate for this decrease in effective of the essiac, we recommend consuming the aggressive PLUS dose of 6 oz. of tea three times per day, rather than the regular aggressive dose of 3 oz. of tea three times per day. From our experience and experimentation, we've found that people on chemotherapy and radiation therapy tend to have best results taking 6 oz. three times per day. However, some have remained on 3 oz. three times per day and also had good results. Personally, if we had a loved one taking chemotherapy and/or radiation therapy, we would recommend 6 oz. three times per day to be on the safe side.

Am I able to take essiac with other types of treatments?

Yes, essiac is able to be taken with all types of treatments, alternative and traditional. Essiac will work in a complementary fashion with other types of treatments compounding the positive health effects. You are advised to consult with your practitioner. If you are concerned, ease into your essiac tea usage gradually, taking 2 or 1/3 of the full dose at first.

When will I notice the benefits of taking essiac?

This varies from individual to individual. Some people notice an increased sense of health, well-being and energy just days after starting essiac tea. It takes others weeks or even months to notice a tangible benefit. But,

Complaint

for most people, an improvement in general health and well-being is experienced after one to two weeks if taking essiac tea regularly. Follow our **essiac dosage recommendations** for at least 5 months if you have cancerous tumors.

What diseases/medical conditions are treated with essiac?

Cancerous tumors, diabetes, leukemia, liver problems, high blood pressure, kidney ailments, high cholesterol, chronic pain, chronic fatigue, and hepatitis C are some of the more common diseases/medical conditions treated with essiac.

Why should I choose the eight herb essiac formula over the four herb formula?

There are several reasons for choosing the eight herb formula instead of the four herb formula. One reason is watercress. An important property of watercress is its cleansing ability. Watercress removes a residual component of sheep sorrel break down called oxalic acid. Oxalic acid will form stones (Kidney stones, etc) within the body. Without watercress, stone formation can happen in individuals who are susceptible. The four herb formula doesn't have watercress but does have sheep sorrel. Secondly, red clover and blessed thistle both have proven anti-cancer properties. These herbs give the eight herb formula a cancer fighting advantage over the four herb formula. Thirdly, kelp is full of vitamins, minerals and other nutrients. Kelp is a strong immune system booster. Kelp is found only in the eight herb formula. Fourthly, four herb essiac was designed to have one of the herbs injected. If you are taking essiac as a tea and not injecting one of the herbs, it won't be as effective. Finally, while four herb

Complaint

essiac is targeted for liver detoxification, eight herb essiac results in liver and colon detoxification for a more complete detoxification. To read more about the merits of eight herb essiac and the history behind it, please visit:

Excerpts from Exhibit C, advertisement on linked web page of *premium-essiac-tea-4less.com* [www.premium-essiac-tea-4less.com/essiac-tea-faq.html].

d. Essiac Testimonials from People with Truly Amazing Testimony.

A handful of our many essiac testimonials from people using our eight herb essiac can be found here:

April 9, 2005

“Essiac tea is amazing. Let me tell you about my mother who has (or had) colon cancer. She is elderly and the doctors warned that she might not survive an operation to try and remove the tumors. We agreed that we would rather have her enjoy her last years as much as possible, living with us etc. rather than be in a hospital trying to recover from invasive surgery. We were on the fence about chemo but decided against it for the time being.

We began giving her essiac tea last November, and we noticed that she seemed happier and more energetic almost right away. However, it wasn't until February that we noticed some dark substance coming from her colon. At first it seemed to be stuck to her skin but after a few days it began falling off on its own while she was bathing. When we went back for testing the

Complaint

doctors said the tumors seemed to be gone. Amazing. My mother continues to take essiac at maintenance dose, and actually the whole family is on it now because cancer runs in our family. Essiac is truly heaven-sent. Please add my account to your cancer testimonials page so that others will know how well it has worked for us.”

March 31, 2005

“I have cancer and I need to order some more essiac tea. I need essiac sent to me as soon as possible. Let me tell you what happened to me

I had become very sick with cancer last year. It got to the point that I was told I would be dead by December. I couldn't stay awake for more than a few hours at a time, and I couldn't speak clearly anymore. My tongue had swollen from the chemo.

I heard about essiac tea and tried it as a last ditch effort to save my life. I continued the chemo but added essiac tea to my regimen. I couldn't believe how quickly I noticed an increase in energy. Then my hair started growing back, both on my head and my eyelashes and such. A few months later, all my tumors were gone. My doctor said, “Whatever you're doing, keep it up, this is a miracle!”

I am religious and I believe that faith can heal. In addition, I believe the chemo and radiation helped me. However, I do not think I would be alive today if not for the essiac tea. The reason I say this is because, once my tumors were gone and I felt better, I ran out of essiac and didn't buy more. I didn't think I needed it

Complaint

anymore. Well, I was wrong. My hair started falling out and I had no energy. My platelet count is up again. This started happening a little over a month ago, a few weeks after I stopped the essiac tea. I had been meaning to get more but I kept putting it off. My friend gave me some other tea to try, he called it "miracle tea." I don't know what was in it, but it did nothing for me. It's not like essiac. Now I feel desperate: I need to get more essiac in me. I feel like crap without it and I'm worried that my tumors will come back, if they haven't already.

My doctor is worried also because I am obviously slipping. He says he can't recommend essiac (which makes me so angry!) but we both know that it's the only thing that has changed in my regimen. I recommend that everyone with cancer take essiac. I believe you should take traditional treatments like chemo in addition to essiac for best results. All I can go by is how I reacted, but it truly has been a miracle for me. Essiac tea is absolutely amazing and I feel it saved my life."

Heather

January 2005

"I'm writing because my attorney (a good friend of mine) suggested that I take essiac tea. The doctors found a growth on my skin that appears not to be cancerous, but I'm not taking any chances. He affirmed that I should use essiac containing eight herbs, not the four-herb tea that is more commonly found. He recommended that I come to this site, as you people have been very helpful and the price is right. I guess he's been pointing a lot of people your way.

Complaint

I am optimistic because my friend's wife was at one point diagnosed with stage IV pancreatic cancer that had metastasized to the liver, and now it's been five years and she is alive and well. Granted, she was on chemotherapy at the same time she took the essiac. She began the chemo December 1999 and the essiac in February 2000. By April 2000 her condition had become stable, which was realistically the best they could hope for at the time.

She continues to maintain relatively good health and although the tumors are still present, her condition is definitely stable and she generally feels well. Her husband switched to your eight-herb essiac when he found your website last month. He says that your herbs seem to be fresher than any he's received before and his wife feels better than ever. I'm looking forward to trying the tea and hope it can do for me what it appears to be doing for so many others. At this point in my life (45) I am well aware of the need for preventive treatment, even if I am "healthy" for the time being."

**Christine L.,
Nevada**

Excerpts from Exhibit D, advertisement on linked web page of *premium-essiac-tea-4less.com* [www.premium-essiac-tea-4less.com/essiac-testimonials.html].

e. This Essiac Tea Formula is Comprised of the Perfect Balance of the Following Eight Herbs.

The essiac tea formula from which we process our eight herb essiac is the last essiac tea formula Dr. Charles Brusch and Rene Caisse, R.N., researched and tested before the time of Rene Caisse's death. They

Complaint

worked together for many years attempting to incorporate additional herbs in with the original four essiac herbs in a ratio that would achieve optimal effectiveness. This research and patient testing was done at the Brusck Medical Center in Cambridge, Massachusetts on terminal cancer patients.

Rene Caisse's original four herb essiac was used by ill patients, often times terminal cancer patients, with positive results. This original formula consisted of burdock root, sheep sorrel, slippery elm bark and Turkey rhubarb root. Rene Caisse added four herbs, which she knew possessed amazing medicinal properties, to her original formula. These herbs had been used for years, and in some cases centuries, to heal the sick. These four herbs were blessed thistle, kelp, red clover and watercress. The medicinal properties of these herbs accomplished what Rene had set out to do. They enhanced the overall effectiveness of the original essiac tea formula making the original formula somewhat obsolete. Why use something that's good when you can use something that's great?

For an extensive overview on who Rene Caisse was and the history of essiac, click here: **[Rene Caisse and her essiac tea formula](#)**.

The exact composition of the eight herb essiac tea formula is not known to the public at large. The eight different herbs are known, but the exact ratio of each herb in the essiac tea formula is not known. This formula is kept locked away. The only people having knowledge of the formula are the people who process the essiac tea herbs. And, they have been sworn to an oath to never divulge this formula. When these eight essiac tea herbs are measured, mixed and freshly

Complaint

packaged, the way that only our company knows how, they make a superior essiac tea.

Excerpt from Exhibit E, advertisement on linked web page of *premium-essiac-tea-4less.com* [www.premium-essiac-tea-4less.com/essiac-tea-formula.html].

f. Essiac Dosage Recommendations**Seven Main Categories of Essiac Dosage Recommendations**

Child Dosage is dependant on the weight of the child and the health conditions for which essiac will be used. Check out our simplified breakdown of essiac dosage for children.

Dosage for Children

Pet Dosage is determined by the health and weight of your animal. Check out a thorough breakdown of the aggressive and maintenance dosage regimens for your cat or dog.

Pet Dosage Instructions

Aggressive Dose is recommended if you have a serious illness. This is the standard essiac dosage recommended if you have cancer, diabetes or another serious medical condition.

Aggressive Dosage Instructions

Aggressive Dose PLUS is recommended for those who are receiving chemotherapy and/or radiation therapy. This dose is also recommended for those who have been given a terminal diagnosis.

Aggressive PLUS Dosage Instructions

Complaint

Maintenance Dose is recommended for those who have overcome an illness. This dose is recommended for at least six months **AFTER** your test results have returned to normal.

Maintenance Dosage Instructions

Preventive Dose is recommended for healthy individuals. This dose is to prevent health problems, disease and illness. This dosage is especially important for those who have a family history of cancer.

Essiac Preventive Dosage

Detoxification Dose is recommended if you wish to detoxify your body. The detoxification dose is for improved health, to prevent disease and illness, or to recover from disease or illness. Detoxification regimens are typically done for a fixed period of time. But, this dose can be continued indefinitely to maintain optimal health.

Detoxification Dosage Instructions.

Excerpt from Exhibit F, advertisement on linked web page of *premium-essiac-tea-4less.com* [www.premium-essiac-tea-4less.com/essiac-dosage-recommendations.html].

g. **Is Essiac a Cure All?**

Essiac tea has been used for many decades as a cure for a wide range of illnesses and diseases. The FDA hasn't proven Essiac to have a beneficial effect as an herbal blend. However, the FDA has confirmed the eight individual essiac herbs do indeed have beneficial properties. Whether essiac tea is a cure or not according to the FDA isn't the important point. The important consideration is whether essiac tea helps a person fight an illness on a case by case basis. It may

Complaint

not help everybody, but it might help you or me on an individual basis.

The Healthy Sense Directory - An excellent source of organized health information . . . The illnesses, diseases and conditions for which essiac tea has been used by people throughout the world are more than I can list. Some of the more common ailments are AIDS and HIV, diarrhea, constipation, high blood pressure, high cholesterol, internal and external cancers, benign and malignant tumor growth, chronic pain, diabetes, arthritis, kidney and bladder problems, ulcers, liver conditions, colon complications, sinus issues, gout, pneumonia and common chest colds. People use essiac for different reasons. Some are looking for a cure for conditions such as cancer. Others are looking to strengthen their immune system as a preventative measure. Essiac can be used in a variety of ways.

Excerpt from Exhibit G, advertisement on linked web page of *premium-essiac-tea4less.com* [www.premium-essiac-tea-4less.com/Cure.html].

5. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that essiac tea is effective in the treatment or cure of cancer, HIV and AIDS, diarrhea, constipation, high blood pressure, high cholesterol, chronic pain, diabetes, arthritis, kidney and bladder problems, ulcers, liver conditions, colon complications, sinus issues, gout, hepatitis C, pneumonia and common chest colds.

6. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that he possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 5, at the time the representations were made.

Complaint

7. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 5, at the time the representations were made. There is no reliable evidence that essiac tea is effective against any of the listed conditions. Therefore, the representation set forth in Paragraph 6 was, and is, false or misleading.

8. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that the essiac tea sold by respondent has been clinically proven to be more effective than other forms or brands of essiac tea.

9. In truth and in fact, essiac tea sold by respondent has not been clinically proven to be more effective than other forms or brands of essiac tea. Therefore, the representation set forth in Paragraph 8 was, and is, false or misleading.

10. The acts and practices of respondent 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.

THEREFORE, the Federal Trade Commission, this twenty-third day of October, 2008, has issued this Complaint against respondent.

By the Commission.

Complaint

EXHIBIT A

premium essiac at an exceptional price from a website you can trust.

page 1 of 9

Exhibit A



The Powerful Benefits of This Gentle Organic Essiac Formula Can be Yours, RISK FREE!

Your number one concern when shopping for essiac is to trust you are receiving your product from a source which is credible. The second most important aspect is the effectiveness of each individual formula sold by each individual company. We are a credible source and clinical trials have proven that the essiac sold at this website is the most effective formula available.

Trust, Exceptional Prices and Relevant Information

Welcome to premium-essiac-tea-4less.com. Our mission is to earn your trust and supply you with the highest quality essiac tea available. We will provide you with a premium product at exceptional prices. We will answer all your questions and discuss any concerns which may arise. We will work hard to ensure your experience is the best possible. We will make you happy you trusted us.



Essiac in Bulk ***Bottled essiac*** ***Essiac packets***

-----Great Deals!!!!-----

FREE Shipping on all orders over \$20.00. (USA orders only). The shipping charge for International purchases has been adjusted to reflect similar savings.

Eight ounce (8 oz) bottle of powdered herbs. \$13.99 each. Four week aggressive dosage; 12 week maintenance dosage. Bottles are unlabeled with safety closures and individually shrink wrapped for security measures. Complete directions accompany all orders.

Unlabeled 8 ounce bottles.

You will receive FREE essiac when a person you refer makes a

Home
Essiac
Refer, Order Guide
Place an Order
Essiac Tea FAQ
Essiac \$2.99 Packet
Testimonials
Essiac tea formula
Essiac Dosages
Cure
Benefits of essiac
Prevention
Cancer Alternative
Breeding Essiac
International Order
Australian Essiac
Free essiac referral
Home page
Pet illness
Handling & Storage
Stevia Sweetener
Ordene essiac
Package \$2.99
Testimonials
Essiac authentic
formula del te
Cure?
Prevention
Cancer Alternativa
Dosis intensiva
recetamento
Preparacion
Essiac gratis
referenciamiento

<http://www.premium-essiac-tea-4less.com/>

2/14/2008

Complaint

Premium Essiac at an Exceptional Price from a Website You Can Trust.

Page 2 of 6

Exhibit A



purchase. We make it easy and inexpensive for you to share with others.

Free essiac for referrals.

Take all the one ounce packets you desire. \$2.99 each. Free shipping on the first packet. Small shipping charge on two or more packets.

Unlimited 1 oz packets (11 day supply).

Six month supply for \$69.99. Similar deals for individual packets and bottles.

Six months for \$69.99.

If you would like to view our prices and packaging options, including the five deals listed above, visit our ShopSite Store. ShopSite for Prices, Packaging Options and to Make a Purchase.

Brief History

Rene Caisse was introduced to doctors at the Brush Medical Center in Cambridge, Massachusetts in 1958. Rene Caisse, under the supervision of 18 doctors, performed a series of treatments on terminally ill cancer patients. Dr Charles Brush, John F Kennedy's personal physician, was Rene Caisse's mentor during this time. Dr Brush took a great interest in Rene Caisse's ancient tonic as a traditional form of healing.

The eight herb formula had results consistently better than all others during these eight years of trials. The positive results from the trials included cessation of pain, an overall feeling of wellbeing, improved sleep, increased appetite and energy, a decrease of nodular masses and a prolongation of life.

Premium-Essiac-Tea-4less.com

We are going to continue providing the most effective essiac tea at prices that allow all people to realize the benefits. Not only do we have the lowest prices you'll find anywhere, we have a six month, 100% money back guarantee. No questions asked. It's RISK FREE!

We take pride in our ability to deliver the most recent and relevant information to you at this website. You will find information on most every topic. If you can't find it here, you can always go straight to the source by calling or emailing us. We would love to talk with you.

Contact Daryl Toll Free @ 866-840-3389 with any questions. You can also send an email to daryl@premium-essiac-tea-4less.com.

The benefits of this herbal remedy are plentiful and indisputable. If you would like to read testimony from some of our network customers, click here: [Testimonials](#).

The Truth About Essiac

Authentic, Organic, Affordable. Essiac Myths Exposed

Essiac Tea & Capsules

Essiac Herbal Health Formula Quality Health Products, Low Prices

Ads by Google

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Premium Essiac at an Exceptional Price from a Website You Can Trust.

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For an unlimited amount of websites offering information on medical conditions and treatment modalities besides those discussed in this website, click here.

[The Healthy Sense Directory](#) - An excellent source of organized health information...

[Shopping-Guide](#)

[Home Saunas and Accessories by Saunafin](#)

Home saunas are believed to produce numerous health benefits and provide a relaxing spa experience. Get one for yourself today at Saunafin.

[The Internet Web Directory](#) - The fastest growing resource for information found on the internet.

[Rikz Vitamins](#) - All you ever wanted to know about Vitamins!

[411.info: Let Us Put You In Touch](#)

[L4 Cancer](#) - All about cancer!

Disclaimer: The statements regarding essiac tea have not been evaluated by the Food and Drug Administration. We cannot claim that this product is a cure, prevents disease or has beneficial medicinal properties. The information on this website or in emails is designed for educational purposes only. It is not intended to be a substitute for informed medical advice or care. You should not use this information to diagnose or treat any health problems or illnesses. Consult your physician before starting any medical treatment.

Essiac gratis, Te medicinal de hierbas de alta calidad, Distribuidor principal.

Puede verdaderamente permitirse el lujo de pasar por alto este Te Medicinal de Hierbas Essiac? Incluso puede ser GRATIS. Ademas, los beneficios del Essiac son numerosos e indiscutibles. Precios excep

Your guide to ordering essiac. What and when to order.

Ordering essiac is easy, but if you've never ordered essiac before and need assistance, you've come to the right place.

Place an Order

Premium Essiac Tea 4less. Three types of packaging options. Fresh, high quality essiac. Excellent prices.

Essiac Tea FAQ (frequently asked questions).

Essiac Tea FAQ

Try an "Essiac herbal remedies" packet for \$2.99. Eleven day supply.

We have such extreme confidence in our "Essiac herbal remedies" we give you a packet for next to nothing.

Essiac Testimonials From People Experiencing Cancer and other Medical Conditions

You have to read these essiac testimonials to see what possibilities exist.

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Premium Essiac at an exceptional price from a website you can trust.

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Exhibit A

This essiac tea formula is comprised of Eight Therapeutic herbs.
Learn about the eight different herbs comprised in this authentic essiac tea formula.

Essiac dosage recommendations are based on multiple circumstances.
Find out what essiac dosage recommendations are based.

Natural Cure, Natural Remedy, Preventative Treatment: Is Essiac the Best Choice?
Essiac has been used by many as a Natural Cure for illnesses ranging from gout to cancer.

Benefits of Essiac Tea Include a Boosted Immune System and Detoxification.
People from all over the world have realized the benefits of essiac tea.

Relapse prevention for cancer patients never ends.
Possibly the relapse prevention necessary for cancer survivors.

An alternative cancer treatment used by many is essiac.
An alternative cancer treatment many patients seek. Conventional and alternative treatment together make potent partners.

Brewing Essiac is Safe and Inexpensive. We Make Brewing Essiac Easy.
When you brew your own essiac you know the essiac is natural, pure and fresh. Plus, brewing essiac is easy.

International essiac orders are shipped throughout the world.
You'll receive your international essiac orders. We guarantee it.

An Australian essiac distributor we recommend for essiac within Australia.
If you want to order essiac and feel secure knowing you'll receive your shipment, order from an Australian Essiac Distributor at Zeolite Worldwide.

Free essiac for any person who refers a new customer.
You refer us a new customer, we give you free essiac.

Taking Essiac: A list of the TOP 10 methods.
Taking essiac on an empty stomach is best. BUT...

Feline and Canine Illness can benefit from Essiac.
Older Canine Illness Presents a Perfect Situation for Using Essiac Tea.

Essiac tea herbs need to be stored and handled properly.
The effectiveness of essiac tea herbs is directly proportional to handling and storage.

Stevia Sweetener is a Natural Sweetener; It's a Food Supplement in USA.
Stevia Sweetener has been Used by the Japanese Since 1977 as a Sugar Substitute.

Ordene essiac: la orden rápida.
Ordene essiac rapidamente via nuestro sitio web o llame nosotros tocamos

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Premium Essiac at an Exceptional Price from a Website You Can Trust.

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libertamos.

**Pruebe un paquete de Remedios de hierbas essiac a \$2,99.
Suministro para once**

Tenemos una confianza tan grande en nuestros Remedios de hierbas essiac que le damos un paquete casi gratis.

Testimonios sobre el essiac brindados por personas que padecen cancer y otras en

Tiene que leer estos testimonios sobre el essiac para ver que posibilidades existen.

Tenemos la receta de te essiac autentico mas nueva y eficaz
Receta del autentico te essiac del Dr. Charles Brusch.

Ocho hierbas terapeuticas en esta formula de te essiac.
Aprenda mas sobre las ocho hierbas diferentes de nuestra formula autentica del te essiac.

Cura natural, remedio natural, tratamiento preventivo: Es Essiac la mejor elecc
Essiac ha sido utilizado por muchas personas como un remedio natural para enfermedades que van desde la gota hasta el cancer.

La prevencion de recidivas para los pacientes con cancer nunca se acaba.
El te essiac puede constituir la prevencion contra recidivas necesaria para quienes sobreviven a un cancer.

Algunas personas utilizan el essiac como tratamiento alternativo para el cancer.
El te de Essiac es un tratamiento alternativo para el cancer busqueda de muchos pacientes. El tratamiento convencional y alternativo juntos hace a socios potentes.

Dosis intensiva de essiac para enfermedades graves.
Dosis de essiac y embalaje para tratamiento intensivo de afecciones medicas serias.

Regimen de dosis de mantenimiento del te essiac; Embalaje para mantenimiento del
La dosis de te essiac y el embalaje ideales para el regimen de mantenimiento.

Preparar essiac es seguro y economico. Hacemos que preparar essiac sea sencillo.
Cuando usted prepara su propio essiac sabe que el essiac es natural, puro y fresco. Ademas, preparar essiac es facil.

Essiac gratis para cualquier persona que envíe un nuevo cliente.
Usted nos manda un cliente nuevo y nosotros le damos essiac gratis.

La manipulacion y el almacenamiento de las hierbas del te essiac son fundamental
La eficacia de las hierbas del te essiac es directamente proporcional a la manipulacion y el almacenamiento.

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Premium Essiac at an Exceptional Price from a Website You can Trust.

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Exhibit A

Una lista de las 10 MEJORES maneras para tomar essiac.
Lo mejor es tomar essiac con el estomago vacio. PER,

Privacy policy
Our privacy policy is for your security.

política de privacidad
Nuestra política de privacidad es para su seguridad.

Our guarantees
100% Money Back Guarantees on All Herbal Products.

Nuestras garantias.
Le garantizamos la devolucion del 100% de su dinero en todos los productos de hierbas.

Contact us
Please contact us with any questions or concerns you may have.

Comuniquese con nosotros.
Comuniquese con nosotros si tiene alguna duda o inquietud.

test

Contact Us

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our guide to ordering essiac, what and when to order.

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fórmula del té
Cura?
Prevenção
Cancer Alternativa
Preparo Essiac
manterimento
Preparación
Essiac gratis

If You've Never Used Essiac Before, Ordering Essiac can be Confusing.

We're Here to Help!

**It is suggested that you take essiac faithfully for
six months to experience the full benefits.**

Ordering essiac. If you've never ordered from premium-essiac-tea-4less.com, or you're not sure how much essiac you need, keep reading--you've found the right place for help! If you have experience purchasing essiac and you know what you want, click here: [Ordering essiac at ShopSite Essiac.](#)

Be sure to check out our Guarantee and Refund Policy:

6-Month 100% Money-Back Guarantee and Refund Policy.

All essiac tea orders from premium-essiac-tea-4less.com include dosage and brewing instructions in **ounces** and **grams**.

When purchasing essiac through this order guide, you will be brought to our 100% secure online shopping cart to complete your purchase. If you would like to place an order over the telephone, you may call us toll-free at 1-866-840-3389. If we are unable to answer at the time you call, please leave a message and we will return your call promptly--usually within the hour. For mail orders, please print and send in our order form: [Download Mail Order Form](#)

You will need Adobe Reader (the latest version is recommended) installed on your computer in order to open and download the Mail Order form above and the tea brochure toward the bottom of this page. You can get Adobe Reader by [clicking here](#).

Essiac Order Guide

The first step in choosing how much essiac you need is to answer the following question:

1. Do you have, or do you suspect you have, cancer or another major health problem?

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OUR GUIDE TO ORDERING ESSIAC. WHAT AND WHEN TO ORDER.

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If your answer is yes, we recommend that you take the aggressive dose (9 oz. of tea per day). If your answer is no, we recommend that you take the maintenance dose (3 oz. of tea per day). Click on the appropriate link (aggressive or maintenance dose) above to learn more about Essiac Tea Dosage Recommendations.

OK, now that you know the difference between the aggressive dose and the maintenance dose, you can decide which you will plan to take. Remember this, because you will need to know which dose you plan to take when choosing your order size.

Next, you need to decide whether you'd like the most economical option, or the most convenient one:

2. If you'd like the most economical choice, order essiac in bulk packages.



Essiac in bulk bags is the least expensive per pound. You will need to weigh out the correct amount of the herb mixture on a kitchen scale when you go to brew your tea, which usually occurs every two weeks. For those on aggressive dose, you'll need to weigh out 4 oz. of the mixture of herbs (equivalent to 113 grams), which will prepare one gallon of tea and last two weeks. For those on the maintenance dose, you'll need to weigh out 1 oz. of the mixture of herbs (28 grams), which will prepare 1 quart of tea and last 10-11 days.

Essiac in a 1-lb. bulk bag costs \$21.90. If you buy the 3 lb 4 oz bulk bag, the cost is \$69.99. If you buy the 6 lb 8 oz bulk bag, the cost is \$136.45.

3. If you'd like the most convenient and easy option, or you are new to essiac, we suggest ordering the smaller 4 oz. or 1 oz. essiac packets.



Each 4 oz. packet prepares exactly 1 gallon of tea (no weighing or measuring!) and each 1 oz. packet prepares exactly 1 quart of tea. All you have to do is boil the water and pour the contents of the package in! Those on aggressive dose should consider ordering essiac in the 4 oz. packets, and those on maintenance dose, or those preparing essiac tea for pets should consider ordering essiac in the 1 oz. packets.

A single 4-oz. packet costs \$9.99, and a single 1-oz. packet costs \$2.99. When you order a 3-month, 6-month, or 1-year supply, you will receive volume discounts.

Use the decisions you've just made to choose the best order size for you below.

By far, our most popular order size is the 3 lb. 4 oz. order, and we recommend that size if you've never tried essiac before. The 3 lb. 4 oz. order is good for one person for 6 months taking the aggressive dose.

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your guide to ordering essiac. What and when to order.

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Most people who are new to essiac start out by ordering essiac in the 4 oz. or 1 oz. packets. People who love convenience also choose the packets when ordering essiac.

Click here to order 3 lb. 4 oz. of sealed and labeled essiac in thirteen (13) 4-oz. packets for \$106.96 (save \$22.91).

Once they become comfortable with the process many people switch to ordering essiac in bulk bags to save money. Click here to order essiac for less (it will come in bulk kitchen bags). 1 lb bulk bag for \$21.90, 3 lb. 4 oz. bulk bag for \$69.99 6 lb. 8 oz. bulk bag for \$136.45

While the 3 lb. 4 oz. order is our most popular size, we also offer essiac in other sizes, designed to suit specific needs.

Our 6 lb. 8 oz. order will last 12 months for one person taking the aggressive dose (or 6 months for a person taking the maximal dose recommended for those on chemotherapy and/or radiation). You will save when ordering essiac in the 6 lb. 8 oz. amount, and it is less expensive than the 3 lb. 4 oz. to ship pound-for-pound.

Your essiac will stay good for at least one year if you store it in a cool, dark place. A basement is a good place in most climates. In extremely warm climates, a refrigerator is acceptable if no cool, dark place is available. Click here to order 6 lb. 8 oz. of sealed and labeled essiac in twenty-six (26) 4-oz. packets for \$187.99 (save \$71.75).

Our 1 lb. 2 oz. order is good for one person for 6 months at maintenance dose. Click here to order 1 lb. 2 oz. sealed and labeled essiac in eighteen (18) 1-oz. packets for \$51.70. Click here to order a 1 lb 2 oz bulk bag of essiac for \$26.35.

Our 2 lb. 3 oz. order is good for one person for 12 months at maintenance dose. Click here to order 2 lb. 3 oz. sealed and labeled essiac in thirty-five (35) packets for \$89.25. Click here to order a 2 lb 3 oz bulk bag of essiac for \$48.05.

Consider ordering essiac in 10, 13.6 and 27.2 lb increments if you plan to resell the product or share with family and friends.

Click here to order 10 lbs. of sealed and labeled essiac in ten (10) 1-lb. packets for \$219.70 (save \$50.29).

Click here to order 10 lb. bulk essiac for \$199.70 (save \$30.00).

Click here to order a 13.6 lb bulk bag of essiac for \$267.99.

Our 1 lb. order is most popular with those treating children or small pets.

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Your guide to ordering essiac. What and when to order.

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However, the 1 lb. order is enough essiac for an adult taking the aggressive dose for eight weeks, or taking the maintenance dose for 24 weeks. We have a variety of sealed and labeled polybag sizes for 1 lb. order size.

Click here to order 1 lb. sealed and labeled essiac in sixteen (16) 1-oz. packets for \$45.40

Click here to order 1 lb. of sealed and labeled essiac in four (4) 4-oz. packets for \$36.85.

Click here to order 1 lb. of sealed and labeled essiac in one (1) 1-lb. bag for \$24.90.

We offer a discount on the sealed and labeled 1-lb. bags when ordering essiac in larger quantities: Click here to order 4 lbs. of sealed and labeled essiac in four (4) 1-lb. bags for \$89.60 (save \$10.00).

Click here to order 10 lbs. of sealed and labeled essiac in ten (10) 1-lb. packets for \$219.70 (save \$50.29).

If you would like a sampler size of essiac, the single 4 oz. packet might be just what you're looking for. Click here to order a 4 oz. packet of sealed and labeled essiac for \$9.99.

THANK YOU for looking over our essiac selection! We hope you can find something that suits you. If you DON'T see what you're looking for, please contact us with your special request. We will do our absolute best to help you in ordering essiac!

If you're not ready to commit to ordering essiac tea in a large amount, consider sampling our product: Click here for your 1 ounce packet for \$2.99. Free Shipping.

We also have a brochure available: Click here for instant access to your Essiac Tea Brochure. Download and print a brochure using Adobe Reader.

Disclaimer: *The statements regarding essiac tea have not been evaluated by the Food and Drug Administration. We cannot claim essiac is a cure, prevents disease or has beneficial medicinal properties. The information on this Web site or in emails is designed for educational purposes only. It is not intended to be a substitute for informed medical advice or care. You should not use this information to diagnose or treat any health problems or illnesses. Consult your physician before starting any medical treatment.*

Contact Us

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Essiac Tea FAQ (frequently asked questions).

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Essiac Tea FAQ and Premium Essiac Tea 4less Information.

[View Essiac Tea FAQ regarding essiac in general](#)
[View frequently asked questions regarding the herbs used in essiac.](#)
[View frequently asked questions regarding premium-essiac-tea-4less.com.](#)

General Information About Essiac Tea.

What are the benefits of using essiac?
 Is essiac able to cure cancer or other diseases?
 Am I able to take essiac while receiving chemotherapy and/or radiation therapy?
 Am I able to take essiac with other types of treatments?
 When will I notice the benefits of taking essiac?
 What diseases/medical conditions are treated with essiac?
 Are there any side effects from using essiac?

What are the benefits of using essiac?

Essiac tea's primary actions are to cleanse the body of impurities, restore energy levels, remove heavy metals and rebuild the immune system. These actions help restore the body to a level where it is able to use its own resources to defeat an illness. In other words, essiac rebuilds the immune system and improves the illness-defeating ability of the body so that the body can rid itself of the illness. For a list of possible benefits from essiac tea, please visit: [Essiac Tea Benefits](#).

Is essiac able to cure cancer or other serious illnesses?

We cannot legally claim essiac is a cancer cure or a cure for any other disease. However, due to the beneficial properties of essiac tea listed above, many people who take essiac report a stronger immune system and increased health and well-being. With all of these positive improvements essiac tea causes in the body, the body becomes much better equipped to rid itself of disease. **(Essiac is not a drug and is therefore not able to be FDA approved as a proven treatment).**

Am I able to take essiac while receiving chemotherapy and/or radiation therapy?

Yes. Essiac has a tendency to improve a person's quality of life while receiving chemotherapy and/or radiation. However, chemotherapy and radiation therapy can destroy the chemicals and compounds of essiac tea diminishing the effects of essiac tea. To accommodate for this decrease in effective of the essiac, we recommend consuming the aggressive PLUS dose of 6 oz. of tea three times per day, rather than the regular aggressive dose of 3 oz. of tea three times per day. From our experience and experimentation, we've found that people on chemotherapy and radiation therapy tend to have best results taking 6 oz. three times per day. However, some have remained on 3 oz. three times per day and also had

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Handling & Storage
Stevia Sweetener
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Cancer Alternativa
Dosis Intensiva
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Essiac gratis

<http://www.premium-essiac-tea-4less.com/essiac-tea-faq.html>

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good results. Personally, if we had a loved one taking chemotherapy and/or radiation therapy, we would recommend 6 oz. three times per day to be on the safe side.

Am I able to take essiac with other types of treatments?

Yes, essiac is able to be taken with all types of treatments, alternative and traditional. Essiac will work in a complementary fashion with other types of treatments compounding the positive health effects. You are advised to consult with your practitioner. If you are concerned, ease into your essiac tea usage gradually, taking 1/2 or 1/3 of the full dose at first.

When will I notice the benefits of taking essiac?

This varies from individual to individual. Some people notice an increased sense of health, well-being and energy just days after starting essiac tea. It takes others weeks or even months to notice a tangible benefit. But, for most people, an improvement in general health and well-being is experienced after one to two weeks if taking essiac tea regularly. Follow our [essiac dosage recommendations](#) for at least 5 months if you have cancerous tumors.

What diseases/medical conditions are treated with essiac?

Cancerous tumors, diabetes, leukemia, liver problems, high blood pressure, kidney ailments, high cholesterol, chronic pain, chronic fatigue, and hepatitis C are some of the more common diseases/medical conditions treated with essiac.

Are there any side effects from using essiac?

The only side effects we've experienced are nausea and diarrhea. These side effects occur during the first few days of taking the aggressive dose of essiac. The nausea and diarrhea are usually quite mild. These side effects are a result of the essiac detoxifying the body, which is a good thing. If you have trouble tolerating these side effects then ease into the aggressive dosage by taking 1/2 to 1/3 of the recommended dose. *Always consult with your medical practitioner if you have any health concerns.*

Essiac Herbs and Essiac Formula

Which herbs are found in the eight herb essiac?

Why should I choose the eight herb essiac formula over the four herb formula?

How is the taste of the eight herb essiac formula?

Should the essiac tea be taken hot, cold or room temperature?

Should essiac tea be taken with food or on an empty stomach?

Are the herbs organically grown?

Are the herbs fresh?

From what location do you receive these herbs?

Have these herbs been irradiated? Are there any pesticides or chemicals used on these herbs?

Which herbs are found in eight herb essiac?

The eight herb formula we distribute is comprised of blessed thistle, burdock root, kelp, red clover, sheep sorrel, slippery elm bark, Turkey rhubarb root, and watercress. These individual herbs each have beneficial properties for healing the human body. Once they are combined together in a specific ratio the individual properties of each herb are enhanced by the other herbs in a synergistic manner. To learn more about the properties of these herbs, please visit: [essiac tea herbs formula](#).

Why should I choose the eight herb essiac formula over the four

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herb formula?

There are several reasons for choosing the eight herb formula instead of the four herb formula. One reason is watercress. An important property of watercress is its cleansing ability. Watercress removes a residual component of sheep sorrel break down called oxalic acid. Oxalic acid will form stones (Kidney stones, etc) within the body. Without watercress, stone formation can happen in individuals who are susceptible. The four herb formula doesn't have watercress but does have sheep sorrel. Secondly, red clover and blessed thistle both have proven anti-cancer properties. These herbs give the eight herb formula a cancer fighting advantage over the four herb formula. Thirdly, kelp is full of vitamins, minerals and other nutrients. Kelp is a strong immune system booster. Kelp is found only in the eight herb formula. Fourthly, four herb essiac was designed to have one of the herbs injected. If you are taking essiac as a tea and not injecting one of the herbs, it won't be as effective. Finally, while four herb essiac is targeted for liver detoxification, eight herb essiac results in liver and colon detoxification for a more complete detoxification. To read more about the merits of eight herb essiac and the history behind it, please visit:

How is the taste of the eight herb essiac formula?

Eight herb essiac has a "earthy" and somewhat bitter taste. The bitterness is due to the watercress. Most people become accustomed to the taste after a two week period. For those who never get accustomed to the taste, we recommend an orange juice chaser. Drink a small portion of orange juice immediately after consuming the essiac tea. The orange juice will help to counteract the taste of the essiac tea. Essiac tea is not meant to be sipped or savored. It should be taken in the same manner as a cough syrup or other medicinal liquid.

Should essiac tea be taken cold, hot or at room temperature?

We recommend taking the essiac tea cold. Test results showed that tea taken cold was the most effective. The tea should be taken immediately after pouring your serving from the container in the refrigerator.

Should essiac tea be taken with food or on an empty stomach?

We recommend taking essiac tea on an empty stomach. Take essiac tea one hour before eating a meal or two hours after eating a meal. Liquids won't interfere with essiac being absorbed into the blood stream through the digestive system, so orange juice, water, etc may be consumed shortly after taking essiac, but please avoid solid foods.

Are the herbs organically grown?

Yes, all the herbs in the eight herb essiac formula are organically grown. They are certified organic.

Are the herbs fresh?

Yes! Our herbs are incredibly fresh because we sell thousands of pounds of essiac herbs a month. We turn over the majority of our herb inventory every 1-2 weeks. Many customers have commented on how fresh the herbs look and smell. If you purchase essiac from an outlet that sells more than one herbal formula, you're more likely to receive stale herbs. We deal with only essiac at Premium Essiac Tea 4less.

From what location do you receive these herbs?

All of our herbs are grown in the U.S.. Our two herb suppliers are StarWest Botanical and San Francisco Herb Company both located in the state of California.

Have these herbs been irradiated? Are there any pesticides or

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chemicals used on these herbs?

Our herb have not been irradiated. Also, our herbs are pesticide-free and chemical-free.

Information About premium-essiac-tea-4less.com

Am I able to purchase your eight herb essiac in a store or market?

How can I place an order?

What type of guarantee do I have if I make a purchase and I'm not satisfied?

What is the return policy?

Will I talk with a real person when I call for customer support?

Where is your business based?

How many years have you been in the essiac business?

How many customers have used your product?

Do you have other products besides essiac?

Does Premium Essiac Tea 4less have a catalog?

Why doesn't Premium Essiac Tea 4less have dozens of customer service representatives or large retail locations throughout the country?

Am I able to purchase your eight herb essiac in a store or market?

No. We deal in internet sales only. This is the reason we are able to sell our essiac at such a discounted price compared to the large corporations which stock every health food store.

How can I place an order?

We recommend that you place your order via our 100% safe and secure online shopping. Click here for the product list that leads you to the shopping cart: [Ordering Essiac](#)

If you prefer to place a telephone order using a credit card, you can call us Toll-Free anytime at 1-866-840-3389. If we are currently assisting another customer, please leave a message and we will return your call promptly.

If you prefer to send a mail order (which you can pay for via credit card, check or money order) click [Download Mail Order Form](#)

What type of guarantee do I have if I make a purchase and I'm not satisfied?

We give you a 6-Month 100% Money-Back Guarantee. We want you to be 100% satisfied with every aspect of your shopping experience. If you are not 100% satisfied we want to know so we can either make it right or compensate you in some way for your inconvenience.

What is your return policy?

Please visit: [Return/Refund Policy](#).

Will I be able to talk with a real person when I call customer support?

Yes. A real person will answer your phone call or will return your call shortly if unavailable. You may contact us using our contact form. You may also call us Toll-Free at 1-866-840-3389 or send an email to daryl@premium-essiac-tea-4less.com. All three methods will result in a real person communicating with you.

Where is your business based?

Premium Essiac Tea 4less is based out of Howell, Michigan, USA. Howell is

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approximately 25 minutes north of Ann Arbor and 30 minutes east of Lansing/East Lansing.

How many years have you been in the essiac business?

This company has been making and distributing essiac since 1986. This website was launched in January 2006 as another means to distribute our essiac.

How many customers have used your product?

The eight herb essiac tea formula we carry has been taken by hundreds of thousands of people all over the world.

Do you have other products besides essiac?

No. The only product we sell is the eight herb essiac.

Does Premium Essiac Tea 4less have a catalog?

Yes! Click here to claim your copy of our brochure: Get your digital essiac brochure instantly [Download and print a brochure using Adobe Reader.](#), or request a brochure that will come in the mail by contacting: daryl@premium-essiac-tea-4less.com

To exit 'Essiac Tea FAQ' page and return to 'Home' page, [click here](#).

Disclaimer: *The statements regarding essiac tea have not been evaluated by the Food and Drug Administration. We cannot claim essiac tea is a cure, prevents disease or has beneficial medicinal properties. The information on this Web site or in emails is designed for educational purposes only. It is not intended to be a substitute for informed medical advice or care. You should not use this information to diagnose or treat any health problems or illnesses. Consult your physician before starting any medical treatment.*

Contact Us

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Essiac Testimonials From People With Truly Amazing Testimony.

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A handful of our many essiac testimonials from people using our eight herb essiac can be found here:

September 14, 2006

I was diagnosed with colon cancer in March that had metastasized to my liver. I was put on strong chemo treatments (3 kinds at a time) every 10 days. The first treatment I was very ill and was in bed for 3 days. I then started taking Essiac twice a day. By the time I took my 2nd Chemo treatment I had more energy and my appetite was better. I just felt better all over. The Doctors were amazed at how well I was handling such strong chemo I took 8 treatments and then had surgery. They removed my gall bladder, 80 percent of my liver and a section of my colon. That was in June. I had some setbacks with infection. After surgery and the infection I was very breathless and weak. I started taking the Essiac again and my breathlessness got better immediately and I had more energy. My appetite has also improved. I had a scan 3 days ago and there is NO Cancer in sight. I do however have a pocket of fluid behind my liver that I am going to have to get checked out. My oncologist said it is not cancer, but is surgery related. I am very thankful I found out about Essiac. I truly believe it has helped me fight this battle. I would recommend it to anyone taking chemo or fighting Cancer.

Jim

February 15, 2005

"I began purchasing essiac tea at a local health food store after reading about it in some cancer testimonials from survivors. I since found your site online and have ordered and begun using your eight herb essiac tea. I was diagnosed with melanoma in 1999. I had surgery and was told that there was a 99% chance the cancer wouldn't spread. Well, less than a year later a lump in my breast was detected.

I had another surgery and started to look into options at the health food store. I didn't want to live my life going from surgery to surgery and never being sure if the cancer had spread. Well, I've been taking essiac tea since 2003 and your product since late 2004. Knock on wood, I am cancer free and have been since early 2004. I have never felt better in my life, and I sincerely believe it is due to the wonderful tea."

**Paul Grady,
New Hampshire**

"I started taking essiac tea because my friend (who had been taking essiac

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ESSIAC Testimonials from People Experiencing Cancer and other Medical Conditions

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for her breast cancer) told me that it could be used as a detox and a general health tea. I had been consuming products made with aspartame for awhile, and started feeling a lack of energy, an increase in pain, increase in weight, and depression. I hoped that taking essiac tea would help my "detox" from aspartame.

It's hard to say how far-reaching the effects of aspartame were, but I have never felt better. It's strange, because my energy levels used to drop in the mid-afternoon and in general I felt lethargic much of the time. After just a few weeks on essiac that has vanished, and I feel better than ever. I've also noticed my skin has cleared up and has a rosy glow to the cheeks that I never had before. I'm sleeping very well and waking up refreshed--and it seems I need less sleep now, but I feel much better all day. I plan on taking essiac for life, and the preventive effect against cancer is a definite plus, as cancer runs in my family. For what it's worth, I've been taking two 3-oz. doses per day, about an hour after breakfast and again right before bed.

I tell everyone I know about these essiac testimonials and this wonderful health tonic--I wish I discovered essiac sooner, and cancer runs in my family so this tea has been a godsend."

**Jennifer,
Maryland**

December 2004

"I've been suffering from hypothyroidism and hypoglycemia since 1997, which has lead to a 50 pound weight gain (5-10 pounds a year from 1997 to 2004). I'm on premarin right now. I went online to research herbal remedies because I figured I had nothing to lose (but the weight, ha ha). I came across some essiac testimonials from diabetics and people with hypoglycemia. I decided to order some essiac and give it a try.

Now I've been on it for over six months. Looking back, I realize now that I probably had accumulated a lot of toxins that made my thyroid become sluggish. I say this because not only has the weight began to come off without a change in diet (purposefully, anyway) but I've noticed that my skin has become clear, I feel much more energetic, and my constant headaches have disappeared. I seemed to be in pain for something or other almost all of the time. My family thought I was a hypochondriac. I just feel that my body was highly toxic and I was paying the price.

Sincerely,

Rachel Currier

January 3, 2005

"I need to order some essiac tea. I've been using some that my sister ordered from your website last November. She really believes in essiac tea, and she was so happy she found your site, which offers it at a lower price than we've been able to find elsewhere. She was diagnosed with esophageal cancer in 1991 and the situation was very bad for awhile. She was given a maximum of six months to live. Right around that time she began an aggressive regimen of essiac tea. And she is still here today. She tells everyone who needs it about essiac tea. Getting to my part of the story...

I was diagnosed with lung cancer October 21, 2004. I started chemo and

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radiation December 5. I was feeling so sick from these treatments through the month of December. It was all I could do to get out of bed. No energy, I felt very depressed. I decided to go with the 6 oz. three times per day of your essiac tea because I am receiving the chemo and radiation. After four days of this regimen I started feeling like I had been before the chemo and radiation...not perfect, but not like I was at death's door, either. I have continued to feel better as the weeks have gone by, and the best news is that the tumor has gone down for the first time as of my last check-up. I will be calling this afternoon to place my order. May God Bless."

**Kenneth Brown,
Oklahoma**

November 2004

"I have had previous experience with essiac tea. I purchased some essiac tea from a friend for my father-in-law about ten years ago. I saw an almost immediate improvement in his health. I can't say for sure what effect it had on his prostate cancer, but it had a positive effect on his psoriasis, diabetes, and asthma for sure. I am convinced the essiac tea helped prolong his life and, perhaps more importantly, improved the quality of his life during his remaining years. He was able to live pain-free much of the time, and that in and of itself was a blessing."

**Margaret L.,
Nevada**

January 2005

"I started suffering from asthma after repeated bouts of bronchitis in 2003 and 2004. I found myself having to use my inhaler quite often during the day, and eventually experimented with Singulair and Advair. Singulair and Advair worked quite well, although because I don't have insurance I found them to be very expensive.

Someone suggested that I try essiac tea. They gave me a two-week supply to try. I was astounded that my asthma was gone three days later! I've been taking 3 oz. per dose, 3 times per day. I noticed other health benefits as well, so I plan to continue essiac tea. Recently everyone got sick around here, and I did as well, but I got better in two days whereas everyone else, it seemed to take them two weeks.

My husband suffers from asthma to a greater degree than I ever did, and I suggested that he try essiac tea. To his pleasant surprise, he took it during an acute attack and his breathing increased from about 20% capacity to almost 100%, almost instantly. He has tried many asthma treatments including steroid packs and Prednisone. Those treatments are hard on his system and he's glad he doesn't have to rely on them anymore. Thank you so much for offering essiac tea at such a great price. We're telling everyone we know about the wonderful effects of health and well-being we've seen from essiac tea."

**Kristen C.,
Ontario, Canada**

February 24, 2005

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"I'd like to order another supply of essiac tea. I have been giving it to my sister (with breast cancer) and my father (diabetes) so I'm already running low. Since my first diagnosis, my ovarian tumor has shrunk 60% and the doctor can't believe it. I am on chemo as well and I'm not sure if the chemo or the essiac is doing the trick, but I'm not going to take any chances. I believe in alternative treatments very much, so I'm partial to attribute my progress to the essiac, but whatever it is I am grateful. I am also thankful to have the chance to read essiac tea testimonials from others who are doing well, it gives me hope."

**Kerry W.,
Texas**

March 4, 2005

"I have been giving this product to my brother for two years now. His cancer has metastasized. His test results have been getting better and better. The doctors do not know I have been giving his essiac tea, but we believe that is what is helping him. I would like to place a bulk order ASAP."

**Kenny,
Colorado**

April 9, 2005

"Essiac tea is amazing. Let me tell you about my mother who has (or had) colon cancer. She is elderly and the doctors warned that she might not survive an operation to try and remove the tumors. We agreed that we would rather have her enjoy her last years as much as possible, living with us etc. rather than be in a hospital trying to recover from invasive surgery. We were on the fence about chemo but decided against it for the time being.

We began giving her essiac tea last November, and we noticed that she seemed happier and more energetic almost right away. However, it wasn't until February that we noticed some dark substance coming from her colon. At first it seemed to be stuck to her skin but after a few days it began falling off on its own while she was bathing. When we went back for testing the doctors said the tumors seemed to be gone. Amazing. My mother continues to take essiac at maintenance dose, and actually the whole family is on it now because cancer runs in our family. Essiac is truly heaven-sent. Please add my account to your cancer testimonials page so that others will know how well it has worked for us."

**Susan Baxter,
New Hampshire**

February 26, 2005

"I've been helping care for my aunt for the past three years. Soon after I took her in they discovered rectal cancer. After debating our options we decided to start chemo and radiation. However, we weren't satisfied to stop with that. I was interested in alternative treatments but I didn't want to go with just anything. My priest recommended essiac tea and of course, prayer and faith. Which we had always kept a part of our lives.

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ESSIAC TESTIMONIALS FROM PEOPLE EXPERIENCING CANCER AND OTHER MEDICAL CONDITIONS

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We started with a four-herb essiac, I think it was affiliated with a company called "resperin." I started telling my friends and family that my aunt was taking essiac tea and a couple of people suggested that I try to obtain eight-herb essiac. I found eight-herb essiac a couple of months later (I had her on the four-herb formula for about eight months). She was already starting to show an improvement. Mind you, she was taking chemo and radiation as well, and also cat's claw and a bunch of "antioxidant" vitamins. All we knew was that something was working.

My aunt's last CAT scan showed that she was normal: no cancer anywhere in sight! We were so relieved. It's so scary to not know what is happening or what you can do. We dropped her back to 4 oz. twice per day; we had been doing three times per day. Now I am told we can drop back further so we will probably do that after her next check-up. Or, we might keep her on twice per day, who wants to mess with what works. We thank God every day for whatever miracle saved my aunt."

**Cassie R.,
Midland, Texas**

March 31, 2005

"I have cancer and I need to order some more essiac tea. I need essiac sent to me as soon as possible. Let me tell you what happened to me..."

I had become very sick with cancer last year. It got to the point that I was told I would be dead by December. I couldn't stay awake for more than a few hours at a time, and I couldn't speak clearly anymore. My tongue had swollen from the chemo.

I heard about essiac tea and tried it as a last ditch effort to save my life. I continued the chemo but added essiac tea to my regimen. I couldn't believe how quickly I noticed an increase in energy. Then my hair started growing back, both on my head and my eyelashes and such. A few months later, all my tumors were gone. My doctor said, "Whatever you're doing, keep it up, this is a miracle!"

I am religious and I believe that faith can heal. In addition, I believe the chemo and radiation helped me. However, I do not think I would be alive today if not for the essiac tea. The reason I say this is because, once my tumors were gone and I felt better, I ran out of essiac and didn't buy more. I didn't think I needed it anymore. Well, I was wrong. My hair started falling out and I had no energy. My platelet count is up again. This started happening a little over a month ago, a few weeks after I stopped the essiac tea. I had been meaning to get more but I kept putting it off. My friend gave me some other tea to try, he called it "miracle tea." I don't know what was in it, but it did nothing for me. It's not like essiac. Now I feel desperate: I need to get more essiac in me. I feel like crap without it and I'm worried that my tumors will come back, if they haven't already.

My doctor is worried also because I am obviously slipping. He says he can't recommend essiac (which makes me so angry!) but we both know that it's the only thing that has changed in my regimen. I recommend that everyone with cancer take essiac. I believe you should take traditional treatments like chemo in addition to essiac for best results. All I can go by is how I reacted, but it truly has been a miracle for me. Essiac tea is absolutely amazing and I feel it saved my life."

Heather

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January 2005

"We never had essiac tea before, but I know it helped my dad last year with the cancer on his spine.

After my dad came home from the hospital, the week before Christmas in 2003, he was on oxy-cotin, and was in pain (They radiated his 'whole' spine). Basically, they sent him home to die. I brought him essiac and he started taking it, just to appease my sister and I. Two days after taking the essiac tea, his pain went away. His pain went away after two days, no more pills, and his cat scans were very good, the doctors were amazed.

However my dad is a retired electrical engineer and thinks prescription drugs are the way to go, not 'voodoo' stuff. Of course, he didn't attribute getting well to the tea. I keep saying, 'God made herbs.' He stopped the essiac tea in the spring. The cancer did spread again in the summer and now he is in a cancer 'vaccine' testing. He has some at his house if he so chooses (It is hard for my parents right now, since their youngest, my brother passed away at age 34 on Sept 15). I have seen this works and with our colds and knowing what we really eat, what is contained in our milks beef, and chicken--we like the idea of purging cancer causers from our bodies. The tea we got my dad was not the 'original' essiac tea, which is why I did buy in bulk from you. Thanks for offering it to us at a great price.

God didn't give me a gift to 'write'..but I still try."

Sincerely,

Karen

May 9, 2005

Hi, so far I love your product. My lab results showed me in the non-diabetic category for the first time and ALL my results improved (I have been on 9oz/day for close to a month now).

I also have, for the 1ST TIME! other normal (average range) lab results. Not to mention what it has done for my C.F.S. (Chronic Fatigue Syndrome) and overall energy level. My only regret is that your product hasn't made me quit smoking (yet!).

God Bless,

Jonathan

April 2005

"One of my friends was diagnosed with Chronic myeloid leukemia (CML) in 2003. She was sick with infections and fevers almost all of the time. She also developed anemia (her red blood cells were very low). Upon her practitioner's recommendation she began to take essiac tea along with chemotherapy.

After four months on essiac tea, to our surprise her body seemed to have rid itself of leukemia cells. The hematologist found her completely normal when he did the bone marrow aspiration. We went to a pathologist as well

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to confirm the diagnosis, and he agreed that the cancer was gone."

Elizabeth

March 2005

"A friend of ours has been taking essiac tea for years and years now. He didn't get it from your company, but I believe it is the same thing. His is the eight herb formula like you have on this site.

My friend was at one point given less than a month to live, and that is when he tried the tea. That was in 1990 and he is still alive today. This is unbelievable to me! I have cancer and would like to try this 'miracle tea' for myself."

**Earl Barrington,
Tennessee**

February 2005

"Bill and I have been drinking essiac tea for three months now (me more consistently than him, but he is getting better) and it has done wonders for my type II diabetes. I also notice a lessening of sugar cravings in general which has allowed me to drop 10 lbs. without really thinking about it. This is good for me as I am still about 30 lbs. overweight, hopefully not for long. My test results re: the diabetes have returned to normal. I hope my husband will receive the same benefits. His diabetes was a bit worse off than mine was to begin with, and like I said he hasn't been as consistent as I have with taking his essiac tea. Now that he has seen me improve so much, though, he appears to be more motivated with his own treatment. I find that many men aren't interested in the herbal remedies but once they see them work in action they come around. I have found my breathing improve as well, is this one of the benefits of essiac tea (I am asthmatic). Please send us another of the same order we got three months ago on 11/29/05, and thank you for all of your help over the phone, etc. these past months."

Sincerely,

Gayle and Bill T.

November 2004

"Seven years ago I had surgery to remove a cancerous rectal tumor that was discovered the year before, and was growing at an alarming rate. I was advised to undergo chemotherapy and radiation. I did for four months but I felt so sick all the time that I couldn't bear to continue. I felt my best course of action was to follow an organic diet and investigate alternative treatments. I stumbled upon essiac tea and began to take it.

I had a colonoscopy a little over six months later, and there was no cancer. I continue to have an examination every year and there is no cancer at all. I don't know if essiac tea is a miracle or what, but it seemed to have done the trick for me. I continue to take the maintenance dose and it gives me incredible peace of mind that I am purging my body of the toxins that may lead to more cancer. Thank you for providing this product. I sincerely feel that I owe my life to it."

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Sincerely,

**Mary T.,
Massachusetts****March 2005**

"My twelve-year old golden retriever, Charlie, was diagnosed with cancer last year. My vet advised that if I wanted to give him the best chance of surviving I should consider surgery to remove the tumor. However, I was also aware that, due to my dog's age and medical history, he might not survive surgery. I was also told that many times cancer in animals re-occurs, so I was hoping I could do something preventive in nature, whether or not I decided to proceed with surgery for him.

I was never aware that cancer in animals could be treated with some of the same things people use, but my homeopathic doctor told me that it can be. In particular, he recommended that I give my dog essiac.

I did some research online and found your site. I decided to start with one pound as I would be giving Charlie 2 oz. two times a day (although I started with just one dose to make sure it agreed with his stomach). Meanwhile, I met with the surgeon to discuss my options. I decided to put off the surgery for the time being and see if the essiac tea made a difference. My main hope was to keep Charlie's quality of life at this stage.

I am happy to report that he is doing wonderfully! The tumor is reducing in size and Charlie has only been on the essiac for two months. He has begun to play again and his appetite is much better. I am confident that his situation will continue to improve as long as we continue with the essiac tea. This improves the spirits of everyone in my household, as me and my husband are in our 70s and having Charlie around really boosts our spirits. Please send me another pound of the tea, and bill my card for the amount. Much thanks!"

**Julie W.,
Arizona****April 2, 2005**

I have been using the four herbs for three years now. I just now found out about the eight herb essiac and want to see if it works better for me. I am alive now because of essiac.

My doctors had me undergo surgery, chemo, and radiation, but it didn't stop the cancer. They recommended that I go through all of it again. I just couldn't face that, though. I decided to try essiac tea and everything got better. So I stopped the tea thinking everything would be fine, but the cancer grew back. I had no energy and so much pain. As long as I stay on the tea my tumors shrink and I feel much better. I am hoping the eight herb essiac is even more effective for me.

Sincerely,

Shannon Waterton

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Essiac Testimonials From People Experiencing Cancer and Other Medical Conditions

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May 9, 2005

Hello! Your product is incredible. I suffer from a number of physical disabilities, and EVERY category of my lab results came back improved! After only one month of your essiac tea!

After 6 weeks of being on the aggressive treatment for essiac I put the diabetic "paper" or lab results (5.6) to the ultimate test. I fasted all day (for scriptural reasons) w/water only. Not only did I not get the shakes from skipping meals or go into a hypoglycemic state, I didn't get hungry! I kept tabs on my sugar levels every 2 hours or so, and my levels stayed in the 90's all day long. I have documented this for my primary care doctor and my nutritionist. According to them, this can't happen!

**Jay,
Massachusetts**

January 2005

"I'm writing because my attorney (a good friend of mine) suggested that I take essiac tea. The doctors found a growth on my skin that appears not to be cancerous, but I'm not taking any chances. He affirmed that I should use essiac containing eight herbs, not the four-herb tea that is more commonly found. He recommended that I come to this site, as you people have been very helpful and the price is right. I guess he's been pointing a lot of people your way.

I am optimistic because my friend's wife was at one point diagnosed with stage IV pancreatic cancer that had metastasized to the liver, and now it's been five years and she is alive and well. Granted, she was on chemotherapy at the same time she took the essiac. She began the chemo December 1999 and the essiac in February 2000. By April 2000 her condition had become stable, which was realistically the best they could hope for at the time.

She continues to maintain relatively good health and although the tumors are still present, her condition is definitely stable and she generally feels well. Her husband switched to your eight-herb essiac when he found your website last month. He says that your herbs seem to be fresher than any he's received before and his wife feels better than ever. I'm looking forward to trying the tea and hope it can do for me what it appears to be doing for so many others. At this point in my life (45) I am well aware of the need for preventive treatment, even if I am "healthy" for the time being."

**Christine L.,
Nevada**

Intrigued? There is one thing that all of these people have in common: They all take our essiac tea.

The Truth About Essiac
Authentic, Organic, Affordable. Essiac Myths Exposed

Healing With Essiac Tea
Buy wholesale essiac tea herbs at \$10.95. Free kit and free shipping!

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Please share any experiences you have had

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with essiac.

Please note that all fields followed by an asterisk must be filled in.

First Name*

Last Name

E-mail Address

City

State/Prov

Country* Country

When did you begin using essiac.

What other treatment modalities are you currently using.

For which medical condition, if any, are you using essiac.

Please tell us about your experience with essiac.

Any other comments, suggestions, or questions welcome.

May we print your testimonial on this website. Yes
No

To exit 'Essiac Testimonials' page and return to 'Home' page, [click here](#).

Contact Daryl Toll Free @ 866-840-3389 with any questions. You can also send an email to daryl@premium-essiac-tea-4less.com.

Disclaimer: The statements regarding essiac tea have not been evaluated by the Food and Drug Administration. We cannot claim essiac is a cure,

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prevents disease or has beneficial medicinal properties. The information on this Web site or in emails is designed for educational purposes only. It is not intended to be a substitute for informed medical advice or care. You should not use this information to diagnose or treat any health problems or illnesses. Consult your physician before starting any medical treatment.

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THIS ESSIAC TEA FORMULA IS COMPRISED OF EIGHT THERAPEUTIC HERBS.

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premium-essiac-tea-4less.com

This Essiac Tea Formula is Comprised of the Perfect Balance of the Following Eight Herbs.

The essiac tea formula from which we process our eight herb essiac is the last essiac tea formula Dr. Charles Brusch and Rene Caisse, R.N., researched and tested before the time of Rene Caisse's death. They worked together for many years attempting to incorporate additional herbs in with the original four essiac herbs in a ratio that would achieve optimal effectiveness. This research and patient testing was done at the Brusch Medical Center in Cambridge, Massachusetts on terminal cancer patients.

Rene Caisse's original four herb essiac was used by ill patients, often times terminal cancer patients, with positive results. This original formula consisted of burdock root, sheep sorrel, slippery elm bark and Turkey rhubarb root. Rene Caisse added four herbs, which she knew possessed amazing medicinal properties, to her original formula. These herbs had been used for years, and in some cases centuries, to heal the sick. These four herbs were blessed thistle, kelp, red clover and watercress. The medicinal properties of these herbs accomplished what Rene had set out to do. They enhanced the overall effectiveness of the original essiac tea formula making the original formula somewhat obsolete. Why use something that's good when you can use something that's great?

For an extensive overview on who Rene Caisse was and the history of essiac, click here: [Rene Caisse and her essiac tea formula.](#)

The Truth About Essiac
Authentic, Organic, Affordable. Essiac Myths Exposed

Essiac Tea & Capsules
Essiac Herbal Health Formula Quality Health Products, Low Prices

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The exact composition of the eight herb essiac tea formula is not known to the public at large. The eight different herbs are known, but the exact ratio of each herb in the essiac tea formula is not known. This formula is kept locked away. The only people having knowledge of the formula are the people who process the essiac tea herbs. And, they have been sworn to an oath to never divulge this formula. When these eight essiac tea herbs are measured, mixed and freshly packaged, the way that only our company knows how, they make a superior essiac tea.

Essiac Tea Formula Herbs. Medicinal Uses and History.

Click on the links below for a detailed history of each of the essiac tea herbs and how they are used alone and combined with other herbs in our essiac tea formula.

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<http://www.premium-essiac-tea-4less.com/essiac-tea-formula.html>

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This essiac tea formula is comprised of eight therapeutic herbs.

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Blessed Thistle. Blessed thistle increases appetite and stomach secretions. Heals the liver. Alleviates inflammation, improves circulation, purifies the blood, and strengthens the heart. May act as brain food. Good for female disorders.

Burdock Root. Burdock root purifies the blood, restores liver and gallbladder function, and stimulates the immune system. Helps skin disorders such as boils and carbuncles and relieves gout symptoms. Burdock root makes an excellent herbal remedy for gout.

Kelp. Kelp is a sea vegetable that is a concentrated source of minerals, including: iodine, potassium, magnesium, calcium, and iron. Kelp as a source of iodine assists in making the thyroid hormones, which are necessary for maintaining normal metabolism in all cells of the body. This increases energy levels and helps make it easier to maintain a healthy body weight. The overwhelming benefits of kelp occurs because its the most nutrient rich of the eight herbal ingredients in our essiac tea formula. And, its not in the original four herb essiac.

Red clover. Red clover acts as an antibiotic, appetite suppressant, blood purifier, and relaxant. Good for bacterial infections, HIV and AIDS, inflamed lungs, inflammatory bowel disorders, kidney problems, liver disease, skin disorders, and weakened immune system. The benefits of red clover have been well documented over the past 80 years in the United States.

Visit the [ShopSite](#). See how these eight herbs are processed and packaged. [Prices.](#) [Shipping.](#)

Sheep Sorrel. Sheep Sorrel is high in oxalic acid, sodium, potassium, iron, manganese, phosphorous, beta carotene, and vitamin C. It is a mild diuretic, mild antiseptic, and a mild laxative.

Slippery elm bark. Slippery elm bark soothes inflamed mucous membranes of the bowels, stomach, and urinary tract. Good for diarrhea and ulcers and for treatment of colds, flu, and sore throat.

Healing With Essiac Tea
Buy wholesale essiac tea herbs at \$10.95.
Free kit and free shipping!

"How I Lost 55 Pounds"
Amazing Chinese Weight Loss Secret As
Seen On CNN, NBC & Fox News

Ads by Google

Turkey rhubarb root. Turkey rhubarb root eliminates worms, enhances the gallbladder function, and has antibiotic properties. Helps disorders of the colon, spleen, and liver. Promotes healing of duodenal ulcers. Good for constipation, malabsorption, and parasitic infections. Turkey rhubarb root is one of the best, if not best, colon cleanse remedies available.

Watercress. High in Vitamin C, watercress is used as a general tonic, and its bitter taste is thought to regulate the appetite and improve digestion. It can be used to alleviate nervous conditions, constipation, and liver disorders. Watercress is a popular cough and bronchitis natural health remedy. It contains a remarkable substance called rhein, which appears to inhibit the growth of pathogenic bacteria in the intestines. It is believed that rhein is also effective against Candida albicans (yeast infection), fever and inflammation, and pain.

Contact Daryl Toll Free @ 866-840-3389 with any questions. You can also send an email to daryl@premium-essiac-tea-4less.com.

Complaint

This essiac tea formula is comprised of eight therapeutic herbs.

Page 3 of 3

Exhibit E

Disclaimer: The statements regarding essiac tea have not been evaluated by the Food and Drug Administration. We cannot claim essiac is a cure, prevents disease or has beneficial medicinal properties. The information on this Web site or in emails is designed for educational purposes only. It is not intended to be a substitute for informed medical advice or care. You should not use this information to diagnose or treat any health problems or illnesses. Consult your physician before starting any medical treatment.

Contact Us

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Complaint

Exhibit F

Essiac dosage recommendations are based on multiple circumstances.

Page 1 of 4

Exhibit F



premium-essiac-tea-4less.com

Essiac Dosage Recommendations

- Home
- Home Español
- Help/ Order Guide
- Place an Order
- Essiac Tea FAQ
- Essiac \$2.99 Packet
- Testimonials
- essiac tea formula
- Essiac Dosage
- Cure
- Benefits of essiac
- Prevention
- Cancer Alternative
- Brewing Essiac
- International Order
- Australian Essiac
- Free essiac referral
- Taking essiac
- Pet Illness
- Handling & Storage
- Stevia Sweetener
- Ordene essiac
- Paquete \$2.99
- testimonios
- Essiac Auténtico
- Formula del te
- Cura
- Prevenção
- Cancer Alternativa
- Dose Intensiva
- mantenedimento
- Preparación
- Essiac gratis

The main factor taken into consideration for essiac dosage recommendations is your health condition. Other factors taken into consideration are age, weight, the seriousness of your current health condition and your past medical history.

Our website has an abundance of information about the proper essiac dosage recommendations for each and every individual. In addition to the information you find here, you should also consult with your health care practitioner and do further medical research into your health condition. The best patient is a well-informed patient. If and when your medical condition changes check back with us to see if your essiac dosage recommendations have also changed.

Seven Main Categories of Essiac Dosage Recommendations

Child Dosage is dependant on the weight of the child and the health conditions for which essiac will be used. Check out our simplified breakdown of essiac dosage for children. [Dosage for Children](#)

Pet Dosage is determined by the health and weight of your animal. Check out a thorough breakdown of the aggressive and maintenance dosage regimens for your cat or dog. [Pet Dosage Instructions](#)

Aggressive Dose is recommended if you have a serious illness. This is the standard essiac dosage recommended if you have cancer, diabetes or another serious medical condition. [Aggressive Dosage Instructions](#)

Aggressive Dose PLUS is recommended for those who are receiving chemotherapy and/or radiation therapy. This dose is also recommended for those who have been given a terminal diagnosis. [Aggressive PLUS Dosage Instructions](#)

Maintenance Dose is recommended for those who have overcome an illness. This dose is recommended for at least six months **AFTER** your test results have returned to normal. [Maintenance Dosage Instructions](#)

Preventive Dose is recommended for healthy individuals. This dose is to prevent health problems, disease and illness. This dosage is especially important for those who have a family history of cancer. [Essiac Preventive Dosage](#)

Detoxification Dose is recommended if you wish to detoxify your body.

Complaint

Essiac dosage recommendations are based on multiple circumstances.

Page 4 of 4

Exhibit F



The detoxification dose is for improved health, to prevent disease and illness, or to recover from disease or illness. Detoxification regimens are typically done for a fixed period of time. But, this dose can be continued indefinitely to maintain optimal health.
Detoxification Dosage Instructions.

To exit 'Essiac Dosage Recommendations' and return to the 'Home' page, click [here](#).

Contact Daryl Toll Free @ 866-840-3389 with any questions. You can also send an email to daryl@premium-essiac-tea-4less.com.

Disclaimer: The statements regarding essiac tea have not been evaluated by the Food and Drug Administration. We cannot claim essiac is a cure, prevents disease or has beneficial medicinal properties. The information on this Web site or in emails is designed for educational purposes only. It is not intended to be a substitute for informed medical advice or care. You should not use this information to diagnose or treat any health problems or illnesses. Consult your physician before starting any medical treatment.

Complaint

Exhibit G

Natural Cure, Natural Remedy, Preventative Treatment: Is Essiac the Best Choice?

Page 1 of 2

Exhibit G



premium-essiac-tea-4less.com

Is Essiac a Cure All?

- Home
- Home - Español
- Help! Order Guide
- Place an Order
- Essiac Tea FAQ
- Essiac \$2.99 Packet
- Testimonials
- essiac tea formula
- Essiac Recipes
- Cure
- Benefits of essiac
- Prevention
- Cancer Alternative
- Breast Essiac
- International Order
- Australian Essiac
- Free essiac referral
- Taking essiac
- Pet illness
- Handling & Storage
- Stevia Sweetener
- Orlistat essiac
- Paquete \$2.99
- testimonios
- Essiac Antiviral
- Formula del té
- Cure?
- Prevention
- Cancer Alternative
- Rese Intensiva
- mantenimiento
- Preparacion
- Essiac gratis

Essiac tea has been used for many decades as a cure for a wide range of illnesses and diseases. The FDA hasn't proven Essiac to have a beneficial effect as an herbal blend. However, the FDA has confirmed the eight individual essiac herbs do indeed have beneficial properties. Whether essiac tea is a cure or not according to the FDA isn't the important point. The important consideration is whether essiac tea helps a person fight an illness on a case by case basis. It may not help everybody, but it might help you or me on an individual basis.

The [Healthy Sense Directory](#) - An excellent source of organized health information...

The illnesses, diseases and conditions for which essiac tea has been used by people throughout the world are more than I can list. Some of the more common ailments are AIDS and HIV, diarrhea, constipation, high blood pressure, high cholesterol, internal and external cancers, benign and malignant tumor growth, chronic pain, diabetes, arthritis, kidney and bladder problems, ulcers, liver conditions, colon complications, sinus issues, gout, pneumonia and common chest colds. People use essiac for different reasons. Some are looking for a cure for conditions such as cancer. Others are looking to strengthen their immune system as a preventative measure. Essiac can be used in a variety of ways.

The Truth About Essiac	Essiac Tea & Capsules
Authentic, Organic, Affordable. Essiac Myths Exposed	Essiac Herbal Health Formula Quality Health Products, Low Prices

Ads by Google

Essiac continues to be used by a large portion of cancer patients in a complementary manner along with chemotherapy and radiation therapy. It's also being used as an alternative treatment and in a palliative manner.

There is not a cure for AIDS and the medicine available for fighting HIV and AIDS is beyond the financial means for a majority of the world's population. Essiac is a popular option for large populations of people in African countries. To learn more about how Essiac helps HIV and AIDS patients, click here: [HIV alternative treatment](#).

Diarrhea and constipation are a common inconvenience for many people, but for others they can be deadly. Essiac's eight herbs have properties with the ability to cure diarrhea and constipation. Click here for more detail on the inner workings of essiac on diarrhea and constipation: [Diarrhea Cure](#). [Constipation Cure](#).



Patients with liver problems such as hepatitis are giving more attention to the benefits of essiac. Essiac has liver and blood cleansing properties. Hepatitis patients have seen the health benefits from this cleansing process.

Complaint

Natural Cure, Natural Remedy, Preventative Treatment: Is Essiac the Best Choice?

Page 4 of 4

Exhibit G



Click here for a thorough explanation of the cleansing process and how it helps the liver:

For details of how essiac can benefit a particular disease, illness, or condition click on the appropriate listing below.

To Place an Order, Compare Pricing, or Check Out Packaging Options for Essiac Tea, [Click Here](#).

Contact Daryl Toll Free @ 866-840-3389 with any questions. You can also send an email to daryl@premium-essiac-tea-4less.com.

Disclaimer: *The statements regarding essiac tea have not been evaluated by the Food and Drug Administration. We cannot claim essiac is a cure, prevents disease or has beneficial medicinal properties. The information on this Web site or in emails is designed for educational purposes only. It is not intended to be a substitute for informed medical advice or care. You should not use this information to diagnose or treat any health problems or illnesses. Consult your physician before starting any medical treatment.*

Contact Us

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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 respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft 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 respondent with violations of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an Agreement Containing Consent Order containing an admission by the respondent of all the jurisdictional facts set forth in the draft 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 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 agreement on the public record for a period of thirty (30) days, 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 Daryl C. Jenks is a resident of Michigan. His principal office or place of business is at 4245 Sundance Meadows, Howell, Michigan 48843. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or

Decision and Order

practices of the business operating under the trade name “Premium Essiac Tea 4less.”

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. “*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.
2. “*Commerce*” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
3. “*Food*” and “*drug*” shall mean “**food**” and “**drug**” as defined in Section 15 of the FTC Act, 15 U.S.C. § 55.
4. “*Essiac Product*” shall mean any product for which the term “Essiac” or “Caisse” appears on the product label or on any advertising or promotion, and any product containing burdock root, sheep sorrel, and slippery elm bark herbs, alone or with other ingredients.
5. “*Endorsement*” shall mean any advertising message (including verbal statements, demonstrations, or depictions

Decision and Order

of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) which message consumers are likely to believe reflects the opinions, beliefs, findings or experience of a party other than the sponsoring advertiser. The party whose opinions, beliefs, findings or experience the message appears to reflect will be called the endorser and may be an individual, group or institution.

6. Unless otherwise specified “*Respondent*” shall mean Daryl C. Jenks, individually and doing business as Premium Essiac Tea 4less, and his agents, representatives and employees.
7. “*Covered product or service*” means any food, dietary supplement, or drug, including, but not limited to any Essiac Product; or any health-related product, service, or program.

I.

IT IS ORDERED that Respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, or sale of any Essiac Product 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, that

- A. Such product or service is effective in the treatment, cure, or prevention of any disease or condition, or
- B. Such product or service is superior to other similar products or services,

Decision and Order

unless the representation is true, not misleading, and, at the time it is made, Respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

IT IS FURTHER ORDERED that Respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, or sale of any covered product or service, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a product name or endorsement, about the absolute or comparative benefits, performance, efficacy, safety, or side effects of such covered product or service unless the claim is true, non-misleading, and, at the time it is made, Respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

III.

IT IS FURTHER ORDERED that Respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, or sale of any covered product or service, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, including through the use of a product name or endorsement, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

IV.

IT IS FURTHER ORDERED that:

- A. Nothing in this order shall prohibit Respondent from making any representation for any drug that is permitted in

Decision and Order

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 Respondent from making any representation for any product that is 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.

V.

IT IS FURTHER ORDERED that Respondent shall:

- A. Within seven (7) days after service of the Order upon Respondent, deliver to the Commission a list, in the form of a sworn affidavit, of all consumers that can be identified from Respondent's records who purchased an Essiac Product from Respondent on or after January 1, 2003. Such list shall include each consumer's name and address, and, if available, the telephone number and email address of each consumer and the full purchase price, including shipping, handling, and taxes, of any Essiac Product purchased from Respondent.
- B. Within thirty (30) days after service of the Order upon Respondent, send by first class mail, with postage prepaid, an exact copy of the notice attached hereto as Attachment A, showing the date of mailing, to each person who can be identified from Respondent's records who purchased Respondent's Essiac Product between January 1, 2003, and the date Respondent executed this Order. This mailing shall not include any other document.

Decision and Order

- C. Except as provided in this Order, Respondent, directly or through any corporation, subsidiary, division, trade name, or other device, shall not sell, rent, lease, transfer, or otherwise disclose the name, address, telephone number, credit card number, bank account number, email address, or other identifying information of any person who paid any money to Respondent, at any time prior to date this Order becomes final, in connection with the purchase of any Essiac Product. *Provided, however,* that Respondent may disclose such identifying information as required in Subpart A above, or to any law enforcement agency, or as required by any law, regulation, or court order.

VI.

IT IS FURTHER ORDERED that Respondent 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.

Decision and Order

VII.

IT IS FURTHER ORDERED that Respondent 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. 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.

VIII.

IT IS FURTHER ORDERED that Respondent, for a period of ten (10) 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 and Part IX below 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 Respondent 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 a report, in writing, setting forth in detail the manner and form in which he has complied with this order.

Decision and Order

X.

IT IS FURTHER ORDERED that this order will terminate on October 23, 2028, 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

ATTACHMENT A

ATTACHMENT A

TO AGREEMENT CONTAINING CONSENT ORDER

**LETTER TO CUSTOMERS (INCLUDING DISTRIBUTORS)
WITH WHOM RESPONDENT HAS DONE BUSINESS
PRIOR TO EXECUTING THIS ORDER**

[To be printed on letterhead of Premium Essiac Tea 4less]

[Date]

[Name and address of recipient]

Dear [recipient's name]:

I recently entered into a settlement with the Federal Trade Commission ("FTC") regarding advertising claims for Essiac Tea. This product was sold on the Premium-essiac-tea-4less website. The settlement with the FTC does not constitute an admission that I have violated the law. As part of the settlement, however, I agreed to send you the following information prepared by the FTC about the scientific evidence on these products.

Very little scientific research has been done concerning Essiac tea as a treatment or cure for cancer or any other disease in humans. The scientific studies that have been done do not demonstrate that Essiac tea, or any of the ingredients in this product, is effective when used as a treatment for cancer or any other disease.

It is very important that you talk to your doctor or health care provider before using *any* alternative or herbal product, including Essiac tea. Speaking with your doctor is important to make sure that all aspects of your medical treatment work together. Things that seem safe, such as certain foods, herbs, or pills, may interfere with or affect your cancer or other medical treatment, or other medicines you might be taking. Some herbs or other complementary or alternative treatments may keep your medicines from doing what they are supposed to do, or could be harmful when taken with other medicines or in high doses. It also is very important that you talk to your doctor or health care

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provider before you decide to take any alternative or herbal product, including Essiac tea, instead of taking conventional cancer treatments that have been scientifically proven to be safe and effective in humans.

If you would like further information about complementary and alternative treatments for cancer, the following Internet web sites may be helpful:

- D. The National Cancer Institute: www.cancer.gov/cancertopics/pdq; or
- E. The National Center for Complementary and Alternative Medicines: www.nccam.nih.gov

You also can contact the National Cancer Institute's Cancer Information Service at 1-800-4-CANCER or 1-800-422-6237.

Sincerely,

Daryl C. Jenks
Premium Essiac Tea 4less

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 Daryl C. Jenks, individually, and d/b/a Premium Essiac Tea 4less (“respondent”).

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 the advertising and promotion of a product known as *Premium Essiac Tea*, a powder for making a tea beverage that, according to its label, contains: burdock root, rhubarb root, sheep sorrel, slippery elm, watercress, blessed thistle, red clover, and kelp. The Commission's complaint charges that respondent claimed that Premium Essiac Tea was effective to treat, prevent or cure cancer and other serious diseases. The complaint alleges that respondent did not have a reasonable basis for this claim. The complaint also charges that respondent claimed that Premium Essiac Tea was clinically proven to be superior to other types of essiac tea. The complaint alleges that this claim was false. The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts and practices in the future.

Part I requires respondent to have competent and reliable scientific evidence substantiating any claim that any covered product or service is effective in the treatment, cure or prevention of any disease or condition, or is superior to other similar products or services. A “covered product or service” is defined as any food, dietary supplement or drug, including, but not limited to any

Analysis to Aid Public Comment

essiac tea product; or any health-related product, service or program. Part II requires that any future claim about the absolute or comparative benefits, performance, efficacy, safety or side effects of any covered product or service be truthful and supported by competent and reliable scientific evidence.

Part III of the consent order prohibits the misrepresentation of the results of any test, study or research in connection with the advertising, promotion or sale of any covered product or service.

Part IV of the proposed order provides that the order does not prohibit respondent from making representations for any drug that are permitted in labeling for the drug under any tentative or final Food and Drug Administration (“FDA”) standard or under any new drug 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 V.A. of the proposed order requires respondent to provide a list of all purchasers of Premium Essiac Tea to the Commission. Part V.B. requires respondent to mail to each purchaser a letter describing the scientific evidence related to essiac tea. Part V.C. prohibits respondent from providing any identifying information about his purchasers to anyone other than a law enforcement agency or as required by law.

Parts VI through IX of the proposed order require respondent to keep copies of relevant advertisements and materials that substantiate claims made in the advertisements; to provide copies of the order to certain of his employees; to notify the Commission of any changes in employment 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 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**HEXION LLC****AND****HUNTSMAN 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-4235; File No. 071 0212**Complaint, October 2, 2008 – Decision, November 13, 2008*

This consent order addresses the proposed acquisition of Huntsman Corporation by Hexion LLC. The companies have been primary competitors in the development, manufacture, marketing, and sale of specialty epoxy resins. In addition, Hexion is a supplier of formaldehyde to three of the four producers of methyl diisocyanate or diphenylmethane diisocyanate (MDI) in the United States, of which Huntsman is one. To address competition concerns in the specialty epoxy resin market, the order calls for Hexion to divest its specialty epoxy business to Spolek Pro Chemickou A Hutni Vyrobu or another Commission-approved buyer, including facilities in Germany and the United States and their related assets. The order requires that Hexion provide for comprehensive and timely technology transfer to the acquirer, and that Hexion license or assign to the acquirer all intellectual property related to the production of specialty epoxy resins. To address concerns that the acquisition would increase the likelihood of coordinated interaction among competitors in the MDI market, the order requires Hexion to institute procedures to ensure that its acquired MDI business not have access directly or indirectly to competitively sensitive non-public information obtained by its formaldehyde division from other MDI producers. The order prohibits Hexion from using any competitively sensitive non-public information obtained from its competitors in an anticompetitive manner. The order provides that the Commission may appoint an Interim Monitor to ensure that the respondents comply with all of their obligations and perform all of their responsibilities. If the respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey relevant assets as required by the order, the Commission may appoint a Divestiture Trustee to do so. The order also requires the respondents to notify the Commission of any proposed dissolution of respondents; any proposed acquisition, merger or consolidation; or any other change in respondents, if such change might affect compliance obligations arising out of the order.

Complaint

Participants

For the Commission: *Roberta S. Baruch, Wallace W. Easterling, Sebastian Lorigo, Angelike Mina, David Morris, Catharine M. Moscatelli, Phillip Runco, Jaqueline Tapp, Leonor Velaquez, and David A. Von Nirschl.*

For the Respondents: *Jonathan M. Rich and Willard K. Tom, Morgan, Lewis & Bockius LLP; and William R. Vigdor, Vinson & Elkins.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested by said Acts, the Federal Trade Commission (the “Commission”), having reason to believe that respondents Hexion LLC (“Hexion”), a corporation, and Huntsman Corporation (“Huntsman”), both subject to the jurisdiction of the Commission, have agreed to an acquisition of Huntsman by Hexion 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. RESPONDENTS

1. Respondent Hexion LLC is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 180 East Broad Street, Columbus, OH, 43215. Hexion LLC, through its Hexion Specialty Chemicals, Inc. subsidiary, is engaged in a wide variety of businesses, including the development, manufacture, marketing, and sale of specialty epoxy resins and formaldehyde.

Complaint

2. Respondent Huntsman is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 500 Huntsman Way Salt Lake City, Utah, 84108. Huntsman is a global company engaged in a wide variety of businesses, including the development, manufacture, marketing, and sale of Specialty Epoxy Resins and Methyl Diisocyanate or Diphenylmethane Diisocyanate (“MDI”).

II. JURISDICTION

3. Huntsman and Hexion 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 businesses are in or affect commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED TRANSACTION

4. Hexion has proposed to acquire Huntsman. The acquisition agreement requires Hexion to pay approximately \$10.6 billion. Pursuant to that agreement, Hexion will acquire Huntsman shares and certain outstanding debts of Huntsman.

IV. THE RELEVANT PRODUCT MARKETS

5. Paragraphs 1-4 are incorporated by reference as if fully set forth herein.

A. Specialty Epoxy Resins

6. One relevant line of commerce within which to analyze the likely effects of the proposed transaction is the market for Specialty Epoxy Resins. Specialty Epoxy Resins are value added high performance epoxy resin products, including, but not limited to, blends, formulations, advanced resins, as well as

Complaint

multifunctional resins. The Specialty Epoxy resins sold into each application segment constitute distinct application specific end-use product markets. These resins are sold in conjunction with curing agents, modifiers, and other ingredients and components necessary to the use of these resins.

7. For example, Specialty Epoxy Resins are used in aerospace and wind turbine blade applications because of their heat resistance and mechanical properties. In aerospace composite applications they provide low weight, thermal reliability, and exceptional mechanical properties. Specialty Epoxy Resins are used in wind blade application because of, among other things, their low weight, tensile strength, and dimensional stability. Consequently, there are no practical and cost effective substitutes for these products. Each of the end-use application markets is highly concentrated as there are few qualified suppliers of Specialty Epoxy Resins for these applications.

8. Due to their enhanced performance, as compared to basic epoxy resins and other chemicals, Specialty Epoxy Resins are used in a wide range of demanding applications where enhanced performance is required. Due to their superior properties and cost-effectiveness, customers have stated they would not switch away from Specialty Epoxy Resins in response to a small but significant and non-transitory increase in their price.

9. The relevant geographic area within which to analyze the likely effects of the proposed transaction in the market for the production and sale of Specialty Epoxy Resins is North America. Due to the need for domestic supply and customer qualification requirements, among other impediments, customers in North America would not switch to foreign firms to any appreciable degree in response to a small but significant and non-transitory increase in their price.

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B. The Methyl Diisocyanate or Diphenylmethane Diisocyanate (“MDI”) Market

10. Another relevant line of commerce within which to analyze the likely effects of the proposed transaction is the Methyl Diisocyanate or Diphenylmethane Diisocyanate (“MDI”) market. The terms Methyl Diisocyanate and Diphenylmethane Diisocyanate are synonymous. MDI is a chemical that comes in various forms, but the bulk of sales are in the polymeric form (similar to the form in which plastics are produced). MDI is used to manufacture polyurethane foam (rigid and flexible), binders, and polyurethane elastomers. It is a chemical used in various applications, including construction insulation, refrigeration, and composite wood products. Because of its desirable properties, customers have stated they would not switch to other chemicals in response to a small but significant and non-transitory increase in the price of MDI.

11. Formaldehyde is a versatile chemical and an essential ingredient used in the manufacture of MDI. It provides useful characteristics such as desirable insulating and mechanical properties. Moreover, its use in MDI provides consumers with the benefit of its desirable characteristics, while avoiding some of the harmful characteristics associated with the use of pure formaldehyde, which is a carcinogen. Formaldehyde is also used in a variety of applications other than MDI, including particle boards, oriented strand boards, laminates, and adhesives

12. The relevant geographic area within which to analyze the likely effects of the proposed transaction in the MDI market is North America. MDI imports are minimal as it is generally consumed in the geographic region in which it is produced. Moreover, it is not practical to import these products due to the deterioration of these products during transport over long distances. Consequently, there are minimal imports of MDI into North America and customers in North America would not switch

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to foreign firms to any appreciable degree in response to a small but significant and non-transitory increase in their price.

V. MARKET STRUCTURE

13. The overall market for Specialty Epoxy Resins is highly concentrated. Additionally, as stated above, each of the application specific end-use markets is also highly concentrated. Hexion and Huntsman are leading competitors in the design, manufacture, and sale of Specialty Epoxy Resins accounting for between 60 and 90 percent of sales in the various application specific end-use markets in North America. Hexion and Huntsman each had close to \$1 billion in sales of Specialty Epoxy Resins in 2007.

14. The market for MDI is highly concentrated. There are only four producers of MDI in the United States: Huntsman, Dow Chemical, BASF, and Bayer. MDI imports are minimal as it is generally consumed in the geographic region in which it is produced. Hexion supplies formaldehyde to all the U.S. MDI producers, except Dow. Consequently, the market for MDI and the formaldehyde used in its production is highly concentrated. Total U.S. sales of MDI in 2007 were approximately \$2 billion.

15. Hexion, as a supplier of formaldehyde to MDI producers, receives competitively sensitive non-public information from three of the four MDI producers in North America. Such information includes, but is not limited to, MDI production forecasts, MDI demand forecasts and updates to these forecasts on a weekly basis as well as projected long term MDI demand forecasts for the next 6 to 12 months, and schedules for periodic shutdowns of MDI production facilities.

VI. CONDITIONS OF ENTRY

16. Entry into the overall Specialty Epoxy Resins market and the various application specific end-use markets in North America

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would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the merger.

17. Entry into the MDI market would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the merger.

18. In the Specialty Epoxy Resins market and the various application specific end-use markets in North America, it is costly to build facilities to produce these resins and the entrant is required to incur substantial sunk costs. Respondents have portfolios of over 100 patents covering their resins, and long and costly qualification requirements and capacity constraints add to the difficulty of entry, among other things. In the MDI market, entry takes several years and is very expensive with a significant sunk cost component included in MDI entry costs.

VII. COMPETITIVE EFFECTS OF THE PROPOSED ACQUISITION

19. The effects of the transaction, if consummated, may be substantially to lessen competition and tend to create a monopoly in each of 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 Hexion and Huntsman in the Specialty Epoxy Resins market and the various application specific end-use markets in North America;
- b. by increasing the likelihood that Hexion will exercise market power unilaterally in the market for Specialty Epoxy

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Resins and the various application specific end-use markets in North America; and

c. by increasing the likelihood of coordinated interaction among competitors in the market for MDI.

20. The agreement described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

21. The merger described in Paragraph 4, if consummated, would constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this second day of October, 2008, 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 Hexion LLC (“Hexion”) of Respondent Huntsman Corporation (“Huntsman”), 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

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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 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 Hexion LLC is a limited liability company organized, existing and doing business under and by virtue of the laws of State of Delaware, with its headquarters address c/o Hexion Specialty Chemicals, Inc., 180 East Broad Street, Columbus, Ohio 43215.

2. Respondent Huntsman Corporation 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 500 Huntsman Way, Salt Lake City, Utah 84108.

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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), which are incorporated herein by reference and made a part hereof, shall apply:

- A. “Hexion” means Hexion LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Hexion (including, but not limited to, Hexion Specialty Chemicals, Inc., Nimbus Merger Sub Inc. and Hexion Specialty Chemicals GmbH) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Hexion shall include Huntsman.
- B. “Huntsman” means Huntsman Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Huntsman, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” mean Hexion and Huntsman, individually and collectively.
- D. “Decision and Order” means the:

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1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance 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.
- E. “Interim Monitor” means any monitor appointed pursuant to Paragraph IV of this Order to Maintain Assets or Paragraph V of the Decision and Order.
- F. “Orders” means the Decision and Order and this Order to Maintain Assets.
- G. “Commission” means the Federal Trade Commission.
- H. “Specialty Epoxy Resin Product Business(es)” means Respondent Hexion’s business throughout the World related to all of the Specialty Epoxy Resin Products, including the research, Development, manufacture, distribution, marketing, and sale of each Specialty Epoxy Resin Product and the assets related to such business, including, but not limited to, the Specialty Epoxy Resin Product 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 Specialty Epoxy Resin Product Business.

II.

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final:

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- A. Until Respondents fully transfer the Specialty Epoxy Resin Product Assets to the Acquirer, Respondents shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the Specialty Epoxy Resin Product Business, to minimize any risk of loss of competitive potential for the Specialty Epoxy Resin Product Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Specialty Epoxy Resin Product Business except for ordinary wear and tear. Respondents shall not sell, transfer, encumber or otherwise impair the Specialty Epoxy Resin Product 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 Specialty Epoxy Resin Product Business.
- B. Respondent Hexion shall retain all of Respondent Hexion's, rights, title, and interest in the InfraTec Assets, until such assets are transferred by Respondent Hexion to the Acquirer pursuant to the Decision and Order.
- C. Prior to the Effective Date and as a condition precedent to the consummation of the Acquisition, Respondents shall secure all consents and waivers from all Third Parties (including, without limitation, such consents and waivers related to the InfraTec Assets) that are necessary to permit Respondents to divest the Specialty Epoxy Resin Product Assets required to be divested pursuant to the Decision and Order to the Acquirer, and/or to permit such Acquirer to continue the research, Development, manufacture, sale, marketing or distribution of the Specialty Epoxy Resin Products;

provided, however, Respondents may satisfy this requirement by certifying that the Acquirer has executed

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all such agreements directly with each of the relevant Third Parties.

- D. Until Respondents fully transfer the Specialty Epoxy Resin Product Assets to the Acquirer, Respondents shall maintain the operations of the Specialty Epoxy Resin Product Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such Business) and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Specialty Epoxy Resin Product Business and shall use their best efforts to preserve 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 Specialty Epoxy Resin Product Business. Respondents' responsibilities shall include, but are not limited to, the following:
1. Respondents shall provide the Specialty Epoxy Resin Product Business with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such Business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the Specialty Epoxy Resin Product Business;
 2. Respondents shall continue, at least at their scheduled pace, any additional expenditures for the Specialty Epoxy Resin Product Business 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;

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3. Respondents shall provide such resources as may be necessary to respond to competition against the Specialty Epoxy Resin Products and/or to prevent any diminution in sales of the Specialty Epoxy Resin Products during and after the Acquisition process and prior to divestiture of the related Specialty Epoxy Resin Product Assets;
 4. Respondents shall provide such resources as may be necessary to maintain the competitive strength and positioning of the Specialty Epoxy Resin Products at the High Volume Accounts;
 5. Respondents shall make available for use by the Specialty Epoxy Resin Product Business 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 Specialty Epoxy Resin Product Assets;
 6. Respondents shall provide the Specialty Epoxy Resin Product Business with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the Specialty Epoxy Resin Product Business; and
 7. Respondents shall provide such support services to the Specialty Epoxy Resin Product Business as were being provided to these Business by Respondents as of the date the Consent Agreement was signed by Respondents.
- E. Until Respondents fully transfer the Specialty Epoxy Resin Product Assets to the Acquirer, Respondents shall maintain a work force at least as equivalent in size, training, and expertise to what has been associated with the Specialty Epoxy Resin Products for the relevant

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Specialty Epoxy Resin Product's most recent Pre-Acquisition Marketing Plan.

- F. Until the Closing Date for each respective set of Specialty Epoxy Resin Product Assets, Respondents shall provide all the related Specialty Epoxy Resin Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, and manufacture the relevant Specialty Epoxy Resin Products consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of such Specialty Epoxy Resin Products pending divestiture and to ensure successful execution of the Pre-Acquisition Marketing Plans related to the relevant Specialty Epoxy Resin Products. Such incentives shall include a continuation of all employee benefits offered by Respondents until the Closing Date for the divestiture of the respective Specialty Epoxy Resin Product 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 Specialty Epoxy Resin Product's competitiveness.
- G. Respondents shall, during the Specialty Epoxy Resin Product Employee Access Period, not interfere with the hiring or employing by the relevant Acquirer of Specialty Epoxy Resin 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 that 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 Specialty Epoxy Resin Product Core Employee who

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receives a written offer of employment from the relevant Acquirer;

provided, however, subject to the conditions of continued employment prescribed in this Order, this Paragraph II.G. shall not prohibit Respondents from continuing to employ any Specialty Epoxy Resin Product Core Employee under the terms of such employee's employment with Respondents prior to the date of the written offer of employment from the Acquirer to such employee.

- H. Pending divestiture of the Specialty Epoxy Resin Product 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 Specialty Epoxy Resin relevant other than as necessary to comply with the following:
 - a. the requirements of the Orders;
 - b. Respondents' obligations to the Acquirer under the terms of any Remedial Agreement related to Specialty Epoxy Resin Products; or
 - c. applicable Law;
 2. not disclose or convey any such Confidential Business Information, directly or indirectly, to any person except the Acquirer or other persons specifically authorized by the Acquirer to receive such information;
 3. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the

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Specialty Epoxy Resin Products to the employees associated with business related to those Retained Products that are used or suitable for use in commerce for the same or similar purposes as the Specialty Epoxy Resin Products; and

4. shall institute procedures and requirements to ensure that the above-described employees:
 - 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.
- I. 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 Specialty Epoxy Resin 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.I. an agreement to abide by the applicable restrictions. Respondents shall maintain complete records of all such agreements at

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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, notifications and reminders sent to Respondents' employees and other personnel.

- J. 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.
- K. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Specialty Epoxy Resin Product Business through its full and complete transfer to the Acquirer, to minimize any risk of loss of competitive potential for the Specialty Epoxy Resin Product Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Specialty Epoxy Resin Product Assets except for ordinary wear and tear.

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

- A. For the time period after the date on which Respondents signs the Consent Agreement,
1. Respondents shall not use, directly or indirectly, any MDI Non-Public Information related to the research, Development, manufacturing, marketing, or sale of MDI Products that is obtained from an MDI Producer other than as necessary to comply with the following:
 - a. the requirements of this Orders;
 - b. Respondents' obligations to such MDI Producer under the terms of any agreement related to MDI Products; or
 - c. applicable Law;
 2. Respondents shall not disclose or convey any such MDI Non-Public Information, directly or indirectly, to any Person *except* the respective MDI Producer, other Persons specifically authorized by such MDI Producer to receive such information, and such employees of Respondent Hexion directly assigned to the FDBU;
 3. Respondents shall not provide, disclose or otherwise make available, directly or indirectly, any such MDI Non-Public Information to the employees associated with the MDI Acquired Business;
 4. Respondents shall ensure that no manager with direct line authority over the FDBU provides, discloses, or otherwise makes available, directly or indirectly, any

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- MDI Non-Public Information to the employees associated with the MDI Acquired Business, including, without limitation, those employees with direct line authority over the MDI Acquired Business;
5. Respondents shall prohibit any employee associated with the FDBU from discussing with, or providing, disclosing or otherwise making available to, any employee associated with the MDI Acquired Business, directly or indirectly, any MDI Non-Public Information;
 6. Respondents shall institute procedures and requirements throughout the various entities of the Respondents to ensure the MDI Non-Public Information is protected as required by this Order to Maintain Assets.
- B. The purpose of this Paragraph III is to prevent Respondents from using the MDI Non-Public Information to the detriment of the research, Development, manufacturing, marketing, or sale of MDI Products of the MDI Producers; to the benefit of the MDI Products researched, Developed, manufactured, marketed, or sold by Respondents; or from otherwise using such information in an anticompetitive manner or in any unfair method of competition.

IV.**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 perform all of their responsibilities as required by the Orders and the Remedial Agreements. The Commission may appoint one

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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 Hexion, which consent shall not be unreasonably withheld. If Respondent Hexion 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 Hexion 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

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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; and
3. The Interim Monitor shall serve until, the latter of:
 - a. the date of completion by Respondents of the divestiture of all Specialty Epoxy Resin Product Assets and the transfer of the Manufacturing Technology, Product Intellectual Property, and Product Licensed Intellectual Property in a manner that fully satisfies the requirements of the Orders; and
 - b. with respect to each Specialty Epoxy Resin Product, the date the Acquirer (or the Designee(s) of such Acquirer) has obtained all Product Approvals necessary to manufacture, market, import, export, and sell such Specialty Epoxy Resin Product and able to manufacture such Specialty Epoxy Resin Product in commercial quantities independently of Respondents;

provided, however, that, the Interim Monitor's service shall not exceed five (5) years from the date on which the Decision and Order becomes final;

provided further, that the Commission may shorten or extend this period as may be necessary or appropriate to accomplish the purposes of the Orders.

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- 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 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 the 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 gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.

Order to Maintain Assets

H. Respondent 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 Respondent, and any reports submitted by the Acquirer with respect to the performance of Respondent's obligations under the Orders or the Remedial Agreement(s). 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 the Orders; *provided, however*, beginning one hundred twenty (120) days after Respondent has filed its final report pursuant to Paragraph VIII.C. of the related Decision and Order, and every one hundred twenty (120) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by the Acquirer toward:

1. obtaining all of the relevant Product Approvals necessary to manufacture in commercial quantities, the Specialty Epoxy Resin Products independently of Respondents and;
 2. to secure sources of supply of the ingredients, inputs and components for the Specialty Epoxy Resin Products from entities other than Respondents.
- 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.

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- 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.

V.

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 complied with their obligations their obligations under Paragraphs II.A. and II.B. 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

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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 shall be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondents pursuant to Paragraph VIII of the Decision and Order.

VI.

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

- A. any proposed dissolution of any Respondent;
- B. any proposed acquisition, merger or consolidation of any Respondent; or
- C. any other change in any Respondent 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 to Maintain Assets.

VII.

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 any Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during business office hours of such Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts,

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correspondence, memoranda and all other records and documents in the possession or under the control of such Respondent related to compliance with this Order to Maintain Assets, which copying services shall be provided by such Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and

- B. to interview officers, directors, or employees of such Respondent, who may have counsel present, regarding such matters.

VIII.

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 Specialty Epoxy Resin Product 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, notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions related to such divestitures are complete, or the Commission otherwise directs that this Order to Maintain Assets is terminated; or

Decision and Order

2. the day the related Decision and Order becomes final.

By the Commission.

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Hexion LLC (“Hexion”) of Respondent Huntsman Corporation (“Huntsman”), 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

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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”):

1. Respondent Hexion LLC is a limited liability company organized, existing and doing business under and by virtue of the laws of State of Delaware, with its headquarters address c/o Hexion Specialty Chemicals, Inc., 180 East Broad Street, Columbus, Ohio 43215.

2. Respondent Huntsman Corporation 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 500 Huntsman Way, Salt Lake City, Utah 84108.

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. “Hexion” means Hexion LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Hexion

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(including, but not limited to, Hexion Specialty Chemicals, Inc. and Nimbus Merger Sub Inc.) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Hexion shall include Huntsman.

- B. “Huntsman” means Huntsman Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Huntsman, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” mean Hexion and Huntsman, individually and collectively.
- D. “Commission” means the Federal Trade Commission.
- E. “Acquirer” means the following:
 - 1. a Person 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. a Person 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 Respondent Hexion’s acquisition of fifty percent (50%) or more of the voting securities of Respondent Huntsman.

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- G. “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 Specialty Epoxy Resin Product or MDI Product. The term “Agency” includes, without limitation, the United States Environmental Protection Agency.
- H. “Closing Date” means the date on which Respondent(s) (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey the Specialty Epoxy Resin Product Assets to an Acquirer pursuant to this Order.
- I. “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 Specialty Epoxy Resin Product(s); *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:
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 Specialty Epoxy Resin Products that Respondent Huntsman can demonstrate it obtained without the assistance of Respondent Hexion prior to the Acquisition;

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3. information that is required by Law to be publicly disclosed;
 4. information that does not directly relate to the Specialty Epoxy Resin Product(s); or
 5. information relating to Respondents' general business strategies or practices relating to research, Development, manufacture, marketing or sales of products that does not discuss with particularity the Specialty Epoxy Resin Product(s).
- J. "Contract Manufacture" means to manufacture a Contract Manufacture Product by the Respondents or a Designee to be supplied to an Acquirer.
- K. "Contract Manufacture Product(s)" means all inputs and components of the Specialty Epoxy Resin Products, or any finished goods that are provided for resale as Specialty Epoxy Resin Products that, are not being manufactured at the Specialty Epoxy Resin Product Facilities on a regular basis as of the Closing Date, and that either are or were being manufactured by Hexion at any time on or after July 12, 2006.
- L. "Copyrights" means rights to all original works of authorship of any kind directly related to the Specialty Epoxy Resin Product(s) and any registrations and applications for registrations thereof, including, but not limited to, the following: all such rights with respect to all promotional, marketing and advertising materials, educational and training materials for the sales force, and sales forecasting models; copyrights in all process development data and reports relating to the research and Development of the Specialty Epoxy Resin Product(s) or of any materials used in the research, Development,

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manufacture, marketing or sale of the Specialty Epoxy Resin Product(s), including copyrights in all raw data, statistical programs developed (or modified in a manner material to the use or function thereof (other than through user preferences)) to analyze research data, market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; all copyrights in customer information; 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 copyrights in records, including customer lists, sales force call activity reports, vendor lists, sales data, manufacturing records, manufacturing processes, and supplier lists; all copyrights in data contained in laboratory notebooks relating to the Specialty Epoxy Resin Product(s); all copyrights in analytical and quality control data; and all correspondence with Agencies.

- M. “Designee” means any entity other than Respondents that will manufacture a Specialty Epoxy Resin Product for an Acquirer.
- N. “Development” means all research and development activities, including, without limitation, the following: test method development; stability testing; toxicology; formulation, including without limitation, customized formulation for a particular customer(s); process development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; statistical analysis and report writing; and conducting experiments for the purpose of obtaining any and all Product Approvals. “Develop” means to engage in Development.

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- O. “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. “Direct Cost” to the Acquirer for its use of any of Respondents’ employees’ labor shall not exceed the average hourly wage rate for such employee; *provided, however*, 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 Specialty Epoxy Resin Product, “Direct Cost” means such cost as is provided in such Remedial Agreement for that Specialty Epoxy Resin Product.
- P. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to the relevant provisions of this Order.
- Q. “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. The term “Domain Name” shall not include any trademark or service mark rights to such domain names other than the rights to the Trademarks required to be divested and shall not include those domain names listed in Appendix A.
- R. “Effective Date” means the date on which the Acquisition occurs.
- S. “Employee Information” means the following, for each Specialty Epoxy Resin 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

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(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 Specialty Epoxy Resin 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;
 - 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.

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- T. “Expiration Date” means the earliest of the following days:
1. the day on which Respondent Hexion withdraws its tender offer for the voting securities of Respondent Huntsman;
 2. the day on which Respondent Hexion’s tender offer for the voting securities of Respondent Huntsman expires without extension or amendment by Respondent Hexion;
 3. the day on which a Third Party acquires fifty (50) percent or more of the voting securities of Respondent Huntsman; or
 4. the day six (6) months after the day on which this Order becomes final.
- U. “Formaldehyde and Derivatives Business Unit” or “FDBU” means the division within Respondent Hexion focused on the production and sale of formaldehyde and its derivatives, including Hexamine, Methaform and various other specialty chemicals produced when formaldehyde is reacted with various substances.
- V. “Formulated System” means the exact combination and proportion of epoxy resins, curing agents, reactive diluents and other components that achieves a particular set of application and end-use characteristics in a final product.
- W. “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.
- X. “Hexion Stuttgart Assets” means all of Respondent Hexion’s Ownership Interest in Hexion Stuttgart, a limited

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liability company under and by virtue of the laws of the Federal Republic of Germany registered with the commercial register (*Handelsregister*) of the Local Court (*Amtsgericht*) of Stuttgart under HRB 21470.

- Y. “High Volume Account(s)” means any customer of Respondent Hexion whose annual and/or projected annual aggregate purchase amounts (on a company-wide level), in units or in dollars, of a Specialty Epoxy Resin Product in the United States from Respondent Hexion was, is, or is projected to be, among the top twenty highest of such purchase amounts by Respondent Hexion’s 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 Specialty Epoxy Resin Product Assets; or 4) the end of the last quarter following the Acquisition and/or the Closing Date.
- Z. “InfraTec” means InfraTec Duisburg GmbH, a corporation organized, existing, and doing business under and by virtue of the laws of the Federal Republic of Germany, with its offices and principal place of business located at Varziner Strasse 49, 47138 Duisburg, Federal Republic of Germany. The term “InfraTec” shall include any Person in which Respondent Hexion holds an Ownership Interest and that: (1) holds or controls assets related to and located at the facility located at Varziner Strasse 49, 47138, at Duisburg, Federal Republic of Germany, such facility is identified in under the term “Specialty Epoxy Resin Product Facilities” in this Order, and (2) provides site services to that facility.

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- AA. “InfraTec Assets” means all of Respondent Hexion’s Ownership Interest in InfraTec. The term “InfraTec Assets” shall include, without limitation, all of Respondent Hexion’s Ownership Interest in InfraTec that Respondent Hexion held as of August 2, 2007, *i.e.*, that Ownership Interest representing seventy (70) percent of the total ownership of InfraTec.
- BB. “Interim Monitor” means any monitor appointed pursuant to Paragraph V of this Order or Paragraph IV of the related Order to Maintain Assets.
- CC. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.
- DD. “Manufacturing Employees” means all salaried employees of Respondent Hexion who have directly participated in the planning, design, implementation or operational management of the Manufacturing Technology of the Specialty Epoxy Resin Products (irrespective of the portion of working time involved unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the three (3) year period immediately prior to the Closing Date.
- EE. “Manufacturing Equipment” means all fixtures, equipment (including, without limitation technical equipment and computers), and machinery that is or has been used at the Specialty Epoxy Resin Product Facilities at any time since April 29, 2005, in the research, Development, or manufacture of a Specialty Epoxy Resin Product and that is suitable for use in the research, Development, or manufacture of a Specialty Epoxy Resin Product as of the Effective Date.
- FF. “Manufacturing Technology” means:

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1. all technology, trade secrets, know-how, and proprietary information (whether patented, patentable or otherwise) related to the manufacture of the Specialty Epoxy Resin 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 procedures, flow diagrams, chemical safety, quality assurance, quality control, research records, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with compliance with Agency regulations, and labeling and all other information related to the manufacturing process, and supplier lists; tabulations, chemical descriptions and specifications of, all raw materials inputs, components, and ingredients related to the Specialty Epoxy Resin Products; 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 Specialty Epoxy Resin Product(s).

GG. "Marketing and Business Development Employees" means all management level employees of Respondent Hexion who directly have participated (irrespective of the portion of working time involved) in the marketing, contracting, or promotion of the Product(s) within the three (3) year period immediately prior to the Closing Date. These employees include, without limitation, all management level employees having any responsibilities in the areas of sales management, brand management, sales training, market research, business development,

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epoxy resin and related specialty markets, but excluding administrative assistants.

- HH. “Marketing Materials” means all marketing materials used specifically in the marketing or sale of a Specialty Epoxy Resin Product(s) prior to and as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (*e.g.*, sales call 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 Specialty Epoxy Resin Product(s).
- II. “MDI Acquired Business” means the business of researching, Developing, manufacturing, marketing, exporting and/or selling MDI Products that Respondent Hexion acquires from Respondent Huntsman pursuant to the Acquisition.
- JJ. “MDI Non-Public Information” means all information that is not in the public domain relating to an MDI Producer’s business related to MDI Products, including, without limitation, customer lists, price lists, marketing plans, production plans, contracts, expansion projects, cost information, marketing methods, competitively sensitive data or information, and all other information not available to the public.

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- KK. “MDI Producer” means any Person that researches, Develops, manufactures, markets, imports, exports or sells any MDI Product other than the Respondents.
- LL. “MDI Product(s)” or “MDI” means methylene diphenyl diisocyanate and/or diphenylmethane diisocyanate.
- MM. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.
- NN. “Ownership Interest” means any and all rights, title, and interest, present or contingent, of the Respondent(s) to hold any voting or nonvoting stock, share capital, equity, assets or other interests or beneficial ownership in a specified entity or specified asset(s).
- OO. “Patents” means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention 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, additions, 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).
- PP. “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.

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QQ. “Product Approval(s)” means any approvals, 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, sale, storage or transport of the product.

RR. “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 Specialty Epoxy Resin Product(s) and pursuant to which any Third Party purchases, or has the option to purchase, the Specialty Epoxy Resin Product(s) from Respondent Hexion;
2. pursuant to which Respondent Hexion purchases raw materials, inputs, components, or other necessary ingredient(s) or had planned to purchase the raw materials(s), inputs, components or other necessary ingredient(s) from any Third Party for use in connection with the manufacture of the Specialty Epoxy Resin Product(s);
3. relating to any experiments or scientific studies involving the Specialty Epoxy Resin Product(s);
4. with universities or other research institutions for the use of the Specialty Epoxy Resin Product(s) in scientific research;

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5. relating to the particularized marketing of the Specialty Epoxy Resin Product(s) or educational matters relating solely to the Specialty Epoxy Resin Product(s);
6. pursuant to which a Third Party manufactures or packages the Specialty Epoxy Resin Product(s) on behalf of Respondent Hexion;
7. pursuant to which a Third Party provides the Manufacturing Technology related to the Specialty Epoxy Resin Product(s) to Respondent Hexion;
8. pursuant to which a Third Party is licensed by Respondent Hexion to use the Manufacturing Technology;
9. constituting confidentiality agreements involving the Specialty Epoxy Resin Product(s);
10. involving any royalty, licensing, or similar arrangement involving the Specialty Epoxy Resin Product(s);
11. pursuant to which a Third Party provides any specialized services necessary to the research, Development, manufacture or distribution of the Specialty Epoxy Resin Products to Respondent Hexion including, but not limited to, consultation arrangements;
12. pursuant to which any Third Party collaborates with Respondent Hexion in the performance of research, Development, marketing, distribution or selling of the Specialty Epoxy Resin Product(s) or the Specialty Epoxy Resin Product(s) business;

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13. pursuant to which any entity that is, in whole or in part, owned by a Third Party, provides management services related to infrastructure expansion within, utility services within, transportation into or out of, or logistical support services within, any of the Specialty Epoxy Resin Product Facilities; and/or

provided, however, that where any such contract or agreement also relates to a Retained Product(s), Respondent Hexion shall assign the Acquirer all such rights under the contract or agreement as are related to the Specialty Epoxy Resin Product(s), but concurrently may retain similar rights for the purposes of the Retained Product(s).

SS. "Product Intellectual Property" means all of the following related to each Specialty Epoxy Resin Product (other than Product Licensed Intellectual Property):

1. Patents;
2. Copyrights;
3. Software;
4. Trademarks;
5. Trade Dress;
6. trade secrets, know-how, utility models, design rights, techniques, data, inventions, practices, recipes, raw material specifications, process descriptions, quality control methods in process and in final Specialty Epoxy Resin Products, protocols, 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

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thereof, other than Product Licensed Intellectual Property;

7. rights to obtain and file for patents and copyrights and registrations thereof; and
8. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing;

provided, however, “Product Intellectual Property” does not include the corporate names or corporate trade dress of “Hexion” or “Huntsman”, or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by Respondents or the related logos thereof;

provided further, however, Product Intellectual Property expressly includes all customer specific product formulations for Specialty Epoxy Resin Products, licenses from customers related to the manufacture of products for that specific customer, and all proprietary and/or trade secret information related to a particular customer.

TT. “Product Licensed Intellectual Property” means the following:

1. Patents that are related to a Specialty Epoxy Resin Product that Respondent Hexion can demonstrate have been routinely used, prior to the Effective Date, by Respondent Hexion for a Retained Product(s) that:
 - a. has been marketed or sold on an extensive basis by Respondent Hexion 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 Hexion; and
2. trade secrets, know-how, utility models, design rights, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development, and other information, and all rights in the to limit the use or disclosure thereof, that are related to a Specialty Epoxy Resin Product and that Respondents can demonstrate have been routinely used, prior to the Effective Date, by Respondent Hexion for a Retained Product(s) that:
 - a. has been marketed or sold on an extensive basis by Respondent Hexion 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 Hexion;

provided however, that, in cases where the aggregate retail sales in dollars of the Retained Product(s) within the two-year period immediately preceding the Acquisition collectively are less than the aggregate retail sales in dollars within the same period of the Specialty Epoxy Resin 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 and

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such a license to Respondents may be perpetual, fully paid-up and royalty-free license(s) with rights to sublicense;

provided further, however, Product Licensed Intellectual Property expressly *excludes* all customer specific product formulations for Specialty Epoxy Resin Products, licenses from customers related to the manufacture of products for that specific customer, and all proprietary and/or trade secret information related to a particular customer as such property is exclusively Product Intellectual Property.

UU. “Proposed Acquirer” means an entity proposed by Respondents (or a Divestiture Trustee) to the Commission and submitted for the approval of the Commission to become the Acquirer of particular assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed by Respondents pursuant to this Order.

VV. “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 Specialty Epoxy Resin

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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
4. any agreement between Respondents and a Third Party to effect the assignment of assets or rights of Respondents related to a Specialty Epoxy Resin 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.

WW. "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 Specialty Epoxy Resin Products (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the three (3) year period immediately prior to the Closing Date.

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XX. "Research and Development Records" means all research and development records relating to Specialty Epoxy Resin Products including, but not limited to:

1. inventory of research and development records, research history, research efforts, research notebooks, research reports, technical service reports, testing methods, invention disclosures, and know how related to the Specialty Epoxy Resin Products;
2. all correspondence to Respondent Hexion from Agencies and from Respondent Hexion to the Agencies relating to Product Approval(s) submitted by, on behalf of, or acquired by, Respondent Hexion related to the Specialty Epoxy Resin Products;
3. annual and periodic reports related to the above-described Product Approval(s), including any safety update reports;
4. Agency-approved product labeling related to the Specialty Epoxy Resin Products;
5. currently used product usage instructions, including, without limitation, package inserts related to the Specialty Epoxy Resin Products;
6. Agency-approved circulars and information related to the Specialty Epoxy Resin Products;
7. reports relating to the protection of human safety and health related to the manufacture or use of the Specialty Epoxy Resin Products;

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8. reports relating to the protection of the environment related to the manufacture or use of the Specialty Epoxy Resin Products;
9. summary of product complaints from customers related to the Specialty Epoxy Resin Products; and
10. product recall reports filed with any Agency related to the Specialty Epoxy Resin Products.

YY. “Retained Product” means any product(s) manufactured by Respondent Hexion prior to the Effective Date at any site owned or operated by Respondent Hexion prior to the Effective Date other than the Specialty Epoxy Resin Product Facilities.

ZZ. “Sales Employees” means all employees of Respondent Hexion who directly have participated (irrespective of the portion of working time involved) in the marketing or promotion of the Specialty Epoxy Resin Product(s) directly to customers within the three (3) year period immediately prior to the Closing Date. This includes employees trained to perform such sales activity for a Specialty Epoxy Resin Product within the three (3) year period immediately prior to the Closing Date.

AAA. “Software” means computer programs related to the Specialty Epoxy Resin Product(s), including all software implementations of algorithms, models, and methodologies whether in source code or object code form, databases and compilations, including any and all data and collections of data, all documentation, including user manuals and training materials, related to any of the foregoing and the content and information contained on any Website; *provided, however*, that “Software” does not include software that is readily purchasable or licensable from sources other than the Respondents and which has

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not been modified in a manner material to the use or function thereof (other than through user preference settings).

BBB. “Specialty Epoxy Resin Products” means, all non-commodity, value-added, epoxy resin products, including, without limitation, epoxy novolacs, glycidyl amines, cycloaliphatic, mono and multifunctional reactive diluents, curing agents, specialty blends, solutions, Formulated Systems and brominated resins (including all such specialty epoxy resin products identified in Appendix B), Developed, in Development, researched, manufactured, marketed or sold by Respondent Hexion at the Specialty Epoxy Resin Product Facilities at any time since May 27, 2005.

CCC. “Specialty Epoxy Resin Product Assets” means all of Respondent Hexion’s rights, title and interest in and to all assets throughout the World related to Respondent Hexion’s business related to the Specialty Epoxy Resin Products to the extent legally transferable, including the research, Development, manufacture, distribution, marketing, and sale of the Specialty Epoxy Resin Products, including, without limitation,

1. all Product Intellectual Property related to the Specialty Epoxy Resin 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, distributed, offered for sale, promoted, advertised, sold, imported, or exported the Specialty Epoxy Resin Product(s);

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3. all Product Approvals related to the Specialty Epoxy Resin Product(s);
4. all Manufacturing Technology related to the Specialty Epoxy Resin Product(s);
5. all Marketing Materials related to the Specialty Epoxy Resin Product(s);
6. all Website(s) related to the Specialty Epoxy Resin Product(s);
7. all Product Development Reports related to the Specialty Epoxy Resin Product(s);
8. at the Acquirer's option, all Product Assumed Contracts related to the Specialty Epoxy Resin Product(s) (copies to be provided to the Acquirer on or before the Closing Date);
9. a list of all customers and/or targeted customers for the Specialty Epoxy Resin Product(s) and the net sales (in either units or dollars) of the Specialty Epoxy Resin 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 the Specialty Epoxy Resin Products on behalf of the High Volume Account and his or her business contact information;
10. at the 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, supplies,

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operating materials, packaging materials, work-in-process, finished goods and merchandise, and other items of inventory related to the Specialty Epoxy Resin Product(s);

11. copies of all unfilled customer purchase orders for the Specialty Epoxy Resin Product(s) as of the Closing Date, to be provided to the Acquirer not later than two (2) days after the Closing Date;
12. at the Acquirer's option, subject to any rights of the customer, all unfilled customer purchase orders for the Specialty Epoxy Resin Products;
13. the Specialty Epoxy Resin Product Facilities;
14. the InfraTec Assets;
15. the Hexion Stuttgart Assets; and
16. all of the Respondents' books and records, customer files, customer lists and records, vendor files, vendor lists and records, cost files and records, credit information, distribution records, business records and plans, studies, surveys, and files related to the foregoing or to the Specialty Epoxy Resin Product(s);

provided however, that in cases in which documents or other materials included in the relevant assets to be divested contain information: (1) that relates both to the Specialty Epoxy Resin 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 the Specialty Epoxy Resin 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

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provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the 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 Acquirer with the above-described information without requiring Respondents completely to divest themselves of information that, in content, also relates to Retained Product(s).

DDD. “Specialty Epoxy Resin Product Core Employees” means the Marketing and Business Development Employees, Manufacturing Employees, Research and Development Employees, and the Sales Employees.

EEE. “Specialty Epoxy Resin Product Divestiture Agreements” means the following agreements:

1. “Master Agreement” by and among Hexion Specialty Chemicals, Inc., and Hexion Specialty Chemicals GmbH, as sellers, CHS Resins, A.S., as buyer, and Spolek Pro Chemickou A Hutni Výrobu, Akciová Společnost, dated as of September 19, 2008, and all amendments, exhibits, attachments, agreements, and schedules thereto;
2. “Raw Materials Supply Agreement” by and among Spolek Pro Chemickou A Hutni Výrobu, Akciová Společnost and Hexion Specialty Chemicals, Inc. dated as of September 19, 2008, and all amendments, exhibits, attachments, agreements, and schedules thereto; and
3. “Transitional Services Agreement” by and among Hexion Specialty Chemicals, Inc, and Hexion

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Specialty Chemicals GmbH, and CH.S. Resins, A.S., as buyer, dated as of September 19, 2008, and all amendments, exhibits, attachments, agreements, and schedules thereto; related to the Specialty Epoxy Resin Product Assets that have been approved by the Commission to accomplish the requirements of this Order. The Specialty Epoxy Resin Product Divestiture Agreements are attached to this Order and contained in non-public Appendix C.

FFF. "Specialty Epoxy Resin Product Facilities" means all assets comprising each of the facilities of Respondent Hexion identified below, including, without limitation, all of the following: real estate; buildings; warehouses; storage tanks; structures; Product Manufacturing Equipment; other equipment; machinery; tools; spare parts; personal property; furniture; fixtures; supplies associated with each particular facility; and other tangible property, owned, leased, or operated on or behalf of Hexion and located at the locations identified below,

1. located at Varziner Strasse 49, 47138, Duisburg, Federal Republic of Germany (but shall *exclude* only that portion of the facility primarily related to the manufacture of formaldehyde or phenolic resin, such exclusion only to apply to the extent that such portion of the facility is not or has not been used by Respondent Hexion in the manufacture of Specialty Epoxy Resin Products);
2. 16122 River Road, West Site, Norco, Louisiana 70079 (but shall *exclude* only that portion of the facility used by Respondent Hexion to the manufacture epichlorohydrin, allyl chloride, calcium chloride and other chlorine based chemicals);

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3. 8600 West 71st Street, Bedford Park, Illinois 60501;
and
4. 12650 Directors Drive, Suite 100, Houston, Texas
77477.

GGG. “Specialty Epoxy Resin Product Releasee(s)” means the Acquirer 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.

HHH. “Spolek” means Spolek Pro Chemickou A Hutni Výrobu, Akciova Společnost, a corporation organized, existing, and doing business under and by virtue of the laws of the Czech Republic, with its offices and principal place of business located at Revoluční 1930/86, 400 32 Ústí nad Labem, Czech Republic. The term “Spolek” shall include CH.S. Resins, A.S., a subsidiary of Spolek Pro Chemickou A Hutni Výrobu, Akciova Společnost.

III. “Supply Cost” means a cost not to exceed the manufacturer’s average direct per unit cost in United States dollars of manufacturing the Specialty Epoxy Resin Product, or raw material or ingredients related to a Specialty Epoxy Resin Product, for the twelve (12) month period immediately preceding the Effective Date. “Supply Cost” shall expressly exclude any intracompany business transfer profit; *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 Specialty Epoxy Resin Product, “Supply Cost” means the cost as specified in such Remedial Agreement for that Specialty Epoxy Resin Product.

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- JJJ. “Third Party(ies)” means any Person other than the following: Respondents or the Acquirer for the affected assets, rights and Specialty Epoxy Resin Product(s). The term “Third Party(ies)” shall include, without limitation, any Person holding an Ownership Interest in InfraTec other than Respondent Hexion.
- KKK. “Trade Dress” means the current trade dress of the Specialty Epoxy Resin Product, including, without limitation, product packaging, and the lettering of the product trade name or brand name.
- LLL. “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 Specialty Epoxy Resin Product(s). The term “Trademarks” includes the following trademarks: BakeliteTM, EPONTM, EPONOLTM, HELOXYTM, and EPIREZTM.
- MMM. “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 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 Specialty Epoxy Resin Product Assets, absolutely and in good faith, to Spolek pursuant to, and in accordance with, the Specialty Epoxy Resin 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 this Order shall not be construed to reduce any rights or benefits of Spolek or to reduce any obligations of Respondents under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Specialty Epoxy Resin Product Assets, respectively, is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondents have divested the Specialty Epoxy Resin Product Assets to Spolek 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 Spolek is not an acceptable purchaser of the Specialty Epoxy Resin Product Assets then Respondents shall immediately rescind the transaction with Spolek, in whole or in part, as directed by the Commission, and shall divest the Specialty Epoxy Resin Product Assets, as is relevant, 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 Specialty Epoxy Resin Product Assets to Spolek prior to the date this Order becomes final, and if, at the time the

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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 Specialty Epoxy Resin Product Assets to Spolek (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. Prior to the Effective Date and as a condition precedent to the consummation of the Acquisition, Respondents shall secure all consents and waivers from all Third Parties (including, without limitation, such consents and waivers related to the InfraTec Assets) that are necessary to permit Respondents to divest the Specialty Epoxy Resin Product Assets required to be divested pursuant to this Order to the Acquirer, and/or to permit such Acquirer to continue the research, Development, manufacture, sale, marketing or distribution of the Specialty Epoxy Resin Products;

provided, however, Respondents may satisfy this requirement by certifying that the Acquirer has executed all such agreements directly with each of the relevant Third Parties.

- C. Respondents shall transfer the Manufacturing Technology to the Acquirer in an organized, comprehensive, complete, useful, timely, and meaningful manner. Respondents shall, *inter alia*:
1. designate employees of Respondents knowledgeable with respect to such Manufacturing Technology to a committee for the purposes of communicating directly with such Acquirer and the Interim Monitor (if any has

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been appointed) for the purposes of effecting such transfer;

2. prepare technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the Specialty Epoxy Resin Products, such protocols and acceptance criteria to be subject to the approval of the Acquirer;
3. prepare and implement a detailed technological transfer plan that contains, *inter alia*, the transfer of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all Manufacturing Technology to the Acquirer; and
4. upon reasonable written notice and request from the Acquirer to Respondents, provide in a timely manner, at no greater than Direct Cost, assistance and advice to enable the Acquirer (or the Designee of the Acquirer) to:
 - a. manufacture the Specialty Epoxy Resin Products in the same quality achieved by the Respondents and in commercial quantities;
 - b. obtain any Product Approvals necessary for the Acquirer to manufacture, sell, market or distribute the Specialty Epoxy Resin Products; and
 - c. receive, integrate, and use such Manufacturing Technology.

D. Respondents shall:

1. upon reasonable written notice and request from the Acquirer to Respondents, Respondents shall Contract

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Manufacture and deliver to the Acquirer, in a timely manner and under reasonable terms and conditions, a supply of each of the Contract Manufacture Products at Respondents' Supply Cost, for a period of time sufficient to allow the Acquirer (or the Designee of the Acquirer) to:

- a. obtain all of the relevant Product Approvals necessary to manufacture in commercial quantities, the Contract Manufacture Products independently of Respondents; and
 - b. secure sources of supply of the ingredients, inputs and components for the Contract Manufacture Products from entities other than Respondents;
2. make representations and warranties to the Acquirer that the Contract Manufacture Product(s) supplied through Contract Manufacture pursuant to a Remedial Agreement meet the specifications of the relevant customers;
 3. for the Contract Manufacture Products supplied by Respondents, 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 a Remedial Agreement by Respondents to meet customer specifications. 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

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right to settle the litigation, so long as such settlement is consistent with Respondents' responsibilities to supply the Contract Manufacture Products 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;

4. 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(s) 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;
5. 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), make available to the Acquirer and the Interim Monitor (if any has been appointed) all records that relate to the manufacture of the Contract Manufacture Products that are generated or created after the Closing Date;
6. during the term of the Contract Manufacture between Respondents and the Acquirer, maintain manufacturing facilities necessary to manufacture each of the Contract Manufacture Products; and
7. during the term of the Contract Manufacture between Respondents and the Acquirer, provide consultation

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with knowledgeable employees of Respondents and training, at the request of the Acquirer and at a facility chosen by the Acquirer, for the purposes of enabling the Acquirer (or the Designee of the Acquirer) to obtain all Product Approvals to manufacture Specialty Epoxy Resin Products manufactured with or from or that use or include the Contract Manufacture Products in the same quality achieved by the Respondents and in commercial quantities, and in a manner consistent with the relevant customer specifications, 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 Specialty Epoxy Resin Products manufactured with or from or that use or include the Contract Manufacture Products

The foregoing provisions, II.D.1. - 7., shall remain in effect with respect to each Contract Manufacture Product until the date the earliest of the following dates: (1) the date that the Acquirer (or the Designee(s) of such Acquirer) is able to manufacture such Contract Manufacture Product in commercial quantities, in a manner consistent with the relevant customer specifications, independently of Respondents; or (2) the date five (5) years from the date on which this Order becomes final.

E. Respondents shall:

1. submit to the Acquirer, at Respondents' expense, all Confidential Business Information;
2. deliver such Confidential Business Information as follows:

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- a. in good faith;
 - b. in a timely manner, *i.e.*, 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 Specialty Epoxy Resin 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 Specialty Epoxy Resin relevant 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 Specialty Epoxy Resin; or
 - c. applicable Law;
 5. not disclose or convey any such Confidential Business Information, directly or indirectly, to any person

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except the Acquirer or other persons specifically authorized by the Acquirer to receive such information; and

6. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the Specialty Epoxy Resin Products to the employees associated with business related to those Retained Products that are used or suitable for use in commerce for the same or similar purposes as the Specialty Epoxy Resin Products.
- F. 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 Manufacturing Technology, Product Intellectual Property, or Product Licensed Intellectual Property related to the relevant Specialty Epoxy Resin Product(s) 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 Manufacturing Technology, Product Intellectual Property and Product Licensed Intellectual Property.
- G. 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.F. that allows the Third Party to provide the relevant Manufacturing Technology, Product Intellectual Property, or Product Licensed Intellectual Property 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.

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H. Respondents shall:

1. for each Specialty Epoxy Resin Product, for a period of at least eighteen (18) months from the relevant Closing Date, provide the Acquirer with the opportunity to enter into employment contracts with the Specialty Epoxy Resin Product Core Employees. Each of these periods is hereinafter referred to as the “Specialty Epoxy Resin Product Core Employee Access Period(s)”;
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 Acquirer or the relevant Proposed Acquirer with the Product Employee Information related to the relevant Specialty Epoxy Resin Product Core Employees. Failure by Respondents to provide the Product Employee Information for any Specialty Epoxy Resin Product Core Employee within the time provided herein shall extend the Specialty Epoxy Resin Product Core Employee Access Period(s) with respect to that employee in an amount equal to the delay;
3. during the Specialty Epoxy Resin Product Core Employee Access Period(s), not interfere with the hiring or employing by the Acquirer of the Specialty Epoxy Resin Product Core Employees related to the particular Specialty Epoxy Resin 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 the Acquirer, including, but not limited to, any noncompete or nondisclosure provision of employment with respect to a Specialty Epoxy Resin Product or other contracts with Respondents that

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would affect the ability or incentive of those individuals to be employed by the Acquirer. In addition, Respondents shall not make any counteroffer to such a Specialty Epoxy Resin Product Core Employee who has received a written offer of employment from the Acquirer;

provided, however, that, subject to the conditions of continued employment prescribed in this Order, this Paragraph II.H.3. shall not prohibit Respondents from continuing to employ any Specialty Epoxy Resin Product Core Employee under the terms of such employee's employment with Respondents prior to the date of the written offer of employment from the Acquirer to such employee;

4. until the Closing Date, provide all Specialty Epoxy Resin Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, and manufacture the Specialty Epoxy Resin Product(s) consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Specialty Epoxy Resin Product(s) and to ensure successful execution of the pre-Acquisition plans for such Specialty Epoxy Resin Product(s). Such incentives shall include a continuation of all employee compensation and benefits offered by Respondent Hexion until the Closing Date(s) for the divestiture of the Specialty Epoxy Resin Product Assets has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

provided, however, that, subject to those conditions of continued employment prescribed in this Order, this

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Order does not require nor shall be construed to require Respondents to terminate the employment of any employee or to prevent Respondents from continuing to employ the Specialty Epoxy Resin Product Core Employees in connection with the Acquisition; and

5. 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 Specialty Epoxy Resin Product (“Specialty Epoxy Resin Product Employee”) to terminate his or her employment relationship with the Acquirer; or
 - b. hire any Specialty Epoxy Resin Product Employee; *provided, however,* Respondents may hire any former Specialty Epoxy Resin Product Employee whose employment has been terminated by the Acquirer or who independently applies for employment with Respondent, 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 Specialty Epoxy Resin Product Employees; or (2) hire a Specialty Epoxy Resin Product Employee who contacts Respondents on his or her own initiative without any direct or indirect solicitation or encouragement from Respondents.

- I. Respondents shall require, as a condition of continued employment post-divestiture of the assets required to be

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divested pursuant to this Order, that each Specialty Epoxy Resin 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 Specialty Epoxy Resin 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).

- J. 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 Specialty Epoxy Resin 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 Specialty Epoxy Resin Products;
 2. are directly involved in the research, Development, manufacturing, distribution, sale or marketing of Retained Products that are used or suitable for use in commerce for the same or similar purposes as the relevant Specialty Epoxy Resin Products; and/or
 3. may have Confidential Business Information related to the Specialty Epoxy Resin Products.

Respondents shall give such notification by e-mail with return receipt requested or similar transmission, and keep a

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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 headquarters address within the United States 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.

K. Until Respondents complete the divestitures required by Paragraph II.A. and fully transfer the related Manufacturing Technology to the Acquirer(s),

1. Respondents shall take such actions as are necessary to:
 - a. maintain the full economic viability and marketability of the businesses associated with each Specialty Epoxy Resin Product;
 - b. minimize any risk of loss of competitive potential for such business;
 - c. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to each Specialty Epoxy Resin Product;
 - d. ensure the assets required to be divested are transferred to the Acquirer in a manner without disruption, delay, or impairment of the regulatory approval processes related to the business associated with each Specialty Epoxy Resin Product;

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- e. ensure the completeness of the transfer of the Manufacturing Technology; and
2. Respondents shall not sell, transfer, encumber or otherwise impair the assets required to be divested (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the businesses associated with each Specialty Epoxy Resin Product.
- L. Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against the Acquirer(s) or the Specialty Epoxy Resin Product Releasee(s) for the research, Development, manufacture, use, import, export, distribution, or sale of the Specialty Epoxy Resin 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 a Specialty Epoxy Resin 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 a Specialty Epoxy Resin Product, 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 Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of a particular Specialty Epoxy Resin Product; or (2) the use within, import into, export from, or the supply, distribution, or sale within, the United States of a particular Specialty

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Epoxy Resin Product. Respondents shall also covenant to the 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 Acquirer or the related Specialty Epoxy Resin Product Releasee(s) under such Patents, if the suit would have the potential to interfere with the Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of a particular Specialty Epoxy Resin Product; or (2) the use within, import into, export from, or the supply, distribution, or sale within, the United States of a particular Specialty Epoxy Resin Product.

- M. Upon reasonable written notice and request from an Acquirer to Respondent, Respondent shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondent to assist that Acquirer to defend against, respond to, or otherwise participate in any litigation related to the Product Intellectual Property related to any of the Specialty Epoxy Resin Products, if such litigation would have the potential to interfere with the Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of the Specialty Epoxy Resin Products; or (2) the use within, import into, export from, or the supply, distribution, or sale within the United States.
- N. Within eighteen (18) months of the Closing Date, Respondents shall either license or assign any and all intellectual property to the Acquirer that constitutes either Product Intellectual Property or Product Licensed Intellectual Property that the Acquirer, with the concurrence of the Interim Monitor, identifies as being necessary to the conduct of the business associated with the Specialty Epoxy Resin Product (as such business had been conducted by Respondent Hexion prior to the

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Effective Date) and that was not listed and/or included in the intellectual property that was licensed or assigned to the Acquirer pursuant to the Remedial Agreements previously submitted by Respondents to the Commission.

- O. For any patent infringement suit in which either Respondent is alleged to have infringed a Patent of a Third Party prior to the Closing Date or for such suit as such Respondent has prepared or is preparing as of the Closing Date to defend against such infringement claim(s), and where such a suit would have the potential to interfere with the Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of a particular Specialty Epoxy Resin Product; or (2) the use within, import into, export from, or the supply, distribution, or sale within, the United States of the relevant Specialty Epoxy Resin Products, Respondents shall:
1. 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 such Specialty Epoxy Resin Product;
 2. waive conflicts of interest, if any, to allow either Respondents' outside legal counsel to represent the Acquirer in any ongoing patent litigation involving such Specialty Epoxy Resin Product; and
 3. 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 Specialty Epoxy Resin Product.

P. Respondents shall not:

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1. use the Product Trademarks related to the Specialty Epoxy Resin 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 their trademark registrations for and trademark rights in such Product Trademarks against Third Parties;

provided, however, that this Order shall not preclude Respondents from continuing to use those trademarks, tradenames, or service marks related to the Retained Products as of the Effective Date.

- Q. Respondents shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to any of the Specialty Epoxy Resin Products a decision the result of which would be inconsistent with the terms of this Order and/or the remedial purposes thereof.
- R. The purpose of the divestiture of the Specialty Epoxy Resin Product Assets and the transfer of the Manufacturing Technology related to the Specialty Epoxy Resin Products, respectively, and the related obligations imposed on the Respondents by this Order is:

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1. to ensure the continued use of the Specialty Epoxy Resin Product Assets in the research, Development, manufacture, use, import, export, distribution, and sale of each of the respective Specialty Epoxy Resin Products;
2. to provide for the future use of the Specialty Epoxy Resin Product Assets for the research, Development, manufacture, use, import, export, distribution, and sale of each of the respective Specialty Epoxy Resin Products;
3. to create a viable and effective competitor, who is independent of the Respondents in the research, Development, manufacture, use, import, export, distribution, or sale of each of the Specialty Epoxy Resin Products; and
4. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

III.

A. For the time period after the Effective Date,

1. Respondents shall not use, directly or indirectly, any MDI Non-Public Information related to the research, Development, manufacturing, marketing, or sale of MDI Products that is obtained from an MDI Producer other than as necessary to comply with the following:
 - a. the requirements of this Order;

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- b. Respondents' obligations to such MDI Producer under the terms of any agreement related to MDI Products; or
 - c. applicable Law;
2. Respondents shall not disclose or convey any such MDI Non-Public Information, directly or indirectly, to any Person *except* the respective MDI Producer, other Persons specifically authorized by such MDI Producer to receive such information, and such employees of Respondent Hexion directly assigned to the FDBU;
 3. Respondents shall not provide, disclose or otherwise make available, directly or indirectly, any such MDI Non-Public Information to the employees associated with the MDI Acquired Business;
 4. Respondents shall ensure that no manager with direct line authority over the FDBU provides, discloses, or otherwise makes available, directly or indirectly, any MDI Non-Public Information to the employees associated with the MDI Acquired Business, including, without limitation, those employees with direct line authority over the MDI Acquired Business;
 5. Respondents shall prohibit any employee associated with the FDBU from discussing with, or providing, disclosing or otherwise making available to, any employee associated with the MDI Acquired Business, directly or indirectly, any MDI Non-Public Information;
 6. Respondents shall institute procedures and requirements throughout the various entities of the Respondents to ensure the MDI Non-Public Information is protected as required by this Order.

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- B. The purpose of this Paragraph III is to prevent Respondents from using the MDI Non-Public Information to the detriment of the research, Development, manufacturing, marketing, or sale of MDI Products of the MDI Producers; to the benefit of the MDI Products researched, Developed, manufactured, marketed, or sold by Respondents; or from otherwise using such information in an anticompetitive manner or in any unfair method of competition.

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

- A. If Respondent Hexion does not acquire more than fifty (50) percent of the voting securities of Respondent Huntsman on or before the Expiration Date, then Respondent Hexion shall divest, absolutely and in good faith, all of its Ownership Interest in Respondent Huntsman on the New York Stock Exchange, or such other securities exchange as the voting securities of Respondent Huntsman are registered to be traded on, within six (6) months of the Expiration Date to a Person that holds not more than one (1) percent of the voting securities of Respondent Hexion.
- B. Pending the divestiture described in Paragraph IV.A., Respondent Hexion shall not, directly or indirectly:
1. exercise dominion or control over, or otherwise seek to influence, the management, direction or supervision of the business of Respondent Huntsman including, but not limited to, any participation in the formulation, determination or direction of any business decisions of Respondent Huntsman;

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2. propose corporate action requiring the approval of Respondent Huntsman shareholders;
3. nominate, or any other way seek to or obtain representation on the Board of Directors of Respondent Huntsman;
4. have any of their directors, officers or employees serve simultaneously as an officer or director of Respondent Huntsman;
5. exercise any voting rights attached to any Ownership Interest in Respondent Huntsman, *provided, however*, that in any matter to be voted on by the shareholders of Respondent Huntsman, Respondent Hexion shall cast the votes related to their Ownership Interest in each class of Respondent Huntsman stock in an amount and manner proportional to the vote of all other votes cast by other Respondent Huntsman shareholders entitled to vote on such matter;
6. seek or obtain access to any confidential, proprietary, or other non-public information of Respondent Huntsman relating to the research, Development, manufacture, distribution, sale, and marketing of products that have the same or similar uses or applications as the Specialty Epoxy Resin Products researched, Developed, manufactured, distributed, sold, or marketed by Respondent Hexion; *provided, however*, that this shall not be construed to prohibit Respondent Hexion from seeking or obtaining discovery in any litigation or other proceeding to resolve a claim between Respondent Hexion and Respondent Huntsman in accordance with the procedures of the forum before which the dispute is pending. With respect to any such discovery, Respondent Hexion shall enter into a protective order to prevent any information from being used for any

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purpose other than providing legal representation or evidence as to the particular dispute and to prevent any information from being disclosed to any person(s) not necessary to the resolution of such dispute; or

7. take any action or omit to take any action in a manner that would be incompatible with the status of Respondent Hexion as a passive investor in Respondent Huntsman.

The requirements of this Paragraph IV.B. shall continue and remain in effect so long as Respondent Hexion retains any Ownership Interest in Respondent Huntsman.

- C. The purpose of the requirements of Paragraph IV is to ensure that, if the Acquisition does not occur, Respondent Hexion will not seek to exert, or exert influence upon, the business operations of Respondent Huntsman.

V.**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 perform 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 Hexion, which consent shall not be unreasonably withheld. If Respondent Hexion 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

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Commission to Respondent Hexion 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. 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; and
 - 3. the Interim Monitor shall serve until, the latter of:
 - a. the date of completion by Respondents of the divestiture of all Specialty Epoxy Resin Product Assets and the transfer of the Manufacturing Technology, Product Intellectual Property, and

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Product Licensed Intellectual Property in a manner that fully satisfies the requirements of this Order; and

- b. with respect to each Specialty Epoxy Resin Product, the date the Acquirer (or the Designee(s) of such Acquirer) has obtained all Product Approvals necessary to manufacture, market, import, export, and sell such Specialty Epoxy Resin Product and able to manufacture such Specialty Epoxy Resin Product in commercial quantities independently of Respondents;

provided, however, that the Interim Monitor's service shall not exceed five (5) years from the date on which this Order becomes final;

provided further, that the Commission may shorten or extend this period as may be necessary or appropriate to accomplish the purposes of the Orders.

- 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 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.

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- F. 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 Respondent, 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 gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
- H. 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 Acquirer with respect to the performance of Respondent's obligations under the Order or the Remedial Agreement(s). 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 the Order; *provided, however*, beginning one hundred twenty (120) days after Respondent has filed its final report pursuant to Paragraph VIII.C., and every one hundred twenty (120) days thereafter, the Interim

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Monitor shall report in writing to the Commission concerning progress by the Acquirer toward:

1. obtaining all of the relevant Product Approvals necessary to manufacture in commercial quantities, the Specialty Epoxy Resin Products independently of Respondents and;
 2. to secure sources of supply of the ingredients, inputs and components for the Specialty Epoxy Resin Products from entities other than Respondents.
- 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.
 - 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 Order.

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- M. 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

VI.**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 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 Hexion, which

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consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent Hexion 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 Hexion 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 Commission. If, however, at the end of the one (1)

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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

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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 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 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. 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

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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 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; 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

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additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

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

With respect to Confidential Business Information, 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, and rules promulgated by the Commission), 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 Specialty Epoxy Resin 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;

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provided, however, that pursuant to this Paragraph VII, Respondents shall: (1) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Acquirer (but shall not be deemed to have violated this requirement if the 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.

VIII.

IT IS FURTHER ORDERED that:

- A. Within five (5) days of Respondent Hexion securing the Third Party consent and waiver related to the InfraTec Assets, as required pursuant to Paragraph II.B., Respondent Hexion shall submit to the Commission a copy of such consent and waiver.
- B. Within five (5) days of the Acquisition, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
- 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 , II.B., II.C., II.E., II.G., II.J.; and
 2. and all of their responsibilities to render transitional services to the Acquirer as provided by this Order and the Remedial Agreement(s);

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

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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 it has complied and is complying with the Order.

IX.

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 this Order.

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

- A. Any Remedial Agreement shall be deemed incorporated into this Order.
- B. Any failure by Respondents to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.
- C. Respondents shall include in each Remedial Agreement related to each of the Specialty Epoxy Resin Products a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of Respondents' obligations to the Acquirer(s) pursuant to this Order.
- D. Respondents shall also include in each Remedial Agreement a representation from the Acquirer that such Acquirer shall use commercially reasonable efforts to secure the Product Approval(s) necessary to manufacture, or to have manufactured by a Third Party, in commercial quantities, each such Specialty Epoxy Resin Product and to have any such manufacture to be independent of Respondents, all as soon as reasonably practicable.
- E. Respondents shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission.

XI.

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 any Respondent made to its principal

Decision and Order

United States offices, registered office of its United States subsidiary, or its headquarters address, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during business office hours of such 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 such Respondent related to compliance with this Order, which copying services shall be provided by such Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and
- B. to interview officers, directors, or employees of such Respondent, who may have counsel present, regarding such matters.

XII.

IT IS FURTHER ORDERED that this Order shall terminate on November 13, 2018.

By the Commission.

**APPENDIX A
EXCLUDED DOMAIN NAMES**

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

Analysis to Aid Public Comment

**APPENDIX B
SPECIALTY EPOXY RESIN PRODUCTS**

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

**NON-PUBLIC APPENDIX C
SPECIALTY EPOXY RESIN PRODUCT
DIVESTITURE AGREEMENTS**

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

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

I. Introduction

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order from Hexion LLC and Huntsman Corporation (“Respondents”). The Consent Agreement is intended to resolve anticompetitive effects stemming from Hexion LLC’s (“Hexion”) proposed acquisition of Huntsman Corporation (“Huntsman”). The Consent Agreement includes a proposed Decision and Order that requires

Analysis to Aid Public Comment

Respondent Hexion to divest its Specialty Epoxy Resin Product Business, which includes the research, development, manufacture, distribution, marketing, and sale of each Specialty Epoxy Resin Product; its Stuttgart (Germany) Assets; and other assets related to such business, including, but not limited to, Duisburg (Germany), parts of Norco (Louisiana), Bedford Park (Illinois), and Houston (Texas); among other things. The proposed Decision and Order also requires the licensing of all Hexion intellectual property related to the production of Specialty Epoxy Resins. The Decision and Order calls for divestiture of Hexion's Specialty Epoxy Business to Spolek Pro Chemickou A Hutni Vyrobu ("Spolek or Spolchemie"), or another Commission-approved buyer in the event that Spolek is determined not to be acceptable.

Additionally, the Decision and Order requires Hexion to institute procedures to ensure that the methylene diphenyl diisocyanate (also referred to as diphenylmethane diisocyanate) ("MDI") business it acquired from Huntsman not have access directly or indirectly to competitively sensitive non-public information obtained by its formaldehyde division.

The proposed Consent Agreement and Decision and Order are designed to address competition concerns in the Specialty Epoxy Resin and MDI markets. The Consent Agreement, if finally accepted by the Commission, would settle charges that the proposed acquisition may substantially lessen competition in the various application specific end-use markets for Specialty Epoxy Resins and the market for MDI. The Commission has reason to believe that Respondent's proposed acquisition 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.

Analysis to Aid Public Comment

II. The Proposed Complaint

According to the Commission's proposed complaint, the relevant product markets in which to analyze the effects of Huntsman's sale of assets to Hexion are the markets for the development, manufacture, and sale of Specialty Epoxy Resins, various application specific end-use markets in North America in which these resins are used, and the market for MDI.

Specialty epoxy resins are value added high performance epoxy resin products, including, but not limited to, blends, formulations, advanced resins, and multifunctional resins. Specialty Epoxy Resins are used with curing agents, modifiers, and other ingredients and components necessary to the use of these resins. Specialty Epoxy Resins are used in demanding applications where enhanced performance is required, such as aerospace composites, wind turbine blades, and electric power generation applications. The relevant geographic market is North America. Additionally, Specialty Epoxy resins sold into each application segment constitute distinct application specific end-use product markets.

MDI is a diisocyanate chemical used in various applications, including construction insulation, refrigeration, and composite wood products. Formaldehyde, a versatile chemical, is an essential ingredient used in the manufacture of MDI. It provides useful characteristics such as desirable insulating and mechanical properties, while avoiding many of the harmful characteristics associated with the use of pure formaldehyde, which is a carcinogen. The relevant geographic market is North America.

The proposed complaint alleges that the various application specific end-use markets for Specialty Epoxy Resins in North America and the market for MDI are highly concentrated. Hexion and Huntsman have been the primary competitors in the market for Specialty Epoxy Resins for many years. According to the proposed complaint, Hexion and Huntsman account for between

Analysis to Aid Public Comment

90 and 60 percent of sales in the various application specific end-use markets in North America. They each had close to \$1 billion in sales of Specialty Epoxy Resins in 2007. There are only four producers of MDI in the United States: Huntsman, Dow Chemical, BASF, and Bayer. MDI imports are minimal, and Hexion provides formaldehyde to all MDI producers in the U.S., except Dow. Hexion, as a supplier of formaldehyde to MDI producers, receives competitively sensitive non-public information from three of the four MDI producers. Such information includes MDI production forecasts, MDI demand forecasts and updates to these forecasts on a weekly basis, MDI projected long term forecasts, and schedules for periodic shutdowns of MDI production facilities supplied by Hexion. Thus, the market for MDI and the formaldehyde used in its production is highly concentrated. Total U.S. sales of MDI in 2007 were approximately \$2 billion.

The proposed complaint alleges that the proposed acquisition would reduce competition for Specialty Epoxy Resins in the various application specific end-use markets in North America by eliminating direct competition between these two companies, and by increasing the likelihood that unilateral market power will be exercised. As to MDI, the complaint alleges that the likelihood of coordinated interaction among competitors is increased as a result of the proposed acquisition.

III. Terms of the Proposed Order

Under the proposed Decision and Order, Hexion will divest its Specialty Epoxy Resins Business, and related assets, to Spolek within ten (10) days after Hexion acquires Huntsman. Spolek, based in the Czech Republic, develops, manufactures, and markets a wide range of commodity or basic epoxy resins. The divestiture will allow Spolek to enter the Specialty Epoxy Resins market. Similar to Hexion, post-divestiture Spolek will participate

Analysis to Aid Public Comment

in both the commodity and Specialty Epoxy Resins markets, which will position Spolek to compete effectively in the market.

The proposed Decision and Order requires Hexion to divest its Duisburg, Germany; Stuttgart, Germany; Norco, Louisiana; Bedford Park, Illinois; and Houston, Texas facilities and their related assets. This will provide Spolek all assets and know-how necessary for the research, development, production and sale of Specialty Epoxy Resins.

In addition, the proposed Decision and Order requires Hexion to institute procedures to ensure that its acquired MDI business not have access directly, or indirectly, to competitively sensitive non-public information obtained by its formaldehyde division. The Decision and Order prohibits Hexion from using any competitively sensitive non-public information obtained from its competitors in an anticompetitive manner.

IV. Opportunity for Public Comment

The proposed Decision and Order has been placed on the public record for thirty (30) days to receive comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the Consent Agreement and comments received and decide whether to withdraw its agreement or make final the Consent Agreement's proposed Order.

The purpose of this analysis is to facilitate public comment on the proposed Decision and Order. This analysis is not intended to constitute an official interpretation of the Consent Agreement and the proposed Decision and Order.

Complaint

IN THE MATTER OF

DICK'S SPORTING GOODS, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-4240; File No. 071 0196
Complaint, November 18, 2008 – Decision, November 18, 2008*

This consent order addresses an agreement between Golf Galaxy, Inc., a wholly owned subsidiary of Dick's Sporting Goods, Inc., and Golf Town Canada Inc. The original 1998 agreement between the two provided that Golf Galaxy would provide consulting services to Golf Canada, which wished to launch a chain of golf superstores in Canada similar to the Golf Galaxy stores in the United States. Golf Galaxy and Golf Canada entered into an amended agreement in 2004 that extended the duration of the restraints on competition beyond the expiration dates contemplated in the 1998 agreement. The proposed order enjoins Golf Galaxy from dividing or allocating markets for the retail sale of golf merchandise. In addition, the order prevents Golf Galaxy from enforcing any non-compete provision beyond the date originally provided for in the 1998 agreement. More specifically, the provision of the 2004 agreement prohibiting Golf Canada from operating any retail store in the United States will no longer be enforceable as of October 8, 2009. The prohibition on Golf Canada's engaging in any business outside of Canada that competes with or is similar to the business of Golf Galaxy will also no longer be enforceable. The order would not interfere with Golf Galaxy's ability to enter into written agreements to allocate or divide markets, customers, contracts, lines of commerce, or geographic territories in connection with the sale of golf merchandise where such agreement is reasonably related to a lawful consulting arrangement or lawful joint venture agreement; and is reasonably necessary to achieve such agreement's procompetitive benefits.

Participants

For the Commission: Jeffrey H. Fischer, Geoffrey M. Green, Melanie Sabo, and Melissa Westman-Cherry.

For the Respondent: Wendy Newton, Buchanan Ingersoll & Rooney PC.

Complaint

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Dick's Sporting Goods, Inc., a corporation, hereinafter sometimes referred to as "Respondent," has violated the provisions of said Act, 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 in that respect as follows:

1. Respondent Dick's Sporting Goods, Inc. ("Dick's"), is a corporation organized, and 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 300 Industry Drive, RIDC Park West, Pittsburgh, PA 15275. Golf Galaxy, Inc. ("Golf Galaxy"), a wholly owned subsidiary of Dick's, is a corporation organized, and existing and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 7275 Flying Cloud Dr., Eden Prairie, MN 55344. In 2007, Dick's acquired all of the issued and outstanding stock of Golf Galaxy.

2. The acts and practices of Respondent, including the acts and practices alleged herein, are in commerce or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

3. Golf Galaxy operates a chain of golf superstores in the United States. Golf Galaxy stores offer a broad selection of golf merchandise and related services, including golf clubs, equipment, accessories, clothing, lessons, swing analysis, and golf club fitting.

Complaint

4. In 1998, the founders of Golf Town Canada Inc. (“Golf Canada”) wished to launch a chain of golf superstores in Canada similar to the Golf Galaxy superstores.

5. In June 1998, Golf Canada and Golf Galaxy entered into a Consulting Agreement (the “1998 Agreement”). Golf Galaxy agreed therein: (i) to develop and present an initial training program for certain Golf Canada employees, (ii) to provide Golf Canada on an ongoing basis with useful business documents, including construction blueprints, merchandising plans, and sales reports, and (iii) to provide continuing consulting support to Golf Canada.

6. In consideration for these consulting services, Golf Galaxy received shares of Golf Canada, a seat on the company’s board of directors, and cash payments.

7. The 1998 Agreement restrained Golf Canada from competing with Golf Galaxy. Specifically, Golf Canada was barred: (i) from operating any retail store in the United States during the term of the 1998 Agreement and for five years thereafter, and (ii) from engaging in any business outside of Canada that competes with or is similar to the business of Golf Galaxy during the term of the 1998 Agreement and for two years thereafter.

8. Between 1998 and 2004, with the assistance of Golf Galaxy, Golf Canada opened thirteen retail locations in Canada.

9. In October 2004, Golf Galaxy and Golf Canada ended their consulting arrangement, and Golf Galaxy sold its shares of Golf Canada. Golf Galaxy and Golf Canada entered into a new contract (the “2004 Amended Consulting Agreement”) that terminated all consulting obligations, effective immediately, but extended the duration of the restraints on competition beyond the expiration dates contemplated in the 1998 Agreement.

Complaint

10. The 2004 Amended Consulting Agreement bars Golf Canada: (i) from operating any retail store in the United States for nine years (until June 2013), and (ii) from engaging in any business outside of Canada that competes with or is similar to the business of Golf Galaxy for six years (until June 2010). In addition, the 2004 Amended Consulting Agreement for the first time prohibits Golf Galaxy from opening a store in Canada (until June 2008). The agreement between Golf Galaxy and Golf Canada to extend the restraints on competition beyond the term specified in the 1998 Agreement is not reasonably necessary for the formation, efficient operation, or dissolution of the collaboration between the parties.

11. The effect of the agreement to extend the non-compete terms beyond what was originally contemplated in the 1998 Agreement, if implemented, would be to restrain competition unreasonably, to increase prices, and to injure consumers.

Violations Alleged

12. As set forth in Paragraph 9 above, Respondent agreed to restrain competition in violation of Section 5 of the Federal Trade Commission Act, as amended.

13. The acts and practices of Respondent, as alleged herein, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighteenth day of November, 2008, issues its complaint against Respondent.

By the Commission.

Decision and Order

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of Golf Galaxy, Inc., which is now a wholly owned subsidiary of Dick’s Sporting Goods, Inc. (hereinafter “Respondent”), 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, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“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 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 Decision and Order (“Order”):

Decision and Order

1. Respondent Dick's Sporting Goods, Inc., is a corporation organized, and 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 300 Industry Drive, RIDC Park West, Pittsburgh, PA 15275.

2. Golf Galaxy, Inc., a wholly owned subsidiary of Respondent, is a corporation organized, and existing and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 7275 Flying Cloud Dr., Eden Prairie, MN 55344.

3. The Federal Trade Commission has jurisdiction of 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:

- A. "Respondent" means Dick's Sporting Goods, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and subsidiaries, divisions, groups, and affiliates controlled by Dick's Sporting Goods, Inc. (including Golf Galaxy, Inc.); and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Commission" means the Federal Trade Commission.
- C. "2004 Amended Consulting Agreement" means the October 8, 2004, "Amended and Restated Consulting Agreement" between Golf Galaxy, Inc. and Golf Town Canada Inc. (Attachment A hereto).

Decision and Order

- D. “Golf Canada” means Golf Town Canada Inc., a corporation organized, and existing and doing business under and by virtue of the laws of Canada, with its office and principal place of business located at First Markham Place, 3265 Hwy 7 East, Unit 2, Markham, ON L3R 3P9, Canada.
- E. “Sale of Golf Merchandise” means the sale of any product or service related to golf, including, but not limited to, golf clubs, equipment, accessories, clothing, lessons, swing analyses, and club fitting.
- F. “United States” means the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and all territories, dependencies, and possessions of the United States of America.

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

- A. Respondent cease and desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, inviting, entering into or attempting to enter into, organizing or attempting to organize, implementing or attempting to implement, continuing or attempting to continue, soliciting, or otherwise facilitating any combination, agreement, or understanding, either express or implied, with any party engaged in the Sale of Golf Merchandise, to allocate or divide markets, customers, contracts, lines of commerce, or geographic territories in connection with the Sale of Golf Merchandise.

Decision and Order

Provided, however, that it shall not of itself constitute a violation of Paragraph II.A. of this Order for Respondent to continue to implement and enforce the 2004 Amended Consulting Agreement, except to the extent prohibited by Paragraph II.B. of this Order.

Provided, further, however, that Respondent may enter into, attempt to enter into, or comply with a written agreement to allocate or divide markets, customers, contracts, lines of commerce, or geographic territories in connection with the Sale of Golf Merchandise that (1) is reasonably related to a lawful consulting arrangement, lawful joint venture agreement, or lawful merger, acquisition or sale agreement; and (2) is reasonably necessary to achieve such agreement's procompetitive benefits.

- B. Respondent cease and desist from, directly or indirectly, or through any corporate or other device, implementing or enforcing:
1. Paragraph 2.3 of the 2004 Amended Consulting Agreement with respect to conduct that takes place on or after October 8, 2009; and
 2. Paragraph 4.1 of the 2004 Amended Consulting Agreement with respect to conduct that takes place on or after thirty (30) days from the date on which this Order becomes final and thereafter.

III.

IT IS FURTHER ORDERED that within thirty (30) days of this Order becoming final:

- A. Respondent shall execute a document that unilaterally waives:

Decision and Order

1. Respondent's rights to enforce Paragraph 2.3 of the 2004 Amended Consulting Agreement with respect to conduct that takes place on or after October 8, 2009; and
 2. Respondent's right to enforce Paragraph 4.1 of the 2004 Amended Consulting Agreement with respect to conduct that takes place on or after thirty (30) days from the date on which this Order becomes final and thereafter.
- B. Respondent shall submit to Golf Canada, with a return receipt, the executed original document required in Paragraph III.A.

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

- A. Within sixty (60) days after the date the Order becomes final, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which the Respondent has complied, is complying, and will comply with this Order including, but not limited to, a copy of the document required in Paragraph III.A. and proof of Golf Canada's receipt of such document.
- B. One (1) year after the date the Order becomes final, annually for the next two (2) years on the anniversary of the date the Order becomes final, and at other times as the Commission may require, Respondent 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.

Decision and Order

V.

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

- A. Any proposed dissolution of Respondent,
- B. Any proposed acquisition, merger or consolidation of Respondent, or
- C. Any other change in 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 Respondent.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this order, upon written request, 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 matters contained in 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.

Analysis to Aid Public Comment

VII.

IT IS FURTHER ORDERED that this Order shall terminate on November 18, 2028.

By the Commission.

NON-PUBLIC APPENDIX A 2004 AMENDED AND RESTATED CONSULTING AGREEMENT

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

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with Dick's Sporting Goods, Inc. ("Dick's" or "Respondent"). Dick's, through its wholly-owned subsidiary Golf Galaxy, operates a chain of golf superstores in the United States. The agreement settles charges that Dick's violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by agreeing with a potential competitor to allocate markets. The proposed consent order has been placed on the public record for 30 days to receive comments

Analysis to Aid Public Comment

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 order. The 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 violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

I. The Complaint

The allegations of the complaint are summarized below:

Golf Galaxy operates a chain of golf superstores in the United States. Golf Galaxy stores offer a broad selection of golf merchandise and related services, including golf clubs, equipment, accessories, clothing, lessons, swing analysis, and golf club fitting. The founders of Golf Town Canada Inc. (“Golf Canada”) wished to launch a chain of golf superstores in Canada similar to the Golf Galaxy stores.

In June 1998, Golf Canada and Golf Galaxy entered into a consulting agreement (the “1998 Agreement”). Golf Galaxy agreed therein: (i) to develop and present an initial training program for certain Golf Canada employees, (ii) to provide Golf Canada on an ongoing basis with useful business documents, including construction blueprints, merchandising plans, and sales reports, and (iii) to provide continuing consulting support to Golf Canada. In consideration for these consulting services, Golf Galaxy received shares of Golf Canada, a seat on the company’s board of directors, and cash payments.

Analysis to Aid Public Comment

Certain provisions of the 1998 Agreement restrained Golf Canada from competing with Golf Galaxy. Specifically, Golf Canada was barred: (i) from operating any retail store in the United States during the term of the 1998 Agreement and for five years thereafter, and (ii) from engaging in any business outside of Canada that competes with or is similar to the business of Golf Galaxy during the term of the 1998 Agreement and for two years thereafter.

Between 1998 and 2004, with the assistance of Golf Galaxy, Golf Canada opened thirteen retail locations in Canada.

In October 2004, Golf Galaxy sold its shares of Golf Canada and the parties terminated all consulting obligations effective immediately. Golf Galaxy and Golf Canada entered into a new contract (the “2004 Amended Agreement”) that, *inter alia*, extended the duration of the restraints on competition beyond the expiration dates contemplated in the 1998 Agreement. The 2004 Amended Agreement bars Golf Canada: (i) from operating any retail store in the United States for nine years (until June 2013), and (ii) from engaging in any business outside of Canada that competes with or is similar to the business of Golf Galaxy for six years (until June 2010). In addition, the 2004 Amended Agreement for the first time prohibits Golf Galaxy from opening a store in Canada (until June 2008).

II. Legal Analysis

There are two distinct sets of restraints in this matter.

One set was agreed upon by Golf Galaxy and Golf Canada in 1998 when their consulting relationship was launched. These restraints appear to have been reasonably necessary to the formation and/or efficient operation of the parties’ collaboration. For example, Golf Canada’s commitment not to compete in the United States during the term of the consulting relationship (and

Analysis to Aid Public Comment

for five years thereafter) may have been necessary in order to induce Golf Galaxy to share with Golf Canada certain valuable, confidential, and proprietary information.¹ The Commission therefore does not challenge these 1998 restrictions.

The parties entered into a second set of restraints in 2004, contemporaneous with the decision to terminate their collaboration. The 2004 restraints provide for a division of markets well beyond the term contemplated in the 1998 Agreement, and are the subject of the Commission's claim in this matter. Under the 1998 Agreement, Golf Canada's undertaking to forgo competing in the United States would have expired five years after termination of the consulting relationship; since the consulting relationship ended in 2004, the noncompete would have expired five years later in 2009. With the 2004 Amended Agreement the noncompete was extended from 2009 until 2013 – four years longer than what was contemplated under the original 1998 Agreement.

The 2004 Amended Agreement may be analyzed under the framework articulated by the Commission in the *PolyGram* case.² Agreements between competitors to divide markets are treated by the courts as presumptively anticompetitive, or inherently suspect. *E.g., Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 134 (1998) (horizontal market division is unlawful per se); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (same); Timothy J. Muris, *The Rule of Reason After California Dental*, 68 Antitrust L. J. 527, 536 (2000) (“[C]ourts already consider price fixing and market division to be inherently suspect.”). When an agreement is deemed inherently suspect, the parties can avoid summary condemnation under the antitrust laws by advancing a legitimate

¹ See *e.g., Polk Bros. v. Forest City Enters.*, 776 F.2d 185, 189 (7th Cir. 1985).

² *Polygram Holding, Inc.*, 136 F.T.C. 310 (2003), *aff=d*, 416 F.3d 29 (D.C. Cir. 2005). See also *N. Tex. Speciality Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008).

Analysis to Aid Public Comment

(cognizable and plausible) efficiency justification for the restraint.³

Here, the Commission found reason to believe that the 2004 restraints serve no pro-competitive purpose. This second set of restraints was *not* reasonably necessary for the formation or efficient operation of the collaboration between Golf Galaxy and Golf Canada. Significantly, the 2004 restraints cannot be said to induce or facilitate cooperation between Golf Galaxy and Golf Canada – for the simple reason that, after 2004, no further cooperation was contemplated. These restraints served only to provide Golf Galaxy’s shareholders with additional protection from competition, with no advantage to U.S. consumers. Because there is no efficiency rationale for the 2004 agreement between Golf Galaxy and Golf Canada to divide markets, such agreement constitutes an unreasonable restraint on trade, and is properly judged to be illegal.

Application of the ancillary restraints framework leads to precisely the same conclusion. The D.C. Circuit has explained:

To be ancillary, and hence exempt from the per se rule, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose. Of course, the restraint imposed must be related to the efficiency sought to be achieved. If it is so broad that part of the restraint suppresses competition without creating efficiency, the restraint is, to that extent, not ancillary.⁴

³ *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35-36 (D.C. Cir. 2005).

⁴ *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986).

Analysis to Aid Public Comment

The legitimate and competitive purpose of the consulting arrangement, in place from 1998 through 2004, was to enable Golf Canada to benefit from Golf Galaxy's experience and expertise. However, as alleged in the Complaint, the 2004 restraints did nothing to encourage, facilitate, or promote this collaboration. (Again, after 2004, no ongoing cooperation was contemplated.) Certainly, the dissolution of a collaboration does not, of itself, provide a rationale for the ex-partners to adopt new and expanded limitations upon future competition. *See Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995) (market division agreement adopted by lawyers following dissolution of their partnership judged per se unlawful). In short, the challenged restraints are naked rather than ancillary.

III. The Proposed Consent Order

Dick's (the parent of Golf Galaxy) has signed a consent agreement containing a proposed consent Order. The proposed consent Order enjoins the company from dividing or allocating markets for the retail sale of golf merchandise. In addition, the proposed Order will prevent Golf Galaxy from enforcing any non-compete provision beyond the date originally provided for in the 1998 Agreement. More specifically, the provision of the 2004 Amended Agreement prohibiting Golf Canada from operating any retail store in the United States will no longer be enforceable as of October 8, 2009, and thereafter. The prohibition on Golf Canada's engaging in any business outside of Canada that competes with or is similar to the business of Golf Galaxy will no longer be enforceable as of thirty (30) days from the date on which the Order becomes final and thereafter.

The proposed Order would not interfere with the company's ability to enter into written agreements to allocate or divide markets, customers, contracts, lines of commerce, or geographic territories in connection with the sale of golf merchandise where

Analysis to Aid Public Comment

such agreement is reasonably related to a lawful consulting arrangement or lawful joint venture agreement; and is reasonably necessary to achieve such agreement's procompetitive benefits.

The proposed Order will expire in 20 years.

Complaint

IN THE MATTER OF

**PREMIER CAPITAL LENDING, INC.,
AND
DEBRA STILES**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4241; File No. 072 3004**Complaint, December 10, 2008 – Decision, December 10, 2008*

This consent order addresses failures by Premier Capital Lending, Inc. (PLC) and Debra Stiles to provide reasonable and appropriate safeguards to protect personal information, as well as false or misleading representations respondents made about the security provided for such information. The order prohibits the respondents from misrepresenting the extent to which PLC maintains and protects the privacy, confidentiality, or security of personal information from or about consumers. The order requires the respondents 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 respondents' size and complexity, the nature and scope of its activities, and the sensitivity of the personal information collected from or about consumers. The respondents are required not to violate any provision of the Gramm-Leach-Bliley Act Safeguards Rule and Privacy Rule. The order requires that the respondents obtain periodic assessments and reports from a qualified, objective, independent third-party professional, certifying, among other things, that PCL has in place a security program that provides protections that meet or exceed the protections required by the order and that PCL's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of consumers' personal information is protected. Other provisions require the respondents to retain documents relating to their compliance with the order and to disseminate the order to persons with responsibilities relating to the subject matter of the order. The order requires Stiles to notify the Commission of changes in her business or employment in connection with providing financial products and services. The respondents must also notify the FTC of changes in PCL's corporate status and submit periodic compliance reports.

Complaint

Participants

For the *Commission*: *Laura Berger, Kandi Parsons, Jessica Rich, and Joel Winston.*

For the *Respondents*: *Not represented by counsel.*

COMPLAINT

The Federal Trade Commission (“FTC” or “Commission”), having reason to believe that Premier Capital Lending, Inc. and Debra Stiles have violated the Commission’s Standards for Safeguarding Customer Information Rule (“Safeguards Rule”), 16 C.F.R. Part 314, issued pursuant to Title V, Subtitle A of the Gramm-Leach-Bliley Act (“GLB Act”), 15 U.S.C. § 6801-6809; the Commission’s Privacy of Consumer Financial Information Rule (“Privacy Rule”), 16 C.F.R. Part 313, issued pursuant to the GLB Act; and Section 5 of the FTC Act, 15 U.S.C. § 45(a), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Premier Capital Lending, Inc. (“PCL”), is a Texas corporation with its principal place of business at 901 W. Bardin Road, Suite 200, Arlington, Texas 76017.

2. Respondent Debra Stiles (“Stiles”) is a co-owner of PCL, Secretary of the company, and Manager of PCL’s headquarters office in Arlington, Texas. Individually, or in concert with others, she formulates, directs, or controls the policies, acts, or practices of PCL, including the acts or practices alleged in this complaint. Her principal office or place of business is the same as PCL’s.

3. PCL is a mortgage lender that specializes in loans to fund the combined purchase by consumers of real estate and manufactured homes. As a lender, PCL routinely obtains sensitive personal information related to its customers and potential

Complaint

customers, including the credit histories or consumer reports for these consumers.

RESPONDENTS' COURSE OF CONDUCT

4. As part of its process for evaluating consumer applicants for mortgage loans, PCL routinely obtains consumer reports from a consumer reporting agency ("CRA"). Under its agreement with the CRA, PCL obtains the consumer reports using an online portal through which authorized PCL employees can request the reports; PCL, in turn, issues each such employee a set of credentials, composed of a user name and password (together, a "CRA login"), with which the employee can log into a personal user portal within PCL's account. Stiles is an administrator of PCL's account, who enables and disables PCL's CRA logins.

5. Once logged into a user portal, a PCL employee requests a consumer report by entering a consumer name, address, and Social Security number ("SSN") into an online form that is transmitted to the CRA. New consumer reports are delivered to an "inbox" within the employee's user portal and, once they are opened, remain accessible to the employee for a period of at least 90 days, via links found in a "Report List" within the user portal. Each employee's Report List includes the name, address, and full SSN used to request the consumer report, as well as a link to the report that was obtained.

6. Stiles, as an administrator of PCL's account with the CRA, is able to review various management reports summarizing consumer report requests made through PCL's account. Among other things, Stiles can review: a chronological list of all consumer report requests made by PCL employees within the preceding 90 days, including the name of the employee who requested the report and the name, address, and SSN used to make the request (a "request list"); a request list limited to requests made using the CRA login of a particular PCL employee; and a request list showing requests made using a particular CRA login

Complaint

during a limited time period, *e.g.*, “Today,” “Yesterday,” “Week to Date,” “Month to Date,” “Last Week,” and “Last Month.” Each of these reports also permits review of the actual consumer reports requested (via a link next to the consumers’ names). PCL incurs no charge for accessing any of these management reports.

7. PCL receives monthly invoices from the CRA that list the requests for which PCL is being billed and include the user name of the employee who made each request, as well as the name of the consumer and the final four digits of the SSN that were used to make the request.

8. In March 2006, Stiles activated a CRA login under PCL’s credentials for the principal of a seller of manufactured homes based elsewhere in the state. The purpose of this arrangement was to enable the seller to access consumer reports from his own workplace for prospective home purchasers that could be referred to PCL for loans. Neither Stiles nor any agent nor employee of PCL visited the seller’s workspace or audited the computer network on which he used the PCL-issued CRA login, in order to assess that network’s vulnerability to attack by a hacker or other unauthorized user. Further, PCL failed to take reasonable steps to assess the seller’s procedures to handle, store, or dispose of personal information. In addition, in the five months that the CRA login issued to the seller was operational, PCL never conducted, or directed the seller to conduct, an inventory of the seller’s computer to determine what personal information related to PCL’s customers was stored there.

9. Working from a computer located in his office, the seller used the CRA login issued to him by Stiles from March through late July 2006. During those five months, he requested and obtained consumer reports on 83 consumers.

Complaint

THE BREACH

10. In or around July 2006, an unauthorized person hacked into the seller's computer and obtained his PCL-issued CRA login. Over the course of about eight days, the hacker used such CRA login to request and obtain 317 new consumer reports on individuals who were not customers of PCL nor the seller. The hacker's requests combined consumers' accurate names and addresses with a suspect series of SSNs, the vast majority of which consisted largely of sequential and repeated numbers, with the final four digits identical (*e.g.*, 866-66-6666).

11. By using the CRA login issued to the seller by PCL, the hacker also gained unrestricted access to all of the 83 consumer reports that had been obtained by the seller for his customers, links to which were stored in his user-portal Report List, together with a list of the name, address, and 9-digit SSN for each of those 83 consumers.

RESPONDENTS' RESPONSE TO THE BREACH

12. PCL learned of the breach on July 25, 2006, after two consumers contacted PCL to ask why their consumer reports had been requested by PCL, a company with which the consumers had no relationship. After confirming that the requests were unauthorized, PCL terminated the seller's CRA login and notified law enforcement authorities and the CRA, which in turn notified the three nationwide CRAs. In August 2006, PCL mailed breach notification letters to the 317 noncustomers whose reports the hacker had obtained.

13. Due to the format of the user portal provided to PCL's users, the "Report List" showing (and providing a link to) the 83 consumer reports requested by the seller was clearly visible to the hacker. However, PCL failed to recognize that the hacker had access to those 83 consumer reports until August 2007, more than

Complaint

a year after the breach. In September 2007, PCL mailed breach notification letters to these additional 83 consumers.

RESPONDENTS' SECURITY PRACTICES

14. From at least March 2006 until August 2007, respondents have engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for consumers' personal information. Among other things, respondents have failed to:

- a. assess the risks of allowing a third party to access consumer reports through PCL's account;
- b. implement reasonable steps to address these risks by, for example, evaluating the security of the third party's computer network and taking steps to ensure that appropriate data security measures were present;
- c. conduct reasonable reviews of consumer report requests made on PCL's account, using readily available information (such as management reports or invoices) for signs of unauthorized activity, such as spikes in the number of requests made on the account or made by particular PCL users or blatant irregularities in the information used to make the requests; and
- d. assess the full scope of consumer report information stored and accessible through PCL's account and, thus, compromised by the hacker.

15. The acts and practices of respondents as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

Complaint

VIOLATIONS OF SAFEGUARDS RULE

16. The Safeguards Rule, which implements Section 501(b) of the GLB Act, 15 U.S.C. § 6801(b), was promulgated by the Commission on May 23, 2002, and took effect on May 23, 2003. The Rule requires financial institutions to protect the security, confidentiality, and integrity of customer information by developing a comprehensive written information security program that contains reasonable administrative, technical, and physical safeguards, including: (1) designating one or more employees to coordinate the information security program; (2) identifying reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information, and assessing the sufficiency of any safeguards in place to control those risks; (3) designing and implementing information safeguards to control the risks identified through risk assessment, and regularly testing or otherwise monitoring the effectiveness of the safeguards' key controls, systems, and procedures; (4) overseeing service providers, and requiring them by contract to protect the security and confidentiality of customer information; and (5) evaluating and adjusting the information security program in light of the results of testing and monitoring, changes to the business operation, and other relevant circumstances. 16 C.F.R. §§ 314.3, 314.4.

17. PCL is a "financial institution," as that term is defined in Section 509(3)(A) of the GLB Act, and is therefore subject to the requirements of the Safeguards Rule.

18. As set forth in **paragraphs 8-11** and **13-14**, respondents have failed to implement reasonable and appropriate security policies and procedures and thereby have engaged in violations of the Safeguards Rule, by, among other things:

- a. failing to identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information, and

Complaint

b. failing to design and implement information safeguards to control the risks to customer information and to regularly test or monitor them.

VIOLATION OF THE FTC ACT

19. Since at least 2006, respondents have disseminated or caused to be disseminated to consumers privacy policies and statements, including but not limited to the following statement from PCL's Privacy Policy:

We take our responsibility to protect the privacy and confidentiality of customer information very seriously. We maintain physical, electronic, and procedural safeguards that comply with federal standards to store and secure information about you from unauthorized access, alteration and destruction. Our control policies, for example, authorize access to customer information only by individuals who need access to do their work.

20. Through the means described in **paragraph 19**, respondents have represented, expressly or by implication, that they implement reasonable and appropriate measures to protect consumers' personal information from unauthorized access.

21. In truth and in fact, as set forth in **paragraphs 8-11** and **13-14**, respondents have not implemented reasonable and appropriate measures to protect consumers' personal information from unauthorized access. Therefore the representation set forth in **paragraph 20** was, and is, false or misleading, in violation of Section 5(a) of the FTC Act.

Complaint

VIOLATION OF THE PRIVACY RULE

22. The Privacy Rule, which implements Section 503(a) of the GLB Act, 15 U.S.C. § 6803(a), requires a financial institution to “provide a clear and conspicuous notice that accurately reflects [its] privacy policies and practices” to its customers. 16 C.F.R. § 313.4.

23. As set forth in **paragraphs 19-20**, respondents disseminated a privacy policy that has contained false or misleading statements regarding the measures it implemented to protect customers’ personal information. Therefore, respondents have disseminated a privacy policy that does not reflect accurately its privacy policies and practices, including its security policies and practices, in violation of the Privacy Rule.

24. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, in or affecting commerce, in violation of Section 5(a) of the FTC Act.

THEREFORE, the Federal Trade Commission this tenth day of December, 2008, has issued this complaint against respondents.

By the Commission.

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 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 Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.* and the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*; and

The respondents and counsel for the Commission, having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), including 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 said Acts, 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 for the receipt and consideration of public comment, 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:

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1. Respondent Premier Capital Lending, Inc. (“PCL”) is a Texas Corporation with its principal place of business at 901 W. Bardin Road, Suite 200, Arlington, Texas 76017.

2. Respondent Debra Stiles (“Stiles”) is a co-owner of PCL, Secretary of the company, and Manager of its headquarters office in Arlington, Texas. Individually or in concert with others, she formulates, directs, or controls the policies, acts, or practices of respondent PCL. Her principal place of business is the same as PCL’s.

ORDER**DEFINITIONS**

For purposes of this order, the following definitions shall apply:

1. “Personally identifiable information” or “personal information” shall mean individually identifiable information from or about an individual 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 an individual’s email address; (d) a telephone number; (e) a Social Security number; (f) credit or debit card information, including card number, expiration date, and 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 an individual consumer; or (h) any information that is combined with any of (a) through (g) above.
2. “Gramm-Leach-Bliley Act” or “GLB Act” refers to 15 U.S.C. §§ 6801-6809, as amended, the “Safeguards Rule”

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or the “Standards for Safeguarding Customer Information Rule” refers to 16 C.F.R. Part 314, issued pursuant to Title V, Subtitle A of the GLB Act, 15 U.S.C. §§ 6801-6809, and the “Privacy Rule” or the “Commission’s Privacy of Consumer Financial Information Rule” refers to 16 C.F.R. Part 313, issued pursuant to the GLB Act.

3. “Financial institution” shall mean as defined in Section 509(3)(A) of the GLB Act, 15 U.S.C. § 6809(3)(A).
4. Unless otherwise specified, “respondents” shall mean Premier Capital Lending, Inc. and its subsidiaries, divisions, affiliates, successors and assigns (“PCL”), and Debra Stiles.
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 respondents, and their officers, agents, representatives, and employees, shall not directly or through any corporation, subsidiary, division, website, or other device, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, misrepresent in any manner, expressly or by implication, the extent to which respondents maintain and protect the privacy, confidentiality, or security of any personal information collected from or about consumers.

II.

IT IS FURTHER ORDERED that respondents, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, website, or other device, no later than the date of service of this order, shall

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establish and implement, and thereafter maintain, a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of consumers' personal information. Such program, the content and implementation of which must be fully documented in writing, shall contain administrative, technical, and physical safeguards appropriate to respondent PCL's size and complexity, the nature and scope of its 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) prevention, detection, and response to attacks, intrusions, or other systems failure;
- 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 select and retain service providers capable of appropriately safeguarding personal information they receive from

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respondents and requiring service providers by contract to implement and maintain appropriate safeguards; and

- E. the evaluation and adjustment of respondents' information security program in light of the results of the testing and monitoring required by subpart C, any material changes to respondents' operations or business arrangements, or any other circumstances that respondents know or have reason to know may have a material impact on the effectiveness of their information security program.

III.

IT IS FURTHER ORDERED that respondents, and their officers, agents, representatives, and employees, shall not, directly or through any corporation, subsidiary, division, website, or other device, violate any provision of:

- A. the Safeguards Rule, 16 C.F.R. Part 314; or
- B. the Privacy Rule, 16 C.F.R. Part 313.

In the event that either of these Rules is hereafter amended or modified, respondents' compliance with that Rule as so amended or modified shall not be a violation of this order.

IV.

IT IS FURTHER ORDERED that, in connection with their compliance with Parts II and III.A. of this order, respondents, and their officers, agents, representatives, and employees, 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: (A) the first one hundred and eighty (180) days after service of the order for

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the initial Assessment; and (B) each two (2) year period thereafter for twenty (20) years after service of the order for the biennial Assessments. Each Assessment shall:

- A. set forth the specific administrative, technical, and physical safeguards that respondent PCL has implemented and maintained during the reporting period;
- B. explain how such safeguards are appropriate to respondent PCL's size and complexity, the nature and scope of respondent PCL'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 the Safeguards Rule; and
- D. certify that respondent PCL's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of personal information is protected and, for biennial reports, 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.

Respondents shall provide the initial Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection,

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Federal Trade Commission, Washington, D.C. 20580, within ten (10) business days after the Assessment has been prepared. All subsequent biennial Assessments shall be retained by respondents until three years after completion of the final Assessment and provided to the Associate Director of Enforcement upon request within ten (10) business days after respondents receives such request.

V.

IT IS FURTHER ORDERED that 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, including by not limited to:

- A. for a period of five (5) years:
 1. any documents, whether prepared by or on behalf of either respondent, that contradict, qualify, or call into question respondents' compliance with this order;
 2. consumer complaints (whether received in written or electronic form, directly, indirectly or through any third party), and any responses to those complaints, whether in written or electronic form, that relate to respondents' activities as alleged in the draft Complaint and respondents' compliance with the provisions of this order;
 3. copies of all subpoenas and other communications with law enforcement entities or personnel, whether in written or electronic form, if such documents bear in any respect on respondents' collection, maintenance, or furnishing of consumer reports or other personal information of consumers; and

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4. all records and documents necessary to demonstrate full compliance with each provision of this order; and
- B. for a period of three (3) years after the date of preparation of each Assessment required under Part III of this order, all materials relied upon to prepare the Assessment, whether prepared by or on behalf of either respondent, including but not limited to all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, and any other materials relating to respondents' compliance with Parts II and III.A. of this order, for the compliance period covered by such Assessment. Respondents shall provide such documents to the Associate Director of Enforcement within ten (10) days of request.

VI.

IT IS FURTHER ORDERED that respondents 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 relating to the subject matter of this order. Respondents 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.

VII.

IT IS FURTHER ORDERED that respondent Stiles, for a period of ten (10) years after the date of issuance of the order, shall notify the Commission of the discontinuance of her current business or employment or of her affiliation with any new business or employment that provides financial products or services. The notice shall include respondent Stiles' new business address and telephone number and a description of the nature of the business or employment and her duties or responsibilities. All

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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, Washington, D.C. 20580.

VIII.

IT IS FURTHER ORDERED that respondents shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) 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(s) about which respondents learn fewer 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, Washington, D.C. 20580.

IX.

IT IS FURTHER ORDERED that respondents 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 a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

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X.

This order will terminate on December 10, 2028, or twenty (20) years from the most recent date that the United States or the 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 fewer 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 respondent(s) did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order as to such respondent(s) 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, a consent agreement from Premier Capital Lending, Inc., and Debra Stiles (collectively, “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 and take appropriate action or make final the agreement’s proposed order.

According to the Commission’s proposed complaint, Premier Capital Lending, Inc. (“PCL”) is a mortgage lender headquartered in Arlington, Texas that specializes in loans to fund the combined purchase by consumers of real estate and manufactured homes. Debra Stiles (“Stiles”) is a co-owner of PCL and has authority to control its policies, acts, or practices, including those acts or practices alleged in the proposed complaint. As a lender, PCL routinely obtains sensitive personal information pertaining to its customers and potential customers (hereinafter “personal information”), including the credit histories or consumer reports for these consumers. This matter concerns alleged failures by respondents to provide reasonable and appropriate safeguards to protect personal information, as well as false or misleading representations respondents made about the security provided for such information.

According to the proposed complaint, PCL obtains consumer reports from a consumer reporting agency (“CRA”) via an online portal, which each authorized PCL employee logs into using personalized credentials (herinafter, a “CRA login”). Once logged into the portal, PCL employees request a consumer report by

Analysis to Aid Public Comment

entering a consumer's name, address, and Social Security number ("SSN") into an online form that is transmitted to the CRA. Consumer reports are delivered to an "inbox" within the employee's portal and, once opened, remain accessible to the employee for at least 90 days. Stiles enables and disables PCL's CRA logins, and can review, at no cost, all consumer reports received by PCL employees, as well as various management reports that summarize consumer report requests made on PCL's account. PCL also receives monthly invoices from the CRA that list the requests for which PCL is being billed, including the user name of the employee who made the request, as well as the consumer name and final four digits of the SSN that were used to make the request.

In March 2006, Stiles activated a CRA login under PCL's credentials for the principal of a seller of manufactured homes based elsewhere in the state. The purpose of this arrangement was to enable this seller to access consumer reports from his own workplace for prospective home buyers who could be referred to PCL for loans. Neither Stiles nor any agent or employee of PCL visited this seller's workplace or audited the computer network on which he used the PCL-issued CRA login, in order to assess that network's vulnerability to attack by an unauthorized person.

In or around July 2006, an unauthorized person hacked into the seller's computer and obtained his PCL-issued CRA login. Using the CRA login, the hacker requested and obtained 317 new consumer reports, submitting requests composed of actual consumer names and addresses, combined with a suspect series of SSNs, the vast majority of which consisted largely of sequential and repeated numbers, with the final four digits identical (*e.g.*, 866-66-6666). Using this CRA login, the hacker also gained access to 83 additional consumer reports that had been requested and obtained by the seller. PCL discovered the hacker's 317 unauthorized requests after two consumers whose reports the hacker had obtained contacted PCL to ask why their consumer reports had been requested by PCL, a company with which the

Analysis to Aid Public Comment

consumers had no relationship. PCL then terminated the seller's CRA login; notified law enforcement and the CRA; and, in August 2006, mailed breach notification letters to these 317 consumers. In August 2007, more than a year later, PCL recognized for the first time that the hacker also had access to the 83 consumer reports requested by the seller whose credentials the hacker used. PCL mailed breach notification letters to these additional 83 consumers in September 2007.

The Commission's proposed complaint alleges that respondents engaged in a number of practices that, taken together, failed to employ reasonable and appropriate security to protect consumers' personal information. In particular, the proposed complaint alleges that respondents failed to: (1) assess the risks of allowing a third party to access consumer reports through PCL's account; (2) implement reasonable steps to address these risks by, for example, evaluating the security of the third party's computer network and taking steps to ensure that appropriate data security measures were present; (3) conduct reasonable reviews of consumer report requests made on PCL's account, using readily available information (such as management reports and invoices) for signs of unauthorized activity, such as spikes in the number of requests made on the account or made by particular PCL users or blatant irregularities in the information used to make the requests; and (4) assess the full scope of consumer report information stored and accessible through PCL's account and thus compromised by the hacker.

According to the complaint, respondents' practices violated the Gramm-Leach-Bliley ("GLB") Safeguards Rule by, among other things (1) failing to identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information and (2) failing to design and implement information safeguards to control the risks to customer information and to regularly test or monitor them. In addition, the proposed complaint alleges that respondents misrepresented that

Analysis to Aid Public Comment

they implemented reasonable and appropriate measures to protect consumers' personal information from unauthorized access, in violation of Section 5 of the Federal Trade Commission Act. Further, the proposed complaint alleges that respondents disseminated a privacy policy that does not accurately reflect PCL's privacy policies and practices, in violation of the GLB Privacy Rule.

The proposed order applies to personal information that respondents collect from or about consumers. It contains provisions designed to prevent respondents from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order prohibits respondents, in connection with the collection of personal information from or about consumers, in or affecting commerce, from misrepresenting the extent to which it maintains and protects the privacy, confidentiality, or security of such information.

Part II of the proposed order requires respondents 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 respondents' 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 respondents to:

1. Designate an employee or employees to coordinate and be accountable for the information security program.
2. Identify 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

Analysis to Aid Public Comment

information, and assess the sufficiency of any safeguards in place to control these risks.

3. 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.
4. Develop and use reasonable steps to retain service providers capable of appropriately safeguarding personal information they receive from respondents, and require service providers by contract to implement and maintain appropriate safeguards.
5. Evaluate and adjust PCL's information security program in light of the results of the 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 a material impact on the effectiveness of their information security program.

Part III of the proposed order requires that respondents not violate any provision of the GLB Safeguards Rule and Privacy Rule.

Part IV of the proposed order requires that respondents obtain, covering the first 180 days after the order is served, and on a biennial basis thereafter for twenty (20) years, an assessment and report from a qualified, objective, independent third-party professional, certifying, among other things, that (1) PCL 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) PCL's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of consumers' personal information is protected.

Analysis to Aid Public Comment

Parts V through VIII of the proposed order are reporting and compliance provisions. Part V requires respondents 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, respondents must retain the documents for a period of three years after the date that each assessment is prepared. Part VI requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part VII requires Stiles to notify the Commission of changes in her business or employment in connection with providing financial products and services. Part VIII requires respondents to notify the FTC of changes in PCL's corporate status. Part IX mandates that respondents submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part X is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of the analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

INTERLOCUTORY, MODIFYING,
VACATING, AND MISCELLANEOUS
ORDERS

IN THE MATTER OF

NORTH TEXAS SPECIALTY PHYSICIANS

Docket No. 9312 Order, August 5, 2008

Order granting the request of complaint counsel and the respondent to present views concerning how the Commission should modify subsection II.A.2 of the remedial order.

**ORDER GRANTING JOINT MOTION FOR BRIEFING ON
REMAND**

On July 28, 2008, the Court of Appeals for the Fifth Circuit issued its Mandate remanding this action to the Federal Trade Commission “for modification of subsection II.A.2 of the remedial order in a manner consistent with this opinion.” On August 1, 2008, Respondent and Complaint Counsel filed a Joint Proposal for Briefing on Remand (hereinafter “Joint Motion”). The Commission has determined to approve the Joint Motion, and also to place word limits on the briefs. Accordingly,

IT IS ORDERED THAT Complaint Counsel shall file its Proposed Modification and Brief, which shall not exceed 2,500 words in length, no later than August 13, 2008;

IT IS FURTHER ORDERED THAT Respondent shall file its Answering Brief, which shall not exceed 2,500 words in length, no later than August 29, 2008; and

IT IS FURTHER ORDERED THAT Complaint Counsel shall file its Reply Brief, which shall not exceed 1,250 words in length, no later than September 9, 2009.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

**WHOLE FOODS MARKET, INC.,
AND
WILD OATS MARKETS, INC.**

Docket No. 9324 Order, August 8, 2008

Order on motion to vacate the stay of administrative proceedings issued August 7, 2007, pending the outcome of proceedings in the collateral federal district court case, and resume action under Part III.

**ORDER RESCINDING STAY OF ADMINISTRATIVE PROCEEDING,
SETTING SCHEDULING CONFERENCE, AND DESIGNATING
PRESIDING OFFICIAL**

On June 6, 2007, the Commission filed a complaint and motions for a temporary restraining order and a preliminary injunction against Respondents in the United States District Court for the District of Columbia. On June 7, 2007, the District Court issued a Temporary Restraining Order preventing Respondent Whole Foods Market, Inc., from consummating any acquisition of any stock, assets, or other interest, directly or indirectly, in Respondent Wild Oats Markets, Inc., pending the District Court's decision on the Commission's motion for a preliminary injunction.

On June 28, 2007, the Commission issued the complaint in this administrative proceeding. The Commission retained adjudicative responsibility for the matter. *See* Commission Rule 3.42(a), 16 C.F.R. § 3.42(a). On July 17, 2007, the Respondents in this matter filed their respective Answers to the Complaint. On August 7, 2007, the Commission -- in light of the pendency of the federal court proceedings and as a matter of discretion -- issued an Order Staying Administrative Proceedings, pursuant to Commission Rule 3.51, 16 C.F.R § 3.51.

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On August 16, 2007, the District Court denied the Commission's motion for a preliminary injunction. On July 29, 2008, the Court of Appeals for the District of Columbia Circuit issued an Opinion reversing the Opinion and Order of the District Court and remanding the case to the District Court for further proceedings consistent with the Court of Appeals Opinion. In light of the Court of Appeals Opinion and Order -- and in order to effectuate the Commission policy enunciated in Commission Rule 3.1, 16 C.F.R. § 3.1, to conduct administrative proceedings as expeditiously as possible -- the Commission has determined to rescind the stay of the administrative proceeding; to set a Scheduling Conference; and to designate Commissioner J. Thomas Rosch as the Presiding Official for the Scheduling Conference. Accordingly,

IT IS ORDERED THAT the stay of this administrative proceeding effected by the August 7, 2007 Order be, and it hereby is, rescinded;

IT IS FURTHER ORDERED THAT a Scheduling Conference, pursuant to Commission Rule 3.21(b), 16 C.F.R. § 3.21(b), shall be held on Monday, August 18, 2008, at 4:00 p.m., on the record by videoconference and/or by telephone, with a transcript to be made available to the public through the Office of the Secretary;

IT IS FURTHER ORDERED THAT, pursuant to Commission Rule 3.42, 16 C.F.R. § 3.42, 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 August 18, 2008; and

IT IS FURTHER ORDERED THAT before appearing at the Scheduling 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

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parties are instructed to file with the Commission a joint case management statement, by Thursday, August 14, 2008, 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 Complaint.
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.

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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

**WHOLE FOODS MARKET, INC.,
AND
WILD OATS MARKETS, INC.**

Docket No. 9324 Order, August 12, 2008

Order granting Whole Food's motion to extend the deadline for submitting a joint case management statement and move the date of the Scheduling Conference.

**ORDER CHANGING DATE OF SCHEDULING CONFERENCE AND
DEADLINE FOR FILING JOINT CASE MANAGEMENT STATEMENT**

On August 8, 2008, the Commission issued an Order in this matter (August 8 Order). That Order rescinded the stay of the administrative proceeding; set a Scheduling Conference; designated Commissioner J. Thomas Rosch as the Presiding Official for the Scheduling Conference; and directed the parties to file a joint case management statement by August 14, 2008. On August 11, Respondent Whole Foods Market filed a Motion to extend the deadline for submitting the joint case management statement until August 28, 2008, and to postpone the Scheduling Conference until September 2, 2008 or a later date. Complaint Counsel have advised that they do not intend to file an opposition to the Motion.

The Commission has determined to grant the Motion. Accordingly,

IT IS ORDERED THAT the Scheduling Conference scheduled for August 18, 2008 by the August 8 Order shall instead be held on Monday, September 8, 2008, at 10 a.m.; and

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IT IS FURTHER ORDERED THAT the joint case management statement shall be filed on or before Thursday, August 28, 2008, at 5:00 p.m. rather than on August 14, 2008 as required by the August 8 Order.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

RAMBUS INCORPORATED

Docket No. 9302 Order, August 12, 2008

Letter approving Rambus' Application for Approval of Compliance Officer filed on June 16, 2008, pursuant to Paragraph III.A.1 of the Commission's Final Order issued February 2, 2007.

**LETTER RESPONDING TO RAMBUS INC.'S APPLICATION FOR
APPROVAL OF COMPLIANCE OFFICER**

Dear Mr. Stone and Mr. Melamed:

This letter responds to the *Application for Approval of Compliance Officer* filed by respondent Rambus Inc. ("Rambus") on June 16, 2008. In that application, Rambus has sought, pursuant to Paragraph III.A.1 of the Commission's Final Order in the above matter ("*Order*"), Commission approval of the employment by Rambus of Laura Stark in the position of Compliance Officer.

After considering Rambus's application, the Commission has determined to approve Rambus's employment of Laura Stark as Compliance Officer. 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.

This approval does not relieve Rambus from liability for any violations of the Order, including any violations for which the Compliance Officer is responsible. See *Order* at ¶ III.C. (as modified by *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 III.C. of the Final Order* at ¶ 2 (April 27, 2007)).

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

**WHOLE FOODS MARKET, INC.,
and
WILD OATS MARKETS, INC.***Docket No. 9324 Order, September 5, 2008*

Order denying the Motion to Disqualify the Commission as Administrative Law Judge and to Appoint a Presiding Official Other Than a Commissioner made by Whole Foods Market, Inc., pursuant to Rule 3.42(g)(2).

**ORDER DENYING RESPONDENT'S MOTION TO DISQUALIFY THE
COMMISSION**

Respondent Whole Foods Market, Inc., moves the Commission to recuse "itself as administrative law judge ("ALJ") and to appoint as presiding official a duly qualified ALJ who is not a Commissioner." See Respondent's Motion to Disqualify the Commission at p. 1 (April 22, 2008) *available at* <http://www.ftc.gov/os/adjpro/d9324/080822respmodisqualifycomm.pdf>. The Commission denies the motion.

In administrative litigation, a party may seek disqualification by a good faith filing "of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee." 5 U.S.C. §556(b). Whole Foods argues that statements the Commission made in seeking a preliminary injunction and in pursuing its appeal of the denial of a preliminary injunction create bias and prejudice requiring the Commission to disqualify itself or any individual Commissioner from acting as the presiding officer.

Whole Foods does not challenge the Commission's authority to review the initial decision – a role in which the Commission has all the powers of the presiding officer. Whole Foods, however, argues that where the Commission seeks a preliminary

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injunction and where the Commission pursues that relief vigorously, it would be inappropriate, or at least appear inappropriate, for the Commission to act as the presiding official. Whole Foods' position is flawed for at least three reasons: (1) Whole Foods' failure to challenge the Commission's ability to hear the appeal of the initial decision refutes its argument, (2) the statements themselves – taken out of context – do not show prejudice and do not require disqualification, and (3) Whole Foods' argument, if accepted, would essentially prevent the Commission from ever seeking a preliminary injunction.

First, Whole Foods' claim fails on its own terms. In moving to recuse the Commission as the presiding officer, Whole Foods does not challenge the propriety of the Commission's hearing the appeal of the initial decision. In hearing such an appeal, the Commission exercises "all the powers which it could have exercised if it had made the initial decision." Rule 3.54(a). It reviews the evidence *de novo*, and the Commission – not the presiding officer – is the finder of fact. It follows that the Commission can undertake the subsidiary and derivative responsibility of acting as a presiding officer.

Second, the statements do not indicate any prejudice or partiality as to the final merits of this action. Whole Foods urges the Commission to disqualify itself because, in Whole Foods' view, the Commission "pressed arguments" in the federal court proceedings "that, on their face, state that the Commission has reached judgments on key issues going to the merits of this administrative proceeding." See Respondent's Motion at p. 3. Whole Foods takes those "arguments" out of context. The question in "this administrative proceeding" is not the same one in the federal court proceeding. The question at the plenary trial (in the administrative proceeding) is whether the evidence adduced during the hearing constitutes a violation of Section 7. That was not the question in the federal court proceedings. As the D.C. Circuit decided, the question in the federal court proceeding was whether the evidence adduced in those proceedings raised

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“questions going to the merits so serious, substantial, difficult[,] and doubtful as to make them fair ground for thorough investigation.” *Fed. Trade Comm’n v. Whole Foods*, 533 F.3d 869, 875 (D.C. Cir. 2008). The statements about the evidence to which Respondent points were statements that the evidence before the federal district court satisfied that standard. The Commission did not express any opinion, and does not express an opinion now, as to whether the evidence adduced at the plenary trial will be sufficient to show a violation of Section 7. Indeed, the only opinion to which Respondent points that even refers to the plenary trial is the Commission’s statement that the federal district court did not assess the evidence adduced in the federal court proceedings in a fashion that would be acceptable at a plenary trial. That is a statement about the way the district court decided whether to issue a preliminary injunction, not a statement about whether the evidence at the plenary trial will be sufficient to establish a Section 7 violation.

The burden on the movant seeking recusal here is high. Whole Foods argues that the standard is “whether a disinterested observer may conclude (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.” Mot. at 3 (*Citing Cinderella Career and Finishing Sch. Inc. v. Fed. Trade Comm’n*, 425 F.2d 583, 591). The test for recusal is different where the movant attacks statements made in the course of the agency’s official duties. The Supreme Court has rejected disqualification where the Commission had made statements in the course of its designated responsibilities that were factually related to a later adjudication. *Fed. Trade Comm’n v. Cement Institute*, 334 U.S. 683 (1948). There, the Commission challenged industry-wide base point pricing in the cement industry. *Id.* at 688. Prior to issuing the complaint, the Commission, in reports and testimony to Congress, had stated that “the operation of the multiple basing point system as they had studied it was the equivalent of a price fixing restraint

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of trade in violation of the Sherman Act.” *Id.* at 701.¹ Forming such opinions did not prevent the Commission from deciding the adjudicatory matter:

“[No] decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involved questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court.

Id. at 702-03.

The analysis would be different if a Commissioner made statements unrelated to the Commission’s official duties. Disqualification is appropriate if a Commissioner gives a speech discussing the merits of a pending case. *See Cinderella Career and Finishing School v. Federal Trade Commission*, 425 F.2d 583 (D.C. Cir. 1970). In contrast, the statements Whole Foods relies on were made as part of the Commission’s attempts to invoke relief under Section 13(b).

Third, the logic of Whole Foods’ argument would destroy the utility of Section 13(b), which allows the Commission to pursue preliminary relief as plaintiff while it adjudicates the ultimate merits in administrative litigation. If Whole Foods’ argument were accepted, the Commission would risk disqualification from

¹ In its reports, the Commission also said it “regarded the cement industry in the same category, as far as price fixing was concerned, as steel and other industries.” *Marquette Cement Mfg. Co. v. Fed. Trade Comm’n*, 147 F.2d 589, 591 (7th Cir. 1945) *aff’d sub nom. Fed. Trade Comm’n v. Cement Institute*, 334 U.S. 683 (1948).

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pursuing administrative litigation – the administrative hearing as well as an appeal of an Initial Decision – each time the Commission decided to pursue preliminary relief under section 13(b) of the FTC Act in federal district court. Under Whole Foods’ view, the Commission could not, or should not, participate in administrative proceedings at all if, on appeal from a denial of preliminary injunction under 13(b), it declared that the evidence before the federal district court was sufficient to satisfy the applicable standard. Such a result would nullify Section 13(b). If Whole Foods were correct, every time the Commission sought a preliminary injunction, it could not pursue administrative litigation, so there would be no need for a preliminary injunction pending the outcome of the adjudicative trial.

Respondent cites no authority for the proposition that the Commission, having sought preliminary relief, may not adjudicate the merits, and we are aware of none. To the contrary, the Administrative Procedure Act envisions agencies acting in the dual roles that Whole Foods objects to. The APA generally forbids a person from ruling on an adjudicative matter if that person engaged “in the performance of investigative or prosecuting functions for” the matter or a factually related matter. 5 U.S.C. §554(d)(2). This prohibition “does not apply . . . (C) to the agency or a member or members of the body comprising the agency.” *Id.* So, the Commission may adjudicate a case while the agency prosecutes “a factually related case.” 5 U.S.C. § 554(d)(2)(C). Because both the FTC Act and the APA contemplate the Commission acting precisely as it has, recusal is inappropriate.

Finally, Whole Foods also makes a number of arguments that relate to whether there is a reason for the Commission to act as a presiding officer. None is relevant to whether the Commission must disqualify itself. At this point, the Commission has not named Commissioner Rosch the presiding officer for all purposes

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nor has it concluded that the Commission itself will retain jurisdiction during the initial proceedings.²

Conclusion

To be clear, the Commission has determined that it has reason to believe Whole Foods' acquisition of Wild Oats may substantially lessen competition. Further, the Commission did argue that the evidence in the preliminary injunction matter established questions so serious, so substantial as to require further study and that the District Court erred in not finding that the Commission had established a likelihood of success on the merits— a position the DC Circuit agreed with. None of that means the Commission has prejudged this case; indeed, the Commission has not made any determination on the ultimate merits of this litigation. Whether it acts as the presiding official or not, it will decide this matter, like all matters, based on the evidence in the case and the law, in an impartial and fair manner. Accordingly,

IT IS ORDERED THAT Respondent Whole Foods' Motion to Disqualify the Commission is **DENIED**; and

² Whole Foods did not follow the proper procedure for seeking disqualification of the presiding officer. The movant must file "a timely and sufficient affidavit" that shows "personal bias or other disqualification." 5 U.S.C. §556(b)(3). Whole Foods filed no such affidavit. Although not a basis for our decision here, the failure to file such an affidavit would be a sufficient reason to deny a motion to disqualify. *Gibson v. Fed. Trade Comm'n*, 682 F.2d 554, 565 (1982). As the *Gibson* court explained, the affidavit requirement is not a "mere formality;" rather, it "serves not only to focus the facts underlying the charge, but to foster an atmosphere of solemnity commensurate with the gravity of the claim." *Id.*

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IT IS FURTHER ORDERED THAT Respondent Whole Foods' Motion for Oral Argument on its Motion to Disqualify the Commission is **DENIED**.

By the Commission.

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IN THE MATTER OF

**WHOLE FOODS MARKET, INC.,
and
WILD OATS MARKETS, INC.**

Docket No. 9324 Order, September 8, 2008

Order granting complaint counsel's motion to amend the complaint by incorporating Respondent's consummation of the acquisition and the procedural history in the federal district and appellate courts.

ORDER AMENDING COMPLAINT

The Commission issued the Administrative Complaint in this matter on June 27, 2007. On July 17, 2007, Respondent Whole Foods Market, Inc. and Respondent Wild Oats Markets, Inc. filed their respective Answers to the Complaint. On August 7, 2007, the Commission issued an Order Staying Administrative Proceedings. On August 8, 2008, the Commission issued an Order Rescinding Stay of Administrative Proceeding, Setting Scheduling Conference, and Designating Presiding Official. On August 26, 2008, Complaint Counsel filed a Motion to Amend Complaint to reflect a number of events that have transpired since the Complaint was issued. Counsel for the Respondents have advised that they do not intend to file an opposition to the Motion.

Upon consideration of the arguments made by Complaint Counsel in its Motion, the Commission has determined to amend the Administrative Complaint in a number of respects. Accordingly,

IT IS ORDERED THAT the Administrative Complaint the Commission issued in this matter on June 27, 2007, be, and it hereby is, amended to read as shown in the attached Amended Complaint; and

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IT IS FURTHER ORDERED THAT Respondent Whole Foods Market, Inc. shall file its Answer to the Amended Complaint on or before September 26, 2008.

By the Commission.

AMENDED COMPLAINT

I. INTRODUCTION

Whole Foods Market, Inc.'s ("Whole Foods") acquisition of Wild Oats Markets, Inc. ("Wild Oats"), is likely to have substantially lessened competition and continues to substantially lessen competition, thereby causing significant harm to consumers. This merger, involving the two leading operators of premium natural and organic supermarkets, may increase prices and reduce quality and services in a number of geographic markets throughout the United States. Whole Foods' Chief Executive Officer John Mackey bluntly advised his Board of Directors of the purpose of this acquisition: "By buying [Wild Oats] we will . . . avoid nasty price wars in Portland (both Oregon and Maine), Boulder, Nashville, and several other cities which will harm [Whole Foods'] gross margins and profitability. By buying [Wild Oats] . . . we eliminate forever the possibility of Kroger, Super Value, or Safeway using their brand equity to launch a competing national natural/organic food chain to rival us. . . . [Wild Oats] may not be able to defeat us but they can still hurt us [Wild Oats] is the only existing company that has the brand and number of stores to be a meaningful springboard for another player to get into this space. Eliminating them means eliminating this threat forever, or almost forever."

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To prevent this consumer harm, the Federal Trade Commission (“Commission”), pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, having reason to believe that Respondent Whole Foods and Wild Oats entered into an agreement pursuant to which Whole Foods acquired the voting securities of Wild Oats, that such agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that such acquisition violates 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 by it in respect thereof would be in the public interest, hereby issues its Amended Complaint, stating its charges as follows:

II. THE PARTIES AND JURISDICTION

Whole Foods Market, Inc.

1. Respondent Whole Foods is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 550 Bowie Street, Austin, Texas 78703.
2. Established in 1980, Whole Foods operates approximately 260 premium natural and organic supermarkets in more than 37 states and the District of Columbia.
3. Whole Foods is the largest operator of premium natural and organic supermarkets in the United States.
4. According to Whole Foods’ Chief Executive Officer John Mackey, Whole Foods is “a company that is authentically committed to its mission of natural/organic/healthy foods. Its core customers recognize this authenticity and it creates a customer loyalty that will not be stolen away by conventional

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markets who sell the same products. Whole Foods has created a 'brand' that has real value for millions of people."

5. Whole Foods 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 ACQUISITION

6. On February 21, 2007, Whole Foods and Wild Oats executed an agreement whereby Whole Foods proposed to acquire all of the voting securities of Wild Oats through WFMI Merger Co., a wholly-owned subsidiary of Whole Foods (the "Acquisition"). The purchase was effected through a tender offer for all shares of Wild Oats common stock. The total cost of the Acquisition was approximately \$671 million in cash and assumed debt.

7. Respondent Whole Foods is in the process of merging Wild Oats into Whole Foods; closing numerous Wild Oats stores; selling several Wild Oats stores; and operating the remainder as Whole Foods stores.

8. On June 5, 2007, the Commission authorized the commencement of an action under Section 13(b) of the Federal Trade Commission Act to seek a temporary restraining order and a preliminary injunction barring the Acquisition during the pendency of administrative proceedings to be commenced by the Commission pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b).

9. In authorizing the commencement of this action, the Commission determined that a temporary restraining order and a

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preliminary injunction were in the public interest and that it had reason to believe that the Acquisition would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act because the Acquisition likely would substantially lessen competition in the relevant markets alleged in the complaint.

10. On June 7, 2007, United States District Court Judge Paul L. Friedman of the United States District Court for the District of Columbia issued an Order granting the Commission's motion for temporary restraining order. On August 16, 2007, Judge Friedman denied the Commission's request for a preliminary injunction and, on August 23, 2007, the United States Court of Appeals for the District of Columbia Circuit denied the Commission's emergency motion for an injunction pending appeal. As a result, Whole Foods' acquisition of Wild Oats was consummated on August 28, 2007. On July 29, 2008, the United States Court of Appeals for the District of Columbia Circuit reversed the district court's conclusion that the Commission failed to show a likelihood of success in this proceeding and remanded the matter back to the district court to address the equities.

IV. NATURE OF COMPETITION

11. "Natural foods" are foods that are minimally processed and largely or completely free of artificial ingredients, preservatives, and other non-naturally occurring substances.

12. "Organic foods" are foods that are produced using: agricultural practices that promote healthy ecosystems; no genetically engineered seeds or crops, sewage sludge, long-lasting pesticides or fungicides; healthy and humane livestock management practices including use of organically grown feed, ample access to fresh air and the outdoors, and no antibiotics or growth hormones; and food processing that protects the healthfulness of the organic product, including the avoidance of irradiation, genetically modified organisms, and synthetic preservatives.

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13. Pursuant to the United States Department of Agriculture's ("USDA") Organic Foods Production Act of 1990 (the "Organic Rule"), all products labeled "organic" must be certified by a federally accredited certifying agency as satisfying USDA standards for organic foods. The Organic Rule further requires that retailers of products labeled "organic" use handling, storage, and other practices to protect the integrity of organically-labeled products, including: preventing commingling of organic and non-organic ("conventional") products; protecting organic products from contact with prohibited substances; and maintaining records that document adherence to the USDA requirements.

14. Premium natural and organic supermarkets offer a distinct set of products and services to a distinct group of customers in a distinctive way, all of which significantly distinguish premium natural and organic supermarkets from conventional supermarkets and other retailers of food and grocery items ("Retailers").

15. Premium natural and organic supermarkets are not simply outlets for natural and organic foods. Whole Foods' Chief Executive Officer John Mackey acknowledged that "Whole Foods isn't primarily about organic foods. It never has been. Organic foods is only one part of its highly successful business model." In announcing its fourth quarter results for 2006, Whole Foods stated that "Whole Foods Market is about much more than just selling 'commodity' natural and organic products. We are a lifestyle retailer and have created a unique shopping environment built around satisfying and delighting our customers." Specifically, Mr. Mackey has said that "[s]uperior quality, superior service, superior perishable product, superior prepared foods, superior marketing, superior branding, and superior store experience working together are what makes Whole Foods so successful." "[P]eople who think organic foods are the key don't understand the business model. . . ."

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16. To begin with, premium natural and organic supermarkets focus on perishable products, offering a vast selection of very high quality fresh fruits and vegetables (including exotic and hard-to-find items) and other perishables. As Whole Foods stated in its 2006 annual report, “We believe our heavy emphasis on perishable products differentiates us from conventional supermarkets and helps us attract a broader customer base.” Whole Foods’ Chief Executive Officer John Mackey has also emphasized the importance of high quality perishable foods to Whole Foods’ business model: “This [produce, meat, seafood, bakery, prepared foods] is over 70% of Whole Foods total sales. Wal-Mart doesn’t sell high quality perishables and neither does Trader Joe’s while we are on the subject. That is why Whole Foods coexists so well with [Trader Joe’s] and it is also why Wal-Mart isn’t going to hurt Whole Foods.”

17. Relative to conventional supermarkets and most other Retailers, premium natural and organic supermarkets target shoppers who are, in the words of the Respondent or Wild Oats, “affluent, well educated, health oriented, quality food oriented people. . . .” The core shoppers of premium natural and organic supermarkets have a preference for natural and organic products, and premium natural and organic supermarkets offer an extensive selection of natural and organic products to enable those shoppers to purchase substantially all of their food and grocery requirements during a single shopping trip.

18. Premium natural and organic supermarkets are differentiated from other Retailers in that premium natural and organic supermarkets offer more amenities and service venues; higher levels of service and more knowledgeable service personnel; and special features such as in-store community centers.

19. Premium natural and organic supermarkets promote a lifestyle of health and ecological sustainability, to which a significant portion of their customers are committed. Through the

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blending together of these elements and others, premium natural and organic supermarkets strive to create a varied and dynamic experience for shoppers, inviting them to make the premium natural and organic supermarket a destination to which shoppers come not merely to shop, but to gather together, interact, and learn, often while enjoying shared eating and other experiences. Premium natural and organic supermarkets expend substantial resources on developing a brand identity that connotes this blend of elements, and especially the qualities of trustworthiness (*viz.*, that all products are natural, that products labeled “organic” are properly labeled, that the store’s suppliers practice humane animal husbandry, and that the store’s actions are ecologically sound) and qualitative superiority to other Retailers.

20. Relative to most other Retailers, premium natural and organic supermarkets’ products often are priced at a premium reflecting not only product quality and service, but the marketing of a lifestyle to which their customers aspire.

21. As Whole Foods’ Chief Executive Officer John Mackey has acknowledged, “Safeway and other conventional retailers will keep doing their thing – trying to be all things to all people . . . They can’t really effectively focus on Whole Foods Core Customers without abandoning 90% of their own customers. . . . Whole Foods core customers will not abandon them because Safeway has made their stores a bit nicer and is selling some organic foods. Whole Foods knows their core customers well and serves them far better than any of their potential competitors do.”

22. Mr. Mackey has also said that “[a]ll those [conventional supermarkets and club stores] you named have been selling organic foods for many years now. The only thing ‘new’ is that they are now beginning to sell private label organic foods for the first time. However, they’ve been selling organic produce and organic milk for many years now. Doing so has never hurt Whole Foods.”

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23. Wild Oats' 2006 10K filed with the Securities and Exchange Commission noted: "Despite the increase in natural foods sales within conventional supermarkets, [Wild Oats] believe[s] that conventional supermarkets still lack the concentration on a wide variety of natural and organic products, and emphasis on service and consumer education that our stores offer."

24. Premium natural and organic supermarkets are also very different from mass-merchandisers, such as Wal-Mart and Target. According to Mr. Mackey, "Wal-Mart does a particularly poor job selling perishable foods. Whole Foods quality is better, its customer service is far superior, and the store ambience and experience it provides its customers is fun, entertaining and educational"

25. With respect to Trader Joe's, Mr. Mackey stated: "TJ's is a completely different concept than WFMI. WFMI's business is all about perishables – fresh produce, fresh seafood, fresh meat, in store delis, juice bars, and bakeries. WFMI has stated that more than 50% of their sales are in these categories of products – categories which TJ's doesn't even have. TJ's is primarily a discount private label company with a large wine selection."

26. Unlike other natural and organic product retailers, premium natural and organic supermarkets offer an extensive selection of natural and organic products to enable shoppers to purchase substantially all of their food and grocery requirements during a single shopping trip. As a result, premium natural and organic supermarkets are appreciably larger than other natural and organic retailers in square footage, number of products offered, inventory for each product offered, and annual dollar sales.

27. Prior to the Acquisition, Whole Foods and Wild Oats, respectively, were the largest and second largest operators of premium natural and organic supermarkets in the United States.

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28. Prior to the Acquisition, Whole Foods and Wild Oats were the only two nationwide operators of premium and natural organic supermarkets in the United States.

29. Consumers spent a combined total of \$6.5 billion in fiscal 2006 at Whole Foods and Wild Oats. Approximately 70% of that total was spent on perishable products, such as produce, meat, seafood, baked goods, and prepared foods.

30. Prior to the Acquisition, Whole Foods and Wild Oats were one another's closest competitors in 22 geographic markets. Consumers in these markets have reaped price and non-price benefits of competition between Whole Foods and Wild Oats. The markets where the two competed head to head are: Albuquerque, NM; Boston, MA; Boulder, CO; Hinsdale, IL (suburban Chicago); Evanston, IL (suburban Chicago); Cleveland, OH; Colorado Springs, CO; Columbus, OH; Denver, CO; West Hartford, CT; Henderson, NV; Kansas City-Overland Park, KS; Las Vegas, NV; Los Angeles-Santa Monica-Brentwood, CA; Louisville, KY; Omaha, NE; Pasadena, CA; Phoenix, AZ; Portland, ME; Portland, OR; Santa Fe, NM; and St. Louis, MO.

31. Over the last five years prior to the Acquisition, Whole Foods targeted markets for entry where, in Whole Foods' words, Wild Oats enjoyed a "monopoly." Consumers in those markets benefitted from the new competition in those markets.

32. Prior to the Acquisition, there were other geographic markets in which only one or the other is present. In many of these markets, Wild Oats or Whole Foods planned, but for the Acquisition, to enter and offer direct and unique competition to the other. Each developed expansion plans that targeted the other's "monopoly" markets, as Whole Foods describes it. These markets include: Palo Alto, CA; Fairfield County, CT; Miami

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Beach, FL; Naples, FL; Nashville, TN; Reno, NV; and Salt Lake City, UT.

33. Whole Foods' Mr. Mackey has said that "Whole Foods has taken significant market share from OATS wherever they have opened competing stores – Boulder, Santa Fe, Denver, Boca Raton, Ft. Lauderdale, and St. Louis." Each of the parties, in anticipation of entry by the other, has engaged in aggressive price and non-price competition that conveys to shoppers benefits that go well beyond the benefits resulting from the presence or threatened entry in those geographic markets of other retailers. In addition, when Whole Foods or Wild Oats expected the other to enter one of its markets, it planned substantial improvements in quality, including renovations, expansions, and competitive pricing. As Mr. Mackey explained upon Whole Foods' entry into Nashville: "At least Wild Oats will likely improve their store there in anticipation of Whole Foods eventually opening and [customers will] benefit from that." Prior to the Acquisition, neither company responded in the same way to competition from conventional supermarkets or other Retailers.

34. Prior to the Acquisition, consumers benefitted directly from the price and quality competition between Whole Foods and Wild Oats. These benefits will be lost in the markets where the two competed before the Acquisition and they will not occur in those markets where each had planned to expand.

V. RELEVANT MARKETS

35. A relevant product market in which to analyze the effects of the Acquisition is the operation of premium natural and organic supermarkets.

36. A relevant geographic market in which to analyze the effects of the Acquisition is an area as small as approximately five or six miles in radius from premium natural and organic supermarkets or as large as a metropolitan area.

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VI. ENTRY CONDITIONS

37. Entry or repositioning into the operation of premium natural and organic supermarkets is time-consuming, costly, and difficult. As a result, entry or repositioning into the operation of premium natural and organic supermarkets in the relevant geographic markets is unlikely to occur or to be timely or sufficient to prevent or defeat the anticompetitive effects of the Acquisition.

VII. ANTICOMPETITIVE EFFECTS

38. The relevant markets are highly concentrated and are significantly more concentrated after the Acquisition. Premium natural and organic supermarkets' primary competitors are other premium natural and organic supermarkets. Shoppers with preferences for premium natural and organic supermarkets are not likely to switch to other retailers in response to a small but significant non-transitory increase in premium natural and organic supermarket prices.

39. The Acquisition is likely to have substantially lessened competition and continues to substantially lessen competition in the following ways, among others:

a. the Acquisition has already eliminated one of only two or three premium natural and organic supermarkets and has substantially increased concentration in the operation of premium natural and organic supermarkets in the relevant geographic markets, each of which already is highly concentrated;

b. the Acquisition has already eliminated substantial and effective price and non-price competition between Whole Foods and Wild Oats in the operation of premium natural and organic supermarkets in the relevant geographic markets,

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substantially reducing or eliminating competition in the operation of premium natural and organic supermarkets in each of those geographic areas;

c. the Acquisition has already eliminated one of only two or three premium natural and organic supermarkets in each of the relevant geographic markets, tending to create a monopoly in the operation of premium natural and organic supermarkets in each of those geographic areas;

d. the Acquisition has already eliminated the only existing company that can serve as a meaningful springboard for a conventional supermarket operator to enter the market for premium natural and organic supermarkets in each of the relevant geographic markets, tending to create a monopoly in the operation of premium natural and organic supermarkets in each of those geographic areas;

e. the Acquisition has already eliminated Whole Foods' closest competitor in geographic and product space in each of the relevant geographic areas, resulting in the loss of direct and unique price and non-price competition that conveys to shoppers benefits that go well beyond the benefits resulting from the presence or threatened entry of other retailers;

f. the Acquisition has already resulted in the closing of numerous Wild Oats stores, reducing or eliminating consumer choice in premium natural and organic supermarkets, and will result in the closing of additional Wild Oats stores and further disposition of assets;

g. the Acquisition has already enabled the combined Whole Foods/Wild Oats to exercise market power unilaterally; and

h. the Acquisition has already eliminated potential competition in numerous parts of the United States.

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VIII. VIOLATIONS CHARGED

COUNT I – ILLEGAL ACQUISITION

40. The allegations contained in paragraphs 1-39 are repeated and realleged as though fully set forth here.

41. Whole Foods' acquisition of Wild Oats is likely to have substantially lessened competition and continues to substantially lessen 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 Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

COUNT II – ILLEGAL ACQUISITION AGREEMENT

42. The allegations contained in paragraphs 1-41 are repeated and realleged as though fully set forth here.

43. Whole Foods, through the Agreement with Wild Oats as described in paragraph 6, has engaged in unfair methods of competition in or affecting 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 sixteenth day of February 2009, at 10 a.m. is hereby fixed as the time, and Federal Trade Commission offices, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580, as the place when and where a hearing will be had on the charges set forth in this Amended Complaint, at which time and place you will have the right under the Federal Trade Commission 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 Amended Complaint.

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Pending further order of the Commission, the Commission will retain adjudicative responsibility for this matter. *See* § 3.42(a) of the Commission's Rules of Practice for Adjudicative Proceedings. The Commission hereby allows you until September 26, 2008, to file either an answer or a dispositive motion. If you file a dispositive motion within that time, your time for filing an answer is extended until 10 days after service of the Commission's order on such motion. If you do not file a dispositive motion within that time, you must file an answer.

An answer in which the allegations of the Amended 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 Amended Complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the Amended Complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the Amended 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 Amended Complaint and, together with the Amended Complaint, will provide a record basis on which the Commission or 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 § 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings and the right to appeal the initial decision to the Commission under § 3.52 of said Rules.

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 Amended Complaint and shall authorize the Commission or the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the Amended

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Complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

Unless otherwise directed, further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Ave., N.W. Room 532, Washington, D.C. 20580. The final prehearing conference shall be held at that location, at 10:00 a.m. on a date to be determined. The parties shall meet and confer prior to the final prehearing conference regarding trial logistics, any designated deposition testimony, and proposed stipulations of law, facts, and authenticity.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the acquisition of Wild Oats by Whole Foods challenged in this proceeding violates Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondent as is supported by the record and is necessary and appropriate, including, but not limited to:

1. An order preventing Whole Foods from consolidating any Wild Oats stores into the Whole Foods system, to the extent such consolidation has not occurred at the time of the Commission's decision;
2. An order preventing Whole Foods from selling or disposing of any owned or leased property that had been used as a Wild Oats store in any geographic market, or a Whole Foods store in any relevant geographic market;
3. An order preventing Whole Foods from discontinuing the use of the Wild Oats name at any store being operated as Wild Oats at the time of the Commission's decision;

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4. Re-establishment of Wild Oats stores, with Whole Foods stores added as necessary, along with any associated or necessary assets in a manner that creates a group or system of stores that may be available for divestiture, including, but not limited to, re-opening closed Wild Oats stores, re-naming Wild Oats stores that had been changed to the Whole Foods name, reversing any consolidation of Wild Oats stores into the Whole Foods system and re-establishing the Wild Oats system, and re-establishing Wild Oats' distribution arrangements, private label products and supplier relationships;
5. The divestiture of Wild Oats stores, and Whole Foods stores, and any other associated or necessary assets, including the Wild Oats name, distribution systems or assets, and supplier relationships, in a manner that restores Wild Oats as a viable, independent competitor in the relevant markets, with the ability to offer such services as Wild Oats had offered prior to its acquisition by Whole Foods;
6. Maintenance of the Wild Oats stores pending divestiture, including operating the stores in the ordinary course and maintaining the inventory of the stores, the hours of operation of the stores and of each department in the stores;
7. Appointment of a monitor, or a divestiture trustee, to assure that the Wild Oats, Whole Foods, and related assets are re-established and divested within the time set forth in the Commission's decision;
8. A requirement that, for a period of time, Whole Foods provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of its operations with any other company providing the operation of premium and natural organic supermarkets;

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9. A requirement for Whole Foods to file periodic compliance reports with the Commission; and
10. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore Wild Oats as a viable, independent competitor in the relevant markets.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this Amended Complaint to be signed by the Secretary and its official seal to be affixed hereto, at Washington, D.C., this eighth day of September, 2008.

By the Commission.

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IN THE MATTER OF

**LINDE AG,
AND
THE BOC GROUP PLC**

Docket No. C-4163 Order, September 9, 2008

Letter granting the request of the Monitor to extend the 2-year time limit within which TNSC must complete construction of its Northern California Helium Transfill, and until which Linde must continue to provide Helium Transfill Tolling Services to TNSC at its Richmond, California, Escrow Transfill due to unanticipated delays in receiving the necessary local permits.

LETTER RESPONSE GRANTING THE REQUEST

Dear Mr. Klein:

This letter is in response to your August 11, 2008, request, which you filed as the Commission-appointed Monitor in the above-referenced matter, that the Commission extend the two-year time limit within which Taiyo Nippon Sanso Corporation (“TNSC”) may construct a Helium Transfill, as that term is defined in the Order in Docket No. C-4163 (“Order”), in Northern California, until December 31, 2008. You also request that the Commission extend the two-year time limit during which Respondent Linde AG (“Linde”) must provide Helium Transfill Tolling Services to TNSC at Linde’s Richmond, California, Escrow Transfill, pursuant to Paragraph III.B.6. of the Order, until December 31, 2008.

Your request was filed pursuant to Paragraph *N.G.* of the Order and Linde supports your request for the extension regarding TNSC’s construction of its Northern California Helium Transfill, and has consented to the extension of its obligation to provide Helium Transfill Tolling Services to

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TNSC at its Richmond, California, Escrow Transfill, and to the Order's escrow procedures.

After consideration of your request, as well as other available information, the Commission has determined, pursuant to Rule 4.3(b) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 4.3(b), to extend the time within which TNSC may construct a Helium Transfill in Northern California, and the time during which Linde must provide Helium Transfill Tolling Services to TNSC at Linde's Richmond, California, Escrow Transfill, until December 31, 2008. In granting the extension, the Commission has relied upon the information submitted and representations made in connection with your request, and has assumed them to be accurate and complete.

By direction of the Commission.

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IN THE MATTER OF

**WHOLE FOODS MARKET, INC.,
AND
WILD OATS MARKETS, INC.**

Docket No. 9324 Order, September 10, 2008

Order approving the Scheduling Order.

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 September 8, 2008 at 10:00 a.m.¹ The schedule imposed by this order shall not be altered absent leave of the Commission.

1. Initial Disclosures: Complaint Counsel and Respondent have agreed that the parties will not produce any further material than what was exchanged in the federal court proceedings for the purposes of satisfying 16 C.F.R. § 3.31(b). Ten (10) days following Respondent's Answer to the Amended Complaint, the parties shall exchange the name, and if known, the address and telephone number of each individual likely to have discoverable information relevant to the allegations in the Amended Complaint, to the proposed relief or to the defense of the Respondent.

2. Statement of Facts. On February 21, 2007, Whole Foods and Wild Oats executed an agreement whereby Whole Foods would acquire all the voting securities of Wild Oats. The FTC issued an administrative complaint on June 27, 2007 alleging that Whole Foods' acquisition of Wild Oats violates the antitrust laws. On

¹ The parties' positions on the discovery schedule and other matters were described in a Joint Case Management Statement on August 28, 2008. See Joint Case Management Statement (Aug. 28, 2008).

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July 17, 2007, Whole Foods and Wild Oats each filed their Answers to the original Complaint. On August 7, 2007 the Commission ordered a stay of the administrative proceeding pending the proceedings in the collateral federal district court case. See no. 8 below (related cases). Whole Foods completed its acquisition of Wild Oats on August 28, 2007.

On August 8, 2008, the Commission issued its Order Rescinding Stay of Administrative Proceeding, Setting Scheduling Conference, and Designating Presiding Official. On August 26, 2008, Complaint Counsel filed a motion to amend the Complaint, and on September 8, 2008, the Commission issued an Order Amending the Complaint and an Amended Complaint. The Amended Complaint alleges that the relevant product market is the operation of premium natural and organic supermarkets and that the relevant geographic market is an area as small as approximately five or six miles in radius from premium natural and organic supermarkets or as large as a metropolitan statistical area, and that Whole Foods and Wilds Oats were each other's closest competitors in approximately 22 geographic markets.

3. Legal Issues. The principal legal issues in this case are as follows:

- a. Complaint Counsel alleges that the acquisition of Wild Oats by Whole Foods is likely to have substantially lessened competition and continues to substantially lessen competition in violation of Section 7 of the Clayton Act 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.
- b. Respondent disputes the allegations in the Complaint and contends that the merger has not and does not violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act in any respect. Other principal legal issues include whether: (1) the complaint fails to state a claim upon which relief can be granted; (2) granting the relief sought is contrary to the public interest;

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(3) efficiencies and other procompetitive benefits resulting from the merger outweigh any and all proffered anticompetitive effects; and (4) the Commission is entitled to relief if it prevails, having stayed this proceeding for a year while Respondent consummated the merger and successfully integrated Wild Oats' business into its own. Whole Foods reserves the right to assert any other defenses as they become known to Whole Foods.

4. Motions. On August 11, 2008, Respondent filed its Motion to Extend the Deadline for Submitting a Joint Case Management Statement and the Scheduling Order seeking to extend the deadline for submitting a joint case management statement to August 28, 2008, and move the date of the Scheduling Conference. On August 12, 2008, the Commission granted Respondent's motion and ordered that the Scheduling Conference be held on September 8, 2008 and that the joint case management statement be filed on or before August 28, 2008. On August 22, 2008, Respondent Whole Foods filed a motion to disqualify the Commission as the Administrative Law Judge and to appoint a presiding official other than a Commissioner. The Commission denied that motion on September 5, 2008.

5. Amendment of the Pleadings. On August 26, 2008, Complaint Counsel filed a motion to amend the Complaint, and the Commission issued an Order Amending Complaint and an Amended Complaint on September 8, 2008. Respondent will file its Answer on September 26, 2008 or otherwise move with respect to the Amended Complaint.

6. Evidence Preservation. The Parties shall take steps necessary to preserve evidence relevant to the issues reasonably evident in this action, including the interdiction of any document-destruction program or ongoing erasures of emails and other electronically-recorded materials.

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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 Respondent and does not exceed twenty-five (25) to Respondent from Complaint Counsel. Only fifteen (15) of the twenty-five (25) interrogatories may be contention interrogatories. The interrogatories in separate sets shall be numbered sequentially. The number of requests for admissions, including all discrete subparts, shall not exceed twenty-five (25) to Complaint Counsel from Respondent and shall not exceed twenty-five (25) to Respondent 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. Respondent represented that it produced more than 20 million documents during the Second Request investigation. There was also three weeks of discovery during the preliminary injunction proceedings in federal district court. In an effort to reduce duplicative and burdensome discovery on the parties, the Commission imposes the following limits on document requests:
 - i. Documents created prior to April 1, 2007: party propounding discovery seeking documents created prior to April 1, 2007 shall make a showing of good cause. The burden then shifts to the responding party to either produce the documents or demonstrate that the relevant documents have already been produced.

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- ii. Documents created after April 1, 2007: there is no limit on discovery seeking documents created after April 1, 2007.
- 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 relevant discovery cut-off date.
- d. Timing of Responses. For interrogatories, requests for production, and requests for admissions served after the issuance of the Scheduling 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. Notwithstanding these limits, Complaint Counsel and Respondent are encouraged to respond on a rolling basis, particularly with respect to document requests.
- e. Electronically-Stored Information. Except as otherwise provided herein, 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.
 - i) Timing. Service of a notice of deposition five (5) business days in advance of the date set for the taking of the deposition shall constitute reasonable notice, provided, however, that notwithstanding the date stated on any deposition notice, the parties reasonably cooperate with each other in setting deposition dates that accommodate the schedules of the deponent.

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- ii) **Avoidance of Duplication.** Complaint Counsel and Respondent are encouraged to take steps to avoid duplicative discovery. Several witnesses have already been deposed during the federal court proceedings. Respondent stipulated to the admissibility of this earlier testimony in these proceedings. A party witness deposed previously during the federal court proceedings shall not be deposed on subject matters that were the subject of examination absent a showing of good cause. This limitation should be interpreted narrowly and it should not be used to stymie the discovery.
- iii) **Duration of Depositions.** Complaint Counsel and Respondent are encouraged to limit the duration of depositions in this matter to a single day with seven hours of testimony.

8. Related Cases. On June 5, 2007, the Commission filed a Complaint for Temporary Restraining Order and Preliminary Injunction in the United States District Court for the District of Columbia. On June 7, 2007, United States District Court Judge Paul L. Friedman issued an Order granting the Commission's motion for temporary restraining order. On August 16, 2007, Judge Friedman denied the Commission's request for a preliminary injunction and, on August 23, 2007, the United States Courts of Appeals for the District of Columbia Circuit denied the Commission's emergency motion for an injunction pending appeal. As a result, Whole Foods' acquisition of Wild Oats was consummated on August 28, 2007. On July 9, 2008, the United States Court of Appeals for the District of Columbia Circuit reversed the district court's conclusion that the Commission failed to show a likelihood of success in this proceeding and remanded the matter back to the district court to address the equities. On August 26, 2008, Whole Foods filed a petition for a rehearing en banc. The United States Court of Appeals for the District of Columbia Circuit at this time has not decided whether to grant the petition for a rehearing en banc.

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9. Scheduling. The following is the pre-hearing schedule:

- | | |
|--------------------|---|
| September 19, 2008 | Exchange Preliminary Witness List (not including experts) with description of proposed testimony. |
| September 19, 2008 | Non-expert depositions can begin. |
| September 26, 2008 | Respondent files response to Amended Complaint. |
| October 6, 2008 | Exchange revised witness lists (not including experts), including preliminary rebuttal fact witnesses, with description of proposed testimony. |
| November 20, 2008 | Deadline for serving document requests, requests for admission, and interrogatories, except discovery for purposes of authenticity and admissibility of exhibits |
| November 21, 2008 | Status report due and, if requested by either party, conference with the presiding official. |
| December 19, 2008 | Close of discovery, other than depositions and discovery permitted under FTC Rules of Practice § 3.24(a)(4) and discovery for purposes of authenticity and admissibility of exhibits. |
| | Status report due and, if requested by either party, conference with the presiding official. |
| January 5, 2009 | Complaint Counsel serves expert witness list and expert witness reports other than rebuttal expert reports. |

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January 15, 2009 Respondent serves expert witness list and expert witness reports.

January 22, 2009 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. No witness not previously disclosed on a witness list may be added except for good cause shown. If a new witness is allowed, an opportunity for deposition must be afforded.

For parties that intend to offer into evidence at the hearing confidential materials of an opposing party or non-party, provide notice to the opposing party or non-party, pursuant to FTC Rules of Practice § 3.45 (b).

Complaint Counsel serves rebuttal expert witness list and rebuttal expert reports. Any such report is to be limited to rebuttal of matters set forth in Respondent's expert reports. If material outside the scope of fair rebuttal is presented, Respondent 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 sur-rebuttal expert reports).

January 27, 2009 Deadline for filing motions for summary decision, motions *in limine*, motions to strike, and motions for in camera treatment of proposed trial exhibits.

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- January 30, 2009 Deadline for completion of all depositions including those of experts.
- February 4, 2009 Exchange and file with the presiding official objections to final proposed witness lists and exhibits lists.
- Exchange objections to the designated testimony to be presented by deposition and counter designations.
- Exchange proposed stipulations of law, facts, and authenticity. Parties file pretrial briefs, not to exceed fifty (50) pages.
- Deadline for filing motions for summary decision motions *in limine*, motions to strike, and motions for in camera treatment of proposed trial exhibits.
- February 11, 2009 Deadline for filing reply to responses to motions for summary decision motions *in limine*, motions to strike, and motions for in camera treatment of proposed trial exhibits.
- Date TBD Final prehearing conference to be held at 10:00 a.m. in Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW Washington D.C. 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 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

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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.

February 16, 2009 Commencement of Hearing, to begin at 10:00 a.m. in Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW Washington, D.C.

10. Hearing. The hearing will take no more than thirty full trial days (i.e., 210 hours). Each side shall be allotted no more than half of the trial time within which to present its opening statements, *in limine* motions, all arguments excluding the closing argument, direct or cross examinations, or other evidence.

- a. Opening Statements. Each side shall be permitted to make an opening statement that is no more than 2 hours in duration.
- b. Closing Statements. Each side shall be permitted to make a closing argument no later than five days after the last filed proposed findings. The closing arguments shall last no longer than 2 hours.

11. Other Matters.

- a. Service on the parties shall be deemed effective on the date of delivery by electronic mail (formatted in Adobe Acrobat) except in those instances where service by electronic mail is not technically possible, 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 Administrative Law Judge, this provision does not modify any of the dates set forth in Paragraph 9.

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- b. Memoranda in support of, or in opposition to, any 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. § 3.45. Parties shall act in accordance with the rules for filings containing such information, including FTC Rules of Practice, 16 C.F.R. § 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 service, copies of all subpoenas *duces tecum* and subpoenas *ad testificandum*. For subpoenas *duces tecum*, the party issuing the non-party 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 non-party 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. Depositions shall be taken by stenographic means unless the party seeking the deposition notifies the deponent and the other party of its intention to record the deposition by other than 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.

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- f. Any declaration obtained by a party that the party intends to use affirmatively in the proceeding (e.g. for purposes other than strictly rebuttal, authenticity or evidentiary foundation) must be produced to the opposing party sufficiently before the close of fact discovery such that opposing counsel shall have a reasonable amount of time to subpoena documents for and to take the deposition of any such declarant.
- 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 (oral, written and by e-mail) between expert witnesses and counsel or consultants need not be produced and are not discoverable unless relied upon.
- 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 rebuttal or 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. Complaint Counsel shall serve, with a courtesy copy to the presiding official, no later than forty-eight (48) hours in advance of the start of the case-in-chief, a schedule by day showing the best estimate of the expected witnesses to be called. Respondent shall serve, with a courtesy copy to the presiding official, no later than forty-eight (48) hours in advance of the start of the defense case, a schedule by day showing the best estimate of the expected witnesses to be called. At least forty-eight (48) hours in advance of Complaint Counsel's rebuttal case, Complaint Counsel shall provide Respondent, with a courtesy copy to the presiding official, 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 forty-eight (48) hours before they are to be 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", Respondent's exhibits shall bear the designation "RX", joint exhibits shall bear the designation "JX", and demonstrative exhibits shall bear the designation "DX"; 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 "CX0001." 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 attention of the presiding official and arrange for a telephonic hearing with the presiding official on the dispute.

By the Commission.

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IN THE MATTER OF

NORTH TEXAS SPECIALTY PHYSICIANS

Docket No. 9312 Order, September 12, 2008

Order amending Paragraph II.A.2 of the Commission's November 29, 2005, Final Order and Opinion to remove the language that the 5th Circuit determined to be "overly broad and internally inconsistent," and change the prohibition on refusals to deal (or threats to refuse to deal) to those taken in furtherance of otherwise prohibited conduct.

ORDER ON REMAND

This matter is before the Federal Trade Commission on remand from the United States Court of Appeals for the Fifth Circuit. On May 14, 2008, the Fifth Circuit affirmed the Commission decision -- embodied in its November 29, 2005 Final Order and Opinion -- that certain activities of Respondent North Texas Specialty Physicians (NTSP) constituted horizontal price fixing in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. *North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008).¹ Specifically relevant to the issue before us, the Circuit Court identified concerted refusals to deal as one of the mechanisms NTSP used to increase its bargaining power and help achieve its collective price demands. The Commission's order prohibited NTSP from entering into agreements "to deal, refuse to deal, or threaten to refuse to deal with any payor." Paragraph II.A.2. Although approving most of the order provisions, the

¹ The Respondent and Respondent's counsel were served with the Final Order and the Opinion of the Commission on December 7, 2005, and the Final Order therefore became effective on the sixtieth day thereafter; that is, on February 6, 2006. See 15 U.S.C. § 5(g)(2); Commission Rule 3.56(a), 16 C.F.R. § 3.56(a) (2008). In an Order issued on January 20, 2006, the Commission stayed enforcement of the Respondent's obligation to comply with Paragraphs IV.B. and IV.C. of the Final Order until the Fifth Circuit issued its ruling disposing of the petition for review. In a second Order issued on January 20, 2006, the Commission modified the Opinion of the Commission in certain respects not relevant here.

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Court found Paragraph II.A.2 to be “overly broad and internally inconsistent,” and remanded the proceeding to the Commission for modification of Paragraph II.A.2 “in a manner consistent with [the Court’s] opinion.”² *Id.* at 371, 372. Both sides have filed briefs on this issue on remand. Upon consideration of the parties’ submissions and the Commission’s goals in enforcing this Order, the Commission will eliminate the language that gave rise to the possible internal inconsistency and limit the prohibition on refusals to deal (or threats to refuse to deal) to those taken in furtherance of otherwise prohibited conduct.

The Commission Final Order requires NTSP to cease and desist from engaging in the anticompetitive price-fixing conduct alleged in the complaint. Paragraph II of the Order contains the core cease and desist provisions. Paragraph II.A includes provisions that specifically address types of joint activity that the Commission and the Court of Appeals found NTSP used to carry out its unlawful conduct. Paragraph II.A. requires NTSP to cease and desist from:

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:

² In its brief on remand, Respondent suggests that Federal Rule of Appellate Procedure 19, “Settlement of a Judgment Enforcing an Agency Order in Part,” might apply here. Response of NTSP to Complaint Counsel’s Proposal for Order Modification on Remand at 4 n. 11. As Complaint Counsel points out, that rule only applies when an agency brings a proceeding to enforce one of its orders. *See* 20 James Wm. Moore et al., *Moore’s Federal Practice – Civil* § 319.10 (3d ed.) (noting that the rule does not apply in a proceeding to review an agency order). Complaint Counsel’s Reply Regarding Order Modification on Remand at 4 n. 3. The Commission did not bring a proceeding to enforce its order in this case, and the Fifth Circuit in this case did not direct the Commission to follow the procedure set forth in Federal Rule of Appellate Procedure 19.

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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 through any arrangement other than Respondent;

The Court of Appeals' first concern with regard to Paragraph II.A.2 is that it appears to be internally inconsistent. The Court stated that "[i]t is . . . difficult to see how NTSP can both deal and refuse to deal with any payor". 528 F.3d at 371. The prohibition in Paragraph II.A.2 against NTSP orchestrating agreements among physicians "to deal" with a payor concerning their provision of physician services also appears in Paragraph II.A.3, which bars NTSP's participation in agreements "regarding any term . . . upon which any physician deals or is willing to deal with any payor." In referencing the term "deal," Paragraphs II.A.2 and 3 are designed to make clear that NTSP's involvement in collective decisions by physician members on whether, or on what terms, to participate in a payor network is prohibited, regardless of whether such an agreement is implemented through acceptance or rejection of a payor offer. The Court of Appeals affirmed this aspect of the Commission's decision. For example, in discussing NTSP's use of member polls on prospective fees and communication of those results to members, the Court of Appeals agreed with the Commission that those activities effectuated an agreement on terms of *dealing* with payors, stating that "[t]he FTC reasonably concluded that the 'physicians anticipated that any individual response [to NTSP's poll] would help to raise or

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lower the average fee for the group – an average that NTSP would then use in negotiating with payors.” 528 F.3d at 363.

It is not necessary to prohibit this same type of conduct in two separate provisions. Accordingly, we have decided to delete the reference to agreements “to deal” from Paragraph II.A.2, as Complaint Counsel has suggested. This modification will eliminate the internal inconsistency in the provision to which the Court of Appeals refers, while leaving intact the prohibition against NTSP involvement in collective decisions by physician members on whether, or on what terms, to participate in a payor network in Paragraph II.A.3. Respondent does not take issue with this proposed modification (other than to argue more generally that the entire provision should be deleted, which we discuss below).

The Court of Appeals’ second concern is that Paragraph II.A.2 is overbroad, stating that it could compel NTSP to messenger contracts or become a party to contracts sent to it by payors, regardless of any risks to NTSP, its patients, or members. 528 F.3d at 372. Complaint Counsel argues that the Commission should add the phrase “in furtherance of any conduct or agreement that is prohibited by any other provision of Paragraph II of this Order” to the end of Paragraph II.A.2 to address the Court’s concern about the provision otherwise imposing an absolute and unqualified duty to deal. Complaint Counsel states that the proviso will make it clear that the Order will not obligate NTSP to messenger contracts or become a party to contracts sent to it by payors, regardless of any risks to NTSP, its patients, or members, unless it would otherwise amount to a violation of the provisions of the Order. We agree with Complaint Counsel’s proposal.

Respondent argues that Complaint Counsel’s proposed “in furtherance” clause is ambiguous and “possibly in conflict with the Fifth Circuit’s opinion.” Response of North Texas Specialty Physicians to Complaint Counsel’s Proposal for Order Modification on Remand at 4. We disagree. As the Commission

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stated several times in its Opinion, the Final Order does not impose a general obligation to “messenger” all offers or to contract with all payors regardless of any risks to NTSP or its members and patients. Commission Opinion at 39 and n. 60. The “in furtherance” clause makes this point clear, by expressly linking the ban on refusals to deal to the conduct prohibited by the other provisions of Paragraph II. The Order thereafter cannot be interpreted as requiring NTSP to messenger contracts or become a party to contracts sent to it by payors, regardless of any risks to NTSP, its patients, or members, and the Court of Appeals’ overbreadth concerns should be satisfied.

Respondent also argues that Paragraph II.A.2 should be deleted in its entirety. We reject that position because a prohibition on refusals to deal is an important aspect of the order. As the Commission found, and the Court of Appeals affirmed, NTSP used threats and refusals to deal to reinforce its collective demands on payors. 528 F.3d 366-67. The Court of Appeals further rejected Respondent’s attempt to justify such refusals as mere avoidance of “risky situations.” *Id.* at 369 (finding that concerns about risk had no bearing on NTSP’s use of refusals to deal with payors to obtain higher fees for member physicians). Those findings justify a prohibition on the use of refusals to deal, or threats to refuse to deal, that are taken in furtherance of conduct that is illegal. Neither the Court of Appeals’ remand language, nor any other part of the Court of Appeals opinion, indicates that it believed it necessary to delete Paragraph II.A.2 to cure its overbreadth concern. The Court of Appeals was aware that a similar concern by the ALJ prompted him to strike Paragraph II.A.2, but the Court instructed the Commission to modify the provision and did not direct that it be deleted. 528 F.3d at 372.

We agree with Complaint Counsel’s proposal to modify Paragraph II.A.2 by adding the phrase “in furtherance of any

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conduct or agreement that is prohibited by any other provision of Paragraph II of this Order.”³

This matter having been heard by the Commission on remand from the United States Court of Appeals for the Fifth Circuit, the Commission, for the reasons stated above, has determined to modify Paragraph II.A.2 as follows, so as to be consistent with the Fifth Circuit opinion. Accordingly,

IT IS ORDERED THAT Paragraph II.A.2 be, and it hereby is, modified to read as follows:

“to refuse to deal, or threaten to refuse to deal, with any payor, in furtherance of any conduct or agreement that is prohibited by any other provision of Paragraph II of this Order;”

and

IT IS FURTHER ORDERED THAT the stay in enforcement of the Respondent’s obligation to comply with Paragraphs IV.B. and IV.C. of the Final Order be, and it hereby is, rescinded.

By the Commission.

³ Complaint Counsel offered an alternative proposal to modify Paragraph II.A.2 that makes specific reference to the types of refusals to deal mentioned in the Court of Appeals opinion (refusals to contract with a payor or to messenger payor offers) and also includes the “in furtherance” clause. Complaint Counsel did not endorse this provision and expressed concern that it could create more ambiguity. While Respondent did not have as much objection to this proposal, it maintained its objection to the “in furtherance” language which we find necessary. We agree with Complaint Counsel that its second proposal could create more ambiguity.

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IN THE MATTER OF

**WHOLE FOODS MARKET, INC.,
AND
WILD OATS MARKETS, INC.**

Docket No. 9324 Order, October 10, 2008

Order granting complaint counsel and Whole Foods Market's joint motion for entry of a protective order governing confidential material.

PROTECTIVE ORDER GOVERNING CONFIDENTIAL MATERIAL

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material ("Protective Order") shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, "confidential material" shall refer to any document or portion thereof that contains non-public competitively sensitive information, including trade secrets or other research, development or commercial information, the disclosure of which would likely cause commercial harm to the producing party, or sensitive personal information. "Discovery Material" shall refer to documents and information produced by a party or third party in connection with this matter. "Document" shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. "Commission" shall refer to the Federal Trade Commission ("FTC"), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.

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2. Any document or portion thereof produced or submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order.
3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.
4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.
5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.
6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof) the designation "CONFIDENTIAL-FTC Docket No. 9324" or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic documents may also be designated as confidential by placing the designation "CONFIDENTIAL-FTC Docket No. 9324" or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on

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which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding, provided such experts or consultants are not employees of the respondent, or any entity established by the respondent, or employees of any third party which has been subpoenaed to produce documents or information in connection with this matter, and provided further that each such expert or consultant has signed an agreement to abide by the terms of this protective order; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for the respondent, their associated attorneys and other employees of their law firm(s), provided such personnel are not employees of the respondent or of any entity established by the respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including experts or consultants, provided such experts or consultants are not employees of the respondent, or any entity established by the respondent, or employees of any third party which has been subpoenaed to produce documents or information in connection with this matter, and provided further that each such expert or consultant has signed an agreement to abide by the terms of this protective order; and (e) any witness or deponent who authored or received the information in question, or who is presently employed by the producing party.

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided,

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however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; Sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7 or 8. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives such notice. Until such time as the Administrative Law Judge rules otherwise, the document or transcript shall be accorded *in camera* treatment. If the motion for *in camera* treatment is denied, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the

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confidential material deleted therefrom may be placed on the public record.

11. If any party receives a discovery request in another proceeding that may require the disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient of the discovery request shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 CFR § 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

12. At the time that any consultant or other person retained to assist counsel in the preparation or hearing of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR § 4.12.

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13. The inadvertent production or disclosure of information or documents produced by a party or third party in discovery that is subject to a claim of privilege will not be deemed to be a waiver of any privilege to which the producing party would have been entitled had the inadvertent production or disclosure not occurred, provided the producing party exercised reasonable care to preserve its privilege. In the event of such inadvertent production or disclosure, the party claiming inadvertence shall promptly notify any party that received the information of the claim and the basis for it. After being so notified, the receiving party must promptly return the specified information, and all copies of it, and may not use or disclose the information unless the claim is resolved such that no privilege applies to the information. Nothing in this Order presupposes a determination on the claim of privilege or of reasonable care in preserving privilege if challenged.

14. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

By the Commission.

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IN THE MATTER OF

RAMBUS INCORPORATED

Docket No. 9302 Order, October 16, 2008

Order granting the joint motion seeking an order authorizing Rambus to receive excess consideration incurred by contingent contractual rights pursuant to Paragraph 1 of the Commission's March 16, 2007 Stay Order.

**ORDER AUTHORIZING RESPONDENT TO RECEIVE EXCESS
CONSIDERATION HELD PURSUANT TO CONTINGENT
CONTRACTUAL OBLIGATION**

Paragraph 1.c. of the Commission *Order Granting in Part and Denying in Part Respondent's Motion for Stay of Final Order Pending Appeal* (March 16, 2007) ("Stay Order") permitted Respondent to incur contingent contractual rights to consideration in excess of that permitted by the Final Order issued in this matter if the consideration were payable to Respondent only upon the issuance by the Commission of an order authorizing Respondent to receive such consideration. The Commission stated in Paragraph 1.c. of the Stay Order that it would issue an order authorizing Respondent to receive such consideration promptly after receiving a mandate from a court of appeals.

On April 22, 2008, the District of Columbia Circuit Court of Appeals ordered that the Commission's orders in this matter be set aside and that this matter be remanded for further proceedings consistent with the Court's opinion. On August 26, 2008, the Court denied the Commission's petition for a rehearing en banc. On September 9, 2008, the Court issued its mandate. Accordingly,

IT IS ORDERED THAT, as used herein, the term "Excess Consideration" shall mean fees, royalties, payments, judgments, and other consideration in excess of that permitted by Paragraphs IV, V.A., VI, and VII of the Final Order; and

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IT IS FURTHER ORDERED THAT, within the meaning of Paragraph 1.c. of the Stay Order, Respondent may receive Excess Consideration (and accrued interest) payable pursuant to any contingent contractual obligation.

By the Commission.

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IN THE MATTER OF

**WHOLE FOODS MARKET, INC.,
AND
WILD OATS MARKETS, INC.**

Docket No. 9324 Order, October 20, 2008

Order appointing an Administrative Law Judge for the remainder of the adjudicative proceeding.

ORDER DESIGNATING ADMINISTRATIVE LAW JUDGE

The Federal Trade Commission (“FTC”) issued an administrative complaint on June 27, 2007, alleging that Whole Foods Market, Inc.’s agreement to acquire Wild Oats Markets, Inc. violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that such an 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. The Commission retained jurisdiction over the matter pursuant to its authority under the Administrative Procedure Act (APA)¹ and the Commission Rules of Practice.² On August 7, 2007 the Commission issued an Order staying the administrative

¹ Section 556(b)(2) of the APA permits the Commission to determine whether the Commission itself, one or more Commissioners, or an administrative law judge appointed under 5 U.S.C. § 3105 of the APA will “preside at the taking of evidence” in adjudications conducted under Section 554 of the APA -- such as this adjudicative proceeding -- and to carry out all the functions permitted by Section 556(c) of the APA and Part 3 of the Commission Rules of Practice. *See* 5 U.S.C. § 556.

² Part 3 of the Commission Rules of Practice governs the procedures used in Commission adjudicative proceedings. *See* 16 C.F.R. § 3.1 *et seq.* (2008). Commission Rule 3.42 gives the Commission full discretion to determine whether it should preside over a particular adjudicative proceeding itself; designate one or more Members of the Commission to preside over the proceeding; or refer the proceeding to an administrative law judge. *See* 16 C.F.R. § 3.42.

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proceeding pending the proceedings in the collateral federal district court case. On August 8, 2008, the Commission issued an Order rescinding the stay of the administrative proceeding, setting a Scheduling Conference, and designating Commissioner J. Thomas Rosch as the Presiding Official for the Scheduling Conference. On September 8, 2008, the Commission issued an Order Amending Complaint and an Amended Complaint. Commissioner Rosch held the Scheduling Conference on that same day, and on September 10, 2008, the Commission issued a Scheduling Order imposing a fair and timely schedule in this matter. That Order provides, *inter alia*, that the administrative hearing shall begin on February 16, 2009.

The Commission has now determined to designate Acting Chief Administrative Law Judge D. Michael Chappell as the Administrative Law Judge in this matter. Chairman William E. Kovacic and Commissioners Pamela Jones Harbour, Jon Leibowitz, and J. Thomas Rosch are committed, subject to the bounds of reasonableness and fairness, to a just and expeditious resolution of any potential appeal from an Initial Decision filed by the Administrative Law Judge in this matter that may be taken to the full Commission. If such an appeal is filed, the Commissioners commit to make every effort to issue a Commission Opinion and Final Order within approximately 45 days after oral argument.

Accordingly,

IT IS ORDERED THAT Acting Chief Administrative Law Judge D. Michael Chappell be, and he hereby is, designated and appointed to serve as the Administrative Law Judge presiding over the adjudicative proceeding in this matter; and

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IT IS FURTHER ORDERED THAT the Commission hereby transfers adjudicative responsibility for this matter to Judge Chappell, in his capacity as Administrative Law Judge presiding over the adjudicative proceeding in this matter.

By the Commission.

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IN THE MATTER OF
AGRIUM, INC.
AND
UAP HOLDING CORPORATION

Docket No. C-4219 *October 28, 2008*

Letter responding to Agrium's petition for approval of a proposed divestiture pursuant to Section 2.41(f) of the Commission's Rules of Practice and Procedure.

LETTER APPROVING DIVESTITURE

Dear Ms. Feinstein:

This is in reference to the Petition of Agrium, Inc. For Approval of Proposed Divestiture to Helena Chemical Company ("Helena"), filed by Agrium, Inc. ("Agrium") and received on August 18, 2008 ("Petition"). Pursuant to the Decision and Order in Docket No. C-4219, Agrium requests prior Commission approval of its proposal to divest certain assets to Helena.

After consideration of Agrium's Petition and other available information, the Commission has determined to approve the proposed divestitures as set forth in the Petition. In according its approval, the Commission has relied upon the information submitted and the representations made by Agrium and Helena in connection with Agrium's Petition and has assumed them to be accurate and complete.

By direction of the Commission.

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IN THE MATTER OF

**LINDE AG,
AND
THE BOC GROUP PLC**

Docket No. C-4163 Order, November 12, 2008

Letter informing Linde AG that the Monitor certified that the installations at Irwindale and Newark are “in accordance with the parameters established for a Standard Industry Transfill, and therefore (TNSC) is in compliance with that portion of the Order.

LETTER APPROVING RETENTION OF ASSETS

Dear Mr. Prince and Ms. Delbaum:

This letter is to inform Linde AG (“Linde”) that it may retain the City of Industry and Richmond, California Escrow Transfills in accordance with Paragraph III.B.6.b. of the Order in the above-referenced matter. Linde also must return to Taiyo Nippon Sanso Corporation (“TNSC”) the purchase price, including interest accrued in escrow, for these Escrow Transfills within 3 days following receipt of this letter.

The Commission’s approval for Linde to retain the City of Industry and Richmond, California Escrow Transfills is based on the Monitor’s August 19, 2008, and October 26, 2008, Certifications, pursuant to Paragraph IV.D.1.c. of the Order, that TNSC has constructed Standard Industry Helium Transfills in Irwindale and Newark, California.

In granting its approval, the Commission has relied upon the information submitted by the Monitor, and has assumed such information to be accurate and complete.

By direction of the Commission.

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IN THE MATTER OF

**CHICAGO BRIDGE & IRON COMPANY N.V.,
CHICAGO BRIDGE & IRON COMPANY
AND
PITT-DES MOINES, INC.***Docket No. 9300 Order, November 26, 2008*

Letter responding to Chicago Bridge & Iron's application for approval of divestiture.

LETTER APPROVING DIVESTITURE

Dear Mr. Aronson:

This letter responds to the September 12, 2008, Application for Approval of Divestiture ("Application") to Matrix Service Company ("Matrix"), which you filed on behalf of Chicago Bridge & Iron Company N.V. and Chicago Bridge & Iron Company (collectively, "CB&I"). The Application requests that the Commission approve the proposed divestiture to Matrix pursuant to the requirements contemplated by the Final Order issued in this proceeding on December 21, 2004, as modified by two subsequent orders issued on August 30, 2005 ("Order"). The divestiture provisions of the Order are not currently in effect due to the automatic stay imposed by operation of Section 5(g)(4) of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45(g)(4). The application was placed on the public record for comments until October 15, 2008; one comment was received.

After consideration of the proposed divestiture as set forth in the Application and supplemental documents, as well as other available information, the Commission has determined to approve the proposed divestiture to Matrix. In according its approval of the proposed divestiture, the Commission has relied upon the information submitted and representations made in connection

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with the Application, and has assumed them to be accurate and complete.

The Commission has further determined that achievement of the remedial purpose of the divestiture to Matrix as contemplated by the Order will be fostered by a continued period of service by the Monitor Trustee, Mr. Paul J. Varello, who was retained by CB&I and approved by the Commission on July 20, 2005. Pursuant to the provisions of Paragraph II.C.3 of the Order, the Monitor Trustee's service terminates three (3) business days after the Monitor Trustee has completed a final report and submitted recommendations in connection with a divestiture application presented to the Commission for its approval, or "at such other time as directed by the Commission." Order ¶ II.C.3. The Commission has therefore determined that it would be in the public interest for the Monitor Trustee to continue to serve, or be available for service if needed, for a period of time coextensive with CB&I's provision of transition services to Matrix pursuant to the terms of the divestiture agreement hereby approved by the Commission, including in connection with the transfer of work by CB&I to Matrix under CB&I's existing contracts for Relevant Products, as defined in the Order.

Accordingly, the Commission hereby directs, pursuant to Paragraph II.D. of the Order, that the term of the Monitor Trustee, Mr. Paul J. Varello, shall be extended for an additional two (2) years from the date of divestiture by CB&I to Matrix on the following terms and conditions, and that CB&I shall modify the Monitor Trustee Agreement between it and Mr. Varello that was approved by the Commission on July 20, 2005, in compliance with this directive:

(i) for the initial six (6) month period immediately following the date of divestiture to Matrix, the Monitor Trustee shall continue to serve and to possess all powers, duties, authorities and responsibilities of the Monitor Trustee pursuant to the Monitor Trustee Agreement to monitor CB&I's compliance with the terms of each of the divestiture-related agreements (including all

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amendments, exhibits, attachments, agreements and schedules thereto) approved by the Commission and incorporated by reference into the Order pursuant to Paragraph IV.B. of the Order (collectively, "divestiture agreement"), in a manner consistent with the purposes of the Order and in consultation with the Commission's staff; and

(ii) for the remaining eighteen (18) month period, the service of the Monitor Trustee may be reactivated as may be necessary and appropriate to assist Commission staff in determining or securing CB&I's compliance with the terms of the divestiture agreement upon five (5) days written notice by the Commission's staff to CB&I. Within five (5) days of receipt of such notice, CB&I shall take all steps as may be necessary to restore the power and authority of the Monitor Trustee to serve in accordance with the terms of the Monitor Trustee Agreement.

By direction of the Commission.

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IN THE MATTER OF

**RED SKY HOLDINGS LP,
AND
NEWPARK RESOURCES INC.**

Docket No. 9333 Order, December 10, 2008

Order granting complaint counsel's and respondents' joint motion to dismiss the Complaint.

ORDER DISMISSING COMPLAINT

On October 22, 2008, the Federal Trade Commission issued the Administrative Complaint in this matter, having reason to believe that respondents Red Sky Holdings LP (“Red Sky”) [through its subsidiary CCS Corporation (“CCS”)] and Newpark Resources Inc. (“Newpark”) had entered into an acquisition agreement, in violation of Section 5 of the Federal Trade Commission Act; 15 U.S.C. § 45 – for the acquisition by Red Sky of Newpark – and having reason to believe that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act. Complaint Counsel and the Respondents have now filed a Joint Motion to Dismiss Complaint, on the grounds that the Respondents are abandoning the proposed acquisition by Red Sky of Newpark Environmental Services; that Red Sky has withdrawn its Hart-Scott-Rodino Notification and Report Forms filed for the proposed transaction; and that the complaint is now moot.¹

The Commission has determined to dismiss the Administrative Complaint without prejudice, consistent with both Commission precedent and the current posture of this case. For

¹ *Joint Motion to Dismiss Complaint* (November 25, 2008) (“Joint Motion”), available at <http://www.ftc.gov/os/adjpro/d9333/081125jointmodismisscmplt.pdf>, at 1.

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example, in *Inova Health System Foundation et al.*, the Commission recently issued an order dismissing the complaint on the grounds that the Respondents had abandoned the transaction and had withdrawn their Hart-Scott-Rodino Notification and Report Forms.² The Commission noted that

the most important elements of the relief set out in the Notice of Contemplated Relief in the Administrative Complaint have been accomplished without the need for further administrative litigation. In particular, the Respondents have publicly announced that they have abandoned the proposed merger at issue. Moreover, the Respondents have withdrawn the Hart-Scott-Rodino Notification and Report Forms they filed for the proposed transaction. As a consequence, the Respondents would not be able to effect the proposed transaction without filing new Hart-Scott-Rodino Notification and Report Forms.³

² *In the Matter of Inova Health System Foundation, and Prince William Health System, Inc.*, Docket No. 9326, Order Dismissing Complaint (June 17, 2008), available at <http://www.ftc.gov/os/adjpro/d9326/080617orderdismisscmt.pdf>; accord, *In the Matter of Equitable Resources, Inc., Dominion Resources, Inc., Consolidated Natural Gas Company, and The Peoples Natural Gas Company*, Docket No. 9322, Order Dismissing Complaint (January 31, 2008) (Public Version), available at <http://www.ftc.gov/os/adjpro/d9322/080204complaint.pdf>; *In the Matter of Swedish Match North America Inc., and National Tobacco Company, L.P.*, Docket No. 9296 (*Swedish Match*), Order Dismissing Complaint (January 4, 2001), available at <http://www.ftc.gov/os/2001/01/swedishdismisscmp.htm>; *In the Matter of H..J. Heinz Company, Milnot Holding Corporation, and Madison Dearborn Capital Partners, L.P.*, Docket No. 9295 (*H..J. Heinz*), Order Dismissing Complaint (December 4, 2001), available at <http://www.ftc.gov/os/2001/12/heinzorder.pdf>.

³ *Inova Health System Foundation*, *supra* note 2, at 2.

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Similarly, in this matter, the most important elements of the relief set out in the Notice of Contemplated Relief in the Administrative Complaint have been accomplished without the need for further administrative litigation. In particular, the Respondents have announced that they are abandoning the proposed acquisition at issue, and Red Sky has withdrawn its Hart-Scott-Rodino Notification and Report Forms filed for the proposed transaction. As a consequence, the Respondents would not be able to effect the proposed transaction without filing new Hart-Scott-Rodino Notification and Report Forms.

For the foregoing reasons, the Commission has determined that the public interest warrants dismissal of the Administrative Complaint in this matter. The Commission has determined to do so without prejudice, however, because it is not reaching a decision on the merits. Accordingly,

IT IS ORDERED THAT the Administrative Complaint in this matter be, and it hereby is, dismissed without prejudice.

By the Commission.

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IN THE MATTER OF**REED ELSEVIER NV,
REED ELSEVIER PLC,
REED ELSEVIER GROUP PLC,
REED ELSEVIER INC.,
CHOICEPOINT INC.,
CHOICEPOINT SERVICES INC.,
AND
CHOICEPOINT GOVERNMENT SERVICES LLC***FTC File No. 081 0133**Order, December 10, 2008*

Letter approving the appointment of the Interim Monitor and the November 18, 2008 Interim Monitor Agreement entered into between Mr. Pettit and the Respondents.

LETTER APPROVING MONITOR AGREEMENT

Dear Mr. Lipstein:

This letter notifies the proposed Respondents in the above-referenced matter that the Federal Trade Commission has approved the appointment of Mitchell S. Pettit of MSP Strategic Communications, Inc., as the Interim Monitor, and has approved the Interim Monitor Agreement by and among Mr. Pettit and Respondents dated November 18, 2008, pursuant to Paragraph 18 of the Agreement Containing Consent Order and, when made final, Paragraph III of the Decision and Order, issued in the above-referenced matter.

In according its approval, the Commission has relied upon the information submitted and representations made by Respondents and has assumed them to be accurate and complete.

By direction of the Commission.

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INTERIM MONITOR AGREEMENT

This Interim Monitor Agreement ("Monitor Agreement") entered into this ^{15th} day of November, 2008 by and among Reed Elsevier PLC, Reed Elsevier NV, Reed Elsevier Group plc, and Reed Elsevier, Inc. (collectively "Reed Elsevier"); and ChoicePoint Inc. and ChoicePoint Services Inc. (collectively "ChoicePoint") (where "Respondents," as used herein, means Reed Elsevier and ChoicePoint, individually and collectively); and Mitchell S. Pettit ("Mr. Pettit") provides as follows:

WHEREAS, the United States Federal Trade Commission (the "Commission"), *In the Matter of Reed Elsevier*, has accepted for public comment an Agreement Containing Consent Order ("Consent Agreement"), incorporating a Decision and Order ("Order") with Respondents, which, among other things, requires Respondents to divest certain defined assets pursuant to the Membership Interest Purchase Agreement By And Among Thomson Reuters (Legal) Inc., ChoicePoint Government Services LLC, ChoicePoint Services Inc., ChoicePoint Inc., Reed Elsevier Inc. and Thomson Reuters U.S. Inc., dated August 29, 2008, and those Ancillary Agreements referenced therein (collectively, the "Remedial Agreement"), and provides for the appointment of one or more Interim Monitors to ensure that Respondents comply with their obligations under the Order and the Remedial Agreement;

WHEREAS, the staff of the Commission has appointed Mr. Pettit as such monitor (the "Interim Monitor") pursuant to the Order to monitor Respondents' compliance with the terms of the Consent Agreement and Order and with the Remedial Agreement referenced in the Order, and Mr. Pettit has consented to such appointment;

WHEREAS, the staff of the Commission on November 12, 2008, notified Respondents of the selection of Mr. Pettit as the Interim Monitor, and Respondents on November 13, 2008 agreed to the selection of Mr. Pettit, and are executing this 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 purpose of the Order;

WHEREAS, this Monitor Agreement, although executed by the Interim Monitor and Respondents is not effective for any purpose, including but not limited to imposing rights and responsibilities on Respondents or the Interim Monitor under the Order, until it has been approved by the Commission; and

WHEREAS, the parties to this Monitor Agreement intend to be legally bound;

NOW, THEREFORE, the parties agree as follows:

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1. Capitalized terms used herein and not specifically defined herein shall have the respective definitions given to them in the Order.
2. The Interim Monitor shall have all of the powers and responsibilities conferred upon the Interim Monitor by the Order.
3. Respondents hereby agree that Respondents will fully comply with all terms of the Order requiring them to confer all rights, powers, authority and privileges upon the Interim Monitor, or to impose upon themselves any duties or obligations with respect to the Interim Monitor, to enable the Interim Monitor to perform the duties and responsibilities of the Interim Monitor thereunder.
4. Respondents further agree that:
 - a. they will use their commercially reasonable best efforts to provide the Interim Monitor with prompt notification of significant meetings, including date, time and venue, scheduled after the execution of this Monitor Agreement, relating to the Service Supply Agreement and Transition Services Agreement and such meetings may be attended by the Interim Monitor or his representative, at the Interim Monitor's option, or at the request of the Commission or staff of the Commission;
 - b. they will provide the Interim Monitor the minutes of the above-referenced meetings as soon as practicable and, in any event, not later than those minutes are available to any employee of the Respondents;
 - c. they will provide the Interim Monitor with copies of all reports submitted to the Commission pursuant to the Order, simultaneous with the submission of such reports to the Commission, for the duration of the Interim Monitor's term under this Agreement;
 - d. they will, subject to any demonstrated legally recognized privilege, grant the Interim Monitor 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; and
 - e. they will 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.

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5. Respondents shall promptly notify the Interim Monitor of any significant written or oral communication that occurs after the date of this Monitor Agreement between the Commission and Respondents related to the Service Supply Agreement and Transition Services Agreement, together with copies of such communications.
6. 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 the Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.
7. Respondents shall pay the Interim Monitor, in accordance with the fee schedule attached hereto as Confidential Appendix A, for all reasonable time spent in the performance of the Interim Monitor's duties and responsibilities, including all monitoring activities, all work in connection with the negotiation and preparation of this Monitor Agreement, all work in the nature of final reporting and file closure, and all reasonable and necessary travel time.
 - a. In addition, Respondents will pay (i) all out-of-pocket expenses reasonably incurred by the Interim Monitor in the performance of the Interim Monitor's duties and responsibilities, including any international telephone calls and any auto, train or air travel in the performance of the Interim Monitor's duties, and (ii) all fees and disbursements reasonably incurred by such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.
 - b. The Interim Monitor shall have full and direct responsibility for compliance with all applicable laws, regulations and requirements pertaining to work permits, income and social security taxes, unemployment insurance, worker's compensation, disability insurance, and the like.
8. The Interim Monitor shall maintain the confidentiality of all information provided to the Interim Monitor by Respondents. Such information shall be used by the Interim Monitor only in connection with the performance of the Interim Monitor's duties pursuant to this Monitor Agreement. Such information shall not be disclosed by the Interim Monitor to any third party other than:

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- a. persons employed by, or working with, the Interim Monitor under this Monitor Agreement, in which case such persons shall be informed of, and agree in writing to abide by, the confidentiality obligations applicable to the Interim Monitor, in accordance with Paragraph 12, below, or
 - b. persons employed at the Commission and working on this matter.
9. The Interim Monitor shall maintain a record and inform the Commission of all persons (other than representatives of the Commission) to whom confidential information related to this Monitor Agreement has been disclosed.
 10. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 11. Upon termination of the Interim Monitor's duties under this Monitor Agreement, the Interim Monitor shall promptly return to Respondents all material provided to the Interim Monitor by Respondents and shall destroy any material prepared by the Interim Monitor that contains or reflects any confidential information of Respondents. Nothing herein shall abrogate the Interim Monitor's duty of confidentiality.
 12. To the extent that the Interim Monitor wishes to retain any employee, agent, consultant or any other third party to assist the Interim Monitor in accordance with the Order, the Interim Monitor shall ensure that, prior to being retained, such persons execute a confidentiality agreement in a form agreed upon by the Interim Monitor and Respondents.
 13. Nothing in this Monitor Agreement shall require Respondents to disclose any material or information that is subject to a legally recognized privilege or that Respondents are prohibited from disclosing by reason of law or an agreement with a third party.
 14. Each party shall be reasonably available to the other to discuss any questions or issues that either party may have concerning compliance with the Order as they relate to Respondents.
 15. Respondents hereby confirm their obligation to indemnify the Interim Monitor and hold the Interim Monitor harmless in accordance with and to the extent required by the Order. 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

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liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.

16. Upon this Monitor Agreement becoming effective, the Interim Monitor shall be permitted, and Respondents shall be required, to notify all current Commission-approved Acquirers and potential future Acquirers with respect to his appointment as Interim Monitor.
17. In the event of a disagreement or dispute between Respondents and the Interim Monitor concerning Respondents' obligations under the Order, and in the event that such disagreement or dispute cannot be resolved by the parties, either party may seek the assistance of the Commission's Compliance Division to resolve this issue.
18. This Monitor Agreement shall be subject to the substantive law of the State of New York (regardless of the choice of law principles of New York or those of any other jurisdiction).
19. This Monitor Agreement shall terminate when the last obligation under Service Supply Agreement and Transition Services Agreement has been fully performed; provided, however, that the Commission may extend this Monitor Agreement as may be necessary or appropriate to accomplish the purposes of the Order.
20. In the event that, during the term of this Monitor Agreement, the Interim Monitor becomes aware that he has or may have a conflict of interest that may affect or could have the appearance of affecting the performance by the Interim Monitor of any of his duties under this Monitor Agreement, the Interim Monitor shall promptly inform both Respondents and the Commission of such conflict or potential conflict.
21. In the performance of his functions and duties under this Monitor Agreement, the Interim Monitor shall exercise the standard of care and diligence that would be expected of a reasonable person in the conduct of his or her own business affairs.
22. It is understood that the Interim Monitor will be serving under this Monitor Agreement as an independent contractor and that the relationship of employer and employee shall not exist between Interim Monitor and Respondents.
23. This Monitor Agreement is for the sole benefit of the Parties hereto and their permitted assigns and the Commission, and nothing herein express or implied shall give or be construed to give any other person any legal or equitable rights hereunder.

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24. This Monitor Agreement contains the entire agreement between the parties hereto with respect to the matters described herein and replaces any and all prior agreements or understandings, whether written or oral.

25. Any notices or other communication required to be given hereunder shall be deemed to have been properly given if sent by mail, facsimile (with acknowledgment of receipt of such facsimile having been received), or electronic mail, to the applicable party at its address below (or to such other address as to which such party shall hereafter notify the other party):

If to the Interim Monitor, to:

Mitchell Pettit

Telephone:

Email:

If Respondents, to:

LexisNexis Risk & Information Analytics Group
Attention: Michael C. Lamb, VP & Legal Director - LexisNexis Risk
& Information Analytics Group
Telephone:

Facsimile:

Email:

With copy to:

Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004-2695

Attention: Robert A. Lipstein
Telephone: 202-624-2630 (work)

Facsimile: 202-628-5116
Email: RLipstein@crowell.com

If to the Commission, to:

Federal Trade Commission
600 Pennsylvania Avenue, N.W.

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Washington, DC 20580

Attention: Secretary
Telephone: (202) 326-2514
Facsimile: (202) 326-2466

With copy to:

Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001

Attention: Assistant Director for Compliance
Telephone: (202) 326-2526
Facsimile: (202) 326-3396


26. This Monitor Agreement shall not become binding until it has been approved by the Commission.

27. This Monitor Agreement may be signed in counterparts.

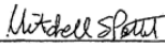
IN WITNESS WHEREOF, the parties hereto have executed this Monitor Agreement as of the date first above written.

Reed Elsevier, Inc.

INTERIM MONITOR



Andrew Prozes
Reed Elsevier, Inc.



Mitchell Pettit

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IN THE MATTER OF**WHOLE FOODS MARKET, INC.,
AND
WILD OATS MARKETS, INC.***Docket No. 9324 Order, December 15, 2008*

Order taking Whole Foods Market's motion to stay the proceeding under advisement.

ORDER

On December 3, 2008, Respondent filed a Motion To Stay the Proceeding, To Amend the Scheduling Order, and to Certify the Questions to the Commission for Determination in this matter ("Motion"). On December 8, 2008, Complaint Counsel filed an Opposition to that Motion. On December 11, 2008, the Administrative Law Judge issued an Order certifying Respondent's Motion to the Commission without a recommendation. The Commission has taken the Motion, the Opposition, and the Order under advisement; no further briefing is needed; and the Commission will shortly issue an appropriate Order.

By the Commission.

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IN THE MATTER OF

**WHOLE FOODS MARKET, INC.
AND
WILD OATS MARKETS, INC.**

Docket No. 9324 Order, December 19, 2008

Order granting Whole Foods Market's motion in part and denying in part.

**ORDER AMENDING SCHEDULING ORDER AND DENYING
RESPONDENT'S MOTION TO STAY PROCEEDING**

Respondent Whole Foods Market, Inc. has filed a Motion to stay this administrative proceeding until the conclusion of the federal district court remand proceeding, and to amend the September 10, 2008 Scheduling Order to postpone the commencement of the administrative hearing until no earlier than September 14, 2009. The Commission has determined to deny Respondent's Motion, but to amend the Scheduling Order in certain respects.

The Scheduling Order currently provides that the administrative trial will begin on February 16, 2009. Respondent argues that (1) a stay is warranted because the remand proceeding "will result in findings of fact regarding the actual effects of the Whole Foods Market/Wild Oats merger and other important issues that necessarily will affect the conduct of the administrative proceedings" (Motion at 1); and (2) without a seven-month extension, it "will be unable to complete adequate third party discovery in advance of expert reports and the administrative hearing." *Id.* at 5. Although we find that Whole Foods has failed to adequately justify staying these proceedings or delaying trial for seven months, we nevertheless will delay the trial until April 6, 2009.

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First, although the current rules allow for a stay of administrative proceedings while a collateral federal court proceeding is ongoing (see Rule 3.51), such a decision is discretionary. The circumstances here do not justify a stay. The Court of Appeals in reversing the district court's denial of a preliminary injunction determined that the Commission had established a likelihood of success on the merits. *Federal Trade Commission v. Whole Foods Market Inc.*, No. 07-5276, 2008 U.S. App. LEXIS 24092 at *32, *54 (Tatel, J.); *id.* at *10, *30 (Brown J.). As a result, the decision on remand will not determine whether the transaction is illegal.

In contrast, the district court's original decision denying a preliminary injunction effectively prevented any finding that the transaction was illegal. The district court found that the Commission had established no likelihood of success on the merits. If that finding— that there was no likelihood of success on the merits – was correct, it would have been virtually impossible for the Commission to find a violation, and the Commission, in all likelihood, would have dismissed this action. Therefore, for prudential reasons, the Commission did not lift the stay until the Court of Appeals reversed that district court's finding. The posture of the federal court action no longer supports staying this proceeding.

Three prudential reasons justify proceeding with this action. If the transaction is anticompetitive, there could be ongoing consumer harm. Moreover, should the Commission determine that the transaction is illegal, the longer it takes to make the decision, the more difficult it will be to fashion effective relief that would protect consumers. Although the Commission believes certain preliminary relief - such as a hold separate order - will help protect a potential remedy, the Commission should still attempt to resolve this matter as expeditiously as possible. Finally, should the district court grant some form of preliminary relief, resolving this matter quickly limits the intrusiveness of such a remedy.

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In addition, Whole Foods is speculating on how the federal court action will proceed on remand. It is not obvious that there will be significant overlap and repetition between the two actions. The district court action is not a determination on the merits. Further, the district court weighs equities related to preliminary relief that are different than the factors related to the need for permanent relief. Although Whole Foods claims that the findings in the federal court action will be conclusive (or nearly so) on this matter, that argument is premature.

Second, with regard to Respondent's separate request for an extension of the administrative trial until September 14, 2009, the motion rests entirely on its unsupported assertion that, absent this extension, it will be unable to conduct necessary third-party discovery. Respondent claims that, in order to defend claims pertaining to the 29 separate geographic markets at issue in this case, it requires compliance with 96 third party subpoenas it has issued, but only 53 third parties have even partially complied with the subpoenas, and it cannot take the depositions of any third party until that compliance has occurred. Motion at 5-6. A party who encounters a problem in this respect is expected promptly to call the problem to the court's attention. The court normally either orders prompt compliance with the subpoena, or, if the subpoena is overly broad or unduly burdensome, the court modifies it and sets a date for the deposition. Respondent's motion makes no showing that any of this occurred. Among other things, Respondent has made no showing (by affidavit or otherwise) that it needed to issue 96 third party subpoenas to begin with, that a problem even exists with any of the 96 subpoenas, much less with all of them, or that it has taken any steps to attempt to resolve these problems.

Although it appears that Respondent has not yet taken a single third party deposition to date, it has failed to show good cause for not having done so. As Commissioner Rosch explains in his dissent, it appears that Part 11(e) may be creating some problems with scheduling third party depositions. The Commission will delete Part 11(e) from the scheduling order.

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It is certainly true that the current discovery schedule is a demanding one. Notwithstanding that, when we issued the scheduling order in September, we believed that this schedule would be a feasible one. The Commission has made it clear – in issuing the September scheduling order and in its recent actions to revise its Rules of Practice relating to Part 3 proceedings – that it is committed to resolving adjudicative proceedings expeditiously as is required by law. We also recognize that this case is in a unique procedural posture because at the time it was filed there was no foreshadowing that the Commission would revise its rules to expedite proceedings, the transaction has since been consummated, and this administrative litigation was stayed for a year. Under these unique circumstances, we believe that the reasons for expedited deadlines do not apply with quite the same force as they will in future cases. Thus, although we find that Respondent has failed to support its assertion that a lengthy seven-month delay in the hearing is warranted, we will extend the commencement of the administrative hearing to April 6, 2009, with the attendant deadlines to be adjusted accordingly.¹ We wish to emphasize, however, that we will not lightly depart from this schedule, and if Respondent believes that any further extension is required it will need to make a particularized showing, with factual support rather than mere unsupported assertions. Accordingly,

IT IS ORDERED THAT Respondent's request to stay this administrative proceeding is **DENIED**;

IT IS FURTHER ORDERED THAT Respondent's request to amend the Scheduling Order to postpone the commencement of the administrative hearing until no earlier than September 14, 2009 is **DENIED**;

¹ With the new hearing date – which is approximately eight months from the date that the Commission lifted the stay in these proceedings, pretrial discovery and preparation will be longer than the roughly five months that the federal district courts allowed in the *Oracle* and *Microsoft* cases. See, *U.S. v. Oracle Corp.*, 331 F. Supp.2d 1098 (N.D. Cal. 2004); *U.S. v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001).

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IT IS FURTHER ORDERED THAT Part 9 of the September 10, 2008 Scheduling Order is amended in the following respects:

1. The Commencement of Hearing will occur on Monday, April 6, 2009, at 10:00 a.m. in Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW Washington, D.C.; and
2. The deadlines specified in Part 9, beginning with December 19, 2008, are changed as follows:
 - a. December 19, 2008 is changed to February 4, 2009;
 - b. January 5, 2009 is changed to February 19, 2009;
 - c. January 15, 2009 is changed to March 2, 2009;
 - d. January 22, 2009 is changed to March 9, 2009;
 - e. January 27, 2009 is changed to March 16, 2009;
 - f. January 30, 2009 is changed to March 19, 2009;
 - g. February 4, 2009 is changed to March 24, 2009; and
 - h. February 11, 2009 is changed to March 31, 2009; and

IT IS FURTHER ORDERED THAT Part 11(e) of the September 10, 2008 Scheduling Order is deleted.

By the Commission, Commissioner Rosch dissenting.

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**DISSENTING STATEMENT OF
COMMISSIONER J. THOMAS ROSCH**

I respectfully dissent from this ruling. Respondent's motion is based on three premises that are unsupported and unsound.

The first premise of the motion is that the remand proceeding "will result in findings of fact regarding the actual effects of the . . . merger and other important issues that necessarily will affect the conduct of the administrative proceeding." Memorandum in Support of Motion at 1, 4. That is incorrect. The first prong of this premise – that the remand proceeding "will result in findings of fact regarding the actual effects of the merger" – is apparently based on the assertion that "there was no opinion of the court" in the D.C. Circuit Court of Appeals proceeding because there were multiple panel opinions. Memorandum in Support of Motion at p.3. That assertion is in turn apparently based on the concurring opinions of two of the nine judges who participated in denying Respondent's motion for en banc review of the panel decision. See attached rehearing en banc order. However, the other seven participating judges did not adopt that view of the law. *Id.* To the contrary, as Judge Kavanaugh pointed out in footnote 8 of his dissent to the panel decision, the Marks principle, which is operative in both the jurisprudence of the Supreme Court and the Circuit Court, treats as binding precedent all explicit and implicit agreements between the authors of the multiple opinions. *Federal Trade Commission v. Whole Foods Market, Inc.*, 2008 U.S. App. LEXIS 24092 at *91, n.8 (Kavanaugh, J.). Judge Kavanaugh's dissenting opinion further pointed out that a majority of the panel (Judge Brown and Judge Tatel) agreed that the remand court is not to "make findings of fact regarding the actual effects of the merger." *Id.* at *85 (Kavanaugh, J.). That is confirmed by the opinions of Judge Brown and Judge Tatel themselves. *Id.* at *29 (Brown, J.), *54 (Tatel, J.) Thus, as was pointed out in our denial of Respondent's motion to recuse the Commission (p.2), insofar as the remand court considers the merits at all, it cannot make "findings of fact regarding the actual effects of the merger" that will affect the conduct of the plenary trial.

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The motion also fails to support the second prong of the premise – that the remand proceeding will result in “findings of fact regarding . . . other important issues that necessarily will affect the conduct of the administrative proceeding.” Apparently, those “other important issues” have to do with the “balancing of equities mandated by the D.C. Circuit.” Memorandum in Support of Motion at p.4. Again, however, that is a function to be performed by the remand court in the preliminary injunction proceeding; whatever “findings of fact” the remand court may make on that score will not necessarily affect the conduct of the plenary trial.

The second premise of the motion is that “staying the Commission’s challenge to this transaction, which was consummated over 15 months ago, will have no adverse effect on the public interest.” Memorandum in Support of Motion at pp. 1, 2, 4-5. That premise is based on the same contentions Respondent made in claiming in the Circuit Court of Appeals proceeding that the matter was moot. Specifically, there, as here, Respondent argued that the fact that it had closed the transaction and that the Commission had stayed the plenary trial made it impossible for the Commission to order any meaningful relief after a plenary trial. Mootness Motion at pp. 2-4; Reply at pp. 1-3, 9. In this instance too, the majority of the panel (Judge Brown and Judge Tatel) agreed that the mootness motion and its premises were without merit. The motion does not demonstrate otherwise. Indeed, the threat that Respondent may take steps to moot the matter underscores the public interest in moving this matter to a conclusion expeditiously.

Finally, the third premise of Respondent’s motion is that it needs until September 14, 2009 to prepare adequately for the plenary trial. Memorandum in Support of Motion at pp. 1, 2. This premise is supported by Respondent’s assertions that in order to defend claims pertaining to the 29 separate geographic markets at issue in this case, it needs compliance with 96 third party subpoenas it has issued, and it cannot take the depositions of any

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third party until that compliance has occurred. Memorandum in Support of Motion at pp.2, 5-6.

Respondent's motion does correctly assert that the scheduling order requires compliance with third party subpoenas before third party depositions are taken. More specifically, paragraph 11e. of the order provides that:

[n]o 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.

This is a standard provision in federal district court scheduling orders. It is designed to make third party depositions more useful by providing that the third party's documents will be produced first. A party who encounters a problem in this respect is expected promptly to call the problem to the court's attention, and the court normally either orders prompt compliance with the subpoena, or, if the subpoena is overly broad or unduly burdensome, modifies it and sets a date for the deposition.

Respondent's motion makes no showing that any of this occurred. Specifically there is no showing that Respondent needed to issue 96 third party subpoenas to begin with, or if it did, that Respondent promptly called any problem created by paragraph 11e. in those circumstances to the attention of the administrative law judge or the Commission. Indeed, there is no showing that a problem even exists with any of the 96 subpoenas, much less with all of them. There is no showing with respect to the status of compliance respecting any of the 96 subpoenas. To the contrary, it appears Respondent has not yet taken a single third

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party deposition to date, and it has failed to show good cause for not having done so.

Under these circumstances, most, if not all, federal judges would simply deny the motion. Certainly they would not grant a 45 day extension of time to complete discovery or continue the hearing date for 49 days, as this ruling does. At most, the ruling should be limited to deleting paragraph 11e (as the majority has done), extending the discovery deadline for 15 days and continuing the hearing date for the same amount of time. Moreover, the ruling should make it clear that no further extensions or continuances will be granted.

For these reasons, I respectfully dissent.

RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

WEST ASSET MANAGEMENT, INC.

FTC File No. 072 3006 Decision, July 2, 2008

RESPONSE TO WEST ASSET MANAGEMENT, INC.'S ("WAM") REQUEST FOR REVIEW OF DENIAL OF PETITION TO LIMIT CIVIL INVESTIGATIVE DEMAND

Dear Mr. Berg:

This letter advises you of the Commission's disposition of West Asset Management, Inc.'s ("WAM") Request for Review of Denial of Petition to Limit Civil Investigative Demand ("Request for Review") issued in conjunction with an investigation of WAM by the Federal Trade Commission (hereinafter "FTC" or "Commission"). For the reasons stated below, the Letter Ruling Denying WAM's Petition to Limit (Apr. 18, 2008) ("Letter Ruling") is affirmed.

I. Background and Summary

The present investigation seeks to determine whether there is any reason to believe that WAM, a debt collection firm, may have violated either the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, or the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.* The Commission issued a Civil Investigative Demand ("CID") to WAM on August 13, 2007. On November 5, 2007, WAM filed a Petition to Limit Civil Investigative Demand ("Petition to Limit"). WAM requested that the CID be limited "because: (1) the requests are unduly burdensome and can be reasonably limited without adversely impacting the FTC's investigation; and (2) the requests require the disclosure of confidential and personally identifiable consumer and client information that is not relevant in any manner to the FTC's investigation." Petition to Limit at 1.

Responses to Petitions to Quash

After Commissioner Harbour issued the Letter Ruling denying the Petition to Limit, WAM filed its Request for Review on April 25, 2008. WAM's Request for Review questions the denial of its Petition to Limit, and supplements and clarifies some of the facts supporting its burdensomeness claim by submitting a second declaration from its Associate Counsel for Compliance, Nancy Van Hoven, and a declaration from its Senior Vice President for Systems and Technology, Michael Regalia.

As Commissioner Harbour noted in the Letter Ruling, WAM's argument that it must be permitted to redact non-privileged, confidential third-party information from its CID responses bears directly on the extent of the burden WAM claims will be imposed on it by CID compliance. Letter Ruling at 3. We therefore address redaction of non-privileged information first.

II. WAM Is Not Entitled to Redact Non-Privileged Information

In its Request for Review, WAM renews its objection to Interrogatories 8, 22, and 26 and Document Requests 21-25 and 27. WAM argues that it should be entitled to review and redact "confidential and personal identifying information" from its CID responses. Petition to Limit at 22.¹ In support of this argument, WAM submits that this information is not relevant to the staffs

¹ The Request for Review also stated that the Letter Ruling compels WAM to produce privileged attorney-client and work product information. Request for Review at 2-3. WAM specifically faults the Letter Ruling for failing to distinguish between privileged information and confidential information. WAM's claim is wide of the mark for two reasons. First, the CID does not require WAM to produce any privileged information. CID ¶ II.B. ("Claims of Privilege) (permitting redaction of such materials and requiring the service of a specified form of privilege log). Second, the Petition to Limit did not seek leave to delete privileged information, only several varieties of third-party confidential information. Accordingly, the fact that the Letter Ruling failed to make an unrequested redaction distinction, *see* Request for Review at 2, is hardly surprising. Further, WAM's unsupported speculation that the Letter Ruling "intended to accomplish a punitive purpose" is beyond the limits of legitimate advocacy. Request for Review at 3.

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investigation, and that the lack of need for the information should be weighed against the harm of disclosure. *See, e.g.*, Request for Review at 11.² WAM's objections fail on several grounds.

The Commission is entitled to information if it is "reasonably relevant" to the investigation. *See, e.g., Fed. Trade Comm'n v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) ("It is well established that a district court must enforce a federal agency's investigative subpoena if the information is reasonably relevant. . . or, put differently, not plainly incompetent or irrelevant to any lawful purpose. . . and not unduly burdensome to produce.") (citations and internal quotation marks omitted). Like Commissioner Harbour, we find that the information sought by these specifications, including any non-privileged confidential information, is reasonably relevant to the investigation of WAM's debt collection practices. Letter Ruling at 2 n.4.

In many cases the "confidential and personal identifying information" WAM seeks to redact is not only relevant, it is often the most relevant evidence sought by the CID specification. For example, Interrogatory 26 asks WAM to "identify the name, address, and telephone number of each consumer from whom WAM has received a complaint, directly either from the consumer or from a third party on behalf of the consumer."³ If the contact information for the individuals who complained were redacted as confidential, staff would not be able to contact those individuals and the investigation would be hampered materially. The complementary Document Request, Document Request 23, required WAM to provide the complete consumer file for each

² In addition to consumer and creditor information, WAM proposes to redact "other confidential information of little conceivable value to the investigation". *Id.*

³ WAM objected to this demand for consumers' names, addresses, and telephone numbers on the basis of an unspecified privilege and on the basis that the interrogatory called for confidential personal information. Petition to Limit, Exhibit F, WAM Non-Public Response to August 13, 2007 CID (undated) at 23-24. WAM does not specify the legal grounds for either objection.

Responses to Petitions to Quash

person who complained – information that, again, is highly relevant to determining whether the company’s practices violated the FDCPA and would be significantly less useful if it could not be matched to the actual consumer who complained. Similarly, Interrogatory 22 asks that WAM “identify all client-creditors who have instructed WAM not to file suit or commence litigation to collect a debt.” A “threat to take any action that cannot legally be taken or that is not intended to be taken” violates Section 807(5) of the FDCPA,⁴ so this information – combined with complaint information that a threat to take legal action was made on behalf of a particular creditor – would enable staff to determine when any threat to take legal action to collect a debt on behalf of a particular client creditor would constitute a violation.⁵ If the creditor’s identity were redacted and replaced with a coded identifier, staff would not be able to verify whether complaints obtained from sources other than WAM (such as the Better Business Bureau or the Commission’s own complaint database) about threats by WAM to take legal action on behalf of that creditor were empty threats, thus violating the FDCPA.

WAM’s belief that it is entitled to withhold production of responsive documents and material so that it can redact non-privileged information is misplaced. First, WAM objects that disclosure of information that identifies its clients would cause “substantial economic harm to [its] competitive position.” Petition at 28 (citing *Diamond State Ins. v. Rebel Oil Co., Inc.*, 157 F.R.D. 691, 697 (D. Nev. 1994)). The court in *Diamond State* did note that under Fed. R. Civ. P. 45 a federal court may limit or quash a subpoena requesting confidential commercial information which, if disclosed, would cause substantial economic harm to the competitive position of the entity from whom the information was obtained. The court went on to hold, however, that the subpoenaed party’s claim was “unsubstantiated” and that a “generalized, self-serving, conclusory assertion of protection or

⁴ 15 U.S.C. § 1692e(5).

⁵ See also Letter Ruling at 3 n.5.

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privilege is without merit.” *Id.* at 698. Further, WAM cites no authority that extends this discovery rule to the investigatory process of the FTC.

WAM’s claim of substantial harm is inadequate for the same reasons. Neither WAM’s Petition nor its Request for Review demonstrate how disclosure of its clients’ names to the Commission – which is required to afford it substantial confidentiality protections⁶ – would cause “substantial economic and competitive harm” to WAM. At most, WAM indicates that it entered a non-disclosure agreement with at least one client that places certain restrictions on WAM’s disclosure of that clients relationship with WAM. WAM, however, does not cite any case law suggesting that a company can shield information from a federal inquiry by entering a non-disclosure agreement with a private party, even if its contract, properly construed, so provided.⁷ The district court in *Fed. Trade Comm’n v. Invention Submission Corp.*, 1991-1 Trade Cas. (CCH) ¶ 69,338 at 65,353-54 (D.D.C. 1991), rejected precisely this argument, holding that Invention Submission Corp. must produce documents demanded by the Commission even if so doing would breach its confidentiality agreements with third parties. The court recognized that “any other state of affairs would undermine the Commission’s mandate to investigate unfair business practices and allow any organization under investigation to escape scrutiny simply by protecting all information under confidentiality agreements.” *Id.* at 65,353; Letter Ruling at 5. Moreover, the Petition does not demonstrate how producing information in

⁶ *See, e.g.*, 15 U.S.C. §§ 46(f) (protecting trade secrets and confidential financial or commercial information), 57b-2(b) (protecting documents obtained under compulsory process in a law enforcement investigation). *See also* 16 C.F.R. § 4.10; 5 U.S.C. § 552(b)(7)(C) (provision of the Freedom of Information Act exempting from mandatory disclosure records or information compiled for law enforcement purposes, to the extent that production could reasonably be expected to constitute an unwarranted invasion of personal privacy).

⁷ *See* Letter Ruling at 6 n.13.

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response to a lawful demand of a federal agency – which is expressly contemplated in the agreement excerpted by WAM, Petition to Limit, Exhibit Y, ¶ IV.C. – would lead to substantial economic and competitive harm for WAM.⁸

Second, WAM objects to producing unredacted documents and material on the basis that various statutes relating to particular types of data place restrictions on disclosure of that data, suggesting that if WAM were to provide the information responsive to the CID it would be violating some other law. WAM's primary argument relates to protected health information that it may have received from health care clients that would be protected under the Health Information Portability and Accountability Act of 1996.⁹ As a preliminary matter, any health care client, as a covered entity under HIPAA, would be required to ensure that disclosures made to a business associate, such as WAM, for purposes of obtaining payment involved the minimum necessary disclosure. *See* 45 C.F.R. §§ 164.502(b), 164.514(d). Just as WAM apparently needed protected health information for its collection purposes, the context for the debt is relevant to the Commission's investigation of WAM's debt collection practices and is an integral part of the consumer's file.¹⁰ WAM implicitly

⁸ WAM argues that WAM would be prejudiced in that it would have to disclose the FTC's investigation to its clients. Petition at 28; Van Hoven Declaration (Nov. 5, 2007) at ¶¶ 33-35 (substantial and irreparable commercial and competitive harm would result to WAM because WAM would have "to provide notification. . . to everyone of WAM's clients of the FTC's preliminary non-public investigation"). However, the non-disclosure agreement WAM cites required WAM to have notified its client of the CID "promptly upon [its] receipt" in August 2007. Petition to Limit, Exhibit Y, ¶ IV.C. In any event, as pointed out in the Letter Ruling, the existence of the investigation is now a matter of public record. Letter Ruling at 6 (citing 16 C.F.R. § 2.7(g)).

⁹ Pub. L. 105-34 (Aug. 21, 1996, *as amended by* Pub. L. 105-33 (Aug. 5, 1997) *and* Pub. L. 105-34 (Aug. 5, 1997)) ("HIPAA").

¹⁰ Under 45 C.F.R. § 160.103, protected health information includes individually identifiable health information that is created by a health care provider, health plan, employer, or health care clearinghouse and that relates to the past, present, or future payment for the provision of health care to an individual.

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concedes as much by offering to turn over this information if Commission staff shows a “specifically identified and justifiable need for the information – an analysis that should be performed on case-by-case basis.” Request for Review at 7. Like the Letter Ruling, the Commission finds that HIPAA regulations allow protected health information to be disclosed to Commission staff in response to a CID where, as here, any protected health information is relevant and material to a legitimate law enforcement inquiry, the Commission’s requests are specific and limited in scope to the extent practicable, and de-identified information – as noted above – would not suffice. 45 C.F.R. § 164.512(f); Letter Ruling at 5. *See also* 45 C.F.R. § 164.512(e)(1) (exceptions for production of information responsive to administrative order or subpoena, including information responsive to an order of a court or administrative tribunal).¹¹

WAM argues that other statutes or regulations may somehow be implicated in addition to HIPAA, but does not identify which statutory provisions apply or how they would apply to WAM. Most of the statutes, however, do not on their face apply to debt collectors such as WAM. Petition to Limit at 21 (citing 18 U.S.C. § 2702(a)(3) – disclosure of information by communications providers, 20 U.S.C. § 1232g – disclosure of information by educational institutions, 42 U.S.C. § 1320d-2 – disclosure of information by health care plans, providers and clearinghouses).

¹¹ The Commission fully understands that preserving the confidentiality of consumers’ protected health information is important, and the Commission does not take the protection of that information lightly. Commission staff routinely handles highly sensitive information. Documents and material produced to the Commission that are marked confidential are accorded substantial protections against public disclosure equivalent to those in a protective order. *See, e.g.*, 15 U.S.C. 46(f) (governing trade secrets and confidential financial or commercial information); 15 U.S.C. § 57b-2 (protecting confidentiality of information obtained by compulsory process or otherwise in an investigation, including requiring 10 days notice prior to disclosure and providing for return of material produced); 16 C.F.R. § 4.10 (applying to nonpublic material, including material obtained in an investigation).

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WAM also cites the Gramm-Leach-Bliley Privacy of Consumer Financial Information Rule, 16 C.F.R. § 313, which does apply to debt collectors in some respects, but specifically allows disclosure to the Federal Trade Commission. 16 CFR § 313.15(a)(4). Moreover, WAM does not cite a single case either in the Petition to Limit or its Request for Review where the Commission or any federal court limited a discovery request to allow a party to redact such non-privileged information, even in litigation between private parties.¹²

For the reasons stated above, we reject WAM's contention that HIPAA, other federal statutes or rules, or WAM's client contracts justify redacting the non-privileged confidential information that WAM seeks to exclude from its CID responses. This holding eliminates most of the burden claimed by WAM for producing material responsive to the CID. *See, e.g.*, Request for Review, Van Hoven Decl. (Apr. 25, 2008) at ¶ 3 (estimating it would take one week to gather documents responsive to a specification, and three to five weeks to review and redact them)¹³

¹² WAM does not cite any case law supporting its redaction arguments in its Request for Review. The case law cited in its Petition to Limit involved challenges to production of confidential *commercial* information, Petition to Limit at 21, and the courts in those cases invariably ordered the parties to produce, subject to confidentiality protections, the requested information. *See, e.g., Graber Mfg. Co. v. Dixon*, 223 F. Supp. 1020 (D.D.C. 1963) (plaintiff had shown a clearly defined and serious injury to his business from public disclosure of confidential business information in a public Commission hearing, but plaintiff must produce the documents provided that they would not be made public unless necessary for proper enforcement of the law); *Fed. Trade Comm'n v. Bowman*, 149 F. Supp. 624 (N.D. Ill.), *aff'd*, 248 F.2d 456 (7th Cir. 1957).

¹³ WAM suggests that its demand to redact responsive documents before producing them is somehow "part of its effort to narrow the scope of the CID," Request for Review at 7, but clearly the process of review and redaction would take a considerable amount of time to redact a single document. WAM made a significant number of redactions to Exhibit W of the Petition to Limit. We assume WAM took particular care when it redacted confidential information from that exhibit; even then, one Social Security number was overlooked on page 2.

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III. WAM Has Not Established that Compliance with the CID Would Be Unduly Burdensome.

WAM challenges Document Requests 23-25 and 27 as unduly burdensome.¹⁴ WAM contends that “several of the requests are so broad and burdensome that compliance with them would cause significant hardship for WAM,” Petition at 14, and “would severely disrupt WAM’s business operations.” Request for Review at 8. WAM objects that production of computerized voice recordings would cost “approximately \$262,000 (hardware and labor cost total)” and that “even with a sufficient increase in WAM’s computing capacity, WAM lacks the personnel to carry out the necessary task of reviewing the consumer and regulatory inquiries as well as employee files” for responsiveness and privilege. Request for Review at 8. WAM states that only two individuals could be made available to produce responsive material and that it would take “nearly 4 months of full-time work by those employees to review and make necessary redactions to all of the computer and hardcopy records responsive to the CID.” Request for Review at 8-9, Request for Review, Exhibit B.¹⁵

¹⁴ WAM notes that Document Request 23 includes all of the material that would be responsive to Requests 24 and 27. Petition to Limit at 18 n.5. Document Request 23 seeks, “for every consumer who complained about WAM, whether directly to the company or through a third party, the complete consumer file, including, but not limited to, each complaint, each recording made of any telephone contacts with the complaining consumer, and WAM’s response to each complaint.” The other request at issue, Document Request 25, seeks “all recordings of telephone calls, in whatever format stored, between any WAM debt collector and any other person made in the process of attempting to collect a debt.”

¹⁵ We note that WAM’s estimates include substantial costs (and additional time) to redact documents to remove non-privileged information. Request for Review, Exhibit B; *see also* Petition to Limit at 17 (“efforts would need to be undertaken to listen to each call in order to determine whether they contain any confidential or personally identifiable information of consumers, which would require audio redaction”). As noted above, WAM will not have to incur those costs.

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WAM bears the burden of demonstrating that a CID request is unduly burdensome. As noted in *Fed. Trade Comm'n v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977):

Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. The burden of showing that the request is unreasonable is on the subpoenaed party. . . . Further, that burden is not easily met where. . . the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose. . . . Broadness alone is not sufficient justification to refuse enforcement of a subpoena. . . . Thus, courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.

Texaco, 555 F.2d at 882 (footnotes and citations omitted).¹⁶

WAM's allegations of burden relate in substantial part to the production of digital recordings of "telephone calls. . . between any WAM debt collector and any other person made in the process of attempting to collect a debt." Document Request 25

¹⁶ WAM's reliance on discovery cases involving disputes between private litigants for the claim that an undue burden arises whenever it can be shown that the burden of production outweighs the probative value of the information is misplaced. See Request for Review at 7 (citing *N.C. Right to Life, Inc. v. Leake*, 231 F.R.D. 49, 51 (D.D.C. 2005) and *Travelers Indem. Co. v. Metro. Life Ins. Co.*, 228 F.R.D. 111, 113 (D. Conn. 2005)). Both cases, moreover, involved discovery demands directed to non-parties. WAM also cited *Fed. Trade Com'n v. Jim Walter Corp.*, 651 F.2d 251 (1981), which involved a challenge to an FTC subpoena. That court discussed weighing the "hardships and benefits" of production "when a subpoena threatens to be unreasonable," but applied the "unduly disrupt or seriously hinder normal operations" standard from *Texaco* in rejecting the allegation of burden. *Id.* at 258.

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(Petition to Limit Exhibit F at 38).¹⁷ WAM notes that it is unlikely that staff will listen to all of these recordings. WAM, therefore, proposes that the Commission should alleviate its burden of producing all of the recordings by accepting only a sample of them. Sampling can sometimes obviate a complete production; however, this is normally done when the issue is genuinely one of whether the requested evidence is actually relevant or useful. *See Texaco*, 555 F.2d at 883 (“The Commission notes that other studies have utilized random sampling techniques and that, in its opinion, such studies are inadequate for its purposes. . . . We therefore enforce the subpoena as originally conceived, without production on a random sample basis.”). Here there is no legitimate question about the relevance or utility of these recordings.

Staff needs access to all of the recordings so it can correlate particular (and as yet unidentified) calls to particular (and as yet unidentified) consumer complaints. Further, staff may devise its own samples of these calls to determine whether particular WAM employees might have engaged in suspect, but not subject of complaint, conduct. If only a sample of calls were initially produced, Commission staff following up on a complaint or targeted employee would likely find that many of the calls required for further investigation were not included in the sample received. Staff would then have to ask WAM to provide those particular calls, thereby enabling WAM, were it so inclined, to impede the investigation based on its ability to monitor and anticipate the investigation’s progress and focus.

WAM’s financial burden to produce the recordings, relative to its annual gross revenue of nearly \$300 million, Letter Ruling at 8, does not demonstrate undue burden. *See, e.g., Fed. Trade*

¹⁷ Like its redaction arguments, WAM claims these recordings are of little or no relevance. WAM seemingly ignores the fact that these recordings, by themselves, might substantially confirm or refute consumers’ complaints about misrepresentations, harassment, empty threats, or other violations of FDCPA or the FTC Act. The records are, therefore, especially relevant to the investigation.

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Comm'n v. Rockefeller, 591 F.2d 182, 190 (DC Cir. 1979) (“The compliance cost. . . estimates. . . simply do not appear to pose a threat to the normal operations of appellants’ businesses considering their size.”). WAM has not satisfied its burden of demonstrating compliance with the CID would be unduly burdensome.

Further, we reject WAM’s assumption that tasking two employees to perform production review is adequate. The record is unclear regarding WAM’s size. *Cf.* Petition to Limit at 16 (1198 employees) versus Petition to Limit, Exhibit F at 2-3 (1856 employees). WAM’s website claims it has over 2600 employees.¹⁸ Regardless of which number is correct, more than two employees need to be dedicated to CID production review. Further, WAM’s burden claims appear to be based on the assumption that compliance should be organized “in a manner that will minimize as much as possible the disruption to WAM’s business operations.” Request for Review at 4 (noting that “the time and cost burden analysis set forth in the Petition to Limit and supplemental affidavit reflects tasking in a manner that will minimize as much as possible the disruption to WAM’s business operations that would arise from the production of such material to the Commission in compliance with the CID”). WAM has not cited, and the Commission is unaware of, any cases to support WAM’s minimize-disruption standard. *See Texaco*, 555 F.2d at 882 (“Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.”). As in *Texaco* the breadth of the CID is a reflection of the comprehensiveness of the inquiry being undertaken and the magnitude of WAM’s business operations. *Id.*

¹⁸ West Asset Management, About Us, http://www.westassetmanagement.com/who_about.cfm?g=1 (last visited Jun. 16, 2008).

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We hold that WAM need not review and redact the production to delete nonprivileged confidential information. We also cannot rely on WAM's estimates based on the work of only two of its employees. In short, we cannot rely on WAM's estimates of time for its production; those estimates included substantial time for such redactions to be performed by only two employees. Accordingly, we direct that WAM comply with the CID immediately, subject to any discreet extensions pursuant to 16 C.F.R. § 2.7(c) to which the Staff agrees with respect to particular specifications.¹⁹

IV. Order

For the reasons set forth herein, the Letter Ruling should be, and it hereby is, **AFFIRMED**.

By direction of the Commission.

¹⁹ This decision moots WAM's motion to stay or extend the May 8, 2008 return date. Request for Review at 2.

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NUTRACEUTICALS INTERNATIONAL, LLC

FTC File No. 082 3130 Decision, July 30, 2008

RESPONSE TO NUTRACEUTICALS INTERNATIONAL'S APPEAL OF THE DENIAL BY COMMISSIONER HARBOUR OF THE PETITION BY NUTRACEUTICALS INTERNATIONAL, LLC TO QUASH OR LIMIT CIVIL INVESTIGATIVE DEMAND

Dear Mr. Klivinyi:

This letter advises you of the Commission's disposition of Nutraceuticals International, L.L.C.'s ("NI") Appeal from the Letter Ruling denying the Petition to Quash or Limit Civil Investigative Demand¹ ("Appeal") issued in conjunction with an investigation of NI by the Federal Trade Commission (hereinafter "FTC" or "Commission"). As set forth below, the Appeal is dismissed as moot.²

NI's Petition claimed that the Civil Investigative Demand ("CID") seeks information that is "clearly beyond the scope of the investigation as defined by the Commission[,]" and also sought to quash the CID because Commission Staff had allegedly acted inappropriately toward an NI clerical employee on one occasion. Petition at 1.³ The Letter Ruling denied the Petition on the grounds that it failed to comply with the requirements of Commission Rules 2.7(d)(2) and 4.1(a)(2)(i), 16 C.F.R. §§ 2.7(d)(2) and 4.1(a)(2)(i), which respectively address the

¹ Letter Ruling Denying Petition of Nutraceuticals International, LLC to Quash or Limit Civil Investigative Demand, File No. 082-3130 (Jun. 25, 2008) ("Letter Ruling").

² Had we reached the merits of NI's appeal, we would have affirmed the denial of NI's Petition to Quash or Limit CID for substantially the same reasons set forth in the Letter Ruling,

³ Like the Letter Ruling, we find no evidence that any alleged misconduct on the part of Commission staff provided any grounds for quashing or limiting the CID.

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requirement that a Petitioner must have conferred with Commission staff regarding its objections in advance of filing a petition to quash or limit a CID and the qualification of an NI officer to represent it before the Commission on its Petition. Letter Ruling at 3. The Letter Ruling also denied the Petition on the grounds that NI had failed to satisfy its burden of showing that the information sought was either outside the scope of the investigation or tainted by the alleged misconduct of Commission staff. Letter Ruling at 4-5. The Letter Ruling directed NI to comply with the CID by July 7, 2008. 16 C.F.R., § 2.7(f).

NI's appeal was timely filed on July 1, 2008. In its appeal, NI claims that the Letter Ruling erroneously found that NI's Petition was "procedurally deficient (and) without substantive merit." Appeal at 1. NI also requested a stay of the July 7 return date until after the

Commission had ruled on the appeal as well as for an additional period sufficient for NI "to access the Federal District Court to protect the Company's legal rights and interests."⁴ *Id.* NI further advised the Commission that if its request for a stay was not granted prior to July 7, then NI intended to "submit its responses to the second CID directly to the Commissioners to hold in strict confidence and not release to Commission staff investigators" pending the Commission's decision and resolution of any actions initiated by NI in the federal courts.⁵ *Id.*

⁴ Contrary to Petitioner's apparent belief that such judicial review would be available to it immediately following the Commission's decision of this appeal, it is well established that FTC investigatory process is not self-executing; accordingly, this CID can only be enforced (or denied enforcement) by the district court in a CID enforcement action brought by the Commission – pre-enforcement challenges to Commission CIDs brought by the party being subpoenaed are premature and not ripe for judicial review. *See, e.g., Atlantic Richfield Co. v. Fed. Trade Comm'n*, 546 F.2d 646, 648-50 (5th Cir. 1977) (affirming district court's dismissal of action for declaratory and injunctive relief challenging FTC subpoena); *Anheuser-Busch Inc. v. Fed. Trade Comm'n*, 359 F.2d 487, 490 (8th Cir 1966) (same).

⁵ NI cites no legal authority to support its request that its CID responses be

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On July 8, 2008, the Secretary received NI's Response to the Second Civil Investigative Demand, dated July 3, 2008. The Commission has reason to believe that NI has substantially complied with the CID. Thus, the relief requested by the Petition – that NI be excused from complying with the CID, or that the CID be substantially modified prior to such compliance – was rendered moot by NI's substantial compliance with the commandments of the CID.

For the reasons set forth above, **IT IS ORDERED** that NI's Appeal should be, and it hereby is, **DISMISSED**.

By Direction of the Commission.

withheld from the "Commission staff investigators" during the pendency of this appeal. The Commission's Rules have no provision for such relief, and the Commission is unaware of any other legal authority which would support that relief.

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CVS CAREMARK CORPORATION*FTC File No. 072 3119 Decision, August 6, 2008***RESPONSE TO CVS CAREMARK CORPORATION'S PETITION TO
LIMIT OR QUASH CIVIL INVESTIGATIVE DEMAND**

Dear Mr. DiResta:

This letter advises you of the disposition of CVS Caremark Corp.'s ("Petitioner" or "CVS") Petition to Limit or Quash Civil Investigative Demand ("Petition") served on it in conjunction with the Federal Trade Commission's ("FTC" or "Commission") investigation of CVS's consumer privacy and data security practices. The Petition is denied for the reasons hereinafter stated. The new date for Petitioner to comply with the Civil Investigative Demand ("CID") is August 18, 2008.

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

The Commission and the Office of Civil Rights of the Department of Health and Human Services ("HHS") are conducting coordinated investigations of CVS's consumer privacy and data security practices. Petition at 2. Television reports detailed CVS's failure to properly dispose of sensitive consumer information that was discovered in publicly-accessible garbage

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 should be calculated from the date you received the original by express mail.

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containers located behind CVS pharmacies in Indianapolis, IN between June and September 2006. *Id.* at 5. Additionally, between September 2006 and May 2007, additional media reports indicated that sensitive consumer information was found in the trash containers behind CVS pharmacies in Indiana, Ohio, Kentucky, Arizona, and Texas.² *Id.* at 8.³ By letter dated September 27, 2007, FTC staff advised CVS that the Commission was conducting an inquiry “to determine whether CVS’s handling of sensitive information from or about its consumers in connection with the preparation and sale of prescription medicines and supplies raises any issues under Section 5.” *Id.* at 5 (quoting from Exhibit C to the Petition at 1-2 [Letter from Alain Sheer, FTC Div. of Privacy and Identity Protection, to Christine L. Egan, Esquire, Asst. Gen. Counsel, for CVS]). That letter further asked CVS to voluntarily provide information identified in the letter to the FTC and/or HHS for their use in their coordinated investigations. Petition, Exh. C at 2-8. Paragraph 9 of the specification in the letter included “documents sufficient to identify all policies and statements made by CVS regarding its collection, disclosure, use, and protection of personal information. . . .” *Id.* at 4. CVS claims that it cooperated with the FTC’s investigation, and voluntarily “provided information and voluminous documents relevant to the inquiry. . . .”⁴ Petition at 2.

² CVS has over 6,000 retail pharmacies, *compare* Petition at 5 (“over 6,200”) *with* Petition at 7 (“now more than 6300”), in forty (40) states and the District of Columbia, and has more than 190,000 employees in its retail pharmacy operations. Petition at 5.

³ CVS refers to these reports collectively as the “Dumpster Incidents.” Petition at 7. For the sake of convenience, the FTC will use this same phrase to refer to these events. In addition, a June, 2005 *Computerworld* article reported a potential security vulnerability in the CVS ExtraCare FSA program. *Id.* at 9-10. ExtraCare is the name CVS uses for its loyalty card program. *See id.* at 9. CVS indicates that its own investigation revealed no disclosure of personally identifiable information as a result of this vulnerability. *Id.* at 10.

⁴ Exhibit E to the Petition (letter of December 14, 2007, from FTC Attorney Loretta Garrison to Anthony DiResta) indicates that Commission staff did not believe CVS had fully responded to its information requests.

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On May 22, 2008, CVS received the CID, issued on May 20, 2008, that is the subject of the Petition. According to CVS, the specifications of the CID seek “a massive volume of documents and information regarding the security and confidentiality of CVS’s electronically stored, transmitted or accessible information that is not limited, or related at all, to: (1) the dumpster incidents or (2) the protection of the ExtraCare program information.” Petition at 3-4. CVS timely filed its Petition on June 20, 2008. The Petition seeks relief from the CID on the following grounds:

(1) CID Specifications for Documents Nos. 5, 6, and 7 and for Interrogatories Nos. 1, 6 and 7 broadly demand disclosure of vast amounts of CVS’s electronically stored, transmitted or accessible information, dating back three to five years, that is not relevant to the purpose of the inquiry and is therefore unreasonable;

(2) based on the overly broad definition of “Company” included in the CID, the Staff unreasonably demands documents and information, not only from CVS’s retail pharmacy operations, but also from its Caremark segment, a Pharmacy Benefit Management company (“PBM”) that merged with CVS in March of 2007, that remains a separate business distinct from CVS’s retail pharmacy, and that had no role in the incidents that form the basis of the inquiry, all of which occurred nearly two years before the 2007 merger;

(3) the challenged Specifications unreasonably demand documents and information from CVS (and its Caremark segment) which is primarily regulated by other federal agencies with exclusive administration and enforcement authority over patient privacy and security issues;

(4) the CID is defective and unenforceable because the challenged Specifications demand documents and information outside the scope and purpose of the inquiry in violation of the FTC’s own rules; and

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(5) compliance with the overly-broad CID Specifications in question would be unduly burdensome to CVS, not only as a result of the sheer volume of the electronically-stored, transmitted or accessible information demanded, but also because the CID further requires that CVS first redact all “Personal Information” from all such information and documents.

Petition at 4 (footnote omitted).

The gravamen of CVS’s claims stems from CVS’s misimpression as to the actual scope of the Commission’s inquiry. CVS correctly notes that the Commission initiated its investigation because media reports indicated that CVS store personnel in several different states had disposed of sensitive consumer information by placing it in publicly-accessible trash containers – the dumpster incidents. *Id.* at 5. CVS also concedes that the Commission’s investigation was directed toward a reported security vulnerability in its ExtraCare program. CVS relies on these two identified data security problems to support its claims that the FTC can only investigate issues related to the physical disposal of records at its pharmacies (the dumpster incidents) or to its ExtraCare program. *Id.* at 10-11.

In particular, CVS complains that the CID seeks information beyond the scope of the investigation, that is, “documents and information regarding the security and confidentiality of CVS’[s] electronically-stored, transmitted or electronically-accessible information that is not relevant, or related at all, to the inquiry concerning: (1) CVS’[s] practices in handling consumers’ personal information with the dumpster incidents and (2) the ExtraCare program.” *Id.* The security vulnerability identified in the media reports relating to the ExtraCare program involved electronically-stored, -transmitted or -accessible information. Petition at 9-10. Accordingly, CVS cannot complain that such information is, in and of itself, beyond the scope of the investigation. It must, therefore, be claiming that the investigation cannot be any broader than the precise episodes that provided the

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lead information for the investigation. Put another way, the scope of the FTC's investigatory powers is, according to CVS, limited to those things the FTC knows about and excludes those things about which the FTC might be suspicious, based on the things it knows. CVS cites no authority for this position; indeed, the *Morton Salt* case that it does cite, Petition at 14, flatly contradicts CVS's position. *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950) (“[The FTC’s power of inquiry] 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.”).

CVS concedes that the dumpster incidents were the result of store personnel at a number of its stores around the country failing to properly adhere to CVS's own data security policies – the “Blue Bag Policy” – regarding the proper disposal of sensitive customer information.⁵ Petition at 7. In sum, the dumpster incidents suggest that some areas of CVS's business operations might be affected by a degree of laxity with respect to adequate data security practices. Accordingly, the scope of the FTC's investigation is directed toward the possibility that portions of the nation's “largest provider of prescriptions and related health care services,” *Id.* at 5, may have data security practices that place its customers' data in jeopardy. The Commission believes that determining the nature, scope, and, if appropriate, remediation of such risks is in the public interest.

Before turning to the issues raised by CVS in its Petition, however, it is appropriate to emphasize the fact that the party who

⁵ Exhibit O [Memorandum of Apr. 7, 2008, from CVS Counsel to FTC Counsel] to the Petition describes the Blue Bag Program as a protocol for the segregation and secure disposal of sensitive waste by pharmacy personnel. In essence, sensitive customer information was to be segregated in blue bags and retained in the stores for later pick-up and disposal; in contrast, nonsensitive waste could be disposed of in the trash receptacle located outside of each store. Exhibit O at 2-5.

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moves to limit the enforcement of a CID bears the burden of demonstrating that a particular CID specification is unreasonable. “[T]he burden of showing that an agency subpoena is unreasonable remains with the respondent, . . . 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. [citations omitted].” *Fed. Trade Comm’n v. Rockefeller*, 591 F.2d 182, 190 (2nd Cir. 1979), quoting *Sec. and Exchange Comm’n v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (2nd Cir. 1973), *cert. denied*, 415 U.S. 915 (1974).

II. CVS Has Not Shown that the CID Seeks Information that Is Irrelevant to the Investigation.

The scope of this investigation is determined by the terms of the resolution authorizing the use of CIDs and other compulsory process to conduct the investigation. *Fed. Trade Comm’n v. Invention Submission Corp.*, 965 F.2d 1086, 1091-92 (1992) (“The Commission’s compulsory process resolution did not restrict the investigation to possible oral misrepresentations, however, and we have previously made clear that ‘the validity of Commission subpoenas is to be measured against the purposes stated in the resolution, and not by reference to extraneous evidence.’”) (quoting *Fed. Trade Comm’n v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980)). As the *Invention Submission* court also noted:

It is well established that a district court must enforce a federal agency’s investigative subpoena if the information sought is “‘reasonably relevant,’” *FTC v. Texaco, Inc.*, 555 F.2d 862, 872, 873 n. 23 (D.C. Cir.) (en banc) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652. . . (1950)), *cert. denied*, 431 U.S. 974. . . (1977) – or, put differently, “‘not plainly incompetent or irrelevant to any lawful purpose’ of the [agency],” *id.* at 872 (quoting *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 . . . (1943)); *accord*

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United States v. Aero Mayflower Transit Co., 831 F.2d 1142, 1145 (D.C. Cir. 1987) – and not “unduly burdensome” to produce, *Texaco*, 555 F.2d at 881. We have said that the agency’s own appraisal of relevancy must be accepted so long as it is not “obviously wrong.” *FTC v. Carter*, 636 F.2d 781,787-88 (D.C. Cir. 1980) (quoting *Texaco*, 555 F.2d at 877 n. 32).

Invention Submission Corp., 965 F.2d at 1089. This is the framework within which CVS’s relevance claims must be assessed.

A copy of the resolution authorizing the use of compulsory process for this investigation was attached to the CID. Petition, Exhibit A at 3. In pertinent part it reads,

Nature and Scope of Investigation: To determine whether persons, partnerships, corporations or others are engaged in, or may have engaged in, deceptive or unfair acts or practices related to consumer privacy and/or data security, in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended. Such investigation shall, in addition, determine whether Commission action to obtain redress of injury to consumers or others would be in the public interest.

Id. The documents and information sought in the challenged CID specifications appear to fall well within the purpose of this investigation; that is, a determination of whether CVS’s business operations might constitute “deceptive acts or unfair practices related to consumer privacy and/or data security in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.” Petition, Exhibit A at 3.

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Indeed, CVS does not claim that the documents and information sought by Document Specifications 5, 6, or 7 and Interrogatories 1, 6, and 7 are unrelated to deceptive acts or unfair practices related to consumer privacy and/or data security.⁶ It complains, rather, that these specifications seek documents and materials, relating to the electronically stored and retrievable personal information regarding its customers, that are unrelated to the events that triggered the Commission's interest in investigating CVS's data security practices in the first place: the dumpster incidents and ExtraCare Program data security vulnerability. Even in this regard, CVS's argument fails as to the data vulnerability with the ExtraCare Program because CVS's own description of this problem shows that it involved electronically stored and retrievable personal information about consumers. Petition at 9 ("Prior to June 20, 2005, the ExtraCare loyalty card program allowed ExtraCare members to obtain their recent purchase histories via a website request."). As previously noted, CVS has offered no legal support for its argument that the FTC may not conduct investigations about possible violations of law unless it already possesses some knowledge about each incident it wishes to investigate. Legal authority it does cite, the *Morton Salt* case in particular, flatly rejects CVS's argument. We find, therefore, both that the information sought by the challenged specifications is relevant to the purpose of this investigation, and that the investigation is in the public interest.

III. CVS Has Not Demonstrated that the FTC Lacks the Jurisdiction to Investigate CVS's Electronic Data Privacy and Security Acts and Practices.

⁶ The challenged specifications deal with CVS's electronic security policies, practices and procedures, its policies, practices and procedures for evaluating the compliance and effectiveness of its electronic security policies, practices and procedures, and the identification of each instance in the last five years when unauthorized electronic access to a consumer's personal information has occurred. There is no legitimate basis for concluding that these specifications seek documents or information beyond the scope of the resolution authorizing the use of compulsory process in this investigation.

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CVS claims that the FTC lacks jurisdiction to enforce privacy and data security standards related to protected health information (“PHI”) within the meaning of the Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191 (Aug. 21, 1996) *as amended by* Pub. L. 105-33 (Aug. 5, 1997) *and* Pub. L. 105-34 (Aug. 5, 1997) (“HIPAA”) because “Congress gave HHS exclusive administration and enforcement authority regarding data privacy and security issues under HIPAA.” Petition at 20. CVS cites no authority for its claim that HHS has exclusive jurisdiction with respect to CVS’s privacy and data security practices. Further, CVS cites no authority to support its claim that HIPAA somehow precludes the FTC from bringing an action against CVS for violations of Section 5 of the FTC Act relating to privacy and data security practices.⁷

Even if CVS’s claim were correct, it would not provide sufficient grounds for quashing or limiting this investigatory CID. First, this is a coordinated investigation by HHS and the FTC. CVS cites no authority holding that the two agencies cannot conduct a coordinated investigation, eschewing redundant investigatory process service on CVS, which would be followed by post-investigation decisions regarding whether one agency or both agencies were better situated to deal with particular enforcement actions that might be uncovered during the course of these investigations. Second, “[a]n agency’s investigations should not be bogged down by premature challenges to its regulatory jurisdiction.” *Fed. Trade Comm’n v. Swanson*, 560 F.2d 1, 2 (1st Cir. 1977). “With rare exceptions (none of which applies here), a subpoena enforcement action is not the proper forum in which to litigate disagreements over an agency’s authority to pursue an investigation.” *Fed. Trade Comm’n v. Ken Roberts Co.*, 276 F.3d 583, 584 (D.C. Cir. 2001). Third, this is especially true where it

⁷ CVS’s Petition cites to public statements by current and former senior FTC officials to the effect that the Commission, as a matter of prosecutorial discretion, does not enforce HHS’s privacy regulations under HIPAA. *See* Petition at 22 n. 38-39. Even so, the FTC has jurisdiction to remedy any violations of the FTC Act by CVS.

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may not be possible to determine the scope of the jurisdictional claim until the investigation is substantially complete. *Fed. Trade Comm'n v. Ernstthal*, 607 F.2d 488, 490 (D.C. Cir. 1979) (“But where, as here, the FTC does not plainly lack jurisdiction, and the jurisdictional question turns on issues of fact, the agency is not obliged to prove its jurisdiction in a subpoena enforcement proceeding prior to the conclusion of the agency’s adjudication.”); *Fed. Trade Comm'n v. Monahan*, 832 F.2d 688, 689 (1st Cir. 1987) (Judge, now Justice, Breyer) (“We, like the FTC, must wait to see the results of the investigation before we know whether, or the extent to which, the activity falls within the scope of a[n] ‘immunity’.”).

IV. CVS Has Not Demonstrated that Caremark’s Consumer Privacy and Data Security Practices Are Beyond the Scope of the Investigation.

CVS correctly notes that its Caremark subsidiary was acquired by it after the time of the events that gave rise to this investigation. Petition at 4 (Caremark “had no role in the incidents that form the basis of the inquiry, all of which occurred nearly two years before the 2007 merger.”). CVS offers two reasons for excluding Caremark from the CID. Having already decided that CVS’s electronic security is within the scope of the investigation, CVS’s only remaining argument is that the CVS and Caremark “businesses are distinct.” Petition at 18. CVS further argues that it “maintains a comprehensive firewall separating the businesses and records” of the parent and subsidiary firms. *Id.* That, however, does not provide a basis for eliminating Caremark from the CID. The Commission has reason to believe that the CVS and Caremark databases are interconnected. The information provided by CVS has not demonstrated that an intruder into the CVS system would be unable to gain access to sensitive personal information contained in the Caremark system. The Declarations of Nobles and Balnaves, Exhibits Y and Z respectively to the Petition, do not mention whether personal information is protected by the firewalls. The written firewall policy annexed to Exhibit Y applies to sensitive commercial information (such as prices and

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contracts); it does not appear to address sensitive personal information at all. Accordingly, the Commission has no factual basis to conclude that continued investigation of CVS, including its Caremark subsidiary, is no longer in the public interest.⁸

V. CVS Has Provided No Factual Support for Its Claims that CID Compliance Would Be Burdensome.

Allegations of burden must be supported with specificity. *In re National Claims Service, Inc., Petition to Limit Civil Investigative Demand*, 125 F.T.C. 1325, 1328-29, 1998 FTC LEXIS 192, *8 (1998). *National Claims* teaches that, “[a]t a minimum, a petitioner alleging burden must (i) identify the particular requests that impose an undue burden; (ii) describe the records that would need to be searched to meet that burden; and (iii) provide evidence in the form of testimony or documents establishing the burden (e.g., the person-hours and cost of meeting the particular specifications at issue).” *Id.* CVS’s Petition fails to meet this burden.

Even assuming that there were some merit in CVS’s claims of burden, we have no factual basis upon which to rely in order to fashion a CID modification with respect to either its scope or the time within which compliance should occur. Additionally, any claim of burden must be assessed in the context of the size and scope of the investigation and of the Petitioner. CVS has provided no facts relative to these issues. Accordingly, the Commission has no reason to believe that CVS’s compliance with the CID is likely to “pose a threat to the normal operation of [CVS’s business] considering [its] size.” *Fed. Trade Comm’n v. Rockefeller*, 591

⁸ CVS’s claim that the CID is defective, based on its speculation that procedures contained in the Commission’s Operating Manual were not followed, Petition at 23-25, is without merit. The Operating Manual specifies internal operating procedures; it creates no rights enforceable by recipients of a CID, and CVS cites no authority to support its arguments based on the Operating Manual, even if it had a factual basis for its speculations.

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F.2d 182, 190 (DC Cir. 1979).⁹ Here, given the scope and scale of CVS's business, compliance with the CID seems unlikely to pose such a threat to CVS. The fact that compliance may be inconvenient or even of some burden is not a sufficient basis to quash or limit a CID. *Texaco*, 555 F.2d at 882 (“Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest.”).

VI. CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED** that CVS’s Petition be, and it hereby is, **DENIED**. Pursuant to Rule 2.7(e), Petitioner must comply with the CID by August 18, 2008.

By direction of the Commission

⁹ See also *Federal Trade Comm. v. Standard American, Inc.*, 306 F.2d 231, 235 (3rd Cir. 1962) (finding petitioner had not provided sufficient evidence that compliance would lead to the “virtual destruction” of a business).

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