

Complaint

IN THE MATTER OF

WEST PENN MULTI-LIST, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4247; File No. 081 0167**Complaint, February 13, 2009 – Decision, February 13, 2009*

This consent order addresses charges that West Penn engaged in a concerted refusal to deal except on specified terms with respect to a key input for the provision of real estate services. The respondent adopted rules and policies that limit the publication and marketing of certain sellers' properties, but not others, based solely on the terms of their respective listing contracts. The order prohibits the respondent from adopting or enforcing any rules or policies that deny or limit the ability of MLS participants to enter into Exclusive Agency Listings, or any other lawful listing agreements, with sellers of properties.

*Participants*For the Commission: *Peggy Bayer Femenella and Joel Christie.*For the Respondent: *Fred C. Jug, Jr., Brandt, Milnes & Rea.***COMPLAINT**

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. § 41, et seq.) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that West Penn Multi-List, Inc. (hereinafter sometimes referred to as "Respondent" or "West Penn"), a corporation, has violated and is now violating the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

Complaint

NATURE OF THE CASE

This matter concerns a corporation, owned by subscriber real estate brokers in Pittsburgh, Pennsylvania, that operates a Multiple Listing Service, which is designed to foster real estate brokerage services by sharing and publicizing information on properties for sale by customers of real estate brokers. West Penn has adopted rules and policies that limit the acceptance, publication and marketing of certain properties, based on the terms of the listing contract entered into between a real estate broker and the customer who wishes to sell a property. These rules discriminate against certain kinds of lawful contracts between listing real estate brokers and their customers, and lack any pro-competitive justification. These rules constitute an anticompetitive concerted refusal to deal except on specified terms with respect to key inputs for the provision of residential real estate brokerage services, and violate the antitrust laws.

RESPONDENT AND ITS SUBSCRIBERS

1. Respondent West Penn, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business at 8980 Perry Highway, Pittsburgh, Pennsylvania 15237. The subscribers of Respondent are real estate brokers and other real estate professionals doing business in the Pittsburgh, Pennsylvania, metropolitan area and surrounding area, and are commonly referred to as “subscribers” of the Respondent.

2. Respondent is organized for the purpose of serving its subscribers’ interests, including their economic interests, by promoting, fostering, and advancing the real estate brokerage services industry in the Pittsburgh, Pennsylvania, metropolitan area and surrounding area. One of the primary functions of Respondent is the operation of the West Penn Multiple Listing Service (“MLS”). A MLS is a clearinghouse through which subscriber real estate brokerage firms regularly and systematically exchange information on listings of real estate properties and share commissions with

Complaint

subscribers who locate purchasers. When a property is listed on the West Penn MLS, it is made available to all subscribers of the MLS for the purpose of trying to match a buyer with a seller. Information about the property, including the asking price, address and property details, are made available to subscribers of the MLS so that a suitable buyer can be found.

3. Respondent has more than 6,800 real estate professionals as subscribers. The majority of West Penn's subscribers hold an active real estate license and are active in the real estate profession. All of the West Penn rules and policies are adopted by the West Penn Board of Directors, which is made up of competing real estate brokers.

4. The large majority of residential real estate brokerage professionals in the Pittsburgh, Pennsylvania, metropolitan area and surrounding area, are subscribers of West Penn. These professionals compete with one another to provide residential real estate brokerage services to consumers.

5. West Penn services the territory within the Pittsburgh, Pennsylvania metropolitan area, specifically Allegheny, Armstrong, Beaver, Butler, Washington, Westmoreland, Fayette, Greene, Clarion, Crawford, Indiana, Lawrence, Mercer and Somerset counties ("West Penn Service Area").

JURISDICTION

6. The acts and practices of Respondent, including the acts and practices alleged herein, have been or are in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, and Respondent is subject to the jurisdiction of the Federal Trade Commission. Among other things, the aforesaid acts and practices:

- a. Affect the purchase and sale of real estate by persons moving into and out of the West Penn Service Area; and

Complaint

b. Affect the transmission of real estate listing information to public real estate web sites that are intended for a national audience, including Realtor.com.

THE CHALLENGED CONDUCT

7. Respondent has restrained competition in the provision of residential real estate brokerage services by combining or conspiring with its subscribers or others, or by acting as a combination of its subscribers or others, to hinder unreasonably the ability of real estate brokers in the West Penn Service Area to offer residential real estate brokerage services on terms other than those contained in the traditional form of listing agreement known as an Exclusive Right to Sell Listing.

8. An Exclusive Right to Sell Listing is a listing agreement under which the property owner or principal appoints a real estate broker as his or her exclusive agent for a designated period of time, to sell the property on the owner's stated terms, and agrees to pay the broker a commission when the property is sold, whether by the listing broker, the owner or another broker. An Exclusive Right to Sell Listing is the form of listing agreement traditionally used by listing brokers to provide full-service residential real estate brokerage services.

9. An alternative form of listing agreement to an Exclusive Right to Sell Listing is an Exclusive Agency Listing. An Exclusive Agency Listing is a listing agreement under which the listing broker acts as an exclusive agent of the property owner or principal in the sale of a property, but reserves to the property owner or principal a right to sell the property without further assistance of the listing broker, in which case the listing broker is paid a reduced or no commission when the property is sold.

10. Exclusive Agency Listings are a means by which listing brokers can offer lower-cost, Unbundled Real Estate Brokerage Services to home sellers. Unbundled Real Estate Brokerage Services are lawful arrangements pursuant to which a listing broker

Complaint

will cause the property offered for sale to be listed on the MLS, but the listing broker will not provide some or all of the additional services offered by traditional real estate brokers, or will only offer such additional services as may be chosen from a menu of services for a fee.

11. Brokers offering Unbundled Real Estate Brokerage Services often provide home sellers with exposure of their listing through the MLS for a flat fee or reduced commission that is small compared to the full commission prices commonly charged by traditional brokers, often by entering into Exclusive Agency Listings that reserve to the home seller the right to sell the property without owing more to the listing broker.

12. To be listed in the MLS, a home seller must enter into a listing agreement with a listing real estate broker that is a subscriber of the MLS. The compensation paid by the home seller to the listing broker is determined by negotiation between the home seller and the listing broker. Whatever type of listing agreement is entered into between the home seller and the listing real estate broker, the MLS rules require that the home seller must offer to pay a commission to a cooperating real estate broker, known as a selling broker, who successfully secures a buyer for the property. If the home seller fails to pay a commission to a selling broker who secures a buyer for the property, the selling broker may recover the commission due from the listing agent, under rules and procedures established by the MLS.

13. Respondent, through its Board of Directors made up of competing brokers, adopted rules that dictate the contract terms that subscribing brokers must use in their listing contracts, and thwart competition by firms using alternative business models for real estate brokerage services in the West Penn Service Area: (1) Exclusion Policy; (2) Website Policy; and (3) 365 Day Policy.

14. Respondent adopted a rule that precludes the acceptance of any listings into the West Penn MLS other than Exclusive Right to

Complaint

Sell Listings (the “Exclusion Policy”). The Exclusion Policy excludes Exclusive Agency Listings from the West Penn MLS.

15. The Exclusion Policy also precludes any revisions, deletions, or amendments to the West Penn Exclusive Right to Sell contract.

16. Respondent enforces the Exclusion Policy by requiring all original listing contracts to be collected and retained by West Penn.

17. Respondent adopted a rule that prevents certain lawful residential property listings provided to West Penn, including Exclusive Agency Listings, from being transmitted to real estate web sites: “Information which can be downloaded and/or otherwise displayed, is limited to properties listed on an exclusive right to sell basis” (the “Website Policy”). The Website Policy specifically prevents information concerning Exclusive Agency Listings from being published on web sites approved by West Penn to receive information concerning properties listed on the West Penn MLS, including (1) the NAR-operated “Realtor.com” web site; and (2) West Penn-subscriber web sites (collectively, “Approved Websites”).

18. Respondent adopted a rule requiring listing contracts between a broker and a seller to be for 365 days (“365 Day Policy”).

19. West Penn actively enforces the Exclusion Policy, Website Policy, and 365 Day Policy by putting holds on listings that do not comply and implementing fines.

WEST PENN HAS MARKET POWER

20. The provision of residential real estate brokerage services to sellers and buyers of real property in the Pittsburgh, Pennsylvania metropolitan area and/or the West Penn Service Area is a relevant market.

21. The publication and sharing of information relating to residential real estate listings for the purpose of brokering residential

Complaint

real estate transactions is a key input to the provision of real estate brokerage services, and represents a relevant input market. Publication of listings through the West Penn MLS is generally considered by sellers, buyers and their brokers to be the fastest and most effective means of obtaining the broadest market exposure for property in the West Penn Service Area.

22. Participation in West Penn is a service that is necessary for the provision of effective residential real estate brokerage services to sellers and buyers of real property in the West Penn Service Area. Participation significantly increases the opportunities of brokerage firms to enter into listing agreements with residential property owners and to assist prospective buyers in obtaining properties that fit their needs, and significantly reduces the costs of obtaining up-to-date and comprehensive information on listings and sales. The realization of these opportunities and efficiencies is important for brokers to compete effectively in the provision of residential real estate brokerage services in the West Penn Service Area.

23. Access to the Approved Websites is a service that is necessary for the provision of effective residential real estate brokerage services in the West Penn Service Area. Home buyers regularly use the Approved Websites to assist in their search for homes. The Approved Websites are the web sites most commonly used by home buyers in their home search. Many home buyers find the home that they ultimately purchase by searching on one or more Approved Websites.

24. The most efficient and, at least in some cases, the only means for West Penn subscribers to have their listed properties visible to the public on the Approved Websites is by having West Penn transmit those listings.

25. By virtue of industry-wide participation and control over the ability of real estate brokers to participate in the West Penn MLS and the ability of home sellers to publicize their homes for sale on the West Penn MLS and on the Approved Websites, West Penn has market power in the West Penn Service Area.

Complaint

**THE WEST PENN POLICIES HAVE NO EFFICIENCY
BENEFIT**

26. There are no cognizable and plausible efficiency justifications for the conduct that constitutes the violation alleged in this Complaint. Such conduct is not reasonably ancillary to the legitimate and beneficial objectives of the MLS.

VIOLATION

27. In adopting the policies and engaging in the Acts and Practices described herein, West Penn has combined or conspired with its subscribers or others, or acted as a combination or conspiracy of its subscribers or others, to restrain trade in the provision of residential real estate brokerage services within the Pittsburgh, Pennsylvania metropolitan area and/or the West Penn Service Area.

28. The acts and practices of West Penn described herein constitute an agreement that only listings based exclusively on traditional contract terms as dictated by West Penn will be placed in the West Penn MLS and the Approved Websites, and thereby eliminate certain forms of competition. The Acts and Practices have no cognizable and plausible efficiency justifications and are inherently suspect restraints of trade.

29. The purposes, capacities, tendencies, or effects of the policies, acts, or practices of West Penn and its subscribers as described herein have been and are unreasonably to restrain competition among brokers, and to injure consumers, in the market for provision of residential real estate brokerage services within the Pittsburgh, Pennsylvania metropolitan area and/or the West Penn Service Area.

30. The policies, acts, practices, and combinations or conspiracies described herein constitute unfair methods of competition in or affecting interstate commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

Decision and Order

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this thirteenth day of February, 2009, issues its Complaint against Respondent West Penn Multi- List, Inc.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of the West Penn Multi-List, Inc. hereinafter sometimes referred to as “Respondent” or “West Penn,” and Respondent having been furnished thereafter with a copy of the draft Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, 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 Complaint, a statement that the signing of the 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

Decision and Order

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 (2009), the Commission hereby makes the following jurisdictional findings and issues the following Order:

1. Respondent West Penn Multi-List, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business at 8980 Perry Highway, Pittsburgh, Pennsylvania 15237.
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**I.**

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

- A. “Respondent” or “West Penn” shall mean West Penn Multi-List Inc., its Subscribers, managers, offices, predecessors, divisions and wholly or partially owned subsidiaries, affiliates, licensees of affiliates, partnerships, and joint ventures; and all the board of directors, owners, managers, directors, officers, employees, consultants, agents, and representatives of the foregoing. The terms “subsidiary,” “affiliate” and “joint venture” refer to any person in which there is partial or total ownership or control by West Penn, and is specifically meant to include West Penn MLS and/or each of the West Penn websites.
- B. The term “Subscribers” shall mean a Pennsylvania real estate broker or a certified Pennsylvania appraiser who is subscribing to the West Penn MLS.

Decision and Order

- C. “Multiple Listing Service” or “MLS” means a cooperative venture by which real estate brokers serving a common market area submit their listings to a central service which, in turn, distributes the information for the purpose of fostering cooperation in and facilitating real estate transactions.
- D. The term “West Penn MLS” means the West Penn MLS or any other MLS owned, operated or controlled, in whole or in part, directly or indirectly, by West Penn, and any of its predecessors, divisions and wholly or partially owned subsidiaries, affiliates, licensees of the affiliates, partnerships, and joint ventures, and all the directors, officers, members, participants, employees, consultants, agents, and representatives of the foregoing.
- E. “IDX” means the internet data exchange process that provides a means or mechanism for MLS listings to be integrated within a Website.
- F. “IDX Website” means a Website that is capable of integrating the IDX listing information within the Website.
- G. “Realtor.com” means the Website operated by the National Association of Realtors that allows the general public to search information concerning real estate listings downloaded from a variety of MLSs representing different geographic areas of the country, including but not limited to real estate listings from West Penn.
- H. “Approved Website” means a Website to which West Penn or West Penn MLS provides information concerning listings for publication including, but not limited to, West Penn Subscriber IDX Websites and Realtor.com.
- I. “Exclusive Right to Sell Listing” means a listing agreement under which the property owner or principal appoints a real estate broker as his or her exclusive agent for a designated

Decision and Order

period of time, to sell the property on the owner's stated terms, and agrees to pay the listing broker a commission when the property is sold, regardless of whether the buyer is found by the listing broker, the owner or another broker.

- J. "Exclusive Agency Listing" means a listing agreement under which the listing broker acts as an exclusive agent of the property owner or principal in the sale of a property, but also reserves to the property owner or principal a right to sell the property without assistance from a broker, in which case the listing broker is paid a reduced commission or no commission when the property is sold.
- K. "Services of the MLS" means the benefits and services provided by the MLS to assist West Penn Subscribers in selling, leasing and valuing property and/or brokering real estate transactions. With respect to real estate brokers or agents representing home sellers, Services of the MLS shall include, but are not limited to:
 - 1. having the property included among the listings in the MLS in a manner so that information concerning the listing is easily accessible by cooperating brokers; and
 - 2. having the property publicized to the general public through any means available to the MLS, including, but not limited to, information concerning the listing being made available on Realtor.com and IDX Websites.

Decision and Order

II.

IT IS FURTHER ORDERED that Respondent West Penn, its successors and assigns, and its officers, committees, agents, representatives, and employees, directly or indirectly, or through any corporation, subsidiary, division, or other device, in connection with the operation of a Multiple Listing Service or Approved Websites in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall forthwith cease and desist from adopting or enforcing any policy, rule, practice or agreement to deny, restrict or interfere with the ability of West Penn Subscribers to enter into Exclusive Agency Listings or other lawful listing agreements with the sellers of properties, including but not limited to any policy, rule, practice or agreement to:

- A. prevent West Penn Subscribers from offering or accepting Exclusive Agency Listings;
- B. prevent West Penn Subscribers from cooperating with listing brokers or agents that offer or accept Exclusive Agency Listings;
- C. prevent West Penn Subscribers from publishing information concerning listings offered pursuant to Exclusive Agency Listings on Approved Websites;
- D. deny or restrict the Services of the MLS to Exclusive Agency Listings or other lawful listings in any way that such Services of the MLS are not denied or restricted to Exclusive Right to Sell Listings; and
- E. treat Exclusive Agency Listings, or any other lawful listings, in a less advantageous manner than Exclusive Right to Sell Listings, including but not limited to, any policy, rule or practice pertaining to the transmission, downloading, or displaying of information pertaining to such listings.

Decision and Order

Provided, however, that nothing herein shall prohibit the Respondent from adopting or enforcing any policy, rule, practice or agreement regarding subscription or participation requirements, payment of dues, administrative matters, or any other policy, rule, practice or agreement, that it can show is reasonably ancillary to the legitimate and beneficial objectives of the MLS.

III.

IT IS FURTHER ORDERED that Respondent shall cease and desist from collecting and retaining Subscriber listing agreements.

IV.

IT IS FURTHER ORDERED that Respondent shall not set the length of time for listing contracts, and will enable Subscribers and sellers to negotiate in accordance with Pennsylvania law.

V.

IT IS FURTHER ORDERED that Respondent shall, no later than thirty (30) days after the date this Order becomes final, amend its rules and regulations to conform to the provisions of this Order.

VI.

IT IS FURTHER ORDERED that, within ninety (90) days after the date this Order becomes final, Respondent shall (1) inform each West Penn Subscriber of the amendments to its rules and regulations to conform to the provisions of this Order; and (2) provide each West Penn Subscriber with a copy of this Order. Respondent shall transmit the rule change and Order by the means it uses to communicate with its members in the ordinary course of West Penn's business, which shall include, but not be limited to: (A) sending one or more emails with one or more statements that there has been a change to the rule and an Order, along with a link to the amended rule and the Order, to each West Penn Subscriber; and (B) placing on the publicly accessible West Penn Website

Decision and Order

(www.westpenmmls.com) a statement that there has been a change to the rule and an Order, along with a link to the amended rule and the Order. Respondent shall modify its Website as described above no later than five (5) business days after the date the Order becomes final, and shall display such modifications for no less than ninety (90) days from the date this Order becomes final. The Order shall remain accessible through common search terms and archives on the Website for five (5) years from the date it becomes final.

VII.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in Respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation or any other proposed changes in the corporation which may affect compliance obligations arising out of the Order.

VIII.

IT IS FURTHER ORDERED that Respondent shall file a written report within six (6) months of the date this Order becomes final, and annually on the anniversary date of the original report for each of the five (5) years thereafter, and at such other times as the Commission may require by written notice to Respondent, setting forth in detail the manner and form in which it has complied with this Order.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on February 13, 2019.

By the Commission.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted for public comment an agreement containing consent order with West Penn Multi-List, Inc. (“West Penn” or “Respondent”). Respondent operates a multiple listing service (“MLS”) that is designed to facilitate real estate transactions by sharing and publicizing information on properties for sale by customers of real estate brokers. The agreement settles charges that West Penn violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, through particular acts and practices of the MLS. The proposed consent order has been placed on the public record for thirty (30) days to receive comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate comment on the proposed consent order. This analysis does not constitute an official interpretation of the agreement and proposed order, and does not modify its terms in any way. Further, the proposed consent order has been entered into for settlement purposes only, and does not constitute an admission by proposed Respondent that it violated the law or that the facts alleged in the complaint against the Respondent (other than jurisdictional facts) are true.

I. The Respondent

West Penn is a Pennsylvania membership corporation that provides multiple listing services to real estate professionals based in the Pittsburgh metropolitan area and surrounding counties. It is owned by its membership, which comprises more than 6800 subscribers. Respondent serves the great majority of the residential real estate brokers in its service area, and is the sole MLS serving that area.

Analysis to Aid Public Comment

II. The Conduct Addressed by the Proposed Consent Order

In general, the conduct at issue in this matter is largely the same as the conduct addressed by the Commission in numerous other consent orders involving MLS restrictions that have been announced since 2006. A general discussion of industry background and the Commission's reasoning is contained in the Analysis to Aid Public Comment issued in connection with five of those consent orders in the "real estate sweep" announced in October 2006.¹ In particular, certain conduct by Respondent is similar to activity addressed in the Commission's consent order involving MiRealSource, Inc. ("MiRealSource"), announced in March 2007.²

A. The Respondent Has Market Power

West Penn serves residential real estate brokers in the Pittsburgh metropolitan area and surrounding counties in Pennsylvania. These professionals compete with one another to provide residential real estate brokerage services to consumers. Membership in West Penn is necessary for a broker to provide effective residential real estate brokerage services to sellers and buyers of real property in this area.

By virtue of broad industry participation and control over a key input,³ West Penn has market power in the provision of MLS services to professionals who provide residential real estate

¹ See <http://www.ftc.gov/os/caselist/0610268/0610268consentanalysis.pdf>. See also *In the Matter of Multiple Listing Service, Inc.*, FTC File No. 061-0090 (analysis of consent order in matter involving similar conduct by Milwaukee, Wisconsin area MLS), located at <http://www.ftc.gov/os/caselist/0610090/071212analysis.pdf>; *In the Matter of Austin Board of Realtors*, FTC File No. 051-0219 (analysis of consent order concerning Austin, Texas area MLS), located at <http://www.ftc.gov/os/caselist/0510219/0510219AustinBoardofRealtorsAnalysis.pdf>.

² *In the Matter of MiRealSource, Inc.*, Dkt. No. 9321.

³ As noted, the MLS provides valuable services for a broker assisting a seller as a listing broker, by offering a means of publicizing the property to other brokers and the public. For a broker assisting a buyer, it also offers unique and valuable services, including detailed information that is not shown on public web sites, which can help with house showings and otherwise facilitate home selections.

Analysis to Aid Public Comment

brokerage services to sellers and buyers of real property in the region it serves.

B. Respondent's Conduct

The complaint accompanying the proposed consent order alleges that Respondent has violated the FTC Act by adopting rules and policies that limit the publication and marketing of certain sellers' properties, but not others, based solely on the terms of their respective listing contracts. Listing contracts are the agreements by which property sellers obtain services from their chosen real estate brokers. As was the case with the other MLSs that agreed to consent orders with the Commission, the contract favored by Respondent here is known as an "Exclusive Right to Sell Listing," and is the kind of listing agreement traditionally used by listing brokers to provide the full range of residential real estate brokerage services. Among the contracts disfavored by the Respondent is the kind known as an "Exclusive Agency Listing," which brokers can use to offer limited brokerage services to home sellers in exchange for set fees or reduced commissions.

The challenged restrictions do not admit Exclusive Agency Listings and other non-traditional listings into the West Penn MLS system; that service is reserved for Exclusive Right to Sell listings only. In addition, the restrictions state that information about properties will not be supplied by the MLS to popular real estate web sites unless the listing contracts follow the traditional format approved by the Respondent. This policy, known as the "Web Site Policy," prevents properties with non-traditional listing contracts from being displayed on a broad range of public web sites, including the "Realtor.com" web site operated by the National Association of Realtors and web sites operated by brokers or brokerage firms that are MLS members. The conduct was collusive and exclusionary, because in agreeing to keep non-traditional listings off the MLS and from public web sites, the brokers enacting the rules were, in effect, agreeing among themselves to limit the manner in which they compete with one another, and withholding valuable benefits of the MLS from real estate brokers who did not go along.

Analysis to Aid Public Comment

In addition to the restrictions that disadvantage Exclusive Agency Listings, Respondent's rules also include a provision that requires brokers to submit their listing contracts to the MLS, which retains them on file for two years. The complaint alleges that the collection of listing contracts by Respondent allows West Penn to enforce its exclusion of Exclusive Agency Listings.

Furthermore, Respondent has established a default duration of one year for all listing contracts. In setting such a lengthy standard contract, the MLS has placed the burden on individual consumers to negotiate shorter terms or request early termination of their service agreements with listing brokers.

Respondent adopted each of the challenged rules and policies at some point after March 2006. On September 9, 2008, prior to agreeing to the proposed consent order and prior to the Commission's acceptance of the consent order and proposed complaint for public comment, the Board of Directors of West Penn voted to rescind the restrictions.

C. Competitive Effects of the Respondent's Rules and Policies

West Penn's rules and policies have discouraged its members from offering or accepting Exclusive Agency Listings. Thus, the restrictions impede the provision of unbundled brokerage services, and may make it more difficult and costly for home sellers to market their homes. Furthermore, the rules and policies have caused home sellers to switch away from Exclusive Agency Listings to other forms of listing agreements. By excluding Exclusive Agency Listings from the MLS and prohibiting them from being transmitted to popular real estate web sites, the West Penn restrictions have adverse effects on home sellers and home buyers. When home sellers switch to full-service listing agreements from Exclusive Agency Listings, they may be required to contract for more services than they desire, and miss opportunities to save money on brokerage fees. In particular, the rules deny home sellers choices for marketing their homes, and deny home buyers the chance to use the internet

Analysis to Aid Public Comment

easily to see all of the houses listed by real estate brokers in the area, making their search less efficient.

Respondent's rules also deter listing brokers and home sellers from contracting for services for terms of less than 365 days. The complaint alleges that West Penn's rule requiring agreements to run for 365 days reduces certain forms of competition among brokers and thereby limits consumer choice. As courts have recognized, the competitive process can be subverted when a group of rivals agrees to restrict the terms on which individual firms will sell their products or services.⁴

D. There is No Competitive Efficiency Associated with the Challenged Practices

The Respondent's rules at issue here advance no legitimate procompetitive purpose. As was the case in the other real estate MLS matters resolved by consent orders since 2006, theoretical concerns about free-riding do not justify the restrictions adopted by the Respondent here. Exclusive Agency Listings are not a credible means for home buyers or sellers to bypass the use of the brokerage services that the MLS was created to promote, because a listing broker is always involved in an Exclusive Agency Listing. Moreover, other provisions in West Penn's rules ensure that when a cooperating broker – a broker who finds a buyer for the property – is involved in a transaction, he or she is compensated for the brokerage services provided. Finally, there are no plausible or cognizable efficiencies associated with the rules requiring (i) terms of 365 days for listing contracts, and (ii) collection of those contracts by Respondent.

⁴ See, e.g., *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649-50 (1980) (condemning agreement to refrain from offering credit terms to buyers because it “extinguish[ed] one form of competition among the sellers”); *Detroit Automobile Dealers Association v. FTC*, 955 F.2d 457, 472 (6th Cir. 1992) (upholding the Commission's conclusion that concerted action by automobile dealerships to limit showroom hours of operation affected “a means of competition, and [therefore] such limitation may be an unreasonable restraint of trade.”).

Analysis to Aid Public Comment

III. The Proposed Consent Order

Despite the recent decision by Respondent's Board of Directors to remove the challenged restrictions, it is appropriate for the Commission to require the prospective relief in the proposed consent order. Such relief ensures that West Penn cannot revert to the old rules or policies, or engage in future variations of the challenged conduct. The conduct at issue in the current case is itself a variation of practices that have been the subject of past Commission orders; in the 1980s and 1990s, the Commission condemned the practices of several local MLS boards that had banned Exclusive Agency Listings entirely, and several consent orders were imposed.⁵

The proposed order is designed to ensure that Respondent does not misuse its market power, while preserving the procompetitive incentives of members to contribute to the joint venture operated by West Penn. The proposed order prohibits Respondent from adopting or enforcing any rules or policies that deny or limit the ability of MLS participants to enter into Exclusive Agency Listings, or any other lawful listing agreements, with sellers of properties. The proposed order includes examples of such practices, but the conduct it enjoins is not limited to those five enumerated examples. The proposed order also requires West Penn to stop collecting and retaining listing agreements, and prevents Respondent from setting the length of time for such agreements. In addition, the proposed order states that, within thirty days after it becomes final, Respondent shall have conformed its rules to the substantive provisions of the order. West Penn is further required to notify its

⁵ See, e.g., *In the Matter of Port Washington Real Estate Bd., Inc.*, 120 F.T.C. 882 (1995); *In the Matter of United Real Estate Brokers of Rockland, Ltd.*, 116 F.T.C. 972 (1993); *In the Matter of Am. Indus. Real Estate Assoc.*, Docket No. C 3449, 1993 WL 1thirty (30)09648 (F.T.C. July 6, 1993); *In the Matter of Puget Sound Multiple Listing Serv.*, Docket No. C 3390 (F.T.C. Aug. 2, 1990); *In the Matter of Bellingham Whatcom County Multiple Listing Bureau*, Docket No. C 3299 (F.T.C. Aug. 2, 1990); *In the Matter of Metro West Penn*, Docket No. C 3286, 1990 WL 10012611 (F.T.C. Apr. 18, 1990); *In the Matter of Multiple Listing Serv. of the Greater Michigan City Area, Inc.*, 106 F.T.C. 95 (1985); *In the Matter of Orange County Bd. of Realtors, Inc.*, 106 F.T.C. 88 (1985).

Analysis to Aid Public Comment

participants of the order through its usual business communications and its web site. The proposed order requires notification to the Commission of changes in the Respondent's structure, and periodic filings of written reports concerning compliance.

The proposed order applies to Respondent and entities it owns or controls, including any affiliated web site it operates. The order does not prohibit participants in the MLS, or other independent persons or entities that receive listing information from Respondent, from making independent decisions concerning the use or display of such listing information on participant or third-party web sites, consistent with any contractual obligations to Respondent. The proposed order will expire in 10 years.

Complaint

IN THE MATTER OF

**AMERICAN NATIONWIDE MORTGAGE
COMPANY, INC.**

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT,
SEC. 144 OF THE TRUTH IN LENDING ACT,
AND SECTION 226.24 OF REGULATION Z

*Docket C-4249; File No. 072 3168
Complaint, February 17, 2009 – Decision, February 17, 2009*

This consent order addresses alleged misrepresentations made by American Nationwide Mortgage Company, Inc., regarding home loans it advertised and made to consumers. The order prohibits the respondent from advertising a monthly payment amount unless it discloses, clearly and conspicuously, that the amount (1) applies only for a limited period of time, after which it will increase, (2) does not include the amount of interest that the consumer owes each month, and (3) is less than the monthly payment amount (including interest) that the consumer owes, with the difference added to the total loan balance. The order also prohibits the respondent from advertising a rate lower than the rate at which interest is accruing, regardless of what the rate is called. The order prohibits the respondent from misrepresenting the nature and/or extent of the variability of any loan rate or payment amount, including but not limited to (1) an interest rate or annual percentage rate (APR), (2) whether it is fixed rather than adjustable or adjustable rather than fixed, and (3) the anticipated duration of the fixed or variable interest rate or payment amount. In addition, the respondent is prohibited from advertising the amount of any payment, the number of payments or the period of repayment, or the amount of any finance charge, without disclosing, clearly and conspicuously, all of the terms required by the Truth in Lending Act and Regulation Z. The respondent is prohibited from stating a rate of finance charge without stating the rate as an APR. The order prohibits the respondent from failing to comply in any respect with the Truth in Lending Act or Regulation Z. The order requires the respondent to maintain all records that will demonstrate compliance with the order, and to distribute copies of the consent 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. The respondent is required to notify the Commission of any changes in its corporate structure that might affect compliance with this order and to file with the Commission one or more reports detailing compliance.

Complaint

Participants

For the *Commission*: *Beverly Childs, James Reilly Dolan, Brian Figueroa, Bevin Murphy, Carole Reynolds, Peggy Twohig, and Evan Zullo.*

For the *Respondent*: *Not represented by counsel.*

COMPLAINT

The Federal Trade Commission, having reason to believe that American Nationwide Mortgage Company, Inc., a corporation (“respondent”) has violated the provisions of the Federal Trade Commission Act and the Truth in Lending Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent, American Nationwide Mortgage Company, Inc., is a Florida corporation with its principal office or place of business at 3820 Northdale Blvd., Suite 111A, Tampa, FL 33624.

2. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

3. In the mortgage lending industry, there are certain terms of art. These terms generally have the following meanings. An “interest rate” is the rate charged the consumer for the loan. It is usually stated as an annual amount, such as “6% interest.” “Interest” is the dollar amount the consumer owes based on the interest rate. A “payment rate” is the rate used to calculate the consumer’s monthly payment amount, and is not necessarily the same as the interest rate. If the payment rate is less than the interest rate, the consumer’s monthly payment amount does not include the full interest owed each month; the difference between the amount the consumer pays, and the amount the consumer owes, is added to the total amount due from the consumer. “Negative amortization” is an increase in the consumer’s total debt due during the term of the loan. It occurs when

Complaint

the consumer's monthly payment amount does not contain the amount of interest owed for that month. The difference between the amount the consumer pays, and the amount the consumer owes, is added to the consumer's total debt, causing it to increase.

4. Since at least 2007, respondent has disseminated or has caused to be disseminated advertisements that promote extensions of closed-end credit in consumer credit transactions, as the terms "advertisement" and "consumer credit" are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2.

5. Respondent originates fixed and adjustable rate, conforming and conforming, FHA and VA purchase money mortgage and mortgage refinancing loans, with terms varying from 10 to 40 years. Nationwide is licensed to operate in 29 states.

6. Respondent has disseminated or has caused to be disseminated mortgage loan advertisements, including but not necessarily limited to the attached Exhibit A. Exhibit A is a direct mail advertisement, which contains the following statements:

**30-Year Fixed,
1.95%¹**

* *

Example

	Balance	Payment
Your Estimated Current Mortgage	\$650,000	\$3,723
Your Estimated Revolving Debt	\$21,439	506

Complaint

Your Estimated Total	\$671,439	\$4,229
----------------------	-----------	---------

Your New, One, Low Monthly Payment: \$2465[]

* *

. . . Our Reduced Rate Loans[] can provide you with a 30-year fixed rate of 1.95%^[1] . . .

A fine print virtually illegible disclosure, in a footnote at the bottom of the advertisement, states: “ 4.981% Annual Percentage Rate . . . “ A fine print disclosure in small font, on the reverse side of the advertisement, states: “Initial Annual Percentage Rate (APR) for a 30 year mortgage loan with 80% loan to value is 4.981%. Rate is fixed for 12 months and adjusts upwards 7.5% of the payment amount annually for the first ten years of the loan . . .” [Exhibit A]

FEDERAL TRADE COMMISSION ACT VIOLATIONS

COUNT I: Failure to Disclose, or Failure to Disclose Adequately, Material Terms

7. Through the means described in Paragraph 6, respondent has represented, expressly or by implication, that consumers can receive mortgage loans at the terms prominently stated in the advertisements, including but not necessarily limited to a low monthly payment amount and/or a low rate.

8. In its mortgage loan advertisements as described in Paragraph 6, respondent has failed to disclose, or failed to disclose adequately, additional terms pertaining to the mortgage offer, such as:

- a. That the advertised low monthly payment amount: (1) applies only for a limited period of time, after which the monthly payment amount will increase; (2) does not include the amount of interest that the consumer owes each month; and (3) is less than the monthly payment amount (including interest) that the consumer owes, with the difference added to the total amount due from the consumer.

Complaint

b. That the advertised low rate: (1) applies only for a limited period of time, after which the rate will increase; (2) does not include the amount of interest that the consumer owes each month; and (3) is less than the interest rate that the consumer owes, with the difference added to the total loan balance.

9. The information described in Paragraph 8 would be material to consumers shopping for a mortgage loan. The failure to disclose, or failure to disclose adequately, this information, in light of the representations made in Paragraph 7, was, and is, a deceptive practice.

10. Respondent's practices constitute deceptive 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).

COUNT II: Misrepresentation that Advertised Mortgage Loan has a Fixed Rate

11. Through the means described in Paragraph 6, respondent has represented, expressly or by implication, that respondent's advertised rate is a fixed rate for the full term of the loan.

12. In truth and in fact, respondent's advertised rate is not a fixed rate for the full term of the loan. Therefore, respondent's representations made in Paragraph 11 were, and are, false and misleading.

13. Respondent's practices constitute deceptive 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).

Complaint

**TRUTH IN LENDING ACT AND REGULATION Z
VIOLATIONS**

**COUNT III: Failure to Disclose, or Failure to Disclose
Clearly and Conspicuously, Required Credit Advertisement
Terms**

14. Respondent's mortgage loan advertisements, including but not necessarily limited to Exhibit A, state periodic payment amounts for certain loan principal amounts but fail to disclose, or fail to disclose clearly and conspicuously, certain additional terms required by the Truth in Lending Act and Regulation Z, including one or more of the following terms:

- a. the terms of repayment;
- b. the "annual percentage rate," using that term; and
- c. if the annual percentage rate may be increased after consummation, that fact.

15. Respondent's practices have violated Section 144 of the Truth in Lending Act, 15 U.S.C. § 1664 (as amended) and Section 226.24(c) of Regulation Z, 12 C.F.R. § 226.24(c).

**COUNT IV: Failure to Disclose, or Failure to Disclose Clearly
and Conspicuously, Required Credit Advertisement Rate
Information**

16. Respondent's mortgage loan advertisements, including but not necessarily limited to Exhibit A, state a rate of finance charge for mortgage loan advertisements, but fail to disclose, or fail to disclose clearly and conspicuously, the following information required by Regulation Z:

- a. the rate of finance charge stated as an "annual percentage rate," using that term;

Complaint

- b. the annual percentage rate, stated in conjunction with and at least as conspicuously as the stated simple annual rate; and
- c. required payment rate disclosures.

17. Respondent's practices have violated Section 144 of the Truth in Lending Act, 15 U.S.C. § 1664 (as amended), and Section 226.24(b) of Regulation Z, 12 C.F.R. § 226.24(b) (including as more fully set out in Section 226.24(b) of the Official Staff Commentary on Regulation Z, 12 C.F.R. § 226.24(b), Supp. 1).

THEREFORE, the Federal Trade Commission this seventeenth day of February, 2009, has issued this complaint against respondent.

By the Commission.

Complaint

EXHIBIT A



30-Year Fixed,
1.95%¹

FREE APPRAISAL²



Example

	Balance	Payment
Your Estimated Current Mortgage	\$430,000	\$3,720
Your Estimated Revolving Debt	\$21,439	200
Your Estimated Total	\$451,439	\$3,920 ³

Your New, One, Low Monthly Payment: \$2,463⁴

Dear [Redacted]

We are making you an incredible offer for the next 7 days. You are pre-qualified to reduce your mortgage payment by hundreds of dollars each month when you refinance with American Nationwide! Our Rate Reduction Loans⁵ can provide you with a 30-year fixed rate of 1.95%¹ for \$630,000 or more.

Based upon this estimate, you can save \$1,764⁴ every month and \$21,168 over 1 year!

American Nationwide Mortgage Company is a nationally licensed mortgage lender with a great record from the Better Business Bureau. We have many loan programs available for every situation and our closing costs can almost always beat any competitor. My company believes that honesty and superior service is the only way to develop life-long mortgage customers and we hope you give us the opportunity to work with you.

There is no obligation or expense to speak to one of our experienced Loan Originators. So give us a call today.

Sincerely,

Matt Rubin, Branch Manager
American Nationwide Mortgage Company
2620 Northdale Boulevard, Suite 111A
Tampa, FL 33624
Licensed in South Carolina #33-738
Toll Free: 866-558-8724

Call Today!
Call toll free: 866-558-8724
Reservation Code: [Redacted]

¹ 30-YEAR Annual Percentage Rate, 30-Year term.
² Minimum all time of closing. See website for terms and conditions of this pre-approved offer.
³ Monthly payments would be \$392 for the next 12 months per \$100,000 borrowed.
⁴ Savings is estimated on all loan payments based on current rate payment.

Exhibit A

You can choose to stop receiving "prescreened" offers of credit from this and other companies by calling toll-free 888-3-OPT-OUT. See PAGESCREEN & OPT-OUT NOTICE on the reverse side for more information about prescreened offers.

Complaint

Terms and Conditions

Our offer is subject to: 1. Continuing to meet the criteria for the program; 2. Your ability to obtain a first mortgage loan on your property; 3. Your credit report, credit history, income and employment continue to meet our pre-established underwriting standards; and 4. We receive a satisfactory title and appraisal on your home. Initial Annual Percentage Rate (APR) for a 30 year mortgage loan with 60% loan to value is 4.381%, Rate is fixed for 12 months and adjusts upwards 7.5% of the payment amount annually for the first ten years of the loan. Loan reserves 0 points. Monthly payments would be \$387 for the first 12 months per \$100,000 financed. This includes principal and interest only. Other rates and conditions apply for different mortgage amounts and terms. **This rate approved after March 31, 2007.**

PRESCREEN & OPT OUT NOTICE: This "prescreened" offer of credit is based on information in your credit report indicating that you meet certain criteria. This offer is not guaranteed if you do not meet our criteria (including providing acceptable property as collateral). If you do not want to receive prescreened offers of credit from this and other companies, call 1-822-567-4688 or visit the website at www.optoutprescreen.com; or write TransUnion Opt Out Request PO Box 585, Woodlyn, PA 19094-0585, Experian Information Systems, Inc. PO Box 919, Allen, TX 75013, Equifax Options PO Box 740123, Atlanta, GA 30394-0123.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having 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 respondent with violation of the Federal Trade Commission Act (“FTC Act”), the Truth in Lending Act (“TILA”), and TILA’s 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 the jurisdictional facts set forth in the aforesaid 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 the complaint, or that the facts as alleged in such complaint, other than the 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 FTC Act and the Truth in Lending Act and its implementing Regulation Z, 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 American Nationwide Mortgage Company, Inc., is a Florida corporation with its principal office or place of business at 3820 Northdale Blvd., Suite 111A, Tampa, FL 33624.

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. Section 226.2(a)(2) of Regulation Z, 12 C.F.R. § 226.2(a)(2), as amended.
2. “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, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade, and appear on the screen for a duration, and in a location, sufficient for an ordinary consumer to read and comprehend it.
 - (C) In a television or video advertisement, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade, and appear on the screen for a duration, and in a location, sufficient for an ordinary consumer to read and comprehend it.

Decision and Order

(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.

(E) In all advertisements, 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 promotion.

3. “Closed-end credit” shall mean consumer credit other than open-end credit. “Open-end credit” shall mean consumer credit extended by a creditor under a plan in which: (i) The creditor reasonably contemplates repeated transactions; (ii) The creditor may impose a finance charge from time to time on an outstanding unpaid balance; and (iii) The amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid. Sections 226.2(a)(10) and (20) of Regulation Z, 12 C.F.R. §§ 226.2(a)(10) and (20), as amended.
4. “Consumer” shall mean a natural person to whom consumer credit is offered or extended. Section 226.2(a)(2) of Regulation Z, 12 C.F.R. § 226.2(a)(2), as amended, and Section 103(h) of the TILA, 15 U.S.C. § 1602(h), as amended.
5. “Consumer credit” shall mean credit offered or extended to a consumer primarily for personal, family, or household purposes. Section 226.2(a)(12) of Regulation Z, 12 C.F.R. § 226.2(a)(12), as amended.
6. “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 American Nationwide Mortgage Company, Inc., a corporation (“respondent”), its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with any advertisement to promote, directly or indirectly, any extension of closed-end credit, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the monthly payment amount, unless it discloses, clearly and conspicuously, and in close proximity to such representation, as applicable, that the advertised low monthly payment amount: (1) applies only for a limited period of time, after which the monthly payment amount will increase; (2) does not include the amount of interest that the consumer owes each month; and (3) is less than the monthly payment amount (including interest) that the consumer owes, with the difference added to the total amount due from the consumer.

II.

IT IS FURTHER ORDERED that respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with any advertisement to promote, directly or indirectly, any extension of closed-end credit, in or affecting commerce, shall not, in any manner, advertise a rate lower than the rate at which interest is accruing, regardless of whether the rate is referred to as an “effective rate,” a “payment rate,” a “qualifying rate,” or any other term, provided that this provision does not prohibit advertisement of the “annual percentage rate” or “APR,” using that term.

III.

IT IS FURTHER ORDERED that respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other

Decision and Order

device, in connection with any advertisement to promote, directly or indirectly, any extension of closed-end credit, in or affecting commerce, shall not, in any manner, expressly or by implication, misrepresent:

The nature and/or extent of the variability of any loan rate or payment amount, including but not limited to:

- A. an interest rate or annual percentage rate;
- B. whether it is fixed rather than adjustable or adjustable rather than fixed; and
- C. for an interest rate or payment amount, the duration, or reasonably anticipated duration, of the fixed or variable interest rate or payment amount.

IV.

IT IS FURTHER ORDERED that respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with any advertisement to promote, directly or indirectly, any extension of closed-end credit shall not, in any manner, expressly or by implication, state the amount of any payment, the number of payments or the period of repayment, or the amount of any finance charge, unless it discloses, clearly and conspicuously:

- A. The terms of repayment;
- B. The “annual percentage rate” or “APR,” using that term; and
- C. If the annual percentage rate may be increased after consummation, that fact; as required by Sections 107 and 144(d) of the TILA, 15 U.S.C. §§ 1606 and 1664(d), as amended; and Sections 226.22 and 226.24(c) of Regulation Z, 12 C.F.R. §§ 226.22 and 226.24(c), until October 1, 2009,

Decision and Order

and thereafter codified as Sections 226.22 and 226.24(d), 12 C.F.R. §§ 226.22 and 226.24(d), as amended.

V.

IT IS FURTHER ORDERED that respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with any advertisement to promote, directly or indirectly, any extension of closed-end credit shall not, in any manner, expressly or by implication, state a rate of finance charge without:

- A. Clearly and conspicuously stating the rate as an “annual percentage rate” or “APR,” using that term; and
- B. If the rate is a simple annual rate, stating it in conjunction with, but not more conspicuously than, the “annual percentage rate;” as required by Sections 107 and 144(c) of the TILA, 15 U.S.C. §§ 1606 and 1664(c), as amended; and Sections 226.22 and 226.24(b) of Regulation Z, 12 C.F.R. §§ 226.22 and 226.24(b), until October 1, 2009, and thereafter codified as Sections 226.22 and 226.24(c), 12 C.F.R. §§ 226.22 and 226.24(c), as amended.

VI.

IT IS FURTHER ORDERED that respondent, its successors and assigns, and its officers, agents, representatives, and employees, 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 shall not, in any manner, fail to comply in any respect with Regulation Z, 12 C.F.R. § 226, as amended, and the TILA, 15 U.S.C. §§ 1601-1667, as amended.

Decision and Order

VII.

IT IS FURTHER ORDERED that respondent, its successors and assigns, and its officers, agents, representatives, and employees, 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. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation, including but not limited to drafts, storyboards, and transcripts;
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations;
- D. Accounting records that reflect the consumer credit or mortgage loans extended or referred to other entities for extension of credit, revenues generated, and the disbursement of such revenues;
- E. Records maintained in the ordinary course of business reflecting during the employment, i.e., the name, physical address, and telephone number of each person employed by respondent, and its successors and assigns, including as an independent contractor, with responsibilities relating to compliance with this Order; that person's job title or position; the date upon which the person commenced work; and the date and reason for the person's termination, if applicable;

Decision and Order

- F. Complaints and refund requests relating to any consumer credit or mortgage loans offered or extended (whether received directly, indirectly or through any third party) and any responses to those complaints or requests;
- G. Copies of all advertisements or other marketing materials promoting, advertising, or referring to any consumer credit products or mortgage loans offered or extended; and
- H. All other records and documents reasonably necessary to demonstrate full compliance with each provision of this Order, including but not limited to, all documents obtained, created, generated or which in any way relate to the requirements, provisions or terms of this Order, and all reports submitted to the FTC pursuant to this Order.

VIII.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall deliver a copy of this Order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of the Order, and to the officers, directors, and managers of any third-party vendor who engages in conduct related to the subject matter of the Order, and shall secure from each such person, within thirty (30) days of delivery, a signed and dated statement acknowledging receipt of the Order. Respondent, and its successors and assigns, shall deliver this Order to current personnel within five (5) days after the date of service of this Order, and to future personnel within ten (10) days after their assuming their responsibilities.

IX.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in any corporation(s) that may affect compliance obligations arising under this Order, including, but not

Decision and Order

limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent, and its successors and assigns, learn less than thirty (30) days prior to the date such action is to take place, respondent, and its successors and assigns, 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, NW, Washington, D.C. 20580.

X.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall, within sixty (60) days after service of this Order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied and is complying with this Order.

XI.

This Order will terminate on February 17, 2029, 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;

Analysis to Aid Public Comment

- B. This Order's application to any respondent, or any of its successors or assigns, 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, or its successors or assigns, 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 (“FTC”) has accepted, subject to final approval, an agreement containing a consent order from American Nationwide Mortgage Company, Inc. (“respondent”).

The proposed consent order has been placed on the public record for thirty (30) days for the 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.

Analysis to Aid Public Comment

The complaint alleges that respondent engaged in practices that violate Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), Section 144 of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1664, and Section 226.24 of Regulation Z, 12 C.F.R. § 226.24.

Section 5(a) of the FTC Act prohibits unfair or deceptive acts or practices. Respondent violated Section 5(a) of the FTC Act because it disseminated or has caused to be disseminated home loan advertisements which offer a low monthly payment amount and/or low rate, but fail to disclose, or fail to disclose adequately, that this monthly payment amount and/or low rate: (1) apply only for a limited period of time, after which they will increase; (2) do not include the amount of interest that the consumer owes each month; and (3) are less than the monthly payment amount (including interest) and/or the interest rate that the consumer owes, with the difference added to the total amount due from the consumer or total loan balance. This information would be material to consumers shopping for a mortgage loan and the failure to disclose, or failure to disclose adequately, this information is a deceptive practice. Respondent also violated Section 5(a) of the FTC Act because it misrepresented, expressly or by implication, that its advertised rate was a fixed rate for the full term of the loan.

TILA and Regulation Z require that closed-end credit advertisers who state a periodic payment amount must also provide additional information in the advertisement, including the terms of repayment; the annual percentage rate (“APR”); and if the APR may be increased after consummation, that fact. TILA and Regulation Z also require that if an advertisement states a rate of finance charge, it must state the rate as an APR. Currently, Regulation Z also requires that if the advertisement states a payment rate, it must include additional disclosures. Respondent’s advertisements failed to disclose, or failed to disclose clearly and conspicuously, this information required by TILA and Regulation Z. Respondent’s failure to disclose this information undermined consumers’ ability to compare these offers to others in the marketplace. Through its law enforcement actions, the Commission intends to promote

Analysis to Aid Public Comment

compliance with the disclosure requirements of TILA and Regulation Z, and to foster comparison shopping for mortgage loans.

The proposed consent order contains provisions designed to prevent respondent from violating the FTC Act or failing to make clear and conspicuous disclosures required by TILA and Regulation Z, as amended, *see* 73 Fed. Reg. 44,522 (July 30, 2008), and as may be further amended in the future.

Part I of the proposed order prohibits respondent, in connection with closed-end credit, from advertising a monthly payment amount unless respondent discloses, clearly and conspicuously and in close proximity to those representations, as applicable, that the advertised monthly payment amount: (1) applies only for a limited period of time, after which it will increase; (2) does not include the amount of interest that the consumer owes each month; and (3) is less than the monthly payment amount (including interest) that the consumer owes, with the difference added to the total amount due from the consumer or total loan balance.

Part II of the proposed order prohibits respondent, in connection with closed-end credit, from advertising a rate lower than the rate at which interest is accruing, regardless of whether the rate is referred to as an “effective rate,” a “payment rate,” a “qualifying rate,” or any other term, provided that this provision does not prohibit advertisement of the “annual percentage rate” or “APR.” In light of respondent’s deceptive use of payment rates in its advertisements, and the Federal Reserve Board’s amendments to Regulation Z banning the use of such rates effective October 1, 2009, the proposed order prohibits respondent from advertising any such rate, to ensure that respondent’s advertisements do not deceive consumers. *See* 73 Fed. Reg. at 44,608.

Part III of the proposed order prohibits respondent, in connection with closed-end credit, from misrepresenting the nature and/or extent of the variability of any loan rate or payment amount, including but not limited to (1) an interest rate or APR; (2) whether it is fixed rather than adjustable or adjustable rather than fixed; and

Analysis to Aid Public Comment

(3) for an interest rate or payment amount, the duration, or reasonably anticipated duration, of the fixed or variable interest rate or payment amount.

Part IV of the proposed order prohibits respondent, in connection with closed-end credit, from advertising the amount of any payment, the number of payments or the period of repayment, or the amount of any finance charge, without disclosing, clearly and conspicuously, all of the terms required by TILA and Regulation Z, including the terms of repayment; the APR; and if the APR may be increased after consummation, that fact.

Part V of the proposed order prohibits respondent, in connection with closed-end credit, from stating a rate of finance charge without stating the rate as an APR, as required by TILA and Regulation Z.

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

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

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

Analysis to Aid Public Comment

Part XI 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 violations 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

**SHIVA VENTURE GROUP, INC.,
D/B/A INNOVA FINANCIAL GROUP**

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT, SEC. 144 OF THE
TRUTH IN LENDING ACT, AND SECTION 226.24 OF REGULATION Z

Docket C-4250; File No. 082 3032

Complaint, February 17, 2009 – Decision, February 17, 2009

This consent order addresses mortgage loan advertisements disseminated by Shiva Venture Group, Inc., doing business as Innova Financial Group. The advertisements did not adequately disclose additional terms pertaining to the mortgage loans, which are required by the Truth in Lending Act and Regulation Z. The order prohibits the respondent from advertising a monthly payment amount unless it discloses, clearly and conspicuously, that the advertised monthly payment amount (1) applies only for a limited period of time, after which it will increase, (2) does not include the amount of interest that the consumer owes each month, and (3) is less than the monthly payment amount (including interest) that the consumer owes, with the difference added to the total loan balance. The order also prohibits the respondent from advertising a rate lower than the rate at which interest is accruing, regardless of what the rate is called. The order prohibits the respondent from advertising the amount of any payment, the number of payments or the period of repayment, or the amount of any finance charge, without disclosing, clearly and conspicuously, all of the terms required by the Truth in Lending Act and Regulation Z. The respondent is prohibited from stating a rate of finance charge without stating the rate as an annual percentage rate (APR). The order prohibits the respondent from failing to comply in any respect with the Truth in Lending Act or Regulation Z. The order requires the respondent to maintain all records that will demonstrate compliance with the order, and 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. The respondent is required to notify the Commission of any changes in its corporate structure that might affect compliance with this order and to file with the Commission one or more reports detailing compliance.

Complaint

Participants

For the *Commission*: Beverly Childs, James Reilly Dolan, Brian Figueroa, Bevin Murphy, Carole Reynolds, Peggy Twohig, and Evan Zullo.

For the *Respondent*: Carlos Martinez, Ison Law Firm; and Jeff Forster.

COMPLAINT

The Federal Trade Commission, having reason to believe that Shiva Venture Group, Inc. dba Innova Financial Group, a corporation (“respondent”) has violated provisions of the Federal Trade Commission Act and the Truth in Lending Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Shiva Venture Group, Inc. dba Innova Financial Group is a California corporation with its principal office or place of business at 700 Gale Dr. Suite 260, Campbell, CA 95008.

2. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

3. In the mortgage lending industry, there are certain terms of art. These terms generally have the following meanings. An “interest rate” is the rate charged the consumer for the loan. It is usually stated as an annual amount, such as “6% interest.” “Interest” is the dollar amount the consumer owes based on the interest rate. A “payment rate” is the rate used to calculate the consumer’s monthly payment amount, and is not necessarily the same as the interest rate. If the payment rate is less than the interest rate, the consumer’s monthly payment amount does not include the full interest owed each month; the difference between the amount the consumer pays, and the amount the consumer owes, is added to the total amount due

Complaint

from the consumer. “Negative amortization” is an increase in the consumer’s total debt due during the term of the loan. It occurs when the consumer’s monthly payment amount does not contain the amount of interest owed for that month. The difference between the amount the consumer pays, and the amount the consumer owes, is added to the consumer’s total debt, causing it to increase.

4. Since at least 2007, respondent has disseminated or has caused to be disseminated advertisements that promote extensions of closed-end credit in consumer credit transactions, as the terms “advertisement” and “consumer credit” are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2.

5. Respondent has disseminated or has caused to be disseminated mortgage loan advertisements, including but not necessarily limited to the attached Exhibits A & B. Exhibits A & B are Internet advertisements, which contain the following statements:

innova
FINANCIAL GROUP
1% Payments Available!
* *

**This means that a \$500,000 loan you will
only cost [sic] \$1264/month!**

[Exhibits A and B]

Innova Financial Group is currently
offering monthly payments as low as 1%!

[Exhibit A]

Complaint

**FEDERAL TRADE COMMISSION ACT VIOLATIONS
COUNT I:****Failure to Disclose, or Failure to Disclose Adequately,
Material Terms**

6. Through the means described in Paragraph 5, respondent has represented, expressly or by implication, that consumers can receive mortgage loans at the terms prominently stated in the advertisements, including but not necessarily limited to a low monthly payment amount and/or a low payment rate.

7. In its mortgage loan advertisements as described in Paragraph 5, respondent has failed to disclose, or failed to disclose adequately, additional terms pertaining to the mortgage offer, such as:

a. That the advertised low monthly payment amount: (1) applies only for a limited period of time, after which the monthly payment amount will increase; (2) does not include the amount of interest that the consumer owes each month; and (3) is less than the monthly payment amount (including interest) that the consumer owes, with the difference added to the total amount due from the consumer.

b. That the advertised payment rate: (1) applies only for a limited period of time, after which the rate will increase; (2) does not include the amount of interest that the consumer owes each month, and (3) is less than the interest rate that the consumer owes, with the difference added to the total loan balance.

8. The information described in Paragraph 7 would be material to consumers shopping for a mortgage loan. The failure to disclose, or failure to disclose adequately, this information, in light of the representations made in Paragraph 6, was, and is, a deceptive practice.

Complaint

9. Respondent's practices constitute deceptive 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).

**TRUTH IN LENDING ACT AND REGULATION Z
VIOLATIONS**

COUNT II:

**Failure to Disclose, or Failure to Disclose Clearly and
Conspicuously, Required Credit Advertisement Terms**

10. Respondent's mortgage loan advertisements, including but not necessarily limited to Exhibits A and B, state periodic payment amounts for certain loan principal amounts but fail to disclose, or fail to disclose clearly and conspicuously, certain additional terms required by the Truth in Lending Act and Regulation Z, including one or more of the following terms:

- a. the terms of repayment;
- b. the "annual percentage rate," using that term; and
- c. if the annual percentage rate may be increased after consummation, that fact.

11. Respondent's practices have violated Section 144 of the Truth in Lending Act, 15 U.S.C. § 1664 (as amended) and Section 226.24(c) of Regulation Z, 12 C.F.R. § 226.24(c).

COUNT III:

**Failure to Disclose, or Failure to Disclose Clearly and
Conspicuously, Required Credit Advertisement Rate
Information**

12. Respondent's mortgage loan advertisements, including but not necessarily limited to Exhibits A and B, state a rate of finance

Complaint

charge and a payment rate for mortgage loan advertisements, but fail to disclose, or fail to disclose clearly and conspicuously, the following information required by Regulation Z:

- a. the rate of finance charge stated as an “annual percentage rate,” using that term;
- b. the annual percentage rate, stated in conjunction with and at least as conspicuously as the stated simple annual rate; and
- c. required payment rate disclosures.

13. Respondent’s practices have violated Section 144 of the Truth in Lending Act, 15 U.S.C. § 1664 (as amended), and Section 226.24(b) of Regulation Z, 12 C.F.R. § 226.24(b) (including as more fully set out in Section 226.24(b) of the Official Staff Commentary on Regulation Z, 12 C.F.R. § 226.24(b), Supp. 1).

THEREFORE, the Federal Trade Commission this seventeenth day of February, 2009, has issued this complaint against respondent.

By the Commission.

Complaint

EXHIBIT A

Pick Your Own Monthly Payment! Options as Low as 1%!!!

page 1 of 2

s.f. bayarea.craigslist > south bay > real estate services > Pick Your Own Monthly Payment! Options as Low as 1%!!!

please flag with care: [miscategorized] [prohibited] [spam] [discussion] [best of]

email this posting to a friend

Pick Your Own Monthly Payment! Options as Low as 1%!!!
(campbell)

Reply to: sevy-352157243@craigslist.org
Date: 2007-06-14, 12:07PM PDT



1% Payments Available!

As a Mortgage Planner, the #1 question I receive from my clients is, "How can I lower my monthly payments?" Great news... the answer to this question has arrived!

Innova Financial Group is currently offering monthly payments as low as 1%! This means that a \$500,000 loan you will only cost \$1264/month! The even better news is that you don't need stellar credit to qualify... In fact, these loans can be originated with credit scores as low as 620!

To answer the question before it is asked, this loan is NOT available with 100% financing (or 100% loan-to-value). However, 95% is available!

If you have any other questions OR to sign-up for our 1% payment plan and save yourself hundreds or even THOUSANDS of dollars ever month, please e-mail Jason.Campas or call him at (408)515-6306.

Jason Campas
Mortgage Planner
Innova Financial Group

Exhibit A

<http://sfbay.craigslist.org/sby/rts/352157243.html>

6/21/2007

Complaint

FILE YOUR OWN BUSINESS: CREDIT AS LOW AS 1.99!!!

Page 4 of 4

(408)515-6306 | jcampos@innovafinancial.us
California Department of Real Estate License
#01792896

It's NOT ok to contact this poster with services or other commercial interests

License Info: #01792896

PostingID: 352157243

Copyright © 2007 craigslist, inc. [terms of use](#) [privacy policy](#) [feedback forum](#)

Complaint

EXHIBIT B

No Points, No Fees! Up to 95% Financing Available!
s.f. bayarea craigslist > south bay > real estate services

Page 1 of:
email this posting to a friend

No Points, No Fees! Up to 95% Financing Available!

please flag with care:
miscategorized
prohibited
spam/overpost
best of craigslist

Reply to: serv-415534725@craigslist.org
Date: 2007-09-06, 11:15AM PDT



1% Payments Available!

As a Loan Officer, the most frequently asked question I receive from my clients is, "How can I lower my monthly payments?" I have told each and every one of them about the payment option program with payments as low as 1%!

This means that a \$500,000 loan you will only cost \$1264/month! The even better news is that you do not need stellar credit to qualify... I have put clients with scores as low as 620 into this program!

The major downfall of this program is that it is NOT available to borrowers in need of 100% financing. You must either have 5% as a down payment on a purchase OR have 5% worth of equity in your home for a refinance.

If you have any other questions OR to sign-up for our option payment plan and save yourself hundreds or even THOUSANDS of dollars each month, please e-mail [Jason Campos](mailto:Jason_Campos) or call him at (408)515-6306.

Jason Campos
Mortgage Planner
Innova Financial Group
(408)515-6306 | jcampos@innovafinancial.us
California Department of Real Estate License #01792896

it's NOT ok to contact this poster with services or other commercial interests

License info: 01792896

Exhibit B

<http://sfbay.craigslist.org/sby/fts/415534725.html>

9/13/2007

Complaint

No Points, No Fees! Up to 95% Financing Available!
PostingID: 415534725

Page 2 of 2

Copyright © 2007 craigslist, inc. [terms of use](#) [privacy policy](#) [feedback forum](#)

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having 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 respondent with violation of the Federal Trade Commission Act (“FTC Act”), the Truth in Lending Act (“TILA”), and TILA’s 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 the jurisdictional facts set forth in the aforesaid 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 the complaint, or that the facts as alleged in such complaint, other than the 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 FTC Act and the Truth in Lending Act and its implementing Regulation Z, 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, Shiva Venture Group, Inc. dba Innova Financial Group is a California corporation with its principal office or place of business at 700 Gale Dr. Suite 260, Campbell, CA 95008.

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. Section 226.2(a)(2) of Regulation Z, 12 C.F.R. § 226.2(a)(2), as amended.
2. “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, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade, and appear on the screen for a duration, and in a location, sufficient for an ordinary consumer to read and comprehend it.
 - (C) In a television or video advertisement, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade, and appear on the screen for a duration, and in a location, sufficient for an ordinary consumer to read and comprehend it.

Decision and Order

- (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.
- (E) In all advertisements, 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 promotion.
3. “Closed-end credit” shall mean consumer credit other than open-end credit. “Open-end credit” shall mean consumer credit extended by a creditor under a plan in which: (i) The creditor reasonably contemplates repeated transactions; (ii) The creditor may impose a finance charge from time to time on an outstanding unpaid balance; and (iii) The amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid. Sections 226.2(a)(10) and (20) of Regulation Z, 12 C.F.R. §§ 226.2(a)(10) and (20), as amended.
 4. “Consumer” shall mean a natural person to whom consumer credit is offered or extended. Section 226.2(a)(2) of Regulation Z, 12 C.F.R. § 226.2(a)(2), as amended, and Section 103(h) of the TILA, 15 U.S.C. § 1602(h), as amended.
 5. “Consumer credit” shall mean credit offered or extended to a consumer primarily for personal, family, or household purposes. Section 226.2(a)(12) of Regulation Z, 12 C.F.R. § 226.2(a)(12), as amended.
 6. “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 Shiva Venture Group, Inc. dba Innova Financial Group, a corporation (“respondent”), its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with any advertisement to promote, directly or indirectly, any extension of closed-end credit, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the monthly payment amount unless it discloses, clearly and conspicuously, and in close proximity to such representation, as applicable, that the advertised low monthly payment amount: (1) applies only for a limited period of time, after which the monthly payment amount will increase; (2) does not include the amount of interest that the consumer owes each month; and (3) is less than the monthly payment amount (including interest) that the consumer owes, with the difference added to the total amount due from the consumer.

II.

IT IS FURTHER ORDERED that respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with any advertisement to promote, directly or indirectly, any extension of closed-end credit, in or affecting commerce, shall not, in any manner, advertise a rate lower than the rate at which interest is accruing, regardless of whether the rate is referred to as an “effective rate,” a “payment rate,” a “qualifying rate,” or any other term, provided that this provision does not prohibit advertisement of the “annual percentage rate” or “APR,” using that term.

III.

IT IS FURTHER ORDERED that respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other

Decision and Order

device, in connection with any advertisement to promote, directly or indirectly, any extension of closed-end credit shall not, in any manner, expressly or by implication, state the amount of any payment, the number of payments or the period of repayment, or the amount of any finance charge, unless it discloses, clearly and conspicuously:

- A. The terms of repayment;
- B. The “annual percentage rate” or “APR,” using that term; and
- C. If the annual percentage rate may be increased after consummation, that fact;

as required by Sections 107 and 144(d) of the TILA, 15 U.S.C. §§ 1606 and 1664(d), as amended; and Sections 226.22 and 226.24(c) of Regulation Z, 12 C.F.R. §§ 226.22 and 226.24(c), until October 1, 2009, and thereafter codified as Sections 226.22 and 226.24(d), 12 C.F.R. §§ 226.22 and 226.24(d), as amended.

IV.

IT IS FURTHER ORDERED that respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with any advertisement to promote, directly or indirectly, any extension of closed-end credit shall not, in any manner, expressly or by implication, state a rate of finance charge without:

- A. Clearly and conspicuously stating the rate as an “annual percentage rate” or “APR,” using that term; and
- B. If the rate is a simple annual rate, stating it in conjunction with, but not more conspicuously than, the “annual percentage rate;”

as required by Sections 107 and 144(c) of the TILA, 15 U.S.C. §§ 1606 and 1664(c), as amended; and Sections 226.22 and 226.24(b)

Decision and Order

of Regulation Z, 12 C.F.R. §§ 226.22 and 226.24(b), until October 1, 2009, and thereafter codified as Sections 226.22 and 226.24(c), 12 C.F.R. §§ 226.22 and 226.24(c), as amended.

V.

IT IS FURTHER ORDERED that respondent, its successors and assigns, and its officers, agents, representatives, and employees, 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 shall not, in any manner, fail to comply in any respect with Regulation Z, 12 C.F.R. § 226, as amended, and the TILA, 15 U.S.C. §§ 1601-1667, as amended.

VI.

IT IS FURTHER ORDERED that respondent, its successors and assigns, and its officers, agents, representatives, and employees, 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. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation, including but not limited to drafts, storyboards, and transcripts;
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations;

Decision and Order

- D. Accounting records that reflect the consumer credit or mortgage loans extended or referred to other entities for extension of credit, revenues generated, and the disbursement of such revenues;
- E. Records maintained in the ordinary course of business reflecting during the employment, i.e., the name, physical address, and telephone number of each person employed by respondent, and its successors and assigns, including as an independent contractor, with responsibilities relating to compliance with this Order; that person's job title or position; the date upon which the person commenced work; and the date and reason for the person's termination, if applicable;
- F. Complaints and refund requests relating to any consumer credit or mortgage loans offered or extended (whether received directly, indirectly or through any third party) and any responses to those complaints or requests;
- G. Copies of all advertisements or other marketing materials promoting, advertising, or referring to any consumer credit products or mortgage loans offered or extended; and
- H. All other records and documents reasonably necessary to demonstrate full compliance with each provision of this Order, including but not limited to, all documents obtained, created, generated or which in any way relate to the requirements, provisions or terms of this Order, and all reports submitted to the FTC pursuant to this Order.

VII.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall deliver a copy of this Order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of the

Decision and Order

Order, and to the officers, directors, and managers of any third-party vendor who engages in conduct related to the subject matter of the Order, and shall secure from each such person, within thirty (30) days of delivery, a signed and dated statement acknowledging receipt of the Order. Respondent, and its successors and assigns, shall deliver this Order to current personnel within five (5) days after the date of service of this Order, and to future personnel within ten (10) days after their assuming their responsibilities.

VIII.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in any 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 about which respondent, and its successors and assigns, learn less than thirty (30) days prior to the date such action is to take place, respondent, and its successors and assigns, 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, NW, Washington, D.C. 20580.

IX.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall, within sixty (60) days after service of this Order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied and is complying with this Order.

Decision and Order

X.

This Order will terminate on February 17, 2029, 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, or any of its successors or assigns, 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, or its successors or assigns, did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this Part as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission (“FTC”) has accepted, subject to final approval, an agreement containing a consent order from Shiva Venture Group, Inc. dba Innova Financial Group (“respondent”).

The proposed consent order has been placed on the public record for thirty (30) days for the 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.

The complaint alleges that respondent engaged in practices that violate Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), Section 144 of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1664, and Section 226.24 of Regulation Z, 12 C.F.R. § 226.24.

Section 5(a) of the FTC Act prohibits unfair or deceptive acts or practices. Respondent violated Section 5(a) of the FTC Act, because it disseminated or has caused to be disseminated home loan advertisements which offer a low monthly payment amount and/or payment rate, but fail to disclose, or fail to disclose adequately, that this monthly payment amount and/or payment rate: (1) apply only for a limited period of time, after which they will increase; (2) do not include the amount of interest that the consumer owes each month; and (3) are less than the monthly payment amount (including interest) and/or the interest rate that the consumer owes, with the difference added to the total amount due from the consumer or total loan balance. This information would be material to consumers shopping for a mortgage loan and the failure to disclose, or failure to disclose adequately, this information is a deceptive practice.

TILA and Regulation Z require that closed-end credit advertisers who state a periodic payment amount must also provide additional

Analysis to Aid Public Comment

information in the advertisement, including the terms of repayment; the annual percentage rate (“APR”); and if the APR may be increased after consummation, that fact. TILA and Regulation Z also require that if an advertisement states a rate of finance charge, it must state the rate as an APR. Currently, Regulation Z also requires that if the advertisement states a payment rate, it must include additional disclosures. Respondent’s advertisements failed to disclose, or failed to disclose clearly and conspicuously, this information required by TILA and Regulation Z. Respondent’s failure to disclose this information undermined consumers’ ability to compare these offers to others in the marketplace. Through its law enforcement actions, the Commission intends to promote compliance with the disclosure requirements of TILA and Regulation Z, and to foster comparison shopping for mortgage loans.

The proposed consent order contains provisions designed to prevent respondent from violating the FTC Act or failing to make clear and conspicuous disclosures required by TILA and Regulation Z in the future. The proposed consent order requires respondent to comply with the TILA and Regulation Z, as has been amended, *see* 73 Fed. Reg. 44,522 (July 30, 2008), and as may be further amended in the future.

Part I of the proposed order prohibits respondent, in connection with closed-end credit, from advertising a monthly payment amount unless respondent discloses, clearly and conspicuously and in close proximity to those representations, as applicable, that the advertised monthly payment amount: (1) applies only for a limited period of time, after which it will increase; (2) does not include the amount of interest that the consumer owes each month; and (3) is less than the monthly payment amount (including interest) that the consumer owes, with the difference added to the total amount due from the consumer or total loan balance.

Part II of the proposed order prohibits respondent, in connection with closed-end credit, from advertising a rate lower than the rate at which interest is accruing, regardless of whether the rate is referred to as an “effective rate,” a “payment rate,” a “qualifying rate,” or

Analysis to Aid Public Comment

any other term, provided that this provision does not prohibit advertisement of the “annual percentage rate” or “APR.” In light of respondent’s deceptive use of payment rates in its advertisements, and the Federal Reserve Board’s amendments to Regulation Z banning the use of such rates effective October 1, 2009, the proposed order prohibits respondent from advertising any such rate, to ensure that respondent’s advertisements do not deceive consumers. *See* 73 Fed. Reg. at 44,608.

Part III of the proposed order prohibits respondent, in connection with closed-end credit, from advertising the amount of any payment, the number of payments or the period of repayment, or the amount of any finance charge, without disclosing, clearly and conspicuously, all of the terms required by TILA and Regulation Z, including the terms of repayment; the APR; and if the APR may be increased after consummation, that fact.

Part IV of the proposed order prohibits respondent, in connection with closed-end credit, from stating a rate of finance charge without stating the rate as an APR, as required by TILA and Regulation Z.

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

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

Analysis to Aid Public Comment

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

Part X 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 violations 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

**MICHAEL GENDROLIS,
D/B/A GOOD LIFE FUNDING**

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT, SEC. 144 OF THE
TRUTH IN LENDING ACT, AND SECTION 226.24 OF REGULATION Z

Docket C-4248; File No. 082 3034

Complaint, February 17, 2009 – Decision, February 17, 2009

This consent order addresses alleged misrepresentations made by Michael Gendrolis, dba Good Life Funding, regarding home loans he advertised to consumers. The order prohibits the respondent from advertising a monthly payment amount unless it discloses, clearly and conspicuously, that the amount (1) applies only for a limited period of time, after which it will increase, (2) does not include the amount of interest that the consumer owes each month, and (3) is less than the monthly payment amount (including interest) that the consumer owes, with the difference added to the total loan balance. The order also prohibits the respondent from advertising a rate lower than the rate at which interest is accruing, regardless of what the rate is called. The order prohibits Good Life Funding from making representations about the consumer's current lender unless it adequately discloses the respondent's name and identity as the entity offering the loan. In addition, the respondent is prohibited from advertising the amount of any payment, the number of payments or the period of repayment, or the amount of any finance charge, without disclosing, clearly and conspicuously, all of the terms required by the Truth in Lending Act and Regulation Z. The respondent is prohibited from stating a rate of finance charge without stating the rate as an annual percentage rate (APR). The order prohibits the respondent from failing to comply in any respect with the Truth in Lending Act or Regulation Z. The order requires the respondent to maintain all records that will demonstrate compliance with the order, and 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. The respondent is required to notify the Commission of any changes in its corporate structure that might affect compliance with this order and to file with the Commission one or more reports detailing compliance.

Complaint

Participants

For the *Commission*: *Beverly Childs, James Reilly Dolan, Brian Figueroa, Bevin Murphy, Carole Reynolds, Peggy Twohig, and Evan Zullo.*

For the *Respondent*: *Not represented by counsel.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Michael Gendrolis dba Good Life Funding (“respondent”), a sole proprietorship owned by Michael Gendrolis, has violated the provisions of the Federal Trade Commission Act and the Truth in Lending Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Michael Gendrolis dba Good Life Funding is a sole proprietorship with its principal office or place of business at 1901 Newport Blvd. Suite 350, Costa Mesa, CA 92627.

2. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

3. In the mortgage lending industry, there are certain terms of art. These terms generally have the following meanings. An “interest rate” is the rate charged the consumer for the loan. It is usually stated as an annual amount, such as “6% interest.” “Interest” is the dollar amount the consumer owes based on the interest rate. A “payment rate” is the rate used to calculate the consumer’s monthly payment amount, and is not necessarily the same as the interest rate. If the payment rate is less than the interest rate, the consumer’s monthly payment amount does not include the full interest owed each month; the difference between the amount the consumer pays, and the amount the consumer owes, is added to the total amount due from the consumer. “Negative amortization” is an increase in the

Complaint

consumer's total debt due during the term of the loan. It occurs when the consumer's monthly payment amount does not contain the amount of interest owed for that month. The difference between the amount the consumer pays, and the amount the consumer owes, is added to the consumer's total debt, causing it to increase.

4. Since at least 2007, respondent has disseminated or has caused to be disseminated advertisements that promote extensions of closed-end credit in consumer credit transactions, as the terms "advertisement" and "consumer credit" are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2.

5. Respondent has disseminated or has caused to be disseminated mortgage loan advertisements, including but not necessarily limited to the attached Exhibit A. Exhibit A is a direct mail advertisement, which contains the following statements:

a. At the top of the advertisement, respondent states the following:

RE Northern Trust Bank of CA	Case Number: DBA19282009
Original Loan: \$557,000	Re-Negotiation Department

b. In the body of the advertisement, respondent states the following:

Your first Mortgage originally funded by Northern Trust Bank of CA can be restructured to a TEN Yr fixed payment of only \$116. . .

Your payment rate is only 1/4%* and is fixed for TEN years. . . This is the lowest payment in mortgage history.

You can receive an additional \$88,252 Cash out with a monthly payment of only \$134. . .

Complaint

Call Today, and have No House Payments until June 2008 (that's 12 months)**.

A fine print disclosure at the bottom of the advertisement states: "Good Life Funding is not sponsored or affiliated with Northern Trust Bank of CA and the solicitation is not authorized by Northern Trust Bank of CA. . . *Payment Rate 1/4% 6.75% APR. Deferred interest will accrue. . . ** . . . Based on the first year 1/4% interest only payment at close . . ." [Exhibit A]

**FEDERAL TRADE COMMISSION ACT VIOLATIONS
COUNT I:****Failure to Disclose, or Failure to Disclose Adequately,
Material Terms**

6. Through the means described in Paragraph 5, respondent has represented, expressly or by implication, that consumers can receive mortgage loans at the terms prominently stated in the advertisements, including but not necessarily limited to a low monthly payment amount and/or a low payment rate.

7. In its mortgage loan advertisements as described in Paragraph 5, respondent has failed to disclose, or failed to disclose adequately, additional terms pertaining to the mortgage offer, such as:

a. That the advertised low monthly payment amount: (1) applies only for a limited period of time, after which the monthly payment amount will increase; (2) does not include the amount of interest that the consumer owes each month; and (3) is less than the monthly payment amount (including interest) that the consumer owes, with the difference added to the total amount due from the consumer.

b. That the advertised payment rate: (1) applies only for a limited period of time, after which the rate will increase; (2) does not include the amount of interest that the consumer owes

Complaint

each month, and (3) is less than the interest rate that the consumer owes, with the difference added to the total loan balance.

8. The information described in Paragraph 7 would be material to consumers shopping for a mortgage loan. The failure to disclose, or failure to disclose adequately, this information, in light of the representations made in Paragraph 6, was, and is, a deceptive practice.

9. Respondent's practices constitute deceptive 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).

COUNT II:**Failure to Disclose Adequately the Identity of the Entity
Extending the Mortgage Offer**

10. Through the means described in Paragraph 5, respondent has represented, expressly or by implication, that the offer is made by the consumer's current lender.

11. In its mortgage loan advertisements as described in Paragraph 5, respondent has failed to disclose adequately that the mortgage offer is made by respondent and not the consumer's current lender. This information would be material to consumers shopping for a mortgage loan. The failure to disclose adequately the identity of the true offeror, in light of the representations made in Paragraph 10, was, and is, a deceptive practice.

12. Respondent's practices constitute deceptive 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).

Complaint

**TRUTH IN LENDING ACT AND REGULATION Z
VIOLATIONS**

COUNT III:

**Failure to Disclose, or Failure to Disclose Clearly and
Conspicuously, Required Credit Advertisement Terms**

13. Respondent's mortgage loan advertisements, including but not necessarily limited to Exhibit A, state periodic payment amounts for certain loan principal amounts but fail to disclose, or fail to disclose clearly and conspicuously, certain additional terms required by the Truth in Lending Act and Regulation Z, including one or more of the following terms:

- a. the terms of repayment;
- b. the "annual percentage rate," using that term; and
- c. if the annual percentage rate may be increased after consummation, that fact.

14. Respondent's practices have violated Section 144 of the Truth in Lending Act, 15 U.S.C. § 1664 (as amended) and Section 226.24(c) of Regulation Z, 12 C.F.R. § 226.24(c).

COUNT IV:

**Failure to Disclose, or Failure to Disclose Clearly and
Conspicuously, Required Credit Advertisement Rate
Information**

15. Respondent's mortgage loan advertisements, including but not necessarily limited to Exhibit A, state a rate of finance charge and/or a payment rate for mortgage loan advertisements, but fail to disclose, or fail to disclose clearly and conspicuously, the following information required by Regulation Z:

Complaint

- a. the rate of finance charge stated as an “annual percentage rate,” using that term;
- b. the annual percentage rate, stated in conjunction with and at least as conspicuously as the stated simple annual rate; and
- c. required payment rate disclosures.

16. Respondent’s practices have violated Section 144 of the Truth in Lending Act, 15 U.S.C. § 1664 (as amended), and Section 226.24(b) of Regulation Z, 12 C.F.R. § 226.24(b) (including as more fully set out in Section 226.24(b) of the Official Staff Commentary on Regulation Z, 12 C.F.R. § 226.24(b), Supp. 1).

THEREFORE, the Federal Trade Commission this seventeenth day of February, 2009, has issued this complaint against respondent.

By the Commission.

Complaint

EXHIBIT A

RE Northern Trust Bank of CA
Original Loan: \$557,000

Case Number: DBA19242009
Re-Negotiation Department
1-888-388-9111

Exhibit A

Dear

Your first Mortgage originally funded by Northern Trust Bank of CA can be restructured to a **TEN yr fixed** payment of only **\$118**.

This is not a typographical error. Your payment rate is only 1.64%* and is fixed for TEN years. My re-negotiation staff has researched the records to make a comparison of our new loan program to your existing loan. This is the lowest payment in midrange history.

You can receive an additional \$88,252 Cash out with a monthly payment of only \$124.

Call Today and have No House Payments until June 2020 (that's 12 months!)
Call toll-free at 1-888-388-9111 and refer to Case Number DBA19242009.

Attention
Homeowner:
Property:
Address:



Information was obtained from public record sources. Good Life Funding is not licensed or affiliated with Northern Trust Bank of CA and the information is not authorized by Northern Trust Bank of CA. Good Life Funding is Licensed by the CA Dept. of Real Estate, Lic. #00330868. *Interest Rate 1.64% APR. Interest amount will increase. Penalties apply as on LTV and credit score. Rates and terms subject to change without notice. **Lowest rate shown with Good Life Funding, only one Equity Advance program. Based on the five year 3% interest rate payment of \$118. Good Life Funding will credit towards 12 months of payments in loan closing. Not all applicants will qualify.

Complaint

PERSONAL AND CONFIDENTIAL
Notwithstanding Information Enclosed

[REDACTED]

SEE TTY, SEC 1702-US Code of Obstruction of US Mail is punishable by fines of up to \$2,500 or 5-years in prison or both.

[REDACTED]

NOT TO BE RELEASED BY THIS AGENCY TO ANY OTHER AGENCY OR INDIVIDUAL

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having 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 respondent with violation of the Federal Trade Commission Act (“FTC Act”), the Truth in Lending Act (“TILA”), and TILA’s 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 the jurisdictional facts set forth in the aforesaid 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 the complaint, or that the facts as alleged in such complaint, other than the 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 FTC Act and the Truth in Lending Act and its implementing Regulation Z, 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, Michael Gendrolis dba Good Life Funding, is a sole proprietorship with its principal office or place of business at 1901 Newport Blvd. Suite 350, Costa Mesa, CA 92627.

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. Section 226.2(a)(2) of Regulation Z, 12 C.F.R. § 226.2(a)(2), as amended.

2. “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, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade, and appear on the screen for a duration, and in a location, sufficient for an ordinary consumer to read and comprehend it.

(C) In a television or video advertisement, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade, and appear on the screen for a duration, and in a location, sufficient for an ordinary consumer to read and comprehend it.

Decision and Order

- (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.
- (E) In all advertisements, 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 promotion.
3. “Closed-end credit” shall mean consumer credit other than open-end credit. “Open-end credit” shall mean consumer credit extended by a creditor under a plan in which: (i) The creditor reasonably contemplates repeated transactions; (ii) The creditor may impose a finance charge from time to time on an outstanding unpaid balance; and (iii) The amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid. Sections 226.2(a)(10) and (20) of Regulation Z, 12 C.F.R. §§ 226.2(a)(10) and (20), as amended.
 4. “Consumer” shall mean a natural person to whom consumer credit is offered or extended. Section 226.2(a)(2) of Regulation Z, 12 C.F.R. § 226.2(a)(2), as amended, and Section 103(h) of the TILA, 15 U.S.C. § 1602(h), as amended.
 5. “Consumer credit” shall mean credit offered or extended to a consumer primarily for personal, family, or household purposes. Section 226.2(a)(12) of Regulation Z, 12 C.F.R. § 226.2(a)(12), as amended.
 6. “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 Michael Gendrolis dba Good Life Funding, a sole proprietorship (“respondent”), its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with any advertisement to promote, directly or indirectly, any extension of closed-end credit, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the monthly payment amount, unless it discloses, clearly and conspicuously, and in close proximity to such representation, as applicable, that the advertised low monthly payment amount: (1) applies only for a limited period of time, after which the monthly payment amount will increase; (2) does not include the amount of interest that the consumer owes each month; and (3) is less than the monthly payment amount (including interest) that the consumer owes, with the difference added to the total amount due from the consumer.

II.

IT IS FURTHER ORDERED that respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with any advertisement to promote, directly or indirectly, any extension of closed-end credit, in or affecting commerce, shall not, in any manner, advertise a rate lower than the rate at which interest is accruing, regardless of whether the rate is referred to as an “effective rate,” a “payment rate,” a “qualifying rate,” or any other term, provided that this provision does not prohibit advertisement of the “annual percentage rate” or “APR,” using that term.

III.

IT IS FURTHER ORDERED that respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other

Decision and Order

device, in connection with any advertisement to promote, directly or indirectly, any extension of consumer credit, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the consumer's current lender or any entity other than respondent, unless it discloses respondent's name and identity as the entity promoting or offering the extension of credit or mortgage loan clearly and conspicuously, and in close proximity to such representation.

IV.

IT IS FURTHER ORDERED that respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with any advertisement to promote, directly or indirectly, any extension of closed-end credit shall not, in any manner, expressly or by implication, state the amount of any payment, the number of payments or the period of repayment, or the amount of any finance charge, unless it discloses, clearly and conspicuously:

- A. The terms of repayment;
- B. The "annual percentage rate" or "APR," using that term; and
- C. If the annual percentage rate may be increased after consummation, that fact;

as required by Sections 107 and 144(d) of the TILA, 15 U.S.C. §§ 1606 and 1664(d), as amended; and Sections 226.22 and 226.24(c) of Regulation Z, 12 C.F.R. §§ 226.22 and 226.24(c), until October 1, 2009, and thereafter codified as Sections 226.22 and 226.24(d), 12 C.F.R. §§ 226.22 and 226.24(d), as amended.

Decision and Order

V.

IT IS FURTHER ORDERED that respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with any advertisement to promote, directly or indirectly, any extension of closed-end credit shall not, in any manner, expressly or by implication, state a rate of finance charge without:

- A. Clearly and conspicuously stating the rate as an “annual percentage rate” or “APR,” using that term; and
- B. If the rate is a simple annual rate, stating it in conjunction with, but not more conspicuously than, the “annual percentage rate;”

as required by Sections 107 and 144(c) of the TILA, 15 U.S.C. §§ 1606 and 1664(c), as amended; and Sections 226.22 and 226.24(b) of Regulation Z, 12 C.F.R. §§ 226.22 and 226.24(b), until October 1, 2009, and thereafter codified as Sections 226.22 and 226.24(c), 12 C.F.R. §§ 226.22 and 226.24(c), as amended.

VI.

IT IS FURTHER ORDERED that respondent, its successors and assigns, and its officers, agents, representatives, and employees, 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 shall not, in any manner, fail to comply in any respect with Regulation Z, 12 C.F.R. § 226, as amended, and the TILA, 15 U.S.C. §§ 1601-1667, as amended.

VII.

IT IS FURTHER ORDERED that respondent, its successors and assigns, and its officers, agents, representatives, and employees,

Decision and Order

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. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation, including but not limited to drafts, storyboards, and transcripts;
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations;
- D. Accounting records that reflect the consumer credit or mortgage loans extended or referred to other entities for extension of credit, revenues generated, and the disbursement of such revenues;
- E. Records maintained in the ordinary course of business reflecting during the employment, i.e., the name, physical address, and telephone number of each person employed by respondent, and its successors and assigns, including as an independent contractor, with responsibilities relating to compliance with this Order; that person's job title or position; the date upon which the person commenced work; and the date and reason for the person's termination, if applicable;
- F. Complaints and refund requests relating to any consumer credit or mortgage loans offered or extended (whether received directly, indirectly or through any third party) and any responses to those complaints or requests;

Decision and Order

- G. Copies of all advertisements or other marketing materials promoting, advertising, or referring to any consumer credit products or mortgage loans offered or extended; and
- H. All other records and documents reasonably necessary to demonstrate full compliance with each provision of this Order, including but not limited to, all documents obtained, created, generated or which in any way relate to the requirements, provisions or terms of this Order, and all reports submitted to the FTC pursuant to this Order.

VIII.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall deliver a copy of this Order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of the Order, and to the officers, directors, and managers of any third-party vendor who engages in conduct related to the subject matter of the Order, and shall secure from each such person, within thirty (30) days of delivery, a signed and dated statement acknowledging receipt of the Order. Respondent, and its successors and assigns, shall deliver this Order to current personnel within five (5) days after the date of service of this Order, and to future personnel within ten (10) days after their assuming their responsibilities.

IX.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in any 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

Decision and Order

address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent, and its successors and assigns, learn less than thirty (30) days prior to the date such action is to take place, respondent, and its successors and assigns, 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, NW, Washington, D.C. 20580.

X.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall, within sixty (60) days after service of this Order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied and is complying with this Order.

XI.

This Order will terminate on February 17, 2029, 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, or any of its successors or assigns, 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.

Analysis to Aid Public Comment

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent, or its successors or assigns, 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 (“FTC”) has accepted, subject to final approval, an agreement containing a consent order from Michael Gendrolis dba Good Life Funding (“respondent”).

The proposed consent order has been placed on the public record for thirty (30) days for the 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.

The complaint alleges that respondent engaged in practices that violate Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), Section 144 of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1664, and Section 226.24 of Regulation Z, 12 C.F.R. § 226.24.

Analysis to Aid Public Comment

Section 5(a) of the FTC Act prohibits unfair or deceptive acts or practices. Respondent violated Section 5(a) of the FTC Act, because it disseminated or has caused to be disseminated home loan advertisements which offer a low monthly payment amount and/or payment rate, but fail to disclose, or fail to disclose adequately, that this monthly payment amount and/or payment rate: (1) apply only for a limited period of time, after which they will increase; (2) do not include the amount of interest that the consumer owes each month; and (3) are less than the monthly payment amount (including interest) and/or the interest rate that the consumer owes, with the difference added to the total amount due from the consumer or total loan balance. This information would be material to consumers shopping for a mortgage loan and the failure to disclose, or failure to disclose adequately, this information is a deceptive practice.

TILA and Regulation Z require that closed-end credit advertisers who state a periodic payment amount must also provide additional information in the advertisement, including the terms of repayment; the annual percentage rate (“APR”); and if the APR may be increased after consummation, that fact. TILA and Regulation Z also require that if an advertisement states a rate of finance charge it must state the rate as an APR. Currently, Regulation Z also requires that if the advertisement states a payment rate, it must include additional disclosures. Respondent’s advertisements failed to disclose, or failed to disclose clearly and conspicuously, this information required by TILA and Regulation Z. Respondent’s failure to disclose this information undermined consumers’ ability to compare these offers to others in the marketplace. Through its law enforcement actions, the Commission intends to promote compliance with the disclosure requirements of TILA and Regulation Z, and to foster comparison shopping for mortgage loans.

The proposed consent order contains provisions designed to prevent respondent from violating the FTC Act or failing to make clear and conspicuous disclosures required by TILA and Regulation Z, as has been amended, *see* 73 Fed. Reg. 44,522 (July 30, 2008), and as may be further amended in the future.

Analysis to Aid Public Comment

Part I of the proposed order prohibits respondent, in connection with closed-end credit, from advertising a monthly payment amount unless respondent discloses, clearly and conspicuously and in close proximity to those representations, as applicable, that the advertised monthly payment amount: (1) applies only for a limited period of time, after which it will increase; (2) does not include the amount of interest that the consumer owes each month; and (3) is less than the monthly payment amount (including interest) that the consumer owes, with the difference added to the total amount due from the consumer or total loan balance.

Part II of the proposed order prohibits respondent, in connection with closed-end credit, from advertising a rate lower than the rate at which interest is accruing, regardless of whether the rate is referred to as an “effective rate,” a “payment rate,” a “qualifying rate,” or any other term, provided that this provision does not prohibit advertisement of the “annual percentage rate” or “APR.” In light of respondent’s deceptive use of payment rates in its advertisements, and the Federal Reserve Board’s amendments to Regulation Z banning the use of such rates effective October 1, 2009, the proposed order prohibits respondent from advertising any such rate, to ensure that respondent’s advertisements do not deceive consumers. *See* 73 Fed. Reg. at 44,608.

Part III of the proposed order prohibits respondent, in connection with consumer credit, from making representations about the consumer’s current lender unless respondent adequately discloses respondent’s name and identity as the entity offering the loan.

Part IV of the proposed order prohibits respondent, in connection with closed-end credit, from advertising the amount of any payment, the number of payments or the period of repayment, or the amount of any finance charge, without disclosing, clearly and conspicuously, all of the terms required by TILA and Regulation Z, including the terms of repayment; the APR; and if the APR may be increased after consummation, that fact.

Analysis to Aid Public Comment

Part V of the proposed order prohibits respondent, in connection with closed-end credit, from stating a rate of finance charge without stating the rate as an APR, as required by TILA and Regulation Z.

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

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

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

Part XI 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 violations 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

**GETINGE AB
AND
DATASCOPE CORP.**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-4251; File No. 091 0000
Complaint, March 9, 2009 – Decision, March 9, 2009*

This consent order addresses the acquisition of Datascope Corp. by Getinge AB. Both companies are engaged in the research, development, manufacturing, marketing, and sale of cardiac surgery devices, including endoscopic vessel harvesting (EVH) devices. The U.S. market for EVH devices is highly concentrated, and the combined firm would account for approximately 90 percent of this market, which is likely to lead to increased prices and decreased innovation for those devices. The order requires Datascope to divest its EVH product line to Sorin Group USA, Inc., or another Commission-approved buyer at no minimum price. The assets to be divested include all third-party contracts to supply the components of the EVH product line. In addition, the order requires Getinge to grant the Commission-approved buyer a covenant not to sue for infringement of any EVH-related patents that Getinge or Datascope held at the time of the acquisition. The order permits Datascope to provide certain services to the Commission-approved buyer to ensure a smooth transition of the product line to the acquirer and continued and uninterrupted service to customers during the transition. The order allows the Commission to appoint an interim monitor to oversee Datascope's compliance with all of its obligations and performance of its responsibilities pursuant to the order. If appointed, the interim monitor would be required to file periodic reports with the Commission about the status of the divestiture, the efforts being made to accomplish the divestiture, and the provision of services and assistance during the transition period. The order contains provisions that allow the Commission to appoint a divestiture trustee if any or all of the remedies are not accomplished within the time frames required by the order.

Complaint

Participants

For the *Commission*: *Lisa DeMarchi Sleigh, David L. Inglefield, Michael R. Moiseyev, and Robert R. Pickett.*

For the *Respondents*: *Matthew D. Kent and Valarie C. Williams, Alston & Bird LLP; and Jeffrey W. Brennan and Paul D. Frangie, Dechert LLP.*

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 Getinge AB (“Getinge”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Datascope Corp. (“Datascope”), 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. “Getinge” or “Respondent” means Getinge AB, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Getinge, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
3. “Datascope” means Datascope Corp., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and

Complaint

affiliates controlled by Datascope Corp., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

4. “Endoscopic Vessel Harvesting Device” or “EVH Device” means a medical device that allows for the minimally-invasive endoscopic removal of a patient’s saphenous vein or the radial artery for use in coronary artery bypass graft surgery.

5. “FDA” means the United States Food and Drug Administration.

6. “Respondents” means Getinge and Datascope individually and collectively.

II. RESPONDENTS

7. Respondent Getinge is a corporation organized, existing, and doing business under and by virtue of the laws of Sweden, with its headquarters located at Ekebergsvagen, Getinge, Sweden 31044. Getinge’s subsidiary in the United States, Getinge USA, Inc., is located at 1777 E. Henrietta Rd, Rochester, NY 14623. Getinge, among other things, is engaged in the research, development, marketing and sale of cardiac surgery devices, including EVH Devices.

8. Respondent Datascope is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 14 Philips Parkway, Montvale, New Jersey 07645. Datascope, among other things, is engaged in the research, development, manufacturing, marketing, and sale of cardiac surgery devices, including EVH Devices.

9. 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

Complaint

in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. PROPOSED ACQUISITION

10. On September 15, 2008, Getinge and Datascope entered into an agreement and plan of merger (the “Merger Agreement”) whereby Getinge agreed to acquire all of the outstanding shares of Datascope common stock in a transaction valued at approximately \$865 million (the “Acquisition”).

IV. RELEVANT MARKET

11. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the research, development, manufacture, marketing, and/or sale of EVH Devices. The size of the U.S. market for EVH Devices is approximately \$220 million.

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.

V. STRUCTURE OF THE MARKETS

13. The U.S. market for EVH Devices is highly concentrated with a pre-acquisition Herfindahl-Hirschman Index (“HHI”) of 7,192 points. Currently, Getinge and Datascope are two of only three companies currently selling EVH Devices in the United States. Getinge dominates the market for these devices, and, together, Getinge and Datascope would account for almost 90 percent of sales in the U.S. market for EVH Devices. The Acquisition would create a duopoly in this market and increase the HHI concentration by 1008 points, resulting in a post-acquisition HHI of 8,200 points.

Complaint

VI. ENTRY CONDITIONS

14. Developing Endoscopic Vessel Harvesting Devices, working around and/or acquiring licenses to critical intellectual property related to those devices, obtaining FDA approval for those devices, and marketing those devices takes significantly longer than two years. Therefore, entry into the relevant line of commerce described in Paragraph 11 would not be timely, likely, or sufficient in magnitude, character and scope to deter or counteract the anti-competitive effects of the Acquisition.

VII. EFFECTS OF THE ACQUISITION

15. The effects of the Acquisition, if consummated, may be to substantially 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, in the following ways, among others:

- a. eliminating actual, direct and substantial competition between Getinge and Datascope in the market for the research, development, manufacturing, marketing, and sale of EVH Devices; and
- b. increasing the ability of the merged entity to unilaterally raise prices in the relevant market.

VIII. VIOLATIONS CHARGED

16. The Merger Agreement described in Paragraph 10 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

17. 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.

Decision and Order

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this ninth day of March, 2009, issues its Complaint against said Respondent.

By the Commission, Commissioner Harbour recused.

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent Getinge AB (“Getinge”) of Respondent Datascope Corp. (“Datascope”), and Respondent Getinge and Respondent Datascope (collectively, “Respondents”) having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents

Decision and Order

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 Getinge is a corporation organized, existing and doing business under and by virtue of the laws of Sweden, with its offices and principal place of business located at Ekerbergsvägen 26, SE-31044, Getinge, Sweden.
2. Respondent Datascope is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 14 Philips Parkway, Montvale, NJ 08933.
3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER**I.**

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

- A. “Getinge” means Getinge AB, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Getinge AB, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Effective Date, the term “Getinge” shall include Datascope.

Decision and Order

- B. “Datascope” means Datascope Corp., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Datascope Corp., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Commission” means the Federal Trade Commission.
- D. “Respondents” means Getinge and Datascope, individually and collectively.
- E. “Sorin” means Sorin Group USA Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, having its principal place of business located at 14401 W. 65th Way, Arvada, CO 80004-3599.
- F. “Acquisition” means the acquisition contemplated by the “Agreement and Plan of Merger” dated as of September 15, 2008, by and among Getinge and Datascope (“Acquisition Agreement”), whereby Getinge agreed to acquire Datascope.
- G. “Actual Cost” means the cost to Datascope to provide the relevant assistance or service (including direct labor and direct material used and allocation of overhead that is in the same proportion that was used by Datascope on November 25, 2008), and any additional fees or expenses agreed to from time to time by the Commission-approved Acquirer.
- H. “Agency(ies)” means any governmental 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 EVH Products.

Decision and Order

- I. “Closing Date” means the date on which Respondents (or a Divestiture Trustee) and a Commission-approved Acquirer consummate a transaction to grant, license, deliver or otherwise convey relevant assets pursuant to this Order.
- J. “Commission-approved Acquirer” means the following:
 - 1. Sorin, if Sorin has not been rejected by the Commission pursuant to Paragraph II.A. of this Order; or
 - 2. an entity that receives the prior approval of the Commission to receive particular assets that the Respondents are required to grant, license, deliver or otherwise convey pursuant to this Order.
- K. “Confidential Business Information” means all information owned by, or in the possession or control of, Datascope that is not in the public domain and that is related to the research, Development, manufacture, marketing, importation, exportation, supply, sales, sales support, or use of a Product; *provided, however,* that “Confidential Business Information” shall not include (1) information that subsequently falls within the public domain through no violation of this Order or of any confidentiality agreement with respect to such information by Respondents or (2) information that Getinge can demonstrate it obtained without the assistance of Datascope prior to the Acquisition.
- L. “Sorin Agreement” means the “Asset Purchase Agreement” by and between Datascope, Sorin and Getinge, dated as of November 25, 2008, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the EVH Business, that have been approved by the Commission to accomplish the requirements of this Order. The Sorin Agreement is attached to this Order as non-public Appendix I.

Decision and Order

- M. “Designee” means any entity that will manufacture a Datascope EVH Product for a Commission-approved Acquirer.
- N. “Development” means all preclinical and clinical drug and/or device development activities, including test method development and stability testing, toxicology, bioequivalency, formulation, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing, conducting clinical trials for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing and sale of a Product (including any governmental price or reimbursement approvals), Product approval and registration, and regulatory affairs related to the foregoing. “Develop” means to engage in Development.
- O. “Divestiture Trustee” means a trustee appointed by the Commission pursuant to the relevant provisions of this Order.
- P. “Effective Date” means the earlier of the following dates:
1. the date the Respondents close on the Acquisition Agreement; or
 2. the date the merger contemplated by the Acquisition Agreement becomes effective by filing articles of merger with the Secretary of State of the State of Delaware.
- Q. “EVH Business” means all of Datascope’s assets, tangible and intangible, businesses and goodwill, related to the research, Development, manufacture, distribution, marketing or sale of Datascope EVH Products as more specifically set forth in the Sorin Agreement and including, without limitation, the following:

Decision and Order

1. all EVH Intellectual Property;
2. all EVH Manufacturing Technology;
3. all EVH Scientific and Regulatory Material;
4. all marketing materials;
5. all books, records and files related to the foregoing or to Datascope EVH Products;
6. all EVH Manufacturing Equipment;
7. to the extent related to the Datascope EVH Products, all of Datascope's rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, and consignees, in each case that are Third Parties, including, without limitation, all of Datascope's contracts with any Third Party to the extent related to the supply of components used in the manufacture of Datascope EVH Products;
8. all inventory, including raw materials, packaging materials, work-in-process and finished goods, in each case to the extent consisting of, or intended for use in the manufacture of, Datascope EVH Products;
9. all commitments and orders for the purchase of goods that have not been shipped, to the extent such goods are, or are intended for use in the manufacture of, Datascope EVH Products;
10. all rights under warranties and guarantees, express or implied, with respect to Datascope EVH Products; and

Decision and Order

11. all items of prepaid expenses, to the extent related to Datascope EVH Products;

provided, however, that “EVH Business” does not include any portion of any of the foregoing assets, businesses and goodwill that does not relate to Datascope EVH Products;

provided further, however, that “EVH Business” does not include any of the following: (i) the name “Datascope” or the names of any other divisions, businesses, corporations or companies owned by Datascope; (ii) any trademarks, trade names or logos used on other of Datascope’s Products; (iii) any interest in real property; (iv) any plant or other facilities; or (v) any assets, tangible and intangible, businesses or goodwill that were owned by Getinge immediately prior to the Effective Date;

provided further, however, that with respect to documents or other materials included in the EVH Business that contain information (i) that relates both to the Datascope EVH Products and to other products or businesses of Datascope or (ii) for which Datascope has a legal obligation to retain the original copies, Respondents shall be required to provide only copies or, at their option, relevant excerpts of such documents and materials, but Respondents shall provide the Commission-approved Acquirer access to the originals of such documents as necessary, it being a purpose of this proviso to ensure that Respondents not be required to divest themselves completely of records or information that relates to products or businesses other than the Datascope EVH Products;

provided further, however, that with respect to any contract or agreement included in the EVH Business that relates both to the Datascope EVH Products and to any other product, Respondents may, concurrently with assigning such contract or agreement to the extent it relates to the Datascope EVH

Decision and Order

Products, retain their rights under such contract or agreement for purposes of such other product(s).

- R. “EVH Employee Information” means the following, as and to the extent permitted by Law:
1. with respect to each EVH 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 EVH Business;
 - d. for sales representatives, the sales ranking as of November 25, 2008, and for other employees, the most recent performance rating;
 - e. the base salary range of all EVH Employees having the same title or position;
 - f. the aggregate annual compensation for Datascope’s last fiscal year and as targeted for the current fiscal year;
 - g. employment status (*i.e.*, active or on leave or disability; full-time or part-time); and
 - h. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees.
 2. at the Commission-approved Acquirer’s option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the EVH Employees.

Decision and Order

- S. “EVH Employees” means all those employees listed in non-public Appendix II to this Decision and Order.
- T. “EVH Intellectual Property” means all of the following that are owned by Datascope, to the extent related to the Datascope EVH Products, each as more specifically described in the Sorin Agreement:
1. Patents;
 2. trademarks, trade names, trade dress, trade secrets, know-how, techniques, data, inventions, practices, methods and other confidential or proprietary technical, business, research, Development and other information;
 3. rights to obtain and file for Patents and registrations thereof; and
 4. rights under any license to any of the foregoing;
- provided, however, “EVH Intellectual Property” does not include (i) the name “Datascope”, or the names of any other corporations, divisions or companies owned by Datascope; (ii) any trademarks, trade names or logos used on other of Respondents’ Products; or (iii) any Getinge intellectual property.*
- U. “EVH Kits” means procedural kits for endoscopic vessel harvesting, including those currently marketed by Datascope under the trademarks CLEARGLIDE® or WATCHBAND INCISION™.
- V. “EVH Manufacturing Equipment” means all equipment of Datascope utilized in the manufacture of Datascope EVH Products, but does not include (i) any sterilization, labeling or packaging equipment or (ii) any assets utilized by Getinge in the manufacture of EVH Products immediately prior to the Effective Date.

Decision and Order

- W. “EVH Manufacturing Technology” means all technology, trade secrets, know-how, and proprietary information (whether patented, patentable or otherwise) related to the manufacture (including that relating to all equipment used to manufacture a Datascope EVH Product in final finished form), validation, packaging, release testing, stability and shelf life of Datascope EVH Products, including all product specifications, processes, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering and other manuals and drawings, standard operating procedures, flow diagrams, chemical, pharmacological, toxicological, pharmaceutical, physical and analytical, safety, efficacy, bioequivalency, quality assurance, quality control and clinical data, research records, compositions, annual product reviews, process validation reports, analytical method validation reports, specifications for stability trending and process controls, testing and reference standards for impurities in and degradation of products, technical data packages, chemical and physical characterizations, dissolution test methods and results, formulations for administration, clinical trial reports, regulatory communications and labeling of, for or with respect to the Datascope EVH Products, and all other information related to the manufacturing process, supplier lists, and supplier contracts for the Datascope EVH Products.
- X. “EVH Products” means endoscopic vessel harvesting Products, whether or not included in EVH Kits.
- Y. “EVH Scientific and Regulatory Material” means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory and clinical trial materials and information related to Datascope EVH Products, and all of Datascope’s rights to use such materials, in any and all jurisdictions (to the extent Datascope can legally transfer such rights).

Decision and Order

- Z. “Field” means the prevention, treatment, diagnosis, or control of a particular medical condition.
- AA. “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.
- BB. “Interim Monitor” means a monitor appointed by the Commission pursuant to Paragraph III of this Order.
- CC. “Datascope EVH Products” mean those EVH Products researched, Developed, manufactured and/or sold by Datascope immediately prior to the Effective Date, and including all such EVH Products that are introduced by Datascope on or before the Closing Date.
- DD. “Law” means all laws, statutes, rules, regulations, ordinances and other pronouncements having the effect of law by any Governmental Entity.
- EE. “Patents” means all patents, patent applications and statutory invention registrations in which Datascope holds rights, either through assignment or license, as of the Effective Date (except where this Order specifies a different time), and includes all reissues, divisions, continuations, continuations-in-part, to the extent the claims of such continuations-in-part are fully supported pursuant to 35 U.S.C. § 112 by such patents and/or applications owned or licensed by Datascope as of the Effective Date, substitutions, reexaminations, restorations, and/or patent term extensions 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, related to a Product.
- FF. “Product” means any medical device.

Decision and Order

GG. “Remedial Agreement” means the following:

1. the Sorin Agreement, if such agreement has not been rejected by the Commission pursuant to Paragraph II.A. of this Order; and
2. any agreement between Respondents and a Commission-approved Acquirer (or between a Divestiture Trustee and a Commission-approved Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets to be granted, licensed, delivered or otherwise conveyed, that have been approved by the Commission to accomplish the requirements of this Order.

HH. “Third Party(ies)” means any private entity other than the following: (1) the Respondents, or (2) the Commission-approved Acquirer.

II.

IT IS FURTHER ORDERED that:

- A. Not later than ten (10) days after the Effective Date, Respondents shall divest the EVH Business to Sorin pursuant to and in accordance with the Sorin 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 Sorin or to reduce any obligations of Respondents under such agreement);

provided, however, that, if Respondents have divested the EVH Business to Sorin prior to the date this Order becomes final, and if, at the time the Commission determines to make

Decision and Order

this Order final, the Commission notifies Respondents that Sorin is not an acceptable acquirer of the EVH Business, then Respondents shall immediately rescind the transaction with Sorin and shall divest the EVH Business 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, however, that if the Respondents have divested the EVH Business to Sorin 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, pursuant to Paragraph IV of this Order, to effect such modifications to the manner of divesting the EVH Business to Sorin (including, but not limited to, entering into additional agreements or arrangements) as may be necessary to satisfy the requirements of this Order;

provided further, however, that Respondents shall not be required to divest to the Commission-approved Acquirer any portion of the EVH Business if the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) does not require such portion of the EVH Business for the continued research, Development, manufacture, use, import, distribution, marketing or sale of the Datascope EVH Products and if the Commission approved the divestiture without such portion of the EVH Business.

- B. Any Remedial Agreement that has been approved by the Commission between Respondents (or a Divestiture Trustee) and a Commission-approved Acquirer of the EVH Business shall be deemed incorporated into this Order, and any failure by Respondents to comply with any term of such Remedial

Decision and Order

Agreement related to the EVH Business shall constitute a failure to comply with this Order.

- C. Respondents shall include in any Remedial Agreement, and Respondents shall observe, a covenant that Respondents shall not join, or file, prosecute or maintain any suit, in Law or equity, against the Commission-approved Acquirer (or the Commission-approved Acquirer's assignee of the entire Remedial Agreement) for the research, Development, manufacture, use, import, distribution, marketing or sale of Datascope EVH Products currently being sold by Datascope, *provided, however*, that the covenant need not cover research and development projects, concepts or initiatives, or any change made to the Datascope EVH Products after the Effective Date.
- D. Until the Closing Date of the EVH Business, Respondents shall take such actions as are necessary to maintain the viability and marketability of the EVH Business and to prevent the destruction, removal, wasting, deterioration, or impairment of the EVH Business, except for ordinary wear and tear and the disposition of inventory and other assets in the ordinary course of business.
- E. At the option of the Commission-approved Acquirer (to be exercised no later than 60 days after the date the Commission-approved Acquirer signs a Remedial Agreement with Respondents to effect the acquisition of the EVH Business), Respondents shall include in any Remedial Agreement the following provisions, and Respondents shall commit to satisfy the following:
 - 1. Respondents shall, for a period of up to eighteen (18) months after the Closing Date at no more than Respondents' Actual Cost, provide agreed upon transition services necessary for the continued research, Development, manufacture, use, import, distribution,

Decision and Order

marketing or sale of Datascope EVH Products by the Commission-approved Acquirer.

2. Respondents shall provide to the Commission-approved Acquirer all documents or materials in Datascope's possession, custody or control as of the Effective Date to the extent related to Third Party EVH Products or EVH Products sold by Getinge prior to the Effective Date; *provided, however*, that as regards to any documents or materials described in this Paragraph II.E.2. that are not owned by Respondents and which Respondents are prohibited by contract or Law from providing to the Commission-approved Acquirer, Respondents shall not be required to provide such documents or materials to the Commission-approved Acquirer if Respondents have made all reasonable efforts to obtain a waiver of such prohibition but have not been successful; *provided further, however*, that Respondents shall not be required to provide to the Commission-approved Acquirer any documents or materials described in this Paragraph II.E.2. that Datascope received through the due diligence process related to the Acquisition; *provided further, however*, that Respondents shall not be required to provide to the Commission-approved Acquirer any documents or materials described in this Paragraph II.E.2. that were owned by, or in the possession, custody or control of, Getinge immediately prior to the Effective Date.

F. Respondents shall:

1. not later than forty-five (45) days after signing the Remedial Agreement, (a) provide to the Commission-approved Acquirer a list of all EVH Employees; (b) allow the Commission-approved Acquirer to interview any EVH Employees; and (c) in compliance with all Laws, allow the Commission-approved Acquirer to inspect the EVH Employee Information;

Decision and Order

2. not later than fifteen (15) days after signing the Remedial Agreement, provide an opportunity for the Commission-approved Acquirer: (a) to meet personally, and outside the presence or hearing of any employee or agent of Respondent, with any one or more of the EVH Employees; and (b) to make offers of employment to any one or more of the EVH Employees;
3. not interfere, directly or indirectly, with the hiring or employing by the Commission-approved Acquirer of EVH Employees, and shall remove any impediments or incentives within the control of Respondents that may deter these employees from accepting employment with the Commission-approved Acquirer, including, but not limited to, any non-compete provisions of employment or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to an EVH Employee who receives a written offer of employment from the Commission-approved Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;
4. provide all EVH Employees with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include, but are not limited to, a continuation, until the Closing Date, of all employee benefits, including regularly scheduled raises, bonuses and vesting of pension benefits (as permitted by law and for those EVH Employees covered by a pension plan), offered by Respondent;
5. provide to each EVH Employee that is offered employment by the Commission-approved Acquirer financial incentives to accept employment with the Commission-approved Acquirer on or about the Closing

Decision and Order

Date, or reimburse the Commission-approved Acquirer for its provision of such incentive. Such incentives shall include a bonus for each such employee, equal to 25% of the employee's annual base salary as of October 2008, who accepts an offer of employment from the Commission-approved Acquirer within one month of the Closing Date and remains employed by the Commission-approved Acquirer for a period of sixty (60) days, payable by Respondents within ninety (90) days after the Closing Date; and

6. not, for a period of one (1) year following the Closing Date, directly or indirectly, solicit or otherwise attempt to induce any of the EVH Employees to terminate their employment with the Commission-approved Acquirer; *provided however*, that Respondents may:
 - a. advertise for employees in newspapers, trade publications or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at the EVH Employees; or
 - b. hire EVH Employees who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this Paragraph II.F.6;

provided further however, that this Paragraph II.F.6 shall not prohibit Respondents from making offers of employment to or employing any EVH Employee where the Commission-approved Acquirer has notified Respondents in writing that the Commission-approved Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined the offer.

Decision and Order

- G. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary for the divestiture of the EVH Business, and for the continued research, Development, manufacture, use, import, distribution, marketing or sale of Datascope EVH Products by the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer); *provided, however,* that Respondents shall not be required to obtain consents from customers necessary to divest contracts that, in the aggregate, represent less than 5% of Datascope's worldwide EVH Kit sales for the period January 1, 2008 to June 30, 2008.
- H. In the event that Respondents are unable to satisfy all conditions necessary to divest any intangible asset that is a permit, license or right granted by any domestic or foreign governmental entity, Respondents shall provide such assistance as the Commission-approved Acquirer may reasonably request in the Commission-approved Acquirer's efforts to obtain a comparable permit, license or right.
- I. Other than as necessary to comply with the requirements of this Order, Respondents shall not use, directly or indirectly, any Confidential Business Information related to the research, Development, manufacture, use, import, distribution, marketing or sale of the Datascope EVH Products, and shall not disclose or convey such Confidential Business Information, directly or indirectly, to any person except in connection with the divestiture of the EVH Business, and to the Divestiture Trustee, if any.
- J. Respondents shall, to the extent permissible under applicable laws and as a condition of continued employment post-divestiture, require that each employee of Respondents with access to Confidential Business Information related to the EVH Business sign a confidentiality agreement pursuant to which such employee shall be required to maintain all such Confidential Business Information strictly confidential,

Decision and Order

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); *provided however*, that:

1. Respondents may use such information only to the extent necessary to defend or prosecute claims relating to assets or liabilities that are retained by Respondents after divestiture; and
 2. This Paragraph II.J. shall not apply to any Confidential Business Information related to the EVH Business that Respondents can demonstrate to the Commission that Getinge had prior to the Effective Date.
- K. Counsel for Respondents (including in-house counsel under appropriate confidentiality arrangements) may retain unredacted copies of all documents or other materials provided to the Commission-approved Acquirer and may have access to original documents provided to the Commission-approved Acquirer. Respondents' use or disclosure of any documents or materials that are retained or accessed by Respondents solely by virtue of this Paragraph II.K (and not, for example, pursuant to the second proviso of Paragraph I.Q) shall be limited to the following:
1. to comply with any Remedial Agreement, this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals), any data retention requirement of any applicable Governmental Entity, or any taxation requirements; and
 2. to 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 EVH Business;

Decision and Order

provided, however, that Respondents shall: (i) require those (other than Governmental Entities) who view any documents or materials that are retained or accessed by Respondents solely by virtue of this Paragraph II.K. to enter into reasonable and customary confidentiality agreements with the Commission-approved Acquirer (but shall not be deemed to have violated this requirement if the Commission-approved Acquirer withholds such agreement unreasonably); (ii) inform any Governmental Entities who seek to view any documents or materials that are retained or accessed by Respondents solely by virtue of this Paragraph II.K. of Respondents' obligation to keep such information confidential, and give the Commission-approved Acquirer as much prior notice of complying with such request from the Governmental Entity as is reasonable in the circumstances, subject to any requirements of Law; and (iii) use all reasonable efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

- L. The purpose of the divestiture of the EVH Business is to ensure the continuing, viable, and competitive operation of the EVH Business in the same business and in the same manner in which the EVH Business was engaged at the time of the announcement of the proposed Acquisition and to remedy the lessening of competition alleged in the Commission's complaint.

Decision and Order

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

- A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor (“Interim Monitor”) to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by Paragraph II of this Order and the Remedial Agreement related to the divestiture of the EVH Business.
- B. The Commission shall select the Interim Monitor, subject to the consent of Getinge, which consent shall not be unreasonably withheld. If Getinge 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 Getinge of the identity of any proposed Interim Monitor, Getinge 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 this Order in a manner consistent with the purposes of this 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

Decision and Order

and asset maintenance obligations and related requirements of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission.

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

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

Decision and Order

with its obligations under this Order, including, but not limited to, its 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 this Order.

5. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of 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 this

Decision and Order

Order or the Remedial Agreement. Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under this Order.

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

Decision and Order

IT IS FURTHER ORDERED that:

- A. If Respondents have not fully complied with the obligations to grant, license, deliver or otherwise convey relevant assets as required by this Order, the Commission may appoint a trustee (“Divestiture Trustee”) to grant, license, deliver or otherwise convey the assets required to be granted, licensed, 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 grant, license, 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 Getinge, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Getinge 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 Getinge of the identity of any proposed Divestiture Trustee, Getinge shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

Decision and Order

- 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 grant, license, deliver or otherwise convey the assets that are required by this Order to be granted, licensed, 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, 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

Decision and Order

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. Each 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 Getinge from among those approved by the Commission; *provided further, however*, that Getinge shall select such entity within five (5) Days after receiving notification of the Commission's approval.
5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture

Decision and Order

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 Getinge, 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. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be granted, licensed, transferred, delivered or otherwise conveyed by this Order.
8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and

Decision and Order

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.
- 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 Paragraphs II.A., II.D., II.E., II.F., II.G., II.H., II.J., and all their responsibilities to render transitional services to the Commission-approved Acquirer as provided in 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 same time a copy

Decision and Order

of their report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed. Respondents shall include in its reports, among other things that are required from time to time:

1. a full description of the efforts being made to comply with the relevant Paragraphs of this Order;
2. if Sorin is rejected by the Commission pursuant to Paragraph II.A., a description of all substantive contacts or negotiations related to the divestiture of the EVH Business and the identity of all parties contacted and copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing its obligations to divest the EVH Business;
3. a detailed plan to deliver all Confidential Business Information required to be delivered to the Commission-approved Acquirer pursuant to Paragraphs II.A. and II.E., and agreed upon by the Commission-approved Acquirer and the Interim Monitor (if applicable) and any updates or changes to such plan;
4. a description of all Confidential Business Information delivered to the Commission-approved Acquirer, including the type of information delivered, method of delivery, and date(s) of delivery;
5. a description of the Confidential Business Information currently remaining to be delivered and a projected date(s) of delivery; and
6. a description of all technical assistance provided to the Commission-approved Acquirer during the reporting period.

VI.

Decision and Order

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) any other change in the Respondents 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 Respondents.

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

- A. access, during business office hours of the 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 the Respondents related to compliance with this Order, which copying services shall be provided by the Respondents at their expense; and
- B. to interview officers, directors, or employees of the Respondents, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on March 9, 2019.

By the Commission, Commissioner Harbour recused.

Decision and Order

**APPENDIX I
NON-PUBLIC**

SORIN AGREEMENT

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

**APPENDIX II
NON-PUBLIC**

EVH EMPLOYEES

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

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 (“Consent Agreement”) from Getinge AB (“Getinge”) and Datascope Corp. (“Datascope”). The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects that would otherwise result from Getinge’s acquisition of Datascope. Under the terms of the proposed Consent Agreement, Datascope is required to divest to a third party its endoscopic vessel harvesting (“EVH”) product line.

The proposed Consent Agreement has been placed on the public record for thirty days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement or make it final.

Pursuant to an Agreement and Plan of Merger dated September 15, 2008, Getinge proposes to acquire all of the outstanding shares of Datascope common stock in a transaction valued at approximately \$865 million. The Commission’s complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the U.S. market for EVH devices. The proposed Consent Agreement would remedy the alleged violations by replacing the competition that would be lost in this market as a result of the acquisition.

Analysis to Aid Public Comment

II. The Parties

Getinge is a leading global provider of equipment and systems in the healthcare and life sciences fields. Getinge is divided into three business segments: Medical Systems, Extended Care, and Infection Control. The Medical Systems segment manufactures and sells, among other things, surgical tables and lights. In January 2008, Getinge acquired the Cardiac and Vascular divisions of Boston Scientific Corporation, including Guidant's EVH business, which Boston Scientific had purchased in 2006. The Boston Scientific divisions have been integrated into the Medical Systems segment of Getinge, and the products are now sold under the Maquet brand. In 2007, Getinge generated global sales of \$2.2 billion.

Datascope is the world's leading supplier of intra-aortic balloon pump counter pulsation devices, and is a diversified medical device company that develops, manufactures and sells proprietary products for clinical health care markets in interventional cardiology, cardiovascular and vascular surgery, and critical care. Datascope acquired the EVH devices at issue in this case from Ethicon, a Johnson & Johnson company, in January 2006. Datascope's global sales for fiscal year 2008 were \$230.9 million, and its U.S. sales were \$98.8 million. Datascope's EVH device is part of its Cardiac Assist business unit, which accounted for \$189.3 million of Datascope's worldwide sales.

III. Endoscopic Vessel Harvesting Devices

The EVH device market is the relevant product market in which to analyze the competitive effects of the proposed acquisition. EVH devices are used in coronary artery bypass graft ("CABG") surgery, most often to remove the saphenous vein from the patient's leg, or sometimes the radial artery from the arm, for use as a conduit to bypass one or more blocked coronary arteries. Because it is a minimally-invasive procedure, EVH provides several benefits over the other two vessel harvesting methods (open and bridging) both of which are more invasive, cause more pain and scarring, and carry a greater risk of infection. As a result, neither of the other methods is

Analysis to Aid Public Comment

considered a viable economic alternative for EVH devices. EVH devices, therefore, constitute a separate product market.

The United States is the relevant geographic market in which to analyze the effects of the proposed acquisition on the EVH device market. EVH devices are subject to regulation and cannot be marketed or sold in the United States without prior approval from the U.S. Food and Drug Administration (“FDA”). Receiving FDA approval to market an EVH device in the United States can be a lengthy process. EVH devices sold outside of the United States but not approved by the FDA for sale in the United States therefore do not provide viable competitive alternatives for U.S. consumers.

The U.S. market for EVH devices is highly concentrated, and together, the combined firm would account for approximately 90 percent of this market. Firms seeking to enter the market for EVH devices face regulatory hurdles and significant intellectual property barriers, both of which make entry into the market for EVH devices in the next two to three years highly unlikely. In addition, while the use of EVH devices in CABG surgery is increasing, the number of CABG procedures and related vessel harvesting procedures performed in the United States has been declining as minimally-invasive stenting procedures have increased. As a result, it is unlikely that firms would find it profitable to enter the EVH device market in response to a modest increase in the price of the devices.

The proposed acquisition would result in a duopoly in the market for EVH devices and is likely to lead to increased prices and decreased innovation for those devices.

IV. The Consent Agreement

The proposed Consent Agreement effectively remedies the proposed acquisition’s anticompetitive effects in the U.S. market for EVH devices by requiring Datascope to divest its EVH product line to a Commission-approved buyer at no minimum price. Datascope has reached an agreement to divest the EVH business to Sorin Group USA, Inc. Sorin, a diversified medical device company, has a line of

Analysis to Aid Public Comment

cardiovascular products, including artificial cardiac valves and coronary stents. Pursuant to the Consent Agreement, Datascope is required to accomplish the divestiture of its EVH product line no later than ten days after the acquisition is consummated.

The divestiture will allow Sorin to enter and compete in the EVH market. The assets to be divested include all third party contracts to supply the components of the EVH product line. In addition, the Consent Agreement requires Getinge to grant the Commission-approved buyer a covenant not to sue for infringement of any EVH-related patents that Getinge or Datascope held at the time of the acquisition. The Consent Agreement also permits Datascope to provide certain transitional services to the Commission-approved buyer of the EVH product line assets. These services may be necessary to ensure a smooth transition of the product line to the acquirer and continued and uninterrupted service to customers during the transition. The purchaser will have a secure supply of the EVH product line because third parties supply the components of the EVH product line. Further, Sorin currently is capable of assembling the components and marketing the finished products.

V. Appointment of an Interim Monitor and a Divestiture Trustee

The proposed Consent Agreement includes a provision that allows the Commission to appoint an interim monitor to oversee Datascope's compliance with all of its obligations and performance of its responsibilities pursuant to the Commission's Decision and Order. If appointed, the interim monitor would be required to file periodic reports with the Commission to ensure that the Commission remains informed about the status of the divestitures, the efforts being made to accomplish the divestiture, and the provision of services and assistance during the transition period.

Finally, the proposed Consent Agreement contains provisions that allow the Commission to appoint a divestiture trustee if any or all of the above remedies are not accomplished within the time frames required by the Consent Agreement. The divestiture trustee

Analysis to Aid Public Comment

may be appointed to accomplish any and all of the remedies required by the proposed Consent Agreement that have not yet been fulfilled upon expiration of the time period allotted for each.

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